

DIGITAL RIGHTS MANAGEMENT AND ACCESS TO COPYRIGHTABLE WORKS IN NIGERIA: LESSONS FROM INDIA^{1*}

Abstract

Copyright laws confer on authors a bundle of rights such as the rights of production, publication, performance, adaptation, broadcasting, etc. in relation to their works. This is to encourage authors to create more works by allowing them to reap economic benefits accruing from their creation. By doing so, authors contribute to the pool of knowledge. However, the laws try strike a balance between the enjoyment of these rights and the public interest right of access to copyrightable works for advancement of knowledge and information. This long existing rule has been distorted as a result of the emergence of digitalization and other technological innovations of the 20th and 21st centuries which created more access to copyrightable works; in most cases, unauthorized access, to the detriment of the right owners. Copyright laws have embraced technological protection of these works in the face of the legal uncertainties and a number of lacunae inherent in the obsolete Copyright Laws, especially those of Nigeria which were oriented towards analogue exploitative technologies. What this means is that these technological devices which do not admit of fair use of protected works are bound to end creativity in that they inhibit public access to works. The work examined the Copyright Acts of Nigeria, India and other Copyright related Instruments in order to discover the areas of conflict between the authors' rights and those of the general public caused by the use of technological protective devices and made recommendations on ways to achieve everlasting solution to these conflicts; and in order to achieve a holistic enforcement of Copyright.

Keywords: Digital rights, Management, Access, Copyrightable works, Nigeria, India

1. Introduction

Copyright is the monopoly rights conferred by law or an institution to do or restrain others from doing certain acts with respect to the author's original literary, musical or artistic work. This is because a person who has laboured or worked to produce copyrightable material ought to have a sole enjoyment of the benefits accruing from his work. Thus, the primary purpose of Copyright is to promote public welfare by the advancement of knowledge with the specific intent of encouraging the production and distribution of new works for the public. The problem faced by Copyright owners relates solely to the covetousness of deviants in the human society who enjoy reaping the benefits of intellectual exploits of others at the expense of Copyright owners. As a way of discouraging this injustice, the law creates enforcement mechanisms which enforce the protection of the exploitative rights of authors by punishing those that infringe them. However, the emergence of digitization which threw off balance the analogue exploitative technologies also destroyed the traditional balance between the rights of authors to enjoy the economic benefits accruing from their creation and the public interest right of access to copyrightable works through fair use. As a result of the failure of the traditional copyright mechanisms to act in the face of these modern technologies, copyright laws provided for the use of technological devices to protect digitized works. Unfortunately, these laws failed to authorize fair use of works digitally protected even when it is clear that these technological devices most times do not admit of fair use of works protected. This development will obviously destroy creativity. This work will examine the nature of copyright, rights of Copyright owners, infringement of these rights, as well as the enforcement mechanisms put in place to protect the enforcement of these rights. Copyright Acts of Nigeria, India and other Copyright related Instruments shall be examined in order to determine the actual provisions of these Instruments that aid inhibition of knowledge and information. Recommendations shall be made towards balancing the aforesaid interests and towards achieving a holistic enforcement of Copyright in Nigeria.

2. Meaning of Copyright

Copyright has been described as property in which an action to restrain the infringement of a right or property will lie even if no damage can be shown.² It is a *specie* of intellectual property, with its own unique character, a

^{1*} **By Samson Obi UMEH, PhD**, Private Legal Practitioner at Osuohia Zion Legal Consult, 127 Wetheral Road, Owerri, Imo State.

property right that at the same time exhibits features of a personal right.³ Copyright is therefore an automatic right that gives the creators the right to control the ways in which their materials may be used.⁴ This is because there is a belief that there is property in creative works.⁵ Thus, there is a basic correlation between work and wages. Therefore, a person who has laboured or worked to produce copyrightable material ought to have a sole enjoyment of the benefits accruing from his work. Lord Atkinson concurred with this line of argument when he stated in *Macmillan & Co. v Cooper*⁶ that the moral basis on which the principle of the protective provisions of Copyright rests is the eighth commandment, ‘Thou shall not steal’.

