



# A Critical Analysis of the Legal Framework for Copyright Protection in Nigeria and the United States of America (U.S.A.)

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## ABSTRACT

This paper examines the legal framework for copyright protection in Nigeria and the USA. The USA and Nigeria Copyright Acts extend protection to copyright owners. Copyright based industries operating in both countries contribute trillions of naira to the gross domestic product and create several millions of jobs. Nigeria and the USA remains the largest piracy destination and markets in the world. So both countries lose trillions of naira annually and millions of lost jobs to pirates and counterfeiters. Causes of piracy and counterfeiting have been discussed and recommendations have been made on how to eliminate them.

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## 1. Introduction

It is a truism that the greatest heritage of a nation remains the creativity of its citizens, and therefore one of the primary functions of law is to protect the ingenuity, resourcefulness and innovation of the citizenry. Thus, the dictum of Belmore J, (as he then was) in *Oladipo Yemitan v. The Daily Times Nigeria Ltd*<sup>1</sup> is very apt when he said that “The right of a man to that which he had originally made is an incorporeal right and must be protected.”

## 2. Definition of Copyright

Copyright has equally been described as one of the branches of intellectual property “which gives the owner the exclusive right to authorise or prohibit certain uses of his work by others.” This definition is that provided by the Copyright Act<sup>2</sup>, which describes the general nature of copyright to mean the right to exclude others from certain activities with respect to a work. We shall for the purpose of this paper define copyright as a proprietary right which confers exclusive rights on the owners of an intellectual property to authorise or prohibit a wide range of activities on the property, as set out in the Copyright Act.

The owner of the copyright of a work has the right to exclude others, except as provided by law, from doing certain things with respect to such work. This exclusive right includes the performance, translation, adaptation, publication and other forms of use or exploitation of the protected work.

## 3. Legislation on Copyright in Nigeria

Nigeria has joined the League of Nations that have enacted domestic legislations to protect the corporeal rights and creativity of its citizens against any undue infringement. The principal legislations in this regard is the Nigerian

Copyright Act<sup>3</sup> which is hinged on the Ten Commandments thou shall not steal.<sup>4</sup> In most Countries, Computer Software is protected under Copyright law and Patent law which are enjoyable by the owner of the copyrighted work. The owner of a copyright in software is usually the software publisher. A person who buys a copy of the software does not become the copyright owner, but rather purchases the right to use the software<sup>5</sup>.

## 4. The Copyright Act 1970

The 1911 Copyright Act applied in Nigeria until it was repealed by the Copyright Act 1970. The 1970 Act was passed as a decree on the 24th day of December 1970 under the then General Gowon led military government of Nigeria. Its provisions were made to apply to works made before its commencement. It provided for works eligible for copyright, conferment of copyright, nature of copyright in certain works, first ownership, assignment and licensing, infringement, and action for infringement. The Act provided powers for the appointment of a competent authority to resolve copyright licensing conflicts but the said power were never activated throughout the life of the legislation<sup>6</sup>.

The 1970 Act established the six categories of copyright works that have been maintained under the present Act These are literary works, musical works artistic works, cinematography films, sound recordings and broadcasts Copyright was conferred on the basis of nationality, domicile, and country of origin or by virtue of having been made by or

<sup>3</sup> Cap C. 28, Laws of the Federation of Nigeria 2004

<sup>4</sup> Exodus 20:15 of the Holy Bible [New King James Version]

<sup>5</sup> “Business Software Alliance, Software Piracy and UD Law” at [http://www.nopiracy.com/swand\\_law-c.html](http://www.nopiracy.com/swand_law-c.html) (Accessed on 13th Jan., 2018)

<sup>6</sup> Ola, “Copyright Collective Administration in Nigeria Lessons for Africans” 28, 2013.

<sup>1</sup> (1980) FHCR 186 at 190

<sup>2</sup> Section 6

under the direction or control of the government, a state authority or a prescribed international body.<sup>7</sup> The nature and scope of copyright was defined to include the exclusive right to control the reproduction, communication to the public or broadcasting of the work..

Nigeria being a party to the Universal Copyright Convention (UCC)<sup>8</sup> provided for reciprocal extension of protection and placed restrictions on importation of printed copies. Reliance on copyright deriving its source from common law rights were abrogated and the enactment allowed for the making of regulations to fill any lacuna which the enactment left out or which may arise.

The Copyright Act 1970 being the indigenous Act was expected to protect Nigerian interest and be reflective of the peculiarities of her people as well as their culture and traditions. This may have accounted for why it cut down the term of copyright to 25 years from 50 years. After all the Nigerian traditional culture is more disposed to a culture of sharing as opposed to the proprietary system. The cut down has however been viewed as a negative move in that the Nigerian copyright owners expected to have retained at least the same right provided by a non-indigenous legislation. They hoped that the indigenous legislation would provide enhanced and more favorable rights, instead it cut down on the term of copyright and was in general terms a watered - down version of the English Copyright Act of 1911.

