

## APPRAISAL OF NATIONAL LEGAL FRAMEWORK FOR PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN NIGERIA

BY

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### Abstract

*The laws continue to change in our society, including Intellectual Property laws. As a result of this dynamism, our laws equally change to meet up with our society as it affects Intellectual Property in Nigeria. This dynamism has made the enforcement of Intellectual Property rights more complex in Nigeria. Intellectual property laws in Nigeria are crippled by obsolete and virtually non-existent laws. The need for a more conducive Intellectual Property laws to match the ever-growing digital environment in Nigeria cannot be over emphasized. In this article, we are going to look at the national legal framework for protection of intellectual property rights in Nigeria. In this article, an appraisal look shall be made at the national legal framework for protection of intellectual property rights and its consequent in Nigeria. This study shall also evaluate these national legal frameworks to see if there are lacunae in them. This study adopts the doctrinal research approach, utilizing primary and secondary sources of data collection. In the final analysis, this article shall have critically looked at the various national legal framework on intellectual property in Nigeria and in the end, make recommendations for a more viable and robust national legal framework on intellectual property in Nigeria.*

**Keywords:** National, Intellectual Property, Legal Framework, Nigeria

### 1.0 Introduction

The need for a more conducive Intellectual Property laws to match the ever-growing digital environment in Nigeria cannot be over emphasized. The histories of Intellectual Property laws in Nigeria<sup>1</sup> have evolved at different times depending on the prevailing circumstances at that time. In this article, we are going to look at the national legal framework for protection of intellectual property rights in Nigeria. This will go a long way in assisting all the stakeholders in understanding the entire laws governing subject matter of this article in Nigeria.

### 2.0 What is Intellectual Property?

Intellectual property is that intangible property which has no physical existence. It is a right conferred by law on human innovators and creators and even entrepreneurs to protect the fruits or products of their intellect, their innovative and creative efforts and their commercial reputation and goodwill. The World Intellectual Property Organization (WIPO) refers it to as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.<sup>2</sup> Kenton sees intellectual property as a broad categorical description for the set of intangible assets owned and legally protected by a company or individual from outside use or implementation without consent.<sup>3</sup> He goes further to describe intangible asset as a non-physical asset that a company or person owns<sup>4</sup>. Intellectual property is 'choses in action' and corporeal hereditaments. Such rights are conferred by law in order to promote creativity, innovation and societal good. In this connection, the right enables creators and innovators to prevent access to the product of their intellect or allow access thereto either freely or for economic gain. The right is not

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<sup>1</sup> Just as in other countries of the world.

<sup>2</sup> World Intellectual Property Organization, 'What is Intellectual Property' *WIPO* (11 March. 2023) <<https://www.wipo.int/about-ip/en/>> Accessed 12 January, 2024.

<sup>3</sup> W Kenton, 'What is Intellectual Property, and What Are Some Types?' *Investopedia* (6 October, 2023) <<https://www.investopedia.com/terms/i/intellectualproperty.asp>> Accessed 12 January, 2024

<sup>4</sup> *Ibid*

absolute but is limited by time and certain exception. Oyewunmi, sees intellectual property as the legal rights conferred to those who engage in creative, inventive and promotion activities which have resulted in original, useful or other beneficial outputs. Such outcome is classified as a form of property, albeit of the intangible, incorporeal variety. This means that unlike physical property, it is incapable of being physically owned or possessed and can therefore be simultaneously enjoyed by different users without being lost to the creator or owner.<sup>5</sup> Oxford Dictionary of Law<sup>6</sup> defined intellectual property as "intangible property that includes patents, trademarks, copyright registered and unregistered design right." Among the different forms of intellectual property, Mereth<sup>7</sup> identified patents, trademarks and copyright as the three most important forms of intellectual property rights while Cornish posits that they see them as models to which aspirants will turn to for the protection of other ideas, information and trade values.<sup>8</sup> According to Adewopo, the expression intellectual property is taken to mean the legal rights which may be asserted in respect of the product of the human intellect.<sup>9</sup> Intellectual property objectives are rooted in international human rights legal framework such as United Nations Declaration on Human Rights, 1948<sup>10</sup> and the International Convention on Economic, Social and Cultural Rights 1966.<sup>11</sup>

### 3.0 What is National Legal Framework?

The legal framework for any research work basically refers to the legal foundations on which the entire research will be based. What suffices here is what the law says as regards issues relating to the subject-matter of the research as it relates to Nigeria. In this article, we are going to look at the national legal framework for protection of intellectual property rights in Nigeria. In our discussion, both judicial and otherwise academic views shall be discussed.