It must be pointed out that it is not every work that is accorded Copyright protection. The Copyright Act of Nigeria⁷ enumerated works that are qualified to attract Copyright protection as: Literary works; Musical works; Artistic works; Cinematograph films; Sound recordings, and Broadcasts.⁸ However, the Nigerian Copyright Act⁹ expressly provides that a work shall not be eligible for Copyright unless sufficient effort has been expended on making the work to give it original character;¹⁰ and such work must be fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.¹¹

3. Rights Conferred by Copyright

The Copyright Act confers on authors some exploitative rights in relation to their works, subject to the exceptions specified in the Second Schedule to the Act.¹² The Act specifically provides that the right of the owner to control the doing of any of the above mentioned activities extends to the whole or a substantial part of the work either in its original form, or in any form recognizably derived from the originals.¹³ The Act further provides that Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form, or in any form recognizable derived from the original, but not the right to control the re-construction in the same style as the original of a building to which the Copyright relates.¹⁴ The Act also provides that Copyright in a sound recording shall be the exclusive right to control in Nigeria, the direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original; the distribution to the public for commercial purposes of copies of the work by way of rental, lease, hire, loan or similar arrangement.¹⁵ In the same vein, the Act provides that Copyright in broadcast shall be the exclusive right to control the doing in

² *Weatherby & sons v International Horse Agency and Exchange Ltd.* [1910] 2 Ch. p.297, at p.305; Choate *et al. Cases and Materials on Patent Law including Trade Secrets-Copyright-Trademarks* (Minnesota, West Publishing Co. St. Paul, 1987) p.800.

³ J Asein, *Nigerian Copyright Law & Practice* (2nd edn, Abuja: Books and Gravel Ltd. 2012) p.6; See also Ikenga K.E. Oraegbunam, ‘A Literary Work as an Intellectual Property of its Author: Implications for Protection under the Copyright Act’ In J.Eyisi, I. Odimegwu & N. Ezenwa-Ohaeto (eds), *African Literature and Development in the Twenty-First Century*, Living Flames Resources, Owerri, 2009, 425 – 443. Available at <http://www.worldcat.org/title/African-literature.../642712856>.

⁴ G Okeke & K Uzor, ‘*Journal of Law and Conflict Resolution*’ *Journal of Law and Conflict Resolution* ALCR., Vol. 6. April, 2014.

⁵ *Ibid.*

⁶ (1923) 40 T.L.R. p.186 at p.187.

⁷ Hereinafter referred to as ‘C.R.A.N.’ or the ‘Act’.

⁸ *Ibid.* Section 1.

⁹ *Ibid.*

¹⁰ C.R.A.N. Section 1(2).

¹¹ C.R.A.N. Section 1(2) (b).

¹² *Ibid.*

¹³ *Ibid.* Subsection (2).

¹⁴ *Ibid.* Section 8.

¹⁵ *Ibid.*

Nigeria any of the following acts:¹⁶ the recording and the re-broadcasting of the whole or a substantial part of the broadcast;

- a. the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original; and
- b. the distribution to the public for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement.

An owner of a Copyright in television broadcast shall also have the exclusive right to control the taking of still photographs from the broadcast.¹⁷ It therefore follows that any person who without the license or authorization of the Copyright owner, does or causes any other person to do any of the acts enumerated above will be liable for infringement of Copyright.¹⁸

4. Copyright Infringement

Copyright infringement, also known as piracy, is the use of works protected by Copyright law without permission, thereby violating certain exclusive rights granted to the Copyrights holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative therefrom. These rights are automatically conferred on authors upon the creation of works in order to allow them reap the economic benefits accruing from their creation. The law confers Copyrights holders with the power to invoke legal and technological measures to prevent and penalize Copyright infringement, subject to the exceptions to Copyright control.

Primary Infringement

As earlier stated, copyright owners are conferred with the exclusive rights of reproduction, publication, performance, adaptation, commercial distribution, public performance and broadcasting of their works.¹⁹ It therefore follows that any person who without the license or authorization of the Copyright owner, does or causes any other person to do any of the acts enumerated above will be liable for infringement of Copyright.²⁰ This class of infringement is usually referred to as primary civil or direct infringement. It must be pointed out that primary/direct infringement is strict liability in nature as there is no requirement of any guilty knowledge or adverse motive.