The Act while making provision on copyright failed to designate any particular authority to oversee copyright issues in Nigeria. The legislation was basically a drawback and at this time the local copyright based industry in Nigeria was beginning to grow and required a firm policy structure to support this local industry from local and international pirates and counterfeiters.<sup>9</sup>

Tony Okoroji captured the frustration succinctly when he stated that the very weak provision was identified as the major obstacle to effective confrontation of the copyright problem. The civil provisions were cumbersome and had many loop holes and the criminal sanctions were laughable. There were no provisions for imprisonment. There was therefore very little legal deterrent against piracy; it became very clear that the most important and urgent task was to get an effective copyright law promulgated in Nigeria.<sup>10</sup>

The end of the Nigeria Civil War (1967-1970) coincided with Nigeria's oil boom which brought immense wealth to Nigeria. With lots of money to spend and people needing to get back their lives, entertainment offered comfort and developed into an important industry in Nigeria.

Highlife was in high demand and artists like Rex Jim Lawson, Eddie Okonta, Oliver De Cock, Sir Osita Osadebe, Victor Uwaifo and Celestine Ukwu met the entertainment needs through live performances and productions of records.

Demand for juju and akpala music was also high so King Sunny Ade, Ebenezer Obey, Haruna and Ayinde Bakare performed live and produced records. Other artists include Fela Anikulakpo Kuti, Nico Mbanga Sunny Okosun and Dan M'raiya.<sup>11</sup>

In the midst of all these developments in the entertainment industry, technological development enabled the invention of the cassette player and cassette recorder which further brought about cheaper and easier methods of copying. A proliferation of facilities of mass produced works on cassette brought about piracy challenges in the entertainment industry. Producers, authors and performers were all concerned about the high level of piracy.<sup>12</sup>

The same effect was occasioned in the publishing industry as well. This led to the setting up of an antipiracy vanguard made up of music and publishing industries.<sup>13</sup> Despite several antipiracy raids in collaboration with the police, piracy was on the rise and the copyright law had no teeth to bite and therefore did not deter the pirates from their acts. The Nigeria copyright industry, frustrated and cheated, identified legislative reform as one of the cardinal issues in combating the challenges posed by piracy. After series of meetings and lobbying the 1988 Copyright Decree was promulgated and became a part of the Nigeria legal system.<sup>14</sup> The Act has been amended twice, firstly in 1992 and secondly in 1999. In 2004, the laws were re-codified under the laws of the federation of Nigeria.

### 5. Subject Matter of Copyright

The Copyright Act sets out six works eligible for copyright. These are: literary works, musical works, artistic works, cinematograph films, sound recordings and broadcast.<sup>15</sup>

### 6. Literary Works

By the provisions of the Act, literary works include novels, stories and poetic works, plays, stage directions, film scenarios and broadcast scripts; choreographic works; computer programmes; textbooks; treaties; essays and articles; lectures, addresses and sermons; law reports.<sup>16</sup> The literary quality of the work is immaterial in determining whether or not the work qualifies as a literary work. From the definition or description of a literary work given by the Act, a post on Facebook or Twitter will qualify as a literary work protected by the Act.

### 7. Musical Works and Artistic Works.

The Act defines a musical work to mean any musical composition, irrespective of the musical quality, and includes works composed for musical accomplishment. This definition covers both sound and the lyrics of the song. The Act defines artistic works as including, irrespective of the artistic quality, any of the following works or works similar thereto: paintings, drawings, etchings, woodcuts, engravings and prints; works of sculpture; photographs not comprised in cinematograph films, to mention but a few.

<sup>7</sup> Ibid Section 2 3 and 4

<sup>8</sup> UNESCO Universal Copyright Convention with Appendix Declaration Relating to Article XVII and Resolution Concerning Article XI — Geneva", A6 September 1952, at <http://www.unesco.org/evi/lalconvention.asp>. (Accessed 14th Jan., 2018)

<sup>9</sup> Ibid

<sup>10</sup> Tony Okoroji is a Musician and Chairman of COSON Board, he was Appointed by the Federal Government into the Committee to Redraft both the Nigeria Copyright Act and its First Amendment.

<sup>11</sup> *Copyright Commission, Survey of Copyright Piracy in Nigeria* (Management Review Limited: 2008) p.5

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Section 1. The meaning and scope of these works are set out in Section 51 of the Act.

