

EMERGING ISSUES IN COPYRIGHT PROTECTION LAW FOR DIGITAL INNOVATIONS IN NIGERIA*

Abstract

Fast paced technological innovations and advancements in this twenty-first century have had an enormous impact on the world's legal systems because they disrupt traditional modes of protecting intellectual property, often times leaving the law in a state of flux. The ever changing forms of innovations such as computers; which includes palmtops and hi-tech phones, satellite and cable receivers/signals, facsimile transmissions and the perpetually growing internet. In Nigeria, the Copyright Act purports to protect intellectual property including digital innovations, notwithstanding that the country remains one of the largest piracy destinations and markets in the world. This article examines the Nigerian Copyright Act with the view to identifying the inadequacies which account for the inability of the Act to accord adequate protection to digital inventions in the country. The article also reveals the legal and technology deficits which have made it possible for infringers of digital inventions to assail the technology with impunity, and therefore make it impossible for our Copyright Act to live up to its mandate. The work recommends that in the fight against piracy and copyright infringements of digital innovations, pragmatic policy measures should be adopted at the administrative, social, judicial and technological levels, to tame the tide of an otherwise purely socio-legal problem.

Keywords: *Intellectual property, copyright protection, information technology, copyright infringement, piracy, Copyright Act*

1. Introduction

Developments in the sciences and technological knowledge have occasioned disruptions in how humans conduct their affairs and carry on business relations with each other and across geographical locations. These developments have also compelled permanent and irreversible changes to the legal landscape and the trajectory of legislative enactments and judicial decisions.¹ The introduction of the printing press in the 16th century and the industrial revolution it engendered, marked the significant growth and recognition of copyrights in Europe, the UK and globally.² The introduction of player-pianos of the 1800s; radio transmitters in the 1920s; cable television in the 1960s; photocopying in the 1970s; home video cassette recorders in the 1980s and digital transmissions and downloads of the internet era triggered major turning points in the growth of copyright law. Such periodic occurrences introduced significant conceptual issues not anticipated and provided for under the legal regimes then in force. The impact of digital technology on copyright law cannot be overemphasized. While our daily lives are enhanced and rendered considerably more manageable through the introduction of new relational platforms and mediums of expression, they raise thorny questions of copyright exploitation and unauthorized appropriation. Some of the challenges which extend to the range of exclusive rights available to copyright authors and rights-holders, use of technological tools for copyright protection, the possible impact on collective management and administration of copyrighted works arising from modern technological tools, and determining the scope of secondary liability in the new digital space are just a few.³ The relative ease of reproduction, distribution, transmission or retransmission and storage of copyrighted works with the use of new technologies pose additional challenges for copyright laws and administration to contend.⁴ With the advent of new forms of dissemination of protected materials, rights-holders have found it near impossible to regulate and control the unauthorized distribution of their works. It is trite that the greatest heritage of a nation remains the creativity of its citizens, and hence one of the primary functions of the law is to protect the ingenuity, resourcefulness and creativity of the citizenry. Thus, the obiter of Belmore J in *Oladipo Yemitan v. The Daily Times Nigeria Ltd*⁵ 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’.

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¹George Thuronyi, ‘Copyright Law and New Technologies: A Long and Complex Relationship’, available at <https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/> accessed on 29th November 2019

²*Ibid*

³Marybeth Peters, ‘The Challenge of Copyright in the Digital Age’, available at <file:///C:/Users/JOHNON~1/AppData/Local/Temp/Dialnet-TheChallengeOfCopyrightInTheDigitalAge-3710016.pdf>, accessed on 29th November 2019