Secondary Infringement

According to the Act, Copyright is infringed by any person who without the license or authorization of the owner of Copyright imports or causes to be imported into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy under this section of the Act.²¹ This prohibition is obviously limited to importation of such copies into Nigeria. Similarly, this provision speaks only of the infringement 'under the Act'. It does not adequately cover cases where the acts constituting infringement was done outside Nigeria prior to importation. Another form of secondary infringement is the unauthorized exhibition of work in the public.²² The prohibition envisaged under this subsection extends to the infringing copies of the work or any other work or articles which, although not copies in the strict sense, but nevertheless embody the object of infringement. The Act does not require that such exhibition in public must be by way of trade. In the same

¹⁶*Ibid.* Section 15 (1).

¹⁷ J Asein, *Nigerian Copyright Law & Practice Op. Cit.* p.172.

¹⁸ C.R.A.I. Section 14.

¹⁹*Ibid.* Section 6. See also I.K.E. Oraegbunam, 'A Literary Work as an Intellectual Property of its Author: Implications for Protection under the Copyright Act' In J.Eyisi, I. Odimegwu & N. Ezenwa-Ohaeto (eds), *African Literature and Development in the Twenty-First Century*, Living Flames Resources, Owerri, 2009, 425 – 443. Available at <http://www.worldcat.org/title/African-literature.../642712856>.

²⁰*Ibid.* Section 15 (1) (a); *Nigeria Copyright Commission v Edolo* 6 I.P.L.R. 41; *Musical Copyright Society v Adeokin Records & Anor.* 6 I.P.L.R. 55.

²¹C.R.A.N. Section 15(1) (a).

²²*Ibid.* Paragraph (b).

vein, the defendant needs not have knowledge that the article being exhibited infringes Copyright in any work. It is submitted that since the Act does not require the actual sale or commercial exposition of the Copyright material in order to prove liability, a mere display or exhibition of the work even for promotional purposes would constitute an infringement.

The Act provides that it is an infringement for a person who does not have the license or authorization of the owner of the Copyright to distribute by way of trade, offering for sale, hire or otherwise or for any purpose prejudicial to the owner of the Copyright, any article in respect of which Copyright is infringed under the relevant provisions of the Act.²³ Similarly, a person who, without the license or authorization of the Copyright owner, makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the purpose of making infringing copies of a work is liable for infringement.²⁴ However, it does appear that in order to succeed under these provisions, the plaintiff must prove that the material found in the defendant's possession have indeed been used to infringe his work. The Act does not require that the article or contrivance be specifically designed or adapted for making copies of that work, although that may have been the intention of the infringer. The Act expressly requires that the equipment or contrivances must be used for the purposes of making infringing copies of the work.

On the other hand, the Act provides that Copyright is infringed by any person who without the license or authorization of the owner of Copyright permits a place of public entertainment or of business to be used for a performance to the public of the work, where the performance constitutes an infringement in the work unless the person permitting the place to be used was not aware and has no reasonable ground for suspecting that the performance would be an infringement of the Copyright in such work.²⁵ In the wisdom of the Courts, the knowledge contemplated by the Acts has to be actual and not merely constructive.²⁶ However, this does not mean that the Court may not infer knowledge on the part of the defendant since by the ordinary rules of evidence; a man may be presumed to be possessed of the ordinary understanding expected of persons in his line of business.²⁷

Copyright is also infringed by any person who without the license or authorization of the owner of the Copyright, performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business, any work in which Copyright subsists.²⁸ It is clear that the performance contemplated by this provision needs not be public. The main aim of this provision is to prohibit performances aimed at promoting trade or business; or providing supporting facilities to trade or business which otherwise would not come within the meaning of performance in public earlier discussed in this work. In this context, the activities of business enterprises such as Banks, Service Providers, Microsoft companies and Mobile Phone Dealers etc, which play music to entertain their workers and customers, may be caught up by this provision. Similarly, commercial advertisement jingles with background music may be constructed as supporting facility to trade or business if such supporting music is inserted without the consent of the Copyright owner.

Criminal Infringement

The Nigerian Act provides that any person who:²⁹

- (a) makes or causes to be made for sale, hire, or for the purposes of trade or business any infringing copy of a work in which Copyright subsists, or
- (b) imports or causes to be imported into Nigeria a copy of any work which if it had been made in Nigeria would be an infringing copy; or

²³*Ibid.* Paragraph (c).