### 4.0 National Legal Framework for Protection of Intellectual Property Rights in Nigeria

The foremost national law in Nigeria as far as intellectual property right is concerned is the Constitution of the Federal Republic of Nigeria.<sup>12</sup> It is the supreme law of the land and therefore superior to all other laws in the country. Its provision on any subject matter overrides the provision of any other law on the same subject. In *Omeje v Agboeze & Ors*<sup>13</sup> the Court of Appeal citing the case of *Military Governor of Ondo State v Adewimo*<sup>14</sup> rehashed the 'consistency test of the Constitution' where it held that:

"it is trite law that under the consistency test, the validity of any law is determined by its consistency with the provisions of the Supreme law, that is, the Constitution. So that where any law is inconsistent with the provisions of the Constitution, such other law shall be to the extent of the inconsistency be void, in support of this proposition".<sup>15</sup>

<sup>5</sup> Oyewunmi, A., 'Nigerian Law of Intellectual Property' (2015).

<sup>6</sup> Martin, E.A, and Law, J. 'Oxford Dictionary of Law' (6<sup>th</sup> edition eds) (Oxford University Press 2006) 280.

<sup>7</sup>Mereth P., 'Intellectual Property Law' (1996).

<sup>8</sup> Cornish N., 'Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights, 4<sup>th</sup> edition (1999).

<sup>9</sup> Adewopo A., 'According To Intellectual Property: A Pro-Development Vision of the Law and the Nigerian Intellectual Property Law and Policy Reform in the Knowledge Era'(NIALS, 2012).

<sup>10</sup> UDHR, Article 27.

<sup>11</sup> ICESCR, Article 27.

<sup>12</sup> 1999 (as amended).

<sup>13</sup> (2012) LPELR-CA/E/369/2008.

<sup>14</sup> (1998) 3 NWLR (pt.82) 280.

<sup>15</sup> Per Uwaifo JSC

Beside the Constitution, intellectual property in Nigeria is regulated by five main local statutes. These are: Copyright Act 2022, Patent and Designs Act 1968, Trade Marks Act 1967, Merchandise Marks Act, and Companies and Allied Matters Act 2020. While Copyright Act regulates literary, musical, artistic works, audiovisual works, sound recordings and broadcast,<sup>16</sup> inventions and industrial designs are governed by the Patent and Designs Act. Similarly, trademarks are protected by Trade Marks Act, while business names are taken care of by Part B of Company and Allied Matters Act (CAMA), 2020.

The laws enumerated above make up the national legal regime for the protection of intellectual property rights in Nigeria. For the sake of this article however, we shall be looking at; Patent and Design Act,<sup>17</sup> Trademark Act<sup>18</sup> Copyright Act,<sup>19</sup> the Cybercrimes (Prohibition, Prevention, etc.) Act,<sup>20</sup> and the Constitution of the Federal Republic of Nigeria, 1999 (as amended).<sup>21</sup>

#### 4.1 Copyright Act 2022

Copyright in an intellectual work is that exclusive right of the author of the original work to control or enable the doing of certain expressly stated acts in respect of the whole or substantial part of the work either in its original form or in any other recognizably derived from the original form but subject to certain statutory exceptions.<sup>22</sup> According to *Loshin*, copyright is a legal term describing ownership of control of the rights to the use and distribution of certain works of creative expression, including books, video, motion pictures, musical compositions and computer programs.<sup>23</sup> Therefore, the copyright laws refer to the bundle of law that seeks to protect the rights of authors of such works that have been expressed in specific forms for the transformation or reproduction by persons who are neither authorized nor licensed by the copyright owner.<sup>24</sup>

On the 17 day of March, 2023, the Nigerian President<sup>25</sup> signed the Copyright Act 2022 which repealed the Copyright Act 2004 (the old Act). The new Copyright Act known as the Copyrights Act 2022 is aimed inter alia at protecting the rights of authors and providing appropriate limitations and exception to guarantee access to creative works.<sup>26</sup> It is the principal law that governs, protects copyrights in Nigeria, while the regulatory agency that supervises copyright registration in Nigeria is the Nigerian Copyright Commission (NCC). The Copyright Act makes provisions for the protection, transfer, infringement, and remedies for infringement of copyrights in Nigeria.<sup>27</sup>

Section 2(1) (a-f) of the Copyright Act provides for works protected by copyright which include; literary works, musical works, artistic works, audiovisual works, sound recordings and broadcasts. Section 2(2) of the Copyright Act provides that a literary, musical or artistic work shall not be eligible to be copyrighted except the following listed thereunder occurs; and provide for both

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<sup>16</sup> Copyright Act, 2022, S. 2 (1)(a)-(f). see also T Okeyinka, 'Are Business Methods Patentable in Nigeria?' <<http://www.worldpreview.com/article/arebusiness-methods-patentable-in-nigeria>> accessed 10 April 2022.

<sup>17</sup> Cap. P2 Laws of the Federation of Nigeria 2004.

<sup>18</sup> Cap. T13. Laws of the Federation of Nigeria 2004.

<sup>19</sup> 2022.

<sup>20</sup> Of 2015.

<sup>21</sup> (as amended).

<sup>22</sup> N J Garrick, 'Intellectual Property in Nigeria: A Summary of Protectable Rights in Nigeria' <<http://www.mondaq.com/nigeria/trademark/1112730/intellectual-property-in-nigeria-a-summary-of-protectable-right-in-Nigeria>> Accessed 26 April, 2022.

<sup>23</sup> P Loshin, 'What is Copyright' *TechTarget* (6 November, 2022) <<https://www.techtarget.com/searchsecurity/definition/copyright>> Accessed 12 January, 2024.

<sup>24</sup> *Ibid.*

<sup>25</sup> President Muhammadu Buhari.

<sup>26</sup> Section 1(a) and (b) of the Copy Right Act.

<sup>27</sup> O.J Jegede, and W Idianru, 'Overview of Copyright Law and Copyright Registration in Nigeria' <<http://www.mondaq.com/nigeria/copyright/9834450/overview-of-copyright-law-and-copyright-registration-in-Nigeria>> accessed 26 April 2022.

civil and criminal actions which may be instituted simultaneously by the copyright owner.<sup>28</sup> There are several case law authorities that disclose the application of the Copyright Act by the courts in resolving cases of infringement of copyright. In *NCC v. Godwin Kadir*,<sup>29</sup> *NCC v. Michael Paul*<sup>30</sup> and *NCC v. Emordi Henry Chukwuma*<sup>31</sup> all on charges respecting infringement of broadcast rights, the defendants were all found guilty. In *NCC v Nwoke Isreal*,<sup>32</sup> the Lagos Judicial Division of the Federal High Court, convicted and sentenced the defendant to one year imprisonment without the option of fine for infringing upon literary rights.

There were several innovations brought to by the Copyrights Act 2022 that were not in the old Copyrights Act. It will be imperative to look at these innovations in the course of appraising the Copyright Act 2022. The new Act provides for conditions which a work must satisfy before it becomes eligible for copyright in Nigeria. Some notable changes in this regard include:

- **Level of expenditure of effort:** under the Act, literary, musical, and artistic works are only eligible for protection if they possess an original character that was achieved through “some effort”<sup>33</sup> as opposed to the previous requirement of “sufficient effort”<sup>34</sup>. The focus now appears to be on the expenditure of any level of effort on a work, whether sufficient or not. It is posited that the term “some” will be interpreted according to its dictionary interpretation since the Act did not offer any interpretation. Through this new provision, the need for the courts to determine the sufficiency of an author’s effort in cases of infringement will be eliminated since the conditions may be considered satisfied once the author proves that he/she made an “effort” to create the copyrighted work, regardless of the amount of effort expended in creating the work.
- **Compilation of Works:**  
The new Act now clarifies that copyright in a compilation would not confer any exclusive right in the pre-existing material or data comprised therein<sup>35</sup>
- **Formalities:**  
The Act has formally incorporated the international principle contained in copyright related treaties that postulate that copyright protection should not require any formalities.<sup>36</sup> Although, this principle has already been recognized by the Nigerian courts, its inclusion in the Act provides a stronger legal backing and alignment with international best practices and conventions.<sup>37</sup> For instance, the Berne Convention, to which Nigeria is a signatory, prohibits compliance with any formalities before the enjoyment of copyright protection in member states who are signatories to the convention.<sup>38</sup>

<sup>28</sup> Copyright Act 2022, S 47 Copyright Act.

<sup>29</sup> FHC/B/43C/2010, (Federal High Court, Benin City, 17/12/2012).

<sup>30</sup> FHC/LF/CR/2/2013, (Federal High Court, Lafia, 3/10/2013).

<sup>31</sup> FHC/ABJ/CR/90/2013, (Federal High Court, Abuja. 19/06/2013).

<sup>32</sup> FHC/L/159C/2013, (Federal High Court, Lagos 6/05/2013).

<sup>33</sup> Copyright Act 2022, s.2(2)(a)

<sup>34</sup> Copyright Act 2022, s. 1(2)(a)

<sup>35</sup> Copyright Act 2022, s. 2(5).

<sup>36</sup> Copyright Act 2022, s. 4.

<sup>37</sup> C. Njoku and M. Abdulsalam, "Is Registration Of Copyright A Requirement For Proving Infringement? A Critical Analysis of The Ruling of The Federal High Court in The Case of *Paul Allen Oche v. Nigerian Breweries Plc. & 3 Ors.*," available at: <https://www.mondaq.com/nigeria/copyright/1124982/is-registration-of-copyright-a-requirement-for-proving-infringement-a-critical-analysis-of-the-ruling-of-the-federal-high-court-in-the-case-of-paul-allen-oche-v-nigerian-breweries-plc--3-ors>, accessed 13 January, 2024

<sup>38</sup> This provision was revised in the 1908 Berlin revision of the Convention by the present rule of formality-free protection, contained in Article 5(2) of the Paris Act 1971, which clearly stipulates that the enjoyment and the exercise of copyright shall not be subject to any formality. See generally, Sandra Eke, "Fundamental Elements of Copyright Ownership and Protection Under Nigerian Law" available

- **Copyright by reference to international agreements:** The Act secures the protection of a work that was initially published in a country in which at least one of the authors at the time of the first publication, was a citizen or resident of that country that is a party to an obligation in a treaty or other international agreement with Nigeria.<sup>39</sup> This provision of the new Act has similar requirements as Section 5 of the old Act. However, this new Act excludes Section 41 of the old Act which had provided for a reciprocal extension of protection in which the Minister was obligated to grant protection in Nigeria to works created in a foreign country that is a party to an obligation in a treaty or other international treaty with Nigeria through an order in a federal gazette. This new Act makes no provision for this requirement, therefore nullifying Section 41 of the old Act which will no longer be in effect.<sup>40</sup> This change is a positive development since it removes the dichotomy created by the old Act,<sup>41</sup> that served as the basis for some flawed judicial decisions which affected foundational principles regarding international agreements and copyright reciprocity in Nigeria.<sup>42</sup> To overcome any potential challenges in this area, all that is required is a certification from the Commission confirming Nigeria's status as a party to the international treaty claimed by the litigant.<sup>43</sup>
- **Ineligible Works:** Under the new Act, copyright protection is not granted to certain types of works such as ideas, processes, official legislative or administrative texts and any official translations (excluding compilations), official state symbols and insignia including flags, coat-of-arms, anthems, and banknote designs.<sup>44</sup> Although, these ineligible works identified in the new Act were absent in the old Act, the Nigerian courts have previously upheld the exclusion of these ineligible works from copyright protection based on their non-compliance with works eligible for copyright as provided in Section 1 of the old Act.<sup>45</sup> The provision in the new Act serves to reinforce this existing principle.

**Also, under the new Act, additional rights were included. Some of which include for instance,**

- a. **Moral Rights:** As in the old law, the new Act provides for the basic moral rights of an author<sup>46</sup> and introduces supplemental provisions to the author's moral rights. One of the additions is that a person now possesses the right to object to any false attribution of authorship of their work.<sup>47</sup> Secondly, the moral rights will continue to exist only for the duration of the copyright,<sup>48</sup> unlike the old Act where they were considered "perpetual" and

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at: <https://www.mondaq.com/nigeria/copyright/866284/fundamental-elements-of-copyright-ownership-and-protection-under-nigerian-law--sandra-eke> accessed 13 January, 2024.

<sup>39</sup> Copyright Act 2022, s.8(1).

<sup>40</sup> This is an important modification because the Minister had not been effectively carrying out this responsibility. The last Order regarding this was issued in 1972 i.e., the Nigeria Copyright (Reciprocal Extension) Order of 1972.

<sup>41</sup> See Adebambo Adewopo and Nkem Itanyi (2021), "Protection of Copyright in Foreign Works in Nigeria: An Analysis of the Decision in *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors*", GRUR International, Volume 70, Issue 12, December 2021, Pages 1174-1180, available at <<https://doi.org/10.1093/grurint/ikab120>> accessed 13 January, 2024

<sup>42</sup> See *Microsoft Corporation v. Franike Associates Ltd* (2012) 3 NWLR (Pt. 1287) 301. See also *Island Records v. Pandum Technical Sales & Services* (1993) FHCR p. 318 and *Societe Bic SA v. Charzin Inds. Ltd.* [1997] 1 FHCLR p.727.

<sup>43</sup> see section 8(2) of the Act. See also, J Onyido, 'Teaching Intellectual Property Law as a Pedagogical Imperative at the Faculty of Law of the University of Ibadan, Nigeria' (Intellectual Property Law Symposium, Ibadan, 13 July 2018), available at <<https://spaajibade.com/intellectual-property-law-symposium-university-of-ibadan/>> accessed 13 January, 2024.

<sup>44</sup> Copyright Act 2022, s. 3

<sup>45</sup> See *Adenuga v. Ilesanmi Press* (1991) 5 NWLR (Pt. 189) 82, *Multichoice (Nig.) Ltd. v. M.C.S.N. Ltd. Gte.* (2020) 13 NWLR (Pt. 1742) 415.

<sup>46</sup> Such as, right to claim authorship and be acknowledged as such; and right to object to mutilation or other derogatory treatment of the work. See section 14(1)(a)(b) of the Act.

<sup>47</sup> Copyright Act 2022, s.14(2).

<sup>48</sup> *Ibid*, s.14(4).

"imprescriptible."<sup>49</sup> This alteration is logical because copyright law aims to safeguard a creator's work while simultaneously encouraging public access to it for the benefit of mankind. Furthermore, the Act provides that an author's moral rights shall not be transmissible during the life of the author and that upon the death of the author, his/her moral rights can be transmissible by testamentary disposition or by operation of law.<sup>50</sup>

- b. **Right to remuneration for broadcasting of sound recordings:** The Act grants the performer and the copyright owner of a sound recording the entitlement to fair and equitable payment/earnings for their work, provided that their work is published for commercial purposes. Additionally, they also possess the right to scrutinize records, statements, and information associated with the broadcast of the sound recording.<sup>51</sup>

The new Act also introduced new and elaborate exceptions to the exclusive rights of a copyright owner. Some of which include:

- a. **Fair dealing:** Unlike the old law, the Act now incorporates specific criteria that will assist the courts in assessing whether a particular use of a work qualifies as "fair dealing". These factors include the purpose and nature of the usage, the characteristics of the work, the quantity and significance of the portion used in relation to the entire work, and the impact of the usage on the potential market or value of the work.<sup>52</sup> While the term "fair dealing" is expressly defined, the provided criteria for determining fair dealing provides detailed basis for establishing this defence against exclusive copyright ownership. Notably, this approach aligns with the "fair use" doctrine adopted in the copyright legal system of the United States of America.<sup>53</sup>
- b. **General Exceptions**

The Act has provided new exceptions to the use of an author's copyright. Some of which includes:

- Making of transient and incidental reproductions of works in a technological process of transmission between third parties;<sup>54</sup>
- Making available works that are not subject to license for the purpose of research or private study through dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums and archives.<sup>55</sup>
- Reproduction of a copy or the adaptation of a computer program is permitted, if the copy or adaptation is necessary for use with a computer for the purpose for which the computer program was obtained; archival purposes or as a replacement, in the event that the original copy of the computer program is lost, destroyed or rendered unusable; and the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes of maintenance or repair only of that machine, subject to certain conditions."<sup>56</sup>

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<sup>49</sup> S.12(2) of the Old Act.

<sup>50</sup> See section 14(3) of the Act. See also, F Okoro, "Understanding The Scope Of Reversionary Interest In Copyright" available at <<https://www.mondaq.com/nigeria/copyright/1220766/understanding-the-scope-of-reversionary-interest-in-copyright>> accessed 13 January, 2024

<sup>51</sup> See section 15 of the Act.

<sup>52</sup> See section 20(1)(a) of the Act.

<sup>53</sup> U.S Copyright Office, "U.S. Copyright Office Fair Use Index" available at: <https://www.copyright.gov/fair-use/> accessed 12th July 2023. See generally, *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991) 499 U.S. 340.

<sup>54</sup> See section 20(1)(o) of the Act.

<sup>55</sup> See Section 20(1)(i) of the Act.

<sup>56</sup> See section 20(2) of the Act.

**C Acts for purposes of instruction or examination:** Reproducing a work for the purpose of providing instructions, or for creating or responding to examination questions, is not considered a violation of a copyright.<sup>57</sup>

**D. Special exceptions for beneficiary persons:** Due to Nigeria's recent accession to the Marrakesh Treaty,<sup>31</sup> the updated Act allows an authorized entity to reproduce copyrighted materials in formats accessible to individuals with disabilities, such as those who are blind, visually impaired, or have a reading disability, for non-profit purposes without seeking the copyright owner's permission.<sup>32</sup> This exception only applied to blind individuals under the old Act.<sup>33</sup>

*Section 37(1)* of the Copyright Act provides that an action for infringement of copyright shall be actionable at the instance of the owner, assignee, or an exclusive licensee of the copyright in the court exercising jurisdiction in the place where the infringement occurred. In action for infringement of copyright, the plaintiff shall be entitled to the reliefs such as damages, injunctions, accounts, or as is available in any corresponding proceeding in respect of infringement of other proprietary rights.<sup>58</sup>

Where in any action for infringement of copyright, it is proved or admitted that an infringement was committed, but at the time of the infringement, the defendant was not aware and had no reasonable grounds for suspecting that the copyright existed in the work to which action relates, the plaintiff will not be entitled to any damages against the defendant in the action relates, the plaintiff will not be entitled to any damages against the defendants in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted.<sup>59</sup>

The Act also made new provisions on performer's rights. The Act provides explicit protection for performers rights. An exclusive right is conferred on a performer to control the fixation of his unfixed performance and reproduction of a fixation of his performance in any manner and the broadcasting of such unfixed performances to the public.<sup>60</sup> The additional rights stated in the Act include:

- a. Right to distribute to the public by sale or other transfer of ownership, a fixation of performances, or copies thereof, that have not been subject to a distribution authorized by the performer.<sup>61</sup> This means that a performer can control the sale, licensing, or other means of transfer of ownership of a fixation of his performance. However, the right will cease once the fixation has been distributed under the authority of the performer. For example, if a performer sells the fixation to a third party, the performer loses the right to control further sale by the third party.
- b. Right to make available to the public, a fixation of performances by wire or wireless means, in a way that members of the public may access them from a place or at a time individually chosen by them etc.<sup>62</sup>
- c. Moral rights of a performer: Section 66 of the Act confers moral rights on a performer, which include the right to be recognized as the performer whenever the performance or its fixation is utilized. Additionally, performers have the authority to object and prevent the use of their performances or their fixation if such use harms their reputation.

However, there are exceptions under the Act to this performer's rights. The Act provides that the provisions of part II (exceptions to copyright) will apply to performer's right with necessary

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<sup>57</sup> See section 21 of the Act.

<sup>58</sup> See section 37(2) of the Copy Right Act.

<sup>59</sup> *Ibid*; Section 47 (4).

<sup>60</sup> Section 63 of the Act.

<sup>61</sup> See section 63(1)(c) of the Act.

<sup>62</sup> See generally section 63 of the Act.

modifications.<sup>63</sup> Therefore, use of a performance or its fixation by way of fair dealing does not amount to infringement of a performer's rights. Other exceptions include reproduction of short extracts from an object of performer's rights in reports on current events, to the extent justified by that purpose, research, or private study of an object of performer's rights kept in publicly accessible libraries, educational establishments, museums, or archives, on the premises of the said institutions etc.

Be this as it may, having looked at some innovative provisions of the Copyright Act 2022, the Act is not devoid of its shortcomings. Some of its shortcomings are highlighted below:

- a. The introduction of "Register of Works" in the commission<sup>64</sup> and the presumption of registration of copyrighted works for an action of infringement<sup>65</sup> are in contradistinction to the notion that copyright is automatically conferred on any eligible work and registration or formality is not required for such eligible works.<sup>66</sup> Works not registered at the commission might be disadvantaged in terms of enforcing the rights and protections granted to the owner of the work.
- b. The Act does not extensively cater for other relevant interests of the heirs and successors-in-title of a copyright owner, as they may likely be responsible for the management and administration of the copyright upon the demise of a copyright owner.<sup>67</sup> However, only these specific interests are referenced to the heirs and successors-in-title in the new Act and same were also available in the old Act, they include: (i) the right to share in the proceeds of a sale of the original copyright upon the death of a copyright holder;<sup>68</sup> and (ii) the privilege to own the moral rights of an author or performer through testamentary disposition upon the death of a copyright holder.<sup>69</sup>
- c. The Nigerian Copyright Commission is granted broad new powers under the Act, including the right to authorize the use of a work by any person for the purpose of rectifying the abuse of a dominant market position or to promote the public interest. If not checkmated, there might be an abuse of such wide powers.<sup>70</sup> In this regard, we recommend the NCC's collaboration with the Federal Competition and Consumer Protection Commission in making a determination on market dominance.<sup>71</sup>
- d. Clarity needs to be provided on the term "Some Effort" used in section 2(2) of the Act regarding eligibility of a work for copyright protection, as this phrase was not defined in the interpretation section

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<sup>63</sup> See generally section 68 of the Act.

<sup>64</sup> Section 87 of the Act.

<sup>65</sup> Section 43 of the Act.

<sup>66</sup> Section 4 of the Act.

<sup>67</sup>See Franklin Okoro, "Understanding the Scope of Reversionary Interest in Copyright" available at <<https://www.mondaq.com/nigeria/copyright/1220766/understanding-the-scope-of-reversionary-interest-in-copyright>> accessed 13 January, 2024. The recognition of heirs and successors-in-title of a copyright owner should be accorded a section in the next Copyright Bill that will be passed into law. This recommendation is to forestall any questions as to the next line of action against the expiration of a copyright term and the validity of ownership of an economic or moral copyright upon the death of a copyright owner who may have either assigned or licensed such right in error to a third party during his lifetime.

<sup>68</sup> See Section 17(5) of the Act.

<sup>69</sup> See Section 14(3)(b) and 66(2) of the Act.

<sup>70</sup> See Section 77 and 78 of the Act.

<sup>71</sup> See Section 70 of the Federal Competition and Consumer Protection Act, 2018. See also, Section 92 of the Nigeria Communication Act CAP N97, LFN 2004.



#### **4.2 Trademarks Act Cap. T13, Laws of the Federation of Nigeria, 2004**

Nigeria is Africa's most populous nation with the largest economy in the continent and a fast-growing services sector with an increasing need for consumer goods. This factor makes trademark registration important. The laws governing trademark in Nigeria are Trade Marks Act,<sup>72</sup> and the Trademark Regulations 1990. The Act defines a mark as including a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof<sup>73</sup>. The Act defines a trade mark to mean a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods, and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person.<sup>74</sup> Trademarks are used to identify and distinguish the source of the goods of one party from those of others in the course of trade. For the purpose of registration of trademarks, Nigerian law classifies goods into the thirty-four international classes. Multi-class applications are not allowed so a separate application must be made for registration in each of these classes. It is important to note that unlike in other jurisdictions, 'use' is not a requirement for registration of a trademark in Nigeria.

The Trademarks Act provides for registration in Parts A and B of the Trademarks Register. For registration in Part A, a trademark must have the quality of distinctiveness, that is, contain at least the name of the applicant (represented in a special manner), or signature of the applicant, or an invented word(s), or a word(s) having no direct reference to the character, quality or geographical name of the goods or any other distinctive mark. While registration under Part B of the Register may only be obtained in the case where the mark is capable of distinguishing goods with which the proprietor is connected in the course of trade from goods or any other distinctive mark.

While registration under part B of the Register may only be obtained in the case where the mark is capable of distinguishing goods with which the proprietor is connected in the course of trade from goods in which no such connection exists. Marks that are names of single chemical element or compound, deception and/or scandalous cannot be registered under the Trademarks Act. Section 5, 6, 7 and 8 of the Trademarks Act provides that, a proprietor of a registered trademark shall have the exclusive right to prevent third party usage of an identical or similar mark in the course of trade in goods and services identical to his, where such is likely to cause confusion. Under Nigeria law the right is similar, but the difference is that the proprietor has a right to exclusive use of the mark subject to vested rights of earlier users.

However, despite the Act having some salient provisions of trade mark protection in Nigeria, however the Act is not devoid of its shortcomings. One of its shortcomings is that the Act is an old act and some of its provisions may not be tenable in the current times. Times change, and the law in its dynamism should change too. An Act of 1967 ought to be amended or changed by now to fit to current trends. Also, some of the words used in the Act were not defined in its interpretative section. For instance, "Distinctiveness" used in Section 9 and 10 of the Act was not defined in the Act. This may prompt resort to dictionary meaning which may not give the true import of the word as used in the Act. Therefore, this paper recommends that the Act be changed to meet up modern trends and legislations and to ensure that most of the term/words used in the Act are defined to truly understand the import of those words from the Act itself.

#### **4.3 Patent and Design Act, Cap P2, Laws of the Federation Nigeria 2004**

Patent is an exclusive right granted for an invention, a product or process providing or offering a new practical solution to a problem or dilemma. Patent application in Nigeria is regulated by the Patents and Design Act.<sup>75</sup> Patent right grants the 'statutory inventor' (first to file) a

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<sup>72</sup> Cap T 13, Laws of the Federation of Nigeria 2004.

<sup>73</sup> Trademark Act 1967, S.67(1).

<sup>74</sup> *Ibid.*

<sup>75</sup> Cap P2 LFN 2004.

temporary, but exclusive right to the commercial exploitation of an invention. It gives the inventor the exclusive right to exclude others from producing, using, or selling the patented invention in that country without the patent owner's consent or being permitted by law, for the duration of 20 years subject to renewal.<sup>76</sup> Contrary to widely held view, not all inventions qualify for a valid patent. For an invention to be patentable, the invention must satisfy the criteria set out in Section 1(1) of the Patent and Design Act<sup>77</sup> which is that an invention is patentable if it is new, results from inventive activity and is capable of industrial application, or if it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application. Sections 3, 4, and 5 of the Patents and Designs Act<sup>78</sup> provide that patent application is to be made to the Registrar at the Trademarks, Patents and Designs Registry and shall contain certain information.

A search will be conducted to ensure the invention has not already been patented. If the result of the search shows there is no previous registration, the application to the registrar must contain:

- a. A petition or request for a patent signed by the applicant or his agent and containing the applicant's full name and address.
- b. specification, including a claim or claims in duplicate; plans and drawings, if any, in duplicate.
- c. where appropriate, a declaration signed by the true inventor requesting that he be mentioned as such in the patent and giving his name and address.
- d. a signed power of attorney or authorization of agent if the application is made by an agent.
- e. an address for service in Nigeria if the applicant's address is outside Nigeria; and payment of the prescribed fee.

Afterwards, the patent application is examined by the Registrar. This is done to ascertain formal compliance with the requirement of the Act. Once the application satisfies the statutory requirements, the Registrar is likely to grant the patent without enquiries to its novelty, inventiveness and industrial applicability or whether the specification sufficiently discloses the invention. In Nigeria, patents are granted at the risk of the patentee and without guarantee as to their validity. Whether an invention is a product or process, the same registration procedure is adopted.

Be this as it may, while this is the extant law on patents and designs in Nigeria, however it is the position of this paper that some of the provisions of the Patents and Designs Act 1968 are obsolete as new trends in technology are being formed. Thus, there is a need for the provisions of our laws to accommodate such innovations that were not envisaged in 1968. Thus, this article recommends that the National Assembly should amend the provisions of the Patents and Designs Act 1968 or better still enact a new Act just like as the Copyright Act 2022. Also, some of the terms used in the Act are not clearly defined, thus this paper recommends that same be amended to clearly define them.

#### **4.3 The Cybercrimes (Prohibition, Prevention, ETC) Act of 2015**

According to OECD<sup>79</sup> Recommendation of 1986 Cyber fraud which includes computer related crime is also considered as any illegal, unethical or unauthorized behavior relating to the automatic processing and the transmission of data. With the advent of computer age, and as technology improves, the rise of technology and online communication has not only created a dramatic increase in the incidence of piracy, it has also led to the emergence of what appears

<sup>76</sup> W Famojuro, 'Patent Registration in Nigeria' <http://www.lexology.com/library/detail> accessed 26 April, 2022.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Organization for Economic Cooperation and Development (OECD), 'Analysis of Legal Politics in the OECD Area' (1986) 2.

to be copyright infringement. Both the increase in the incidence of piracy and the possible emergence of new copyright infringements pose challenges to copyright owners. The Internet is one of the fastest-growing areas of technical infrastructure improvement.<sup>80</sup>

Nowadays, Information and Communication Technologies (ICTs) are universal and the trend towards digitization is increasing. The request for Internet and computer connectivity has led to the incorporation of computer technology into products that have usually functioned without it, such as cars and buildings. Electricity supply, transportation infrastructure, military services and logistics - virtually all current services depend on the use of ICTs.

Here are some of the challenges faced by the copyright owners;<sup>81</sup>

The Cyber Crime (Prohibition, Prevention, etc.) Act, 2015 was enacted purposely to combat cybercrimes. Nigerians were optimistic that it will have positive effects as to mitigate cybercrime in Nigeria. Unfortunately, the drafters of the Act were not able to come up with something worthwhile. For instance, section 7(2) of the Act provides as follows that "it is an offence to commit online fraud using a cybercafe and to make perpetrators liable on conviction to a fine of either 41,000,000.00 or a three years prison terms or both. Also, section 7(3) of the Act provides that there \was connivance by the cyber owners the latter will be given of an offence and liable upon conviction to a fine of 42,000,000.00- or 3-years imprisonment.

The provision available for copyright infringement has some loopholes that encourage the infringers. Experience has shown that Nigerians usually harp on the inadequacies of the laws to further their selfish interest. Accordingly, the time is due for this kind of research because we cannot continue to live with those inadequacies on our law, otherwise it will collapse the copyright industries, the fines are not enough and the prison <sup>1111</sup>not adequate for it is not commensurate to the gravity of the offence.

This Act contains certain provisions on liability on internet Intermediaries 'Service provider as they are called under the Cybercrimes Act are required to provide assistance e identification, apprehension and prosecution of offenders; the identification, and tracing of proceeds of any offence or any property, equipment or devise used in the commission of any offence or the freezing, removal, erasure or cancellation of the service of the offender which enables the offender to either commit the offence, hide or preserve the proceed of any offence or any property, equipment or devise used in the commission of the offence. Some of such offences include, intentionally accessing in whole or in part without authorization, a computer system or network for fraudulent purposes and obtaining data that are vital to national security internationally and without authorization, intercepting by technical means non-public transmission of computer data, content or traffic data, including electromagnetic emission or signals from a computer, computer system or network carrying or emitting signals to or from a computer, computer system or connected system or network. Any service provider w<sup>7</sup>ho contravenes the provisions of the Cybercrimes Act will be liable on conviction to a crime of not more than N10, 000, 000.00 (Ten Million Naira). In addition, each director, manager or officer of the service provider shall be liable on conviction to imprisonment for a term of not more than three years of a fine if not more than N7, 000, 000.00 or to both such fine and imprisonment.

## **5.0 Conclusion**

We have by this article been able to look at national legal framework for protection of intellectual property rights in Nigeria. We were able to look at: (a) the Copyright Act 2022; (b) the

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<sup>80</sup> Jegede, A.E., Segun, J. and Olorunyomi, B., 'State Failure, Youths Dual Victimization and Unabated Error of Internet Crime in Nigeria' (2015) *Journal of law applied* 19.

<sup>81</sup> Sieber, Council of Europe Organized Crime Report 2004, 140.

Trademarks Act Cap. T13, Laws of the Federation of Nigeria, 2004; (c) Patent and Design Act, Cap P2, Laws of the Federation Nigeria 2004; (d) The Cybercrimes (Prohibition, Prevention, ETC) Act of 2015. This has gone a long way in better understanding of the national legal framework for protection of intellectual property rights in Nigeria.

### **6.0 Recommendation**

While these laws above represent the major national legal framework we have in Nigeria on intellectual property, however, there are still some shortcomings in them which the National Assembly should ensure to amend. Clarity should be made to some of the terms used in these Acts as this is one of the major shortcomings of these Acts. Most of the terms lack clear definition or definition at all. For instance, the term “some effort” used in the Copyright Act 2022 was not defined. Same should have been properly defined therein. Term like “distinctiveness” used under the Trademarks Act 1967 also wasn’t defined. Therefore, it is the recommendation of this paper that the National Assembly strive to bring our national laws on intellectual property to bring them up to speed with global legislations on intellectual property.