<sup>16</sup> Section 51

### 8. Cinematograph Films and Sound Recording

A cinematograph film, according to the Act, includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction. This definition encompasses visual images fixed in different media, such as video tapes, and compact discs.. Sound recording means the first fixation of a sequence of sounds capable of being perceived aurally and of being reproduced, but does not include a sound track associated with a cinematograph film. This definition clearly sets out sound recording contained in a cinematograph film from the ambit of sound recording. Such sound recording will be treated within the ambit of cinematograph films.

### 9. Broadcast

The Act defines broadcast to mean sound or television broadcasting by wireless telegraphy or wire or both, or by satellite or cable programmes, and includes re-broadcast.

### 10. Ownership, Authorship and Subsistence of Copyright

Once it is established that a work falls within the six categories of works subject to copyright, the next step is to determine if copyright subsists in relation to a work at issue. The Act provides that for copyright to subsist in literary, artistic and musical works, the twin requirements of originality and fixation must be fulfilled. Once the twin requirements are fulfilled, copyright will subsist in the work whether or not the work is registered.

By originality, it is meant that the work must have not been copied but originates from an author. The work must therefore be the result of the author's intellectual creation. It should be noted that the mere fact that the author's works drew inspiration from an existing stock of knowledge, which was in the public domain, will not affect the copyright of the work. Where, however, a work was simply copied from other works, such work is not original and does not qualify for protection.

Apart from originality as earlier discussed, a work must be in a fixed medium of expression from which it can be perceived, reproduced or otherwise communicated before it can qualify for protection. It should be noted that what copyright protects is the particular expression of an idea. It is immaterial who fixed the work, provided the work is a fixed medium of expression.

### 11. Author of a Work

<sup>17</sup>The Act provides, with regard to literary, musical and artistic works, that the author refers to the creator of the work. The author of a photograph is the person who took the photograph. The author of sound recordings, films and broadcasts is the person who made the arrangement for the film or sound recording or broadcast as the case maybe to be made.

### 12. Ownership of a Work

The owner of a work is the person entitled to the copyright of the work. The general rule is that copyright is vested in the author of a work. This rule applies even where such author has been paid by someone to create the work by way of commission or pursuant to a contract of employment. From the above provision of the Act, the author of a photograph is the photographer. The person appearing in the photograph can, in appropriate cases, be sued by the photographer for the breach of his copyright. This is, however, different from the position obtainable in the United States of America and other countries where ownership of

such work, usually referred to as 'work made for hire', is vested in the person who commissioned the agent to do the work or the employer as the case may be.

To avoid such problem,<sup>18</sup> the Act provides a situation where the parties may by agreement vary the authorship of the work. This may be by contract of employment or any other contract between the parties.

### 13. Infringement of Copyright, Remedies and Defences

The Act confers certain exclusive rights on the owner of a work with respect to works protected by copyright. These exclusive rights vary from one work to another. For example, for literary and musical works, the owner of the work has exclusive right with respect to the following:

- a. Reproduction of the work in any material form;
- b. Publication of the work;
- c. Performance of the work in public;
- d. Production, reproduction, performance or publication of any translation of the work;
- e. Making of any adaptation of the work;
- f. Broadcasting or communication of the work to the public by a loud speaker or any similar device;
- g. Distribution to the public, for commercial purposes, copies of the work by way of rental, lease, hire, loan or similar arrangement.

From the exclusive rights listed above, it will amount to an infringement on the right of the copyright owner for anybody not authorised by this owner to do any of the acts stated above with respect to the work protected by copyright. Thus it will amount to infringement of copyright to publicly perform a drama piece without the consent of the copyright owner. The same will equally apply to radio and television stations playing songs and music videos of artists without the written consent of the copyright owner.

Any person whose copyright is infringed can bring civil and/or criminal actions against the offender at the Federal High Court in whose judicial division the infringement occurred. The criminal charge is initiated by the Nigerian Copyright Commission. On conviction, the offender can be sentenced to terms of imprisonment ranging from six months to two years or with the option of fine per infringing copy ranging from N100 (naira) to N1000 per infringing copy.

An array of civil remedies are available to the copyright owner. The owner may sue for damages, institute and action for account, injunction and conversion of the infringing materials. Nigerian courts have awarded substantial damages in deserving cases. The Copyright Act provides an array of defences in deserving situations, including fair dealing, educational use, public interest use and research purposes.