²⁴*Ibid.* Paragraph (d).

²⁵*Ibid.* Paragraph (d).

²⁶*Van Dusen v. Krutz* [1938] 2K.B. p.176; *R.C.A. Corp. v Custom Cleared Sales Pty. Ltd.*[1978] F.S.R. p.576.

²⁷ J Asein, *Nigerian Copyright Law &Practice* ,Op. Cit. p.221.

²⁸C.R.A.N. Section 15 (1) (f).

²⁹*Ibid.* Section 20 (1) (a)-(c); *N. C. C. v Madu* (Unreported Suit No. FHC/L/40^c/2015, judgment delivered on 14th Feb., 2017, by Oguntoyinbo, J. at Federal High Court, Lagos Division).

- (c) makes, causes to be made, or has in his possession, any plate, master tape, machine, equipment or contrivances for the purposes of making any infringing copy of any such work;
shall, unless he proves to the satisfaction of the Court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, or that such plate, master tape, equipment or contrivance was not for the purpose of making infringing copies of any such work, be guilty of an offence under this Act and shall be liable on conviction to a fine of an amount not exceeding N1,000 for every copy dealt with in contravention of this section or to a term of imprisonment not exceeding five years, or to both such fine and imprisonment.

The Act further provides that³⁰ any person who-

- (a) sells or lets for hire or for the purposes of trade or business, exposes or offers for sale or hire any infringing copy of any work in which Copyright subsists; or
(b) distributes for the purposes of trade or business any infringing copy of any such work; or
(c) has in his possession, sells, lets for hire or distribution for the purposes of trade or business or exposes or offers for sale or hire any copy of a work which if it had been made in Nigeria would be an infringing copy;
(d) has in his possession other than for his private or domestic use, any infringing copy of any such work-
shall unless he proves to the satisfaction of the Court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, be guilty of an offence under this Act and shall be liable on conviction to a fine of N100 for every copy dealt with in contravention of this section, or to a term of imprisonment not exceeding two years or in the case of an individual, to both such fine and imprisonment.

The Act also prohibits a person who without the consent of the owner of the Copyright, distributes in public for commercial purposes, copies of the work by way of rental, lease, hire, loan or similar arrangement, and renders him or her liable upon conviction to a fine of N100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment.³¹ It is a good defence to the offences provided in this section that the accused person never knew and had no reason to believe that the copy concerned was an infringing copy of any such work, or that such plate master tape, machine, equipment or contrivance was not for the purposes of making infringing copies of such work. In *Ubi Basseyno v N.C.C.*,³² the Appellant who was convicted by the Court of first instance for being in possession of smart cards and other equipment for illegal rebroadcasting of signals argued on appeal that since he lawfully obtained the smart card and equipment, their possession cannot be said to be unlawful. In interpreting the provision of the Act under discussion,³³ the Court of Appeal held that the section makes it an offence to possess the equipment for the purpose of making infringing copies. The Court went ahead and concluded that the equipment in the present case were in fact used for illegal rebroadcasting, which is a reproduction of a broadcast and since it is illegal, each rebroadcast is an infringing copy.³⁴ Similarly, in *Nigerian Copyright Commission v Nwankwo*,³⁵ the accused person was sentenced to a fine of one hundred naira for each copy of the five hundred and four infringed copies of DVD/CD possessed and presented.

³⁰C.R.A.N. Section 20 (2).

³¹*Ibid.* Subsection (3).

³²6 I.P.L.R.p.93.

³³Copyright Act, 1988, section 18 (1) (c), now C.R.A.N. Section 20 (1) (c).

³⁴*Ibid.*

³⁵Unreported Suit No. FHC/ABJ/CR/14/2010 quoted by J. Asein, *Nigerian Copyright Law & Practice*, Op.Cit.p.227.

It is worthy of note that as with the other criminal trials, each of the elements of the offences provided under this section must be proved beyond reasonable doubt.³⁶ It is not sufficient to show that the accused person had done wrong. Infringing actions must be linked with the particular Copyright work and related to a right that is preserved thereto.³⁷

5. Copyright Enforcement

Enforcement of Copyright is the act or process of compelling compliance with the Copyright law. The Copyright Act put in place proper legal institutional and regulatory mechanisms and frameworks for the effective implementation and administration of Copyright. These include the Nigeria Copyright Commission,³⁸ Copyrights Inspectors,³⁹ Collecting Societies,⁴⁰ Department of Customs and Excise,⁴¹ Police,⁴² and the Courts.⁴³ These are the traditional enforcement mechanisms.