⁴*Ibid*

⁵ (1980) FHCR (Federal High Court Reports) 186 at 190

The principal legislation enacted in Nigeria to protect the incorporeal rights and creativity of its citizens against any undue infringement is the Nigerian Copyright Act.⁶ Section 1(1) of the Copyright Act provides protection and confers copyright status on the following innovative products: (a) literary works (b) musical works (c) artistic works (d) cinematograph films (e) sound recordings, and (f) broadcasts. Although digital innovations are not expressly provided for, it can be argued that spectrum of these products implicitly covers digital innovations.⁷ In 2008, the Director General of the Nigerian Copyright Commission, Adebambo Adewopo, during the 50th anniversary of the commission made it publicly known that the totality of copyright based industries operating in the country contributed just about ₦1.2 trillion to the Nigeria gross domestic income.⁸ Notwithstanding, Nigeria still remains the largest piracy destination and market in the world invariably in the same products purportedly protected by the Copyright Act, particularly computer software.⁹ This is due to a number of factors, essentially bordering on the inability of the Act to meet contemporary challenges in the protection of copyrights of particularly new genres of innovations within the above broadly provided products. Again, although Nigeria is signatory to various international conventions on copyright protection,¹⁰ these conventions are hardly enforceable in Nigeria owing to the fact that they have not been domesticated.¹¹ Thus, for instance, unlike the United States of America which has recognized the need to accord special protection to digital works (a new species of traditional innovation that straddle sound and picture electronic signals) by the enactment of several legislations including the Digital Millennium Copyright Act of 1998, Nigeria has only succeeded in recopying the 1990 Copyright Act into the 2004 version of the Laws of the Federation of Nigeria. The aim of this article is to discuss the emerging issues in digital technology under the current Nigerian copyright regime. It will also explore the idea behind computer generated works and how well they can be protected.

2. Meaning and Nature of Copyright

According to Black's law dictionary,¹² copyright is the right of literary property as recognized and sanctioned by positive law. It is an intangible incorporeal right granted by statute to the author or originator of certain literary or artistic productions whereby he is vested for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them. The Nigerian Copyright Act does not expressly define the term 'copyright', but on a deducible perspective, the meaning can be appreciated in the provisions of Section 6 of the Act, which provides that copyright in Nigeria of an eligible work is the exclusive right to control, do or authorize the doing of any of the act restricted to the copyright owner. Lord MacCoughton in the cases of *Corelli v. Gray*,¹³ *Jerrold v. Houston*,¹⁴ and *Rees v. Melville*¹⁵ defined copyright as a negative right, because it restricts others from doing a particular act. Thus, copyright is a form of protection provided by the laws of a state or international law, to the creators of original works.¹⁶ The protection offered by copyright is available to both published and unpublished works of authors. Once conferred with copyright in Nigeria, the author of the work would be vested with the exclusive right to do the following; reproduce the work, make adaptation of the work, distribute copies of the work by sale or other transfer of ownership or by lease, perform the work publicly, display the copyrighted work publicly and authorise others to do all the above.¹⁷ Copyright only covers the particular form or manner in which ideas or information have been manifested (the form of material expression). It does not protect ideas but the

⁶ Cap C. 28, Laws of the Federation of Nigeria 2004

⁷ See S. 51 of the Copyright Act which defines literary works to include computer software

⁸ Tosin Ajirere, 'The Anniversary of the Nigerian Copyright' available at <http://www.ndunigeriadailynews.com> accessed on 29th November 2019

⁹ Akinjide and Co. 'Nigerian Computer Software Protection in Nigeria' available at <http://www.lawedit.co.UK/viewarticle> accessed on 29th November 2019

¹⁰ This includes the Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention), the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), the World Intellectual Property Organization (WIPO) Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

¹¹ See S. 12 (1) of the 1999 Constitution of the Federal Republic of Nigeria that require domestication of international obligations by the legislative arm of government before they come into force in Nigeria

¹² Bryan. A. Garner, *Black's Law Dictionary*, (8th edition west publishers: N.Y.), P.361

¹³ (1913) 39 TLR 570 at 571

¹⁴ (1857) Mac G Cop 117

¹⁵ (1914) 3 K. & J. 703

¹⁶ S. 1 (1) of the Copyright Act, Cap. C. 28 LFN 2004

¹⁷ S. 10 (1) of the Copyright Act. See also Ikenga K.E. Oraegbunam, 'Literary Work and Enforcement of Copyright in Nigeria', *Business Law Review, Nigerian Journal of Business and Corporate Law*, Vol. 1. No. 3, October 2010, pp.48-71.

original expression of ideas. The exclusive nature of copyright for original authors and rights holders is limited by certain exceptions and limitations contained in schedule 2 and 3 of the Nigerian Copyright Act. These include; fair dealing provisions, compulsory licence, exceptions for the visual and hearing disabled, and so on.