### 14. Enforcement of Computer Software Copyright

Business Software Alliance (BSA) describes software piracy as the unauthorized copying or distribution of copyrighted software. This can be done by copying, downloading, sharing, selling or installing multiple copies onto personal or work computers. Making more copies of the software than the license permits amounts to piracy.<sup>19</sup> Piracy is distinguishable from counterfeiting in that the counterfeiter makes an unauthorized copy of a work "with a view to deceive or defraud by passing the copy as original or genuine".<sup>20</sup> Software is particularly susceptible to piracy and

<sup>18</sup> Section 10

<sup>19</sup> *ibid*

<sup>20</sup> Blacks Law Dictionary, 9th ed., (West Publishers:2009), 1,1)402.403

<sup>17</sup>Section 51

counterfeiting because of the ease with which software can be copied through the use of a personal computer. Apart from individual persons, even countries can be involved in piracy, for instance, countries that lack the technology and funds to independently develop or purchase new software products depend on counterfeiting to obtain software. According to Robert Holleyman, piracy and counterfeiting are profitable ventures.<sup>21</sup>

A computer program is defined in section 51 (1)<sup>22</sup> as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result. According to the Court in *Johnson Controls Inc v. Phoenix Control Systems Inc*,<sup>23</sup> it is made up of several different components, including the source code and object code, the structure, sequence and/or organization of the program, the user interface, and the function, or purpose of the program. The U.S. Court of Appeal in *Apple Computer Inc v. Franklin Computer Corp*<sup>24</sup> noted that a Computer program, whether in object code or source code, is a literary work and is protected from unauthorized copying from both its object code and source code.

### 15. The Nigerian Copyright Commission (NCC) and the Administration of Copyright.

The Federal Military Government in 1988 promulgated the Copyright Decree No.47 of 1988 as amended<sup>25</sup>. This decree was designated the Copyright Act of 1990. The enactment of this new Act was to strengthen and improve the existing regime of copyright law in Nigeria. Emphatically, the scope of works eligible for copyright protection was broadened, enforcement mechanisms were instituted and more stringent punishment for infringement of copyright was entrenched in the new legislation to curb the destructive menace of piracy in the country.<sup>26</sup>

Most significantly, however, the 1988 Act (as amended) provides for the establishment of an administrative body, the Nigeria Copyright Commission (NCC),<sup>27</sup> for the purpose of ensuring the effective and efficient administration, regulation and enforcement of copyright under the Act.<sup>28</sup> This marked a watershed in the regulation of copyright in Nigeria.

According to Adewopo, the administrative system can be viewed from two broad perspectives viz — the institutional framework and the private machinery for the collective administration of rights<sup>29</sup>. Such institutional framework for

administration of rights is in the form of a collection of individuals instituting actions for infringement of their copyright<sup>30</sup>.

### 16. The Nigeria Copyright Commission (NCC)

Section 34 of the 1988 Copyright Act created<sup>31</sup> the Commission which came into existence on 19th August 1989, with permanent administrative and operational status of a Commission.<sup>32</sup> At the moment, the Commission remains a body corporate with perpetual succession and a common seal. It can sue and be sued in its corporate name.

According to Olueze, the Commission (NCC) has zonal offices in some states of the federation for the purposes of decentralized administration of copyright matters. It is headed by a director - general, who is responsible for the day to day administration of the NCC.<sup>33</sup> A governing board is established for the effective management of NCC<sup>34</sup>. The Commission has numerous functions under the Copyright Act, which include the following<sup>35</sup>

- a. To be responsible for all matters provided for in this Act
- b. To monitor and supervise Nigeria's position in relation to international conventions and advise government thereon
- c. To monitor and regulate conditions for conclusion of bilateral and multilateral agreement between Nigeria and any other country.
- d. To enlighten and inform the public on matters relating to copyright.
- e. To maintain an effective data bank on authors and their works
- f. To be responsible for such other matters related to copyright in Nigeria as the minister may from time to time, direct

The Commission, internationally, monitors and supervise both bilateral and multilateral conventions relating to copyright. Such international agreements contemplated by the Act include but is not limited to treaties and conventions such as:

- (i) The Berne Convention of 1886 for the protection of literary and artistic works,
- (ii) The Universal Copyright Convention of 1952 for the protection of the right of Authors and copyright owners;
- (iii) The Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations of 1961;
- (iv) The World Intellectual Property Organization (WIPO) copyright treaty; and
- (v) The trade - related aspects of intellectual property rights (TRIPS) which reinforces the Berne Convention.

<sup>21</sup> Hollyman R., *Software Piracy Abroad: Challenges and Opportunities*, 453 Prac. Law inst. <pat., "Copyright trademarks & Literary Prop". Handbook Series (1996) 419, 422,

<sup>22</sup> Copyright Act, Cap C28, Law of the Federation of Nigeria, 2004

<sup>23</sup> 886 F.2d, 1175, 12 USPQ2d 1566, 1586 (9th Cir. 1989)

<sup>24</sup> 714 F.2d 1240, 1249, 219 USPQ 113, 121 (3d Cir (1983)

<sup>25</sup> Copyright Act (Cap 28 Laws of the Federation of Nigeria (LFN) 2004 Containing the 1998 Act as Amended by the Copyright (Amendment) Decree No 98 of 1992 and the Copyright (Amendment) Decree of 1999.