6. Digitization and Copyright Protection

As a result of the emergence of advanced digital technologies in the 20th and 21st centuries, there emerged enhanced modes of easy Copyright violation through the process of Digitization which connotes the conversion of works to a format in which they can be read by a machine.⁴⁴ This digitalization is basically the ability to record works in a binary format in which they are stored and transmitted. Digitization has impact not only on the format of work, but also on their use and distribution. In the analogue world, works are created and distributed in material forms, such as books or paintings. These works were scriptable to the human senses. In contrast, digital works have been dematerialized into electric or digital format which are no longer contained in the traditional material formats. Although the digital format of works can be read or understood only by technologies such as computers, it can be readily translated into impulses susceptible by human eyes, ear and mind.⁴⁵ Moreover, an existing analogue work can be converted into a digital data object. It is also very popular to create new works in the digital format because doing so is convenient and inexpensive.⁴⁶ Thus, the conversion from analogue to digital not only revolutionized the ways in which works are created but also the ways in which works can be used. This development gave rise to the emergence of Digital Rights Management through which publishers and right owners check violations by the use of technological devices such as encryption and digital watermarking. Since digital technology can be used to trace/monitor and control the production and dissemination of works, it can also be successfully employed to protect Copyright works. It is true that whilst Copyright Law can be applied only after infringement had occurred, as it does not work prospectively, technological protective measures work prospectively so as to effectively prevent infringement. Also, while Copyright law provides authors merely with the rights to control the use of their Copyright works, technological protective measures enable authors to exercise factual control over what users can do with their works.⁴⁷ These technological measures can be intergraded in softwares or built into the hardware; some involve the insertion of identification signals in digital recordings; or technical devices which prevent copying or recording, either at all, or on more than specified number of occasions.⁴⁸ The major protective devices used to protect digital media are Digital Watermarking and Encryption.

³⁶*Eno v Nigeria Copyright Commission* 6 I.P.L.R.p.93; *Compact Disc Technologies Ltd. & 2 Ors.v Musical Copyright Society of Nigeria* G.T.E. 6 I.P.L.R. p.199.

³⁷*Musa v Le Maitre* [1987] F.S.R. p.272.

³⁸C.R.A.N. Section 34.

³⁹*Ibid.* Subsection (3).

⁴⁰*Ibid.*Section 39 (1).

⁴¹C.R.A.N. Section 44 (1).

⁴²*Ibid.*Section 20 (5).

⁴³Sections 251 (1) (f) & 251 (3) 1999 Constitution of Nigeria (as amended), C.R.A.N. Section 46.

⁴⁴ B Iftikhar, 'Technological Protection Measures Under Copyright Law', *International Journal of Emerging Trends & Technology in Computer Science (ITETICS)*, Volume 2, Issue 2, March-April 2013, p.319.

⁴⁵*Ibid.*

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸*Ibid.*

Digital Watermarking is a promising technology employed by various digital right management systems to achieve rights management.⁴⁹ It supports Copyright information such as the owner's identity transaction dates, and serial numbers to be embedded as unperceivable signals into digital contents.⁵⁰ The signals embedded can be perceivable or insignificant to humans. On the other hand, visible watermarking is analogous to stamping a mark on paper.⁵¹ An example of visible watermarking is as seen in television channels when their logos are visibly superimposed in the corner of the television screen. On the other hand, Invisible Watermarking is imperceptible under normal viewing conditions.

Watermarking systems generally involves two processes, that is to say, watermarking embedding, and watermarking decoding. With the help of an encoder, the watermark is applied to the original media signal.⁵² First, a list of data elements is selected from the original media signal that will be modified during the encoding of the watermark. The Watermark consists of noise-like signals, which are generated by pseudo-randomly based secret keys.⁵³ The same key is required for the watermark decoding process where a decoder checks the possibly attacked content from the presence of the watermark. To achieve these results, there are some techniques employed by Watermarking. For instance, in Spatial Domain Technique, watermarks are constructed in the image spatial domain, and embedded directly in an image pixel data. Other Water Marking Techniques are, Fractal Domain Technique, Transform Domain Technique, Feature Domain Technique, etc.

Encryption is the technology that supports the Electronic Document Management and Control. Digital Rights Management uses a cryptographic algorithm to encrypt content that needs a secret key, a particular phrase, or string of numbers.⁵⁴ It is only the holder of this key that can unlock the content and read it. Decryption is the process of decoding data that has been encrypted into a secret format.⁵⁵ Asymmetric Encryption gives each person a pair of keys, ie, a public and a private key.⁵⁶ Each person's public key is kept secret. Messages are encrypted using the intended recipient's public key and can any be decrypted using his private key.⁵⁷ This method eliminates the need for the sender and receiver to share secret information, ie, keys with a secure channel.⁵⁸ All communications use only public keys and no private keys is ever transmitted or shared. To implement public-key encryption on a large scale, a digital certificate is required. A digital certificate is basically a bit of information that says that the web server is trusted by an independent source known as a digital authority. The certificate authority acts as a middleman that computers trust, and confirms that each computer is in fact who it says it is; and then provides the public keys of each computer to the other. On the other hand, Symmetric Encryption uses a symmetrical key and is essential for protecting data.⁵⁹ It uses the same key for password to encrypt and decrypt data and is sometimes referred to as secret-key encryption. This type of technology is used to encrypt everything, ie, from an entire hard drive to an individual file. Once a file is encrypted, it can be sent or stored in the cloud; but a cloud provider would not have access to the data without having access to the original key.⁶⁰ The advantage of this form of encryption is that it is fast and can be used to encrypt large volumes of static data.

⁴⁹Kuma et al, 'Staffing Scheme for Copyright Protection in Multimedia', *International Journal of Network Security & Its Applications* (IJNSA), Vol. 3. No.2, March 2011, p.135.

⁵⁰*Ibid.*

⁵¹*Ibid.*

⁵²*Ibid.*

⁵³*Ibid.*

⁵⁴*Ibid.*

⁵⁵ L Chun-shien, 'Multimedia security; Steganography and Digital Watermarking Techniques for Protection of Intellectual Property: Computer Forensics, Cybercrime and Steganography Resources'. <http://www.forensics.nl/digital-water-marking.htm>. accessed on 10/10/2017.

⁵⁶*Ibid.*

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹*Ibid.*

⁶⁰*Ibid.*

It must be pointed out that these technical enforcement mechanisms discussed above can only be validly applied with the requisite legal backing and of course the technological know-how. It is unfortunate that the Nigerian situation is bereft of both. It cannot therefore be gainsaid that there is a serious need for positive efforts for Nigeria to join the legion of developed countries in making use of the above discussed mechanisms.

7. Technological Enforcement of Copyright and Access to Information

It is worthy to note that by the express provision of the Berne Convention, authors of literary and artistic works protected by the Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.⁶¹ Such rights are also conferred on authors of dramatic, dramatico-musical and musical works.⁶² However, it shall be a matter for legislation in the countries of the member States of the Berne Convention to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁶³ This provision actually laid the foundation for fair dealing as codified in the Acts under consideration. This is also supported by the provisions of the Convention which encourages free uses of works.⁶⁴ Thus, it can safely be inferred that not all acts of circumventions that will amount to infringement of Copyright. Member States incur no obligation to prohibit circumventions that allow the user to exploit a work that is already in public domain; or to engage in an act authorized by the right owner; or that allows the user to engage in a non infringing act; or copying a work for purposes endorsed by the relevant provisions of the Convention.⁶⁵ In line with the Berne Convention and other Treaties/Instruments on Copyright, most States of the world have domesticated the provisions prohibiting circumvention of technological protection measures. For instance, the Nigerian Act confers on the Nigerian Copyright Commission, the authority to prescribe any design, label, mark, impression or any other anti-piracy device for use on, in, or in connection with any work in which Copyright subsists.⁶⁶ The Commission shall exercise these powers with the consent of the Minister charged with the responsibility for Culture.⁶⁷ The Act also prohibits the selling, renting or offering for sale, rent or hire, any work in contravention of the prescription made under the Act.⁶⁸ It makes such acts offences punishable on conviction with an imprisonment for a term not exceeding twelve months, or both fine and imprisonment.⁶⁹ The Act further prohibits the importation into Nigeria, or being in possession of any anti-piracy device, or any machine, instrument or other contrivance intended for use in the production of the anti-piracy device.⁷⁰ The Act renders such a person liable upon conviction to a fine not exceeding Five Hundred Thousand Naira or imprisonment for a term not exceeding five years, or to both such fine or imprisonment.⁷¹ The Act also bars any person from being in possession of, or reproducing or counterfeiting any anti-piracy device without the consent of the Nigerian Copyright Commission and renders such an offender upon conviction to a fine of Fifty Thousand Naira or a term of imprisonment not exceeding five years, or to both such fine and imprisonment.⁷²

It is submitted that the Nigerian Act does not make ample provision outlawing anti circumvention devices. This encouraged piracy until the Cybercrimes Act was signed into law in 2015. This Act prohibits unlawful access to a computer system; acts hindering the functioning of a computer system by imputing, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or any form of interference with its intended purpose.⁷³ It bars all manner of computer related forgery, fraud, theft of electronic devices, altering or

⁶¹ Article 9 Berne Convention for the Protection of Literary and Artistic Works, 1896.

⁶² *Ibid.* Article 11.

⁶³ *Ibid.* Article 9 (2).

⁶⁴ *Ibid.* Articles 10

⁶⁵ *Ibid.*

⁶⁶ C.R.A.N. Section 12 (1).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* Subsection (2).

⁷⁰ *Ibid.* Subsection (3).

⁷¹ *Ibid.*

⁷² *Ibid.* Subsection (4).

⁷³ Cybercrime (Prohibition, Prevention, ETC) Act 2015, Sections 6 (1) & 8.

forgery of electronic signature etc.⁷⁴ It is submitted with greatest respect that though the provisions of this Act contain fairly robust provisions that make it an offence to use or make available ‘any devices primarily designed to overcome security measures in any computer, computer system or network’,⁷⁵ It is crystal clear that this Act is not a Copyright Legislation, but a criminal law which operates to curb cybercrime offences flourishing in Nigeria. It will therefore not make much impact as far as Copyright is concerned.

In India, the use of technological measures used by Copyright owners to protect their rights in the works and the possible circumvention of such measures were not addressed by any legislation until the Indian Copyright Act was amended in 2012.⁷⁶ This amendment introduced a new section⁷⁷ which provides for the protection of technological measures used by Copyright owners.⁷⁸ Thus, any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Indian Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years, and shall be liable to fine.⁷⁹ However, such prohibition shall not prevent the doing of anything for a purpose not expressly prohibited by the Act.⁸⁰ The Act provides that any person facilitating circumvention measure for purposes of infringing the Copyright in the work shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated.⁸¹ The Act exempts a person from liability if he does anything necessary to conduct encryption research; or if he is conducting any lawful investigation; or he is doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or he is doing anything necessary to circumvent technological measures intended for identification or surveillance of a user, or taking measures necessary in the interest of national security.⁸² Thus, circumvention of anti-piracy devices is allowed in India for purposes of fair use. However, unlike in Nigeria, there is nobody or institution empowered by the Indian Act to prescribe any anti-piracy device to be used in India. It will therefore work hardship to fair users of the work who may not access the work as a result a sophisticated anti-piracy devices used on the works by rights owners.

It should be noted that by the wordings of the Act, it is only the circumvention of an effective technological measure applied for purposes of protecting the work from infringement that will amount to an offence.⁸³ It is further noted that the Indian Act does not contain any provision in relation to the importation of materials that are capable of circumventing any anti-piracy device, machines or other contrivances into India, or being in possession of any such circumventing device or machine. It does not also provide for the consequences of such acts, or any punishment attached thereto. This may be ‘a grave oversight’ on the part of the Indian legislators. An Immediate amendment is therefore suggested to bring the Act in conformity with International standards.

It is noted that unlike the Nigerian Copyright Act, the Indian Act adequately protects right management information and even renders an offender punishable upon conviction to a term of imprisonment not exceeding

⁷⁴*Ibid.* Sections 13-17.

⁷⁵ The U.S. Chamber International IP “Infinite Possibilities”, February 10, 2016. <http://uschamber.com/event/intl...> accessed on 29th August, 2017.

¹³⁷ Digital Millennium Copyright Act, 1998, hereinafter referred to as ‘D.M.C.A.’

¹³⁸ *Ibid.* Section 1201(a)(1).

¹³⁹ *Ibid.* Subsection (2).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* Paragraph (b).

⁷⁶ Hereinafter referred to as ‘C.R.A.I.’.

⁷⁷ C.R.A.I. Section 65A.

⁷⁸ C.R.A.I. Section 65.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* Subsection (2).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

two years.⁸⁴The Act imposes fine on any person who knowingly removes or alters any rights management information without authority, or distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority.⁸⁵ Any breach of the section entitles the Copyright owner to seek civil reliefs against the infringer as provided under the Indian Act.⁸⁶ The scope of this provision seems to be very broad because the acts of access control circumvention are also outlawed even if undertaken for control purposes, such as fair use.⁸⁷ The Act requires that the knowledge of the infringer that the work he deals on has been removed or altered without the authority of the owner of the Copyright must be proved by the prosecution.⁸⁸

It is a well known fact that the Indian Act allows fair use of technologically protected works. It is however submitted that without the establishment of any regulatory body in relation to the protection of technological measures renders the idea of technical enforcement and the provisions relating thereto useless. It is therefore suggested that the Indian Act be amended to appoint a body that will be charged with the responsibilities of prescribing the anti-piracy devices to be used in India; and also to define what the Act means by the phrase ‘in the interest of National security’. This is because if this term remains undefined, there will be an upsurge of illegal circumvention of anti-piracy devices under the guise of national security.

It is submitted that the provisions of the Nigerian Acts on anti circumventive devices are faulty in that they do not provide for the use of effective anti piracy devices as is the case with the Indian Act. Apart from empowering the Nigerian Copyright Commission with the power to prescribe the types of anti piracy devices to be used in Nigeria, the Act does not mention or prescribe the types of anti piracy devices to be used in Nigeria. Till date, the commission has not prescribed any form of anti piracy devices pursuant to the provisions of the Nigerian Act. Worst still, the Nigerian Act’s provisions on the use of anti piracy devices do not contemplate fair use of works protected with technological protective measures. This will obviously inhibit access to such protected works and in turn, kill creativity. It is further submitted that the Indian Act is a best articulated legal instrument for the protection and enforcement of copyright through technological devices in that it adequately protects the public interest right of fair use of technologically protected work. It is therefore suggested that the Nigerian Act be amended to incorporate the laudable provisions of the Indian Act in relation technological protective measures if Nigeria is to totally eradicate piracy emanating from anti circumvention of technical devices.

8. Conclusions and Recommendations

Having examined the concept and origin of Copyright, the conflicting interests of Copyright owners and the general public; as well as the protection and enforcement of these interests, it is concluded that the Copyright Act of Nigeria and other related Instruments operating in Nigeria have not done enough to protect Copyright and interests attached thereto. It is also concluded that the use of technical measures to enforce Copyright protection in Nigerian is restrictive of public access to copyrightable works in that these measures do not admit of fair use in of protected works. Moreover, these Instruments considered failed neither prescribed the type of anti piracy devices to be used to protect works, nor mention the circumventive devices that are outlawed by the law. Above all, most Nigerians lack copyright education. Even Copyright Owners are not conversant with use of technological protective measures.

There are a good number of steps that could be taken to totally eliminate Copyright infringement in the jurisdictions considered. A strict adherence to the recommendations discussed below will help a lot in achieving a holistic enforcement of Copyright by striking a balance between the conflicting interests of authors

⁸⁴*Ibid.* Section 65B.

⁸⁵*Ibid.*

⁸⁶*Ibid.* Proviso to Section 65 B.

⁸⁷*Ibid.*

⁸⁸*Ibid.*

and those of the general public. It is recommended that the Copyrights Acts of the jurisdictions considered be amended to fully implement the provisions of World Intellectual Property Organization Obligations and to create strong enforcement mechanisms as required by the World Trade Organization. Tough anti-piracy provisions should also be introduced into the Act. Most importantly, the Amended Acts should authorize fair use of technologically protected works. There is need to introduce a Copyright Enforcement Units as a department in each of the Law Enforcement