

EFFECT OF NON-DOMESTICATION OF INTERNATIONAL TREATIES: A CASE FOR SUSTAINING PIRACY OF COPYRIGHT WORKS IN DIGITAL ENVIRONMENT IN NIGERIA*

Abstract

This paper examines the effect of domestication of international treaties in copyright protection in Nigeria. The evolution and advancement of information technology in the late 20th and early 21st century has created a favourable tool for online piracy of copyrighted work of an author and has really exposed the lacuna in the principal legislation guiding copyright protection in Nigeria in the world of technology. In order to curb this incessant activities of pirates, and in a bid to attract foreign direct investment to boost the nation's economy, Nigeria has signed and ratified related treaties in order to make the country a favourable destination for investment, encourage originality and discourage laziness. These treaties, after being signed and ratified, have not been domesticated as required by the Constitution of the Federal Republic of Nigeria, 1999 and therefore cannot be applied by the courts for purposes of having a binding effect when necessary. This raises a serious legal question on the status of the various treaties Nigeria has signed and ratified, because section 12 of the Constitution provides that a treaty remains unenforceable under the Nigeria legal system unless the National Assembly has passed it into law. This paper therefore analyses various ways non domestication of treaties could affect investment both local and international in a developing country like Nigeria, it also points out the implication of non-domestication and a recommendation in the way treaties are implemented in Nigeria to facilitate their domestication.

Keywords: Copyright, Domestication, Nigeria, Piracy, treaties

1. Introduction

The term 'Copyright' unfortunately does not earn itself a precise definition by the principal legislation guiding copyright in Nigeria. Section 51 of the Act¹ defines 'copyright' means copyright under this Act. The term copyright was however given a clearer picture by the provision of section 6 of the Act.² Copyright is a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural and architectural works, motion pictures and other audio-visual works and sound recording) fixed or any tangible medium of expression giving the holder the exclusive right and display of work³. Another author defines 'copyright' as 'the right to make copies.'⁴ Cornish defined copyright as a right given against the copying of defined types of cultural, information and entertainment production. Bainbridge on his part describes copyright as a property right which subsists in various works for example literary works, artistic works, musical works, sound recordings films and broadcasts.⁵ From the foregoing definitions, it is observed that copyright is beyond the act of copying and reproducing of works, it is a proprietary right which confers exclusive rights to give authority or prohibits a wide range of activities relating to qualified subject matter.

There is not gainsaying that Nigeria have a robust legislation guiding the administration and enforcement of copyright in Nigeria through the Nigerian Copyright Commission⁶ which is the body saddled with responsibility of administering law relating to copyright matter both in civil and criminal actions. However despite the various mode of enforcement mechanisms introduced by the NCC⁷ to curb copyright piracy by arresting, prosecution, destruction of infringed copyright works, payment of fines in most cases of copyright infringement, the activities of copyright piracy and infringement still remain a problem to the Nation in general which therefore has affected intellectualism, originality and had seriously encourage laziness which conversely has affected the nation economic development in term of foreign direct investment and local investment. The advent of information technology in the 20th and 21st century though a laudable development age but has created a favourable tool for online piracy especially in copyrighted work of an author; and because of this trend in technological advancement, nation must be able to harness her ideas, innovations, inventions in other to attract foreign direct investment.

Furthermore, aside the establishment of the Nigerian Copyright Commission to oversee and administer copyright matters and various mode of enforcement measures by the NCC, Nigeria government in responding to the trend of online piracy due to technological advancement became member of world trade organization⁸, and by being a member of World Trade Organization, it has signed and ratified treaties and conventions including those relating to copyright protection. The important of signing relevant treaties is a way in which investment seeking countries such as Nigeria, demonstrate its zeal to be bind by it, and to attract investment by guaranteeing to observe internationally agreed rules and principles for the protection of investors/investments. However, Nigeria, despite being a signatory to some treaties and ratify some, the issue of domestication as required by section 12⁹ for it to have a force of Law, and legally binded has become a serious legal issue which calls for legislative attention.

2. International Treaties on Copyright Protection in Information Technology Era

Information technology has been one of the first creations of human mind and has opened gates for a wide range of possibilities in various areas like media, entertainment, communication, advertisement, and Education. However, the easy access to materials available on the internet has posed serious challenges for copyright protection. The world of digitalization has made it considerably easy to copy,

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¹ Copyright Act Cap C28, Laws of the Federation of Nigeria, 2004.

² Ibid

³ C. Nwabachili, *Intellectual Property and Law in Nigeria*, Malthouse Press limited (2017) 7.

⁴ M. Leaffer, *Understanding Copyright Law*, 3rd Ed, New York: Mathew Bender 1999 2; A.O Oyewunmi, *Nigeria Law of Intellectual Property* (2018) 21

⁵ M. Noodley, *Osborn's Concise Law Dictionary*, (London: Sweet and Maxwell, 2005) 114; C. Nwabichili *op. cit.* 7.

⁶ Section 34 Copyright Act, *Op. cit.*

⁷ Nigerian Copyright Commission

⁸ Accession date 1st January 1995

⁹ The Constitution of the Federal Republic of Nigeria, 1999.

duplicate and sell the works of a copyright owner without his permission, and detection of such infringement becomes difficult. With a view to responding to the challenges posed by digital technology in copyright sector, World Intellectual Property Organization (WIPO) has put in place two major treaties to checkmate the level of internet infringement in copyright especially in the copyright arena, the treaties includes WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT) which is both refer to as internet treaties¹⁰. The treaties are also considered to supplement Berne Convention and Rome Convention for the protection of literary and artistic works. The primary aim of this two internet treaties can be divided into three (3) parts;

- (a) The treaties incorporate certain provisions of the Trade Related Aspect of Intellectual Property Rights Agreement (TRIPS) not previously included in explicit in WIPO Copyright Law.
- (b) Updates in the WIPO Copyright Laws not specific to digital technologies for example the generalized right of communication to the public.
- (c) Provisions that specifically address the impact of digital technologies¹¹. Berne convention is an international agreement that sought to govern copyrights. The convention has three basic principles which is applicable to eligible works namely;
 - a. The principle of national treatment¹²
 - b. The principle of automatic protection¹³
 - c. The principle of independence of protection

Under Berne Convention, a minimum term of protection of an author work lies during the life time of the author and fifty years or fifty years from the date of publication¹⁴ during this period, the author(s) shall have and enjoy exclusive economic rights of translation and reproduction of his works¹⁵. In 1996 WIPO Copyright Treaty and WIPO performances and phonograms Treaty came into place to address the lacuna in the Berne Convention as relate to online infringement. The WIPO Copyright Treaty (WCT) applies to authors of literary and artistic works¹⁶. The treaty ensures protection of computer programs and also the arrangement and selection of materials in database¹⁷. The treaty also provides protection for authors with control over the rental and distribution of their work¹⁸ which was directly explicate in the Berne convention¹⁹ while WIPO Performance and Phonograms Treaty (WPPT) applies to performers and phonograms by granting performer four (4) different kinds of economic rights which includes;

- (a) Right of reproduction.
- (b) Right of Distribution.
- (c) Right of rental and
- (d) Right of making available²⁰

Nigeria acceded to Berne Convention on Copyright in 1993, and in October 2017, the Director general of the World Intellectual Property Organization (WIPO) notify the deposit by the government of the Federal Republic of Nigeria of its intention to ratify WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT) adopted at Geneva in December 1996,²¹ the implication of which Nigeria has undertaken to respect and implement its obligations under the treaties. However until this treaties are domesticated in accordance with the provision of section 12²² it cannot be enforce in our domestic court and consequently does not have a binding effect or force of Law. Domestication of treaties is an instrument which empowers the judiciary to implement treaties terms and obligations and also to entertain disputes relating to them, without which the judiciary will be essentially incapacitated to fully apply the country fully obligation of which would be of a greater risk of non-compliance²³, which may also bring about low inflow of foreign direct investment, and also discourages originality in the work of knowledge in both international and local intellectualism. Domestication of WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT) will extend reach to copyright enforcement particularly in the online environment. According to the Nigerian Copyright Commission (NCC), with the ratification of these treaties, it suggests that 'Nigeria is about to witness a new era in its intellectual property (IP) protection and legislation. The ratification also underscores the need to enact a new copyright legislation that will implement the standard stipulated in the treaties. Nigeria also, in responding to the challenge posed by information technology came up with an idea of amending its copyright Act through copyright Bill 2009. This Bill focuses on internet, service provider and interpretation of the meaning of storage, distribution and transmitting of data on internet, unfortunately this Bill was not passed into Law by the National Assembly.²⁴ In 2015 the Nigerian Copyright Commission came up with another Bill on Technological measures called copyright Amended Bill 2015, this Bill although was subjected to many criticism but it's a laudable development by the NCC to respond to challenges of information technology and copyright protection, hence key players in the copyright industry through public advocacy mount pressure on the National Assembly to hasten the passage of the Draft Bill so that what happened to the 2009 Bill will not be its fate, and without being passed, the obligations and rights benefits included in the WIPO Copyright Treaty (WCT) and WIPO Performer and Phonograms Treaty (WPPT) cannot be benefited by the right owner. Its enactment will signal the domestication of treaties which will further extend the reach of copyright enforcement in the online environment.

¹⁰ World Intellectual Property Organization (WIPO) 1996 <https://www.wipo.int/treaties/en/ip/wct/summary-wct.html> accessed 20 October, 2023.

¹¹ WIPO, *The Centre for Internet and Society* < <https://cis-india.org/telecom/knowledge-repository-on-internet-access/WIPO>> accessed 20 October 2023.

¹² Article 5(1) Berne Convention 1986

¹³ *Ibid.* Article 5(2).

¹⁴ Article 7 Berne Convention.

¹⁵ Articles 8 and 9 respectively.

¹⁶ Article 1 WIPO Copyright Treaty 1996.

¹⁷ Article 5 WCT.

¹⁸ Article 6, 1 and 8 WCT.

¹⁹ Article 9 WIPO Performance and Phonograms Treaty (WIPPT) 1996.

²⁰ WIPO, the centre for internet and society.

²¹ Berne Notification No 147.

²² NCT Notification No 86 Ratification by the Federal Republic of Nigeria

²³ D. Sloss, *Domestic Application of Treaties* (Santa Clara University) 2011, 25 <<http://digitalcommons.law.scu.edu/facpubs/635/>> accessed 26th Dec 2021

²⁴ A.O. Oyewunmi 346.

3. Domestication of Treaties in Nigeria

Domestication of a Treaty or an international agreement can be described as a process of incorporating the provision(s) of a duly signed and ratified treaty into the domestic law of a given country for the purpose of force of Law and enforcement in the domestic courts. Domestication of a treaty is an indication that a given country indicates intention to duly oblige and adhere to the provision(s) of the treaties and obligation therein. There are two basic approaches of domesticating a treaty, a treaty can be domesticated either by monism approach or dualism approach depending on the constitutional approach of a giving country. Monism approach of domestication of a treaty is a procedure where treaties are automatically incorporated and recognized as a national law upon legislative approval and ratification. Dualism approach on the other hand, treaties and conventions are regarded as an international law or instrument which does not have same norms as the domestic law of the given country, though they are legally acknowledged and recognized, but to acquire legal status, it must be enacted into law following due process of legislative approval. Domestication of treaties in Nigeria is primarily a constitutional requirement²⁵ by the provision of section 12. It is also a statutory legislative requirement by the provision of section 3(1) (a), 3(2) (a) and section 3(3)²⁶. The above section therefore indicates that Nigeria practice dualism approach of treaty domestication. Section 12(1)²⁷ found that no treaty between the federation and any other country shall have the force of Law except to the extent to which such treaty has been enacted into Law by the National Assembly.’ In addition section 3(1)²⁸ provides that law making treaties, being agreements constituting rules which govern inter-state relationship and co-operation in any area of endeavor and which have the effect of altering or modifying existing legislation of which affects the legislative powers of the National Assembly. Agreements which impose financial, political and social obligations on Nigeria or which are of scientific or technological import. There are also agreements which deal with mutual exchange of cultural and educational facilities. Section 3(2)²⁹ provides: the treaties or agreements specified in:

- (a) Paragraph (a) of subsection (1) of this section need to be enacted into Law
- (b) Paragraph (b) of subsection (1) of this section need to be ratified.
- (c) Paragraph (c) of subsection (1) of this section may not need to be ratified.

It is clear from the provision of section 3(2)(a) that WIPO Copyright Treaty, (WCT) and WIPO Performer and Phonograms Treaty (WPPT) falls into the category of interstate treaty that will have effect of altering existing legislation on copyright law and which thereby affects the legislative powers of the National Assembly. It is obvious however that, a ratified but undomesticated treaty will have no force of law Nigeria, also a domesticated treaty does not operate in Nigeria by force of international law but by virtue of the statute enacted by the legislature (National Assembly) to implement it³⁰. This was the decision of the supreme court in the case of *Abacha v. Fawehinmi*³¹ per Ogunbare JSC (as he then was) held that: ‘It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be, it remain unenforceable, if it is not enacted into Law of the country by the National Assembly’.

The foregoing position was adumbrated with approval in *Attorney General of Federation v. A-G of Abia State & Ors*³² where the court held a similar decision. Therefore, because of constitutional and statutory provision of domestication of treaties in Nigeria, the judges in Nigeria, the judges in Nigeria courts have been held incapacitated as most of them are reluctant to deliver decision which directly conflict with the provisions of the constitution and would generally refrain from enforcing the provisions of international treaties which have not been domesticated.

4. Challenges of Non-Domestication of Treaties in Nigeria

The purpose of signing international treaties and agreements is to foster peace, unity and cooperation among member states, and each member state is expected to enforce the provision of the treaties in accordance with the modalities prescribed by their laws. Nigeria government ratified some treaties to which they are signatory to, but the problem of enforcement has pose a serious challenge for it to have force of Law. It is however observed that, the principal legislation³³ particularly section 12 did not make adequate procedure or process to be adopted in Negotiating, signing, ratifying, and implementing treaties, this lacuna, is the rationale behind the enactment of Treaties (making procedure etc.) Act³⁴ to provide for procedure for treaty making in the country. However as laudable as the Act³⁵ is, it did not provide for a particular institution that will be responsible for treaty Negotiation. The provision of section 1(2)³⁶ is so porous that any governmental ministry or agency can enter into treaty negotiation on behalf of the federal government. This particular act constitute a bottle neck to the enforcement of the treaty in Nigeria³⁷ as there are number of treaties some ministries and agencies had negotiated and signed on behalf of the government which the legislature are unaware of thereby lead to unnecessary delay in their domestication. Also the nonchalant attitudes of some ministries and agencies even the legislature who has entered into treaties negotiation on behalf of the federal government by not properly depositing it with the ministry of Justice which the Act³⁸ specifically state as the depository ministry for proper documentation of all treaties entered into on behalf of the federal government constitute a challenge for the domestication of some treaties in Nigeria. Another factor that constitute a challenge for domestication of treaties in Nigeria is the fact

²⁵ 1999 Nigerian Constitution.

²⁶ Treaties (making procedure etc.) Act, Cap T20 Laws of the Federation of Nigeria (LFN) 2004

²⁷ 1999 Nigerian Constitution.

²⁸ Treaties (making procedure etc.) Act.

²⁹ Ibid

³⁰ Section 12(1) 1999 Nigerian Constitution; M.T Ladan, National Practice on Domestication of Treaties in Nigeria (1960-2021) Policy Brief No 1 June 10, 2021.

³¹ (2000) Federation weekly Law Report (FLUR) (PT 4) 553 at 586

³² (2002) FWLR (Pt. 102) P.1 at 92-93.

³³ 1999 Nigerian Constitution.

³⁴ Treaty (making procedure etc).

³⁵ Cap T20 LFN 2004.

³⁶ Cap T20 LFN 2004.

³⁷ Babatunde Isaac Olutoyin, Treaty making and its application under Nigeria Law: the journey so far 3 *international journal of Business and management invention* (2014) 7.

³⁸ Section 4(1) (2), Treaty 9makign procedure etc) Act *Op. cit.*

that the legislature is largely ignored by the executive during treaty negotiations because both the constitution and treaty (making procedure etc.) Act did not confer any specific role to the legislature during the negotiation of treaties.³⁹ The legislature only became aware of such treaties many years after its ratification or when it is brought before it for domestication. All these and many more constitute challenge why the citizenry of Nigeria and the country at large have not been a beneficiary of the provision of some treaties particularly in copyright as relate to digital infringement thereby discourages many authors from further works of intellectualism in Nigeria.

5. Effect of Non-Domestication of Treaties in Nigeria

The purpose of signing a treaty is to create an obligation which results into a binding effect of the force of Law upon all the parties which is expected to be performed in good faith⁴⁰. Nigeria has signed and ratified some international treaties including the WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT), the implication of non-domestication of these treaties therefore have some far reaching effect on our domestic court which creates difficulties in the application when issue arises on the subject matter. The followings are therefore part of the many effect of non-domestication of treaties in Nigeria.

Non-Legal Force or Binding Effects

Non domestication of international treaties or agreement will not have a binding effect when matter arises on same as the domestic court does not have the power to reckon with a non-domesticated treaty no matter how beneficial it would be in the matter at hand. The case of *Abacha v. Fawehinmi*⁴¹ is illustrated on this point where it was held that a non-domesticated treaty has no force of Law whatsoever in Nigeria. The above decision had been the norm until the third alteration of the constitution in 2010 which came into force in 2011 which impliedly introduced monism approach of treaty domestication only on labour treaties.⁴² The WCT and WPPT which are treaties relating to copyright law does not fall under this exception category hence its domestication is of utmost important in Nigeria otherwise it would only be regarded as a legal instrument which has no binding force of law, the implication of which will discourage potential foreign and local investors who may seek the assurance that country is complying with all of it international obligations.

Discourages Investment

Nigeria is a known destination for foreign direct investment due to its abundant natural and human resources and huge market potential. Despite this, however, Nigeria is still perceived as a risky investment destination for both local and international investors. Investors sift through the varying rules, regulations, stakeholders and market dynamics across the nation and the final destination for their investment will be partly influenced by favourable provisions in these treaties. With the non-domestication of some treaties particularly the WCT and WPPT under discuss, Nigeria risk being perceived as an unattractive investment destination for potential investors. This could discourage prospective investors who might prefer to invest in other West Africa countries that have fully domesticated treaties. The non-domestication of treaties in Nigeria could affect its capability to attract more investors to develop the copyright and other area of investment sector.

Non-Compliant Status

Non domestication of treaties could have the effect of portraying Nigeria a non-compliant country with the international obligation. The signing and ratification of treaties is an indication that the party country is ready to be bound by the treaty's provisions and obligations, the failure of which will cast a doubt on the real intention of the country and reduce the confidence of potential investors.

6. Conclusion and Recommendations

It is no doubt that the world at large is now in global age where sharing of content has become easy and efficient and has also open more avenues for E-commerce, sale, purchase of music, movies and other related content. The advent of information technology had really expose the lacuna imbedded in the legislations guiding the administration and enforcement of some field, copyright included, hence making it impossible to implement and enforce issues relating to them when matter arise. Thus, as technology evolves, efforts needed to be made to respond to new development in our domestic laws in other to ensure that the objectives of protection are realized and public interest is assured. With the world continuous transformation into global age, the relevance of dualist theory of enforcement of treaties which place more emphasis to legislative intervention after ratification of treaty before it can be applied by our domestic court and enforceable is becoming shrinking, as most domestic courts are deploying ways by which undomesticated treaties can be applied and become binding without legislative intervention, like what is adopted and apply in a countries like Ghana⁴³, Kenya⁴⁴ and South Africa⁴⁵ whose courts have repeatedly had recourse to undomesticated treaties while adjudicating on matters before them. The constitution of Federal Republic of Nigeria (Third Alteration) Act⁴⁶ appears to have made ratified but undomesticated labour related treaties justifiable in Nigeria without any legislative intervention⁴⁷ the Act appeared to have treaties an automatic application hence the duty behooves on Nigerian court to welcome this laudable development in the Act and begin to apply this in deserving cases.

With the operational of 1999 Nigerian Constitution (Third Alteration) Act⁴⁸ this Article therefore recommends the followings: A repeal of section 12 of the 1999 constitution is hereby recommended. This is so because, this section has seen and created barriers that have precluded our Nigerian courts from enforcing most treaties, so that every treaties to which Nigeria is a signatory and has ratified becomes automatic justiciable and enforced without any legislative intervention. The Article also recommends that treaty making procedure in

³⁹ C.E Okeke, M.I Anushiem; Implementation of treaties in Nigeria; Issues, Challenges and the way forward" 9 Nnamdi Azikiwe University, Journal of International Law and Jurisprudence (2018) 216.

⁴⁰ Paul Reuter, Introduction to the Law of Treaties (Kegan Paul International, 1995) 94; Vienna Convention 1969, Article 26.

⁴¹ (2000) FMR Pt 4 Op. cit.

⁴² Sections 6(2), 254(C) Constitution of Federal Republic of Nigeria (Third Alteration) Act 2010

⁴³ *New Patriotic Party v Inspector General of Police* (1993-94) 2GLR 459 at 466

⁴⁴ *Rono v Rono* (2005) KLR 538 538 at 550

⁴⁵ *De Gree v Webb* (2007) 55A 184

⁴⁶ 2010.

⁴⁷ Section 6(2), 254 (6)(2)(C)

⁴⁸ 2011

Nigeria be amended to regulate the effect of various factors that impede quick domestication of treaties. The amendment should mandate the ministries, Agency or parastatals to notify the floor of National Assembly any treaty they enter into and negotiate on behalf of Nigeria, they should also be under a safer obligation to deposit any treaty negotiated for and on behalf of Nigeria with the ministry of justice for record purpose within a specific timeframes failure of which would attract heavy penalty. Also the phrase ‘on any matter on the exclusive list’ in section 1(1) of the treaties making procedure Act, be deleted. If this is done, the controversies surrounding the exclusivity of the treaty-making power of the federal government will be abated and will also bring the treaties Act in line with the provision of the constitution. Lastly this Article recommends that the international organizations through their supervisory bodies needs to exert more effort in ensuring rapid domestication of treaties in member states by setting a specific time limits for members operating dualist approach of domestication and a stiffer penalties imposed on defaulting state, this will serve as a deterrent and will discourage misconduct geared at defeating the objectives of international treaties.