<sup>26</sup> Although, Presently the punishment has proved to be inadequate, consequently, heavier criminal sanction continues to be widely advocated for by many stakeholders in the industry.

<sup>27</sup> Hereafter Referred to as "the Commission."

<sup>28</sup> S. 34 (1) Copyright Act.

<sup>29</sup> Adebambo A "Legal Framework for Copyright Protection in Nigeria Lagos State University (LASU) Law

*Journal*" 82 (1995).

<sup>30</sup> The Extant Copyright Act in fact recognises dual actions i.e. simultaneous institution of both civil and criminal proceedings against any alleged infringer in respect of the same infringement.

<sup>31</sup> 34 (1) of the Act.

<sup>32</sup> As a Commission, the NCC was no longer a mere group of government officials providing copyright services to the public but given the statutory powers of control and regulation of copyright matters in Nigeria by virtue of s. 2 of the Copyright (Amendment) Decree No. 47 1999 the word 'Council' was Substituted for the Word "Commission"

<sup>33</sup> Copyright Law (Lagos: Maghlink International Ltd:1998) p. 148

<sup>34</sup> Copyright Act, supra s 35

<sup>35</sup> Ibid

After considering the legal framework already in place in Nigeria and relating it to the digital age today, it will still be right to say that Nigeria still has a long way to go with respect to copyright protection, digital protection and adequate protection for computer software. According to Akinjide and Co., the lack of adequate legislative incursion in this area<sup>36</sup> has led to a dearth of judicial jurisprudence on the field, which result in Nigeria having the highest incidence of piracy of computer programs and other digital innovations in the whole of Africa.<sup>37</sup>

### 17. Development of Copyright Laws in the U.K. and the United States

According to Stuart J.H Graham, American copyright Law originated with the introduction of the printing press to England in the late fifteenth century.<sup>38</sup> As the number of presses grew, authorities sought to control the publication of books by granting printers a near monopoly on publishing in England.<sup>39</sup> The Licensing Act 1662 confirmed that monopoly and established a register of licensed books to be administered by the stationers company, a group of printers with the authority to censor publications.<sup>40</sup>

The 1662 Act lapsed in 1695 leading to a relaxation of government censoring, and in 1910 parliament enacted the statute of Anne to address the concerns of English book sellers and printers.<sup>41</sup> The 1710 Act established the principles of authors' ownership of copyright and a fixed term of protection of copyrighted works (fourteen years, and renewable for fourteen more if the author was alive upon expiration). The statute presented a monopoly on the part of the book sellers and created a "public domain" for literature by limiting terms of copyright and by ensuring that once a work was purchased, the copyright owner no longer had control over its use.<sup>42</sup> The statute did provide for an author's copyright, the benefit was minimal because in order to be paid for a work an author had to assign it to a seller or publishers.<sup>43</sup> The United States was still a colony of Great Britain at the time so British Statutes were applied in her colonies including the United States at the time. Eventually the United States gained independence in 1776. The geographical entity known as Nigeria was non-existent at the time.

<sup>36</sup>The USA has enacted the Digital Millennium Act specifically to cater for computer software and other digital innovations' protection.

<sup>37</sup> Akinjide and Co, "Nigeria Computer Software Protection" (www.document) (created 2007) at URL://http://www.lawedit.co.uk. Note where Nigeria Rated 84% of Piracy Level in the World as at 2004. {Accessed 20<sup>th</sup> Jan., 2018}

<sup>38</sup>Graham S. J. H., "Post-issue Patent Quality Control" A Study of the US patent re-examinations and European Patent Organizations - National Bureau Economic Research, Working Paper no.w8507, at <http://emlab.berkeley.edu/users/bhpapers.html>, {Accessed 20th Jan., 2018}.

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Petterson, L. R. & Stanley, W. L., "The Nature of Copyright A Law of Users' Rights" (Athens: University of Georgia Press: 1991)

### 18. Copyright Act of 1790

The first congress implemented the copyright provision of the US constitution in 1790. The Copyright Act of 1790, an Act for the encouragement of learning, by securing copyright of maps, charts and books to the authors and proprietors of such works, It was modeled on the statute of Anne 1710<sup>44</sup>. It granted American authors the right to print, re-print, or publish their work for a period of fourteen years and to renew them for another fourteen.<sup>45</sup> The law meant to provide an incentive to authors, artistic and scientists to create original works by providing creators with a monopoly<sup>46</sup>. At the time the monopoly was limited in order to simulate creativity and the advancement of "science and the useful arts" through wide public access to works in the "public domain." Major revision to the Act were made in 1831, 1870, 1909 and 1976.<sup>47</sup> Other laws that persist in the intellectual properly industry in the United States and partly applicable in Nigeria include;

### 19. Berne Convention 1886

The goals of the Berne Convention provided the basis for mutual recognition of copyright between sovereign nations and promoted the development of international norms in copyright protection.<sup>48</sup> European nations established a mutually satisfactory uniform copyright law to replace the need for separate registration in every country.<sup>49</sup> The treaty has been revised several times since 1886<sup>50</sup>. Of particular note are the revisions in 1908 and 1928. In 1908, the Berlin Act set the duration of copyright at life of the author plus 50 years, expanded prior copyright protection.<sup>51</sup> In 1928, the Rome Act first, recognized the moral rights of authors and artists, giving them the right to object to modifications or to the destruction of a work in a way that might prejudice or decrease the artist's reputations<sup>52</sup>. The United States became a Berne signatory in 1988.<sup>53</sup>

### 20. International Copyright Treaty 1891

The American Copyright Law only applied to American publications. European authors were not protected from the publication and sale of their works at extremely low prices during the nineteenth century.<sup>54</sup> The so-called "cheap books" movement, spread rapidly by small upstart publishers after the civil war, threatened the "courtesy principle" of gentlemanly price - fixing adhered to by the large established publishers. By Peterson, Lyman Ray's point of view, the 1880's cheap books flooded the American market.<sup>55</sup>

<sup>44</sup> U.S.C S. 102 (a) (1988); Software Copyright Directive also TRIP Agreement

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> "Essential Elements of Intellectual Property, Overview of the Basic Notions of Copyright and Related Rights and Treaties Administered by WIPO Academy", World Intellectual Property Organization,

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Essential Elements of Intellectual Property, supra

<sup>55</sup> Peterson & Lyman R., *Copyright in Historical Perspective*, (Nashille: Vanderbilt University Press: 1968)

### 21. Circulation of Computer Software 1990

Congress amended the Copyright Act to prohibit commercial lending of computer software.<sup>56</sup> The amendment noted that libraries could lend software, provided the “copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright”. The amendment was termed a modification of the first sale doctrine.<sup>57</sup>

### 22. The US Court of Claims interpretation of the fair use doctrine

The Court had occasion to interpret the fair use doctrine in the case of *Williams and Wilkins Co. v. United States* 197. Williams and Wilkins, publishers of specialized medical journals sued the National Library of Medicine (NLM) and the National Institutes of Health (NIH) charging that the agencies had infringed copyright by making unauthorized photocopies of articles featured within their publications and distributing them to medical researchers.<sup>58</sup> The US. Court of claims held that medicine and medical research would be harmed by infringement and since the Copyright Act was under revision by congress. It was better to allow the status quo to continue in the interim.<sup>59</sup> In the decision, Judge Davis stated, “the holds’ based on the type and context of use by NIH and NLM as shown by the record, that there has been no infringement, that the challenged use of it is “fair” in the view of the combination of all the factors involved in consideration of ‘fair’ and ‘unfair’ use and was of the opinion, that the record fails to show a significant detriment to plaintiff but demonstrated injuries to medical and scientific research of photocopying of this kind. It held that there was a need for congressional legislation on the problems of photo copying.”<sup>60</sup>

### 23. Trips Agreement 1996

In December 1994, President Clinton signed the Uruguay Round Agreement Act (URRA) which implemented the General Agreement on Tariffs and Trade (GATT) including Trade Related Aspects of Intellectual Property (TRIPS)<sup>61</sup> provision in the URAA amended U.S. copyright law On January 1, 1996, copyright for works from eligible countries was restored<sup>62</sup>

### 24. World Intellectual Property Organization (WIPO) 1996

Delegates from 160 countries considered two treaties on international intellectual property law during a diplomatic conference convened in December 1996 in Geneva, Switzerland.<sup>63</sup> The delegates adopted new versions of the proposed treaties resulting in a new approach to copyright issue. The treaty language emphasized “the need to maintain a balance between the right of authors and the larger public

interest, particularly education, research and access to information”.

### 25. Digital Millennium Copyright Act 1978

The Digital Millennium Copyright Act (DMCA) was signed into law on October 28, 1998<sup>64</sup> by President Clinton:<sup>65</sup> the law made provisions for the implementation of WIPO internet treaties, established safe harbors for online service providers; permits temporary copies of programs during computer maintenance, made miscellaneous amendment, to the Copyright Act including amendments which facilitated internet broadcasting; and created *sui generis* protection for boat hull designs.<sup>66</sup>

Among the most controversial provisions is section 1201. According to Jonathan Band of Momson and Foersters<sup>67</sup> the Act prohibits gaining unauthorized access to a work by a measure put in by the copyright owner where such protection machine otherwise effectively controls access to a copyright work. This prohibition on an unauthorized access take effect two years after enactment of the “DCMA” over the next two years, the library of congress conducted a rulemakings processing to determine appropriate exceptions to the prohibition Additional rulemakings will occur every three years<sup>68</sup>

### 26. Family Entertainment and Copyright Act 2005

The family entertainment and copyright Act was enacted on April 27, 2005.<sup>69</sup> One part of the Act, the Artists rights and theft prevention Act of 2005, created criminal penalties for individuals who record motion pictures at a theater or for individuals who distribute unpublished works, such as movies or software.<sup>70</sup> The family entertainment and Copyright Act also included the family Home Movie Act, 2005.<sup>71</sup> The Family Home Movie Act provided a statutory exemption for DVD players and other home movie players that contain technology to skip objectionable contents.<sup>72</sup>

### 27. Different Organizations’ Actions against Software Piracy in the United States of America

According to George H’ Pike, several efforts have been made to minimize the growing software piracy worldwide. Stop Online Piracy Act (SOPA) was introduced in the United States by Lamar S. Smith in 2011, intended to address the growing problem of piracy and counterfeit goods. It is a crucial effort to enforce and protect intellectual property rights which can mitigate the losses of many software vendors<sup>73</sup> Likewise, the National Intellectual Property Law Enforcement Co-ordination Council (NIPLECC) was formed in 1999 to investigate and prohibit intellectual property violation over the internet.

In 2001 as part of its protection, it conducted simultaneous searches in different parts of the United States and five other foreign countries. In the search process several computers sites were found to have thousands, of pirated

<sup>56</sup> “Computer Communication Software”, January 1975 — October 1986. Springfield, VA; NTIS 1987, 109 p.

<sup>57</sup> Ibid

<sup>58</sup> *Williams and Wilkins Co. v. United States*, 172 U.S.P.Q 670,679 (ct.cl. 1972)

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Established on World Trade Organization (TRIPS WTO) Annex IC, 33 LL M, (197 (1994)

<sup>62</sup> Ibid

<sup>63</sup> International Bureau of NIPO, *Basic Notion of Copyright and Related Rights* WIPO (CR/GE/60/11 October 2000

<sup>65</sup> P.L. 105-304

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> LLP, Section 1205

<sup>69</sup> Ibid

<sup>70</sup> Family Entertainment and Copyright Act 2005 (S.167)

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Pike, G. H., *Copyrights and Copy Wrongs: The rise of intellectual property and how it threatens certainty* (New York University Press: 2001). {Accessed 24<sup>th</sup> Jan., 2018}

copies of software, computer games, music and movies. Seventeen defendants were prosecuted and ten of them were found guilty and sentenced to 30 — 40 months in jail.<sup>74</sup> Apart from them, there are several other organizations dedicated to stop worldwide growing piracy, such as BSA, SIA Microsoft Corporation and others that describe the intellectual property rights and penalties for abusing legitimate software in the US.

### **28. Business Software Alliance BSA**

Business software alliance is the leading advocate for global software and hardware industries with its headquarters in Washington, DC It was established in 1988 and has been promoting legal software use in more than 60 countries including Nigeria It works on behalf of the largest software companies including Adobe Microsoft, McAfee, Autodesk, Intuit Symantec, Apple gently system, Borland, Macromedia, Unigraphics Solutions and many others. It has collected millions of dollars in restitution from different companies in the United States alone that were caught with illegally made copies of software Every year, it conducts world-wide study in collaboration with IDC and estimates the level of software piracy as well as the total losses to the software companies.

If any company or individual is suspected of using illegal software, it will first send an audit letter asking it to provide proofs of purchases for each of the software products installed on computers and if the company or individual is unable to provide the proof of legal purchase, then they could be liable to pay penalties as much as \$150,000 depending upon the illegal software found in the company.

### **29. Software and Information Industry Association - SIIA**

This is the principal trade association that advocates the software and digital content industries for more than 800 companies worldwide. It was formed in 1999 in an association with software publishers and information industry. Its members range from startup companies to the largest companies such as Adobe Auto - desk, Symantec, McAfee filmmaker and Borland. It promotes the importance of copyright protection and intellectual property to business consumers and education. It takes legal action against illegal software use and illegal selling of software. It runs the corporate Anti- piracy programs and internet Anti - piracy programs.<sup>75</sup> Through the corporate anti-piracy program it handled cases of software and digital content piracy taking place within an organization.<sup>76</sup>

Pirates not only distribute software among themselves, but nowadays they are reaching out to the public through different online auction sites. They are selling illegal copies of genuine software for a fraction of the price. In 2006 SHA launched a new program called Anti- Piracy Litigation Program (ALP) to combat the illegal sale of software on several auction sites — under this program SITA monitors auction sites, identifies groups or individuals involved in

selling illegal software or contents and sues them on behalf of the association member companies.<sup>77</sup>

### **30. Microsoft Corporation**

Microsoft Corporation is the world's leading software industry founded by Bill Gate and Paul G. Allen in 1975 to develop computer software applications and systems, Its headquarter is in Redmond, Washington and it has nearly 90,000 employees working in more than 100 countries,<sup>78</sup> besides developing software application and system, it also publishes books, offers email service and sells computer peripherals, electronic game systems and portable media players. Its best known product such as Microsoft windows series of operating system, internet explorer, web browser and others are well known worldwide.<sup>79</sup> Microsoft is also facing software piracy as a serious threat to the company. Many of its products have been illegally used and distributed by software pirates that causes them a loss of millions of dollars and thousands of jobs every year. According to a study, "addressing global software piracy" conducted by Microsoft in partnership with government agencies and customers in 2010, software piracy recorded \$750 billion dollars in lost revenues and millions of lost jobs in software industries.<sup>80</sup>

### **Conclusion**

The causes and motives for piracy are many and varied. In Nigeria, its prevalence is attributable to a number of significant contributory factors which include: the scarcity and high cost of genuine products, poverty, poor distribution networks, a slow judicial system, poor cooperation in some quarters of the creative sectors and inadequate funding of regulatory agencies, including the Nigerian Copyright Commission (NCC) which is saddled with the responsibility of monitoring, administering and enforcing copyright laws and ensuring proper implementation of these laws. Insecurity, poor enforcement mechanism, poor information and communication technology (ICT) knowledge, poor equipment for the implementation of the anti-piracy policies are among the challenges facing the Commission

. This enduring problems are further compounded by the challenges posed by new digital technologies which, themselves, create opportunity for illegal mass reproduction of copyright protected work. The consequences are that rights owners who have invested enormous energy, time and money in producing sound recordings films, books and computer programs suffer huge losses in revenue. As a consequence, creators of genuine copyright protected products are discouraged from setting up their operations in the country. The government loses much needed tax revenue to fund public services and the country as a whole loses out on its ability to attract foreign direct investment and to harness opportunities for technology transfer.

### **Recommendations**

1. The National Assembly should enact an Act creating special courts or tribunals for the speedy trial of copyright infringement cases. The Chief Judge of each State should be

<sup>74</sup> Introduced into the House by Representative Lamar Smith (R — TX) and the Protect IP Act (PIPA)

"Stop Online Piracy Act (online)", January 2012 at <http://www.al I net.org/document/government-relation/issue-briefs-and-reports/2012.SOPA one pager pdf>. {Accessed 25th Jan., 2018}.

<sup>76</sup> National Intellectual Property Law Enforcement Coordination Council NIPLECC Report (online)" at <http://www.uspto.gov/web/offices/dcom/olia/niplecc 2002>. {Accessed 26th Jan., 2018}

<sup>77</sup> Ibid

<sup>78</sup> "Microsoft Corporation Microsoft Research Labs World Wide" at <http://reserach.rnicrosoft.com/enuis/labs> {Accessed 12th April, 2017}.

<sup>79</sup> Ibid

<sup>80</sup> Ibid

authorized to make Rules of Procedure for these courts that would facilitate speedy trials.

2. The National Assembly should consult experts in the area of information technology, computer technology, professionals in relevant government agencies such as the National Broadcasting Commission, the Nigerian Copyright Commission and the Nigerian Communications Commission in order to make them knowledgeable in the intricacies involved in copyright violations and the adverse consequences to the economy.

3. The Nigerian Copyright Commission should be adequately funded, trained and equipped with adequate number of vehicles and uniformed policemen to be able to identify areas where pirated works and counterfeits are mass produced and raid them effectively.

4. A massive nationwide campaign of awareness should be carried out by the National Orientation Agency in Conjunction with the Nigerian Copyright Commission to enlighten the public on the ills and dangers of patronizing pirated works and counterfeits.

5. The Nigeria Police, the Nigerian Ports Authority, the Nigerian Customs Service the Nigerian Immigration Service with the Nigerian Copyright Commission should collaborate to prevent pirated copies and counterfeits of works protected by copyright from entering this country.

6. The Nigerian Copyright Commission should collaborate with International Copyright Protection Agencies such as the World Intellectual Property Organization (WIPO), Business Software Alliance (BSA) and Software Information Industries Association (SIIA)

on novel threats to works protected by copyright and ways of combating them as well as training of its manpower.

7. The United States Congress has been doing a lot in passing legislations aimed at preventing the counterfeiting and pirating of materials protected by copyright. One area they need to find a solution to be hacking of classified information in their computers. Nigeria does not have the problem of hacking for now but it is best to be proactive, so both countries should consult experts and come up with the best way to protect their classified information from hackers.