3. Nature of Digital Works Subject to Copyright Protection

The term ‘digital’ emanates from the Latin word ‘*digitus*’ meaning fingers used for discrete counting.¹⁸ Digital works simply refers to all those technologies that make use of information transmitted by means of discrete values using the binary system (combination of 1 and 0) rather than continuous range.¹⁹ As stated earlier, Section 1 (1) of the Copyright Act has listed out works eligible for copyright protection in Nigeria to include; Literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts. The effect of this categorisation is multifaceted, so that when any of these copyrighted products include or use information which is automatically a combination of discrete values rather than continuous value, it results in a digital innovation for the purpose of protection under the Act. This is why broadcast in any form or method is likely to fall under the category of works eligible for protection, including broadcast by satellite and cable. More so, the Copyright Act in Section 51 classifies digital computer software as literary works for the purpose of eligibility for protection. Thus, though digital technology in the varied forms known to us today was not expressly contemplated for protection under the Nigerian Copyright Act, most of the new digital innovations can be accommodated in some form under the Act if they approximately fall under any of the six genres protected under the Copyright Act, for instance, satellite and cable broadcast, and computer software. We shall briefly examine the nature of these two digital technologies.

Satellite and Cable Broadcast

Satellite broadcasting involves the transmission of signals by wireless or electromagnetic means (consisting of discrete values), which when received by a suitable apparatus, is converted into sounds and visual images perceivable by humans.²⁰ It involves transmitting signals through installations in the earth’s orbit, which serves as aerials to boost or transmit the signals back to earth. The effect is that the signals are receivable by many other countries known as footprint.²¹ The term ‘satellite’ on its own is a man-made object fired into space (earth’s orbit) to travel round the earth for certain purposes (i.e. for weather forecasting, transmission of broadcast, telecommunication or defence) and which makes use of discrete values. A ‘cable’ on the other hand is a conductor for transmitting electrical or optical signals, or electric power.²² A cable broadcast is therefore, a transmission of information in the form of electronic or optical signals, transmitted through a cable or over a cable directly to a receiver.²³

Computer Software

The computer electronic device is one of the devices that make use of a vivid combination of 1 and 0.²⁴ The computer device is basically divided into two components; the computer hardware and computer software. Whereas the computer hardware (which is the physical interconnections and devices of a computer set) is a subject for protection by the law of patent, the computer software is a subject for protection by the law of copyright.²⁵ Computer software is actually incapable of any precise definition. It is a general term primarily used for digitally stored data such as computer programmes and other kinds of information read and written by computers usually in an intangible form.²⁶ In *New Datacom Ltd. v. Satellite Decoding Systems*,²⁷ it was accepted that a smartcard decoder for use with scrambled satellite television broadcast was a computer program. Also in *NEC Corp v. Intel Corp*,²⁸ it was held that even though the computer programs were permanently stored in read only memory (ROM), the programs were still capable of copyright subsistence.

¹⁸ Computer desktop encyclopedia, ‘meaning of digital system’ available at <http://www.answers.com> accessed on 29th November 2019

¹⁹Null Linda *et al*, *The Art of Digitalization* (2nd ed. Cambridge University Press, 2006), p. 471.

²⁰International Bureau of WIPO ‘The New Communication Technologies Copyright’, WIPO/PO/ACAD/E/98/28

²¹*Ibid*, p.26

²²*Ibid*, p. 89

²³Arc Dictionary, ‘Meaning of Cable Broadcast’, available at <http://www.arcdictionary.com/cablebroadcast.html> accessed on 29th November 2019

²⁴*Ibid*.

²⁵ S. 51 of the Copyright Act

²⁶Dictionary Unabridged, ‘Software’ (n.d), available at <http://dictionaryreference.com/browse> accessed on 29th November 2019

²⁷(1995) FSR 201

²⁸645 F sup. 1485 (D minni 1985)

4. Copyright Protection of Digital Innovations

Copyright Protection of Digital Innovations under International Law

The regulation of copyright law is generally a question of national laws and each country stipulates the boundaries of what is copyrightable, their nature, applicable rights and term of protection. Traditionally, most copyright laws provide for the protection of literary and artistic works, sound recordings and musical compositions, broadcasts and neighbouring/performance rights. These traditional categories of eligible works appear ill-suited to the exigencies of the digital age.²⁹ The mere digitization of a piece of copyrighted material may implicate two or more categories of works simultaneously or even necessitate the creation of new and more fluid categories of a *sui generis* nature deserving of discrete legal protection.³⁰ The limitations of national legislations have given rise to an international regime of laws to address transboundary copyright issues starting firstly with the Berne Convention on Literary and Artistic Works of 1886,³¹ the Universal Copyright Convention established in 1952,³² the Geneva Phonograms Convention³³ and the Rome Convention.³⁴ In 1996, the WTO Treaty introduced the TRIPS Agreement³⁵ which stipulated certain minimum standards of protection for copyrighted works premised on the framework of the Berne Convention as part of the international trade in goods and services. Most of these international instruments did not directly address the special role of digital technologies and their ramifications for copyright ownership and enforcement. However, the WIPO Internet treaties³⁶ introduced with effect from 2002 have attempted to extend the provisions of the Berne Convention and the TRIPS Agreement to these new technologies by allowing rights-holders to protect their rights through encryption technologies best suited to the needs of the Digital Age. These treaties introduced minimum requirements for the protection of copyright owners by member states of WIPO from unauthorized access and use of their works on the internet and other digital platforms by recognizing their rights to control these works and to be compensated for their use.³⁷ In addition to extending the recognized protections of copyright law to these uses, the WIPO Internet treaties also introduced the anti-circumvention provisions to all digital rights management techniques and the prohibition of intentional deletion of associated electronic digital rights management information.³⁸

Copyright Protection of Digital Innovations in Select Foreign Jurisdictions

Some other jurisdictions have taken the giant stride to enact legislations or incorporate into their local laws, provisions of international law that protect copyright in digital innovations or technology. The United States, for instance, has implemented the provisions of the WIPO Internet treaties in its Digital Millennium Copyright Act (DMCA) enacted in 1998.³⁹ In addition to criminalizing the circumvention of technical protection measures and access control technologies adopted by copyright holders, the DMCA also introduced exemptions and protections from direct and indirect liability for internet intermediaries and internet service providers (ISPs). In the European Union also, The Copyright (Information Society) Directive⁴⁰ implements the provisions of the WIPO Internet Treaties. This Directive distinguishes between reproduction rights and the right of communication to the public, which covers transmissions and publications distributed on the internet. Transient and incidental copying forming part of a network transmission or other legal uses are exempted for the benefit of ISPs. The anti-circumvention provisions under the Directive extend to the manufacture, importation, distribution, sale and rental of devices intended for such use, specifically marketed and advertised for circumvention purposes, and have limited commercial uses other than to sidestep copyright protection measures, or are primarily designed and adapted for the

²⁹Marshall A. Leaffer, 'Protecting Authors' Rights in a Digital Age', (1995) University of Toledo Law Review Vol 27, available at <http://www.repository.law.indiana.edu/facpub/611>, accessed on 30th November 2019, p. 4

³⁰*Ibid*, p. 6 – 8

³¹828 UNTS 221, S. Treaty Doc. No. 99-27

³²25 UST 1341, T.I.A.S. No. 7868 (1952)

³³Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, October 29th, 1971.

³⁴International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 26th October 1961.496 UNTS 43.

³⁵Trade Related Aspects of Intellectual Property Rights, Annex 1C of the WTO Agreement 1995.

³⁶The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, adopted December 20th 1996.

³⁷Articles 6, 7 and 8 WCT; Articles 7- 10 of Ch. II and 11-14 of Ch. III WPPT.

³⁸Articles 11 and 12 WCT; Articles 15, 18 and 19 Ch. IV WPPT.

³⁹The Digital Millennium Copyright Act of 1998 amending Title 17 of the United States Code, Pub. L. 105-304.

⁴⁰The EU Copyright Directive 2001/29/EC

purpose of enabling or facilitating such evasive measures.⁴¹Very recently, the EU issued a new Directive on Copyright in the Digital Single Market⁴² intended to ensure '... a well-functioning marketplace for the exploitation of works and other subject matters...taking into account in particular digital and cross-border uses of protected content.' The measure seeks to protect copyrighted materials distributed online, encouraging collaboration between content creators and internet platforms and engendering a just and more equitable distribution of profits generated from such content.⁴³

Copyright Protection of Digital Innovations in Nigeria

The Nigerian Copyright Act accords certain protection to digital innovations in the country. In the case of satellite and cable broadcast for instance, Section 51 of the Copyright Act defines broadcasting to include satellite or cable programmes as well as a rebroadcast. This section is further accentuated by section 8 (1) of Copyright Act which stipulates that copyright in a (satellite or cable) broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts: a) recording and broadcasting the whole or a substantial part of the broadcast, b) communicating to the public of the whole or substantial part of such broadcast, either in its original form or in any form recognisably derived from the original, c) the distribution to the public for commercial purposes of the copies of the work by way of rental, lease, hire, loan or similar arrangement. Section 51 of the Act however, defines communication to the public as including in addition to any live performance or delivery, any mode of visual or acoustic presentation but does not include a broadcast or re-broadcast. This would imply that where a Television station pirates off the broadcast of another Television station and rebroadcasts the same to the public, the Television station will be exculpated from liability for infringement of copyright by Section 51 of the Act.

The Nigerian Copyright Act also accords protection to computer software and this is expressly contained in the provisions of section 51 (1) of the Act. The said section defines computer software or programmes as a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result. It further defines computer software as an aspect of literary works. Consequently, any provision of the Copyright Act applicable to literary works is applicable to computer software. Section 1 of the Act enumerates works eligible for protection, and the two conditions required for such eligibility is that sufficient effort must have been expended in the work to give it originality of character, and it must be fixed in a definite medium of expression. Section 10(1) of Copyright Act stipulates that ownership of a computer software vests on the author first, however this is subject to cases of computer software created as part of an employment duty in cases of contract of employment, as held in *Joseph Ikhudiora v. Campaign Services Ltd. & anor*,⁴⁴ Where the plaintiff's claim to entitlement to copyright in a work he created in the course of working for the defendant was dismissed by the court and the defendant was held to be entitled to copyright in the work.

The Nigerian Copyright Act⁴⁵ confers the following scope of rights in relation to digital works on copyright owners: i) The right of production and related rights; ii) The right to control the distribution of copyrighted work and issuing of copies to the public; iii) The right to control the making of adaptation which has been defined as the modification of preexisting works from one genre to another and consist in altering works within the same genre to make it suitable for different conditions of exploitation, and may also involve the altering of the composition of the work. Section 21⁴⁶ of the Act, which provides for anti-piracy measures empowers the Commission to prescribe suitable marks, labels, designs or impressions or other anti-piracy devices in connection with any works over which copyright subsists. That section proscribes the offer for sale, rental or hire, importation, possession, unauthorized replication or circumvention of anti-piracy devices. This amendment was followed up in 2006 with the introduction of the Copyright (Optical Discs) Plants Regulations,⁴⁷ empowering the Nigerian Copyrights Commission (NCC) to monitor and regulate the activities of optical disc manufacturing and production plants and the importation of

⁴¹ Articles 2-4, 6 and 7

⁴² Directive on Copyright in the Digital Single Market. Directive (EU) 2019/790 of 17th April 2019.

⁴³ Articles 15, 17, 18, 19 and 20. This Directive comes into effect on 7th June 2021

⁴⁴ (1986) F.H.C.R. (Federal High Court Report), 308

⁴⁵ S. 6 (1) of the Copyright Act

⁴⁶ Backed up by the provisions of The Copyright (Security Devices) Regulation of 7th September 1999, made pursuant to section 45(4) of the Act

⁴⁷ Regulation No. 63 Vol. Vol. of 20th December, 2006 and the Guidelines for the (Optical Disc Plants) Regulations, initiated by the NCC as part of the Strategic Action Against Piracy (STRAP) through public enlightenment, proactive enforcement and rights administration

relevant equipment into the country. In 2010, the Commission introduced the mandatory inscription of Source Identification Codes (SIDs) on all optical discs produced in Nigeria.⁴⁸

5. Emerging Issues in Digital Technology under the Nigerian Copyright Regime

After considering the legal framework already in place in Nigeria and relating it to our digital age today, it will be right to say that Nigeria still has a long way to go with respect to the protection of digital broadcast by cable and satellite; and adequate protection for computer software and other digital innovations. The lack of adequate legislative incursion in this area has led to a dearth of judicial jurisprudent on the field and has resulted in Nigeria recording the highest incidence of piracy of computer programs and other digital innovation in the whole of Africa.⁴⁹ One of the greatest concerns is the impact of the skeletal nature of our copyright Act with regards to copyright regulation in this area. The various forms of piracy of digital broadcast in Nigeria is so digitalized and complicated in nature that it is only a specific legislation that would effectively contain the progressively worsening situation.⁵⁰ An illustration is the ‘subscriber under declaration’,⁵¹ which is a situation where cable companies who legally subscribe to major satellite stations do not pay for all the channels they rebroadcast to the public. There is also unauthorized cable access where individuals that have high receptive television set tap into lines of legitimate television companies through signal bleedings, without paying for subscription.⁵² This menace cannot be protected by our skeletal legal framework. Another challenge is the test of originality and expression in a definite form that a computer program is subjected to before it becomes eligible for protection under the Act.⁵³ Some modern innovations may not fit into the requirement, for instance, most computer programmes in their technical nature may involve computer language created by different authors distinct from the interface which may be created by another person. This implies that as far as our jurisdiction is concerned, the creator of a computer language is not entitled to a distinct copyright on the creation of language only under the copyright Act. This is not the case in the United States.⁵⁴ Again, the manner in which computer works are pirated may not amount to infringement under our Copyright Act. For instance, there is a form of copyright infringement of computer software known as re-bundled software, which is the assembling of different parts of legitimate software components manufactured by different companies by technical means and re-bundling them, and giving it the name of a major software company. There is therefore urgent need to amend the Copyright Act to accommodate this.

Another major challenge is the protection of copyright works on social networks. Nigeria is recorded to have the highest level of internet usage in Africa. According to the 2016 Digix facts report, Nigeria has 63 million people on the internet.⁵⁵ Popular sites visited by Nigerians include social networks such as blogging platforms, YouTube, Facebook, Twitter and Instagram. These platforms have created an outlet for creators to broadcast themselves and create and share content, not only within Nigeria, but with the world. Many Nigerians have in turn been able to leverage on this visibility to gain economy for themselves, bypassing the established bureaucracy of the mainstream sectors of engagement. The nature of the digital ecosystem demonstrates unlimited access to available content and the ability to share that content with others. In the context of copyright, this raises the question of copyright application in the digital space. To what extent is the Nigerian Copyright Act applicable to the digital space? At what point, would copyright infringement have said to occur and who would be held liable for this?⁵⁶

⁴⁸Reg. 7 of the Regulations. A joint initiative of the International Federation of Phonographic Industries (IFPI) and Philips Consumer Electronics.

⁴⁹Akinjide and Co., Op. cit. A report published by the United Kingdom-based Business Software Alliance (BSA) and the US-based International Data Corporations (IDC) shows that Nigeria’s piracy level ranks 84% among countries of the world, and is on the same level with Algeria in the global rate of software piracy

⁵⁰Like the United States’ Family Entertainment Act, governing family related broadcast.

⁵¹CASBAA ‘Piracy Estimates’ available at <http://www.casbaa.com/report.piracyestimates.html> accessed on 30th November 2019

⁵²Okou and Modey, ‘The Implication of New Technology on Nigerian Copyright Protection Practices in Today’s Computer Age’ (2015), Journal of Law, Policy and Globalisation available at <file:///C:/Users/User/Downloads/COPYRIGHT%20&%20DIGITAL%20TECHNOLOGY.pdf> accessed on 30th November 2019

⁵³S. 1 (2) of the Copyright Act

⁵⁴By virtue of S. 6 of Digital Millennium Copyright Act 1998 of U.S.A., such language is entitled to copyright

⁵⁵<http://www.digitxplus.com/wp-content/uploads/2016/10/2015DigitalFactsBook-Abridged-1.pdf> accessed on 30th November 2019

⁵⁶Emerging Issues in Copyrights and Information and Communication Technology available at http://nji.gov.ng/images/Workshop_Papers/2017/Refresher_Judges_and_Kadis/s7.pdf accessed on 3rd December 2019

It is obvious from the provisions of the Nigerian Copyright Act that the Act did not contemplate copyright application in digital space. There are no provisions under the Act that deals with this area specifically and the existing provisions for the protection of digital technology are grossly inadequate. The question as to whether copyright is applicable in digital space and to what extent will be considered briefly. Online communities such as blogs, social networking platforms and sharing sites thrive on contents generated by members of these communities. The members who generate specific content on the face of it hold the copyright to the generated content.⁵⁷ As social platforms, the terms of use on these platforms also give a non-exclusive license to the platform holders to share content posted on the platforms with others who use the platform. In some cases, through privacy settings and terms of use, the community members agree to allow other users of the platform access to the copyrighted material and permission to share with others without further authorization required. In such a case, it can be argued that any such use or sharing of the copyrighted material will not amount to an infringement.⁵⁸ However, where a user generates and shares content, whose copyright is owned by another without the consent or permission of the right owner, a copyright infringement claim may exist.

The current Copyright Act also does not provide for liability or protection for intermediaries for copyright infringement of users of their platforms. In the United States, for instance, the Digital Millennium Copyright Act (DMCA) enacted by Congress to respond to the nuances of digital copyright protection provides safe harbours or limits the liability of online service providers/intermediaries from copyright infringement claims in specific circumstances.⁵⁹ The European Union has also enacted legislation that specifically provides for extent of liabilities or safe harbours of intermediaries in certain circumstances.⁶⁰ It is recommended that Nigeria follows in this footsteps. As earlier indicated, the Nigerian Copyright Act exempts from copyright protection the reproduction of published work for the exclusive use of the blind or disabled persons.⁶¹ In other words, through a process called reverse engineering, approved institutions can reproduce published work and sound recordings in a way that is accessible to the disabled without authorization from the copyright owner. In the context of the digital space, reverse engineering may require the circumvention of technology protection measures (TPM).⁶² This raises the question as to whether circumvention of TPM in the case amounts to infringement of copyright or not, and if it does not amount to infringement, the extent to which the Nigerian copyright Act could be considered to cover the circumvention of technology protection measures in such a case. The Act is again silent on this issue. The Act ought to contain express provisions tackling this problem.

6. Conclusion and Recommendations

Although the Act attempts to anticipate improvements in technology and scientific knowledge, the intended flexibility and broadness are hampered by the other eligibility requirements and parameters for copyright protection stipulated in the Act. New technological advancement has really exposed the lacunas of copyright protection in Nigeria. For instance, the narrow definition under the Act, of broadcast and communication to the public by a loudspeaker or any other similar device does not anticipate digital transmissions which are prevalent in today's world. Also, the reproduction and distribution rights stipulated under the Act are restrictive in scope. The Copyright Act lists the works which are eligible for copyright protection. Works in digital format may or may not fit into these protected categories. Multimedia works obscure the clear-cut distinction of categories of works as they combine works of different kinds. They are also not static as they evolve with technology. There is inadequate provision under the Act for the Protection of this kind of works. Also, the concept of fixation on a stable material or medium seems difficult to sustain as a pre-requisite for the qualification of a creation as a copyright work since intangibility and a transitory nature are common features of works placed on the internet. The social media and digital space in general, is an avenue which promotes intellectual creativity and a minefield of ideas which can be deployed into important works. For any nation, including our own to progress economically, it must not play down the development of its intellectual resources. The only way to ensure the protection of original intellectual works is by tightening provisions for the safeguard of copyright products and especially, liberalizing provisions in the extant

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹See 17 USC 512 at <https://www.copyright.gov/title17/92chap5.html#512> accessed on 3rd December 2019

⁶⁰See EUR E-Commerce Directive safe harbors (2000/31/EC)

⁶¹Second schedule to the Copyright Act

⁶²Technology protection measures are technologies used to control access to copyright content, or to prevent users from copying protected content. For example, a password is a technology protection measure.

copyright laws of the country to be able to accommodate products derived from the rapidly growing technology in the world.⁶³

Having examined the challenges facing our copyright legal framework in the light of digital technology, this research makes the following recommendations: Various legislative measures should be enacted to cater for the increasingly new species of digital innovations. Wide consultations, especially with experts in the fields of information technology, copyright and computer technology should be made while making these enactments in order to effectively acquire the technical knowledge that would expose the intricacies involved in copyright violation of digital technology. There should be effective administrative enforcement mechanism for the protection of copyright especially in digital works. There is a pressing need for the domestication of the various international instruments on copyright protection of digital innovations in line with section 12 of 1999 Constitution especially considering the fact that the provisions of our law in this area are grossly inadequate. The Copyright Act should be amended to expressly provide for take down procedures. In several other jurisdictions like the United States⁶⁴, one of the actions often sought for content that is found to infringe copyright is to have such content taken down by the intermediary. However, to further preserve the internet freedom and to prevent arbitrary take-down procedures or content blocking, take down procedures are subject to administrative and judicial procedures. There should be robust fair dealing provisions and criteria for determining fair dealing. The laws should expressly provide for circumvention of TPMs especially in relation to the its exemption of the exploitation of copyright works for the blind, visually impaired or otherwise disabled persons. The extent of protection granted in this case should also be clearly defined. The law should be amended to impose certain duties on online service providers just like other countries have done. For instance, duty to give notice of illegal activities and duty of identification of infringers upon request of the investigative authorities. Infringers should also be made to account for profits while the infringing contents were up. Finally, due to the potential for commercial exploitation of user-generated contents on social media sites, they should use effective content identification technology to eliminate from their services all infringing user generated contents. Enlightenment and awareness campaigns that will be taken down to the grassroot level should be embarked upon. This can be achieved through various commercial ringlets and advertisements in radio and television broadcasts in a way that a layman on the street would understand.

⁶³ Nkem Itanyi and Chinelo Ngwu, 'Expanding the Frontiers of Nigerian Copyright Law in the Age of Social Media', *The Gravitas Review of Business & Property Law*, Vol. 9 No. 1, March 2018 pp. 96-107 available at <https://gravitasreview.com.ng/shop/expanding-frontiers-of-nigerian-copyright-laws/> accessed on 4th December 2019

⁶⁴ See 17 USC 512, *op cit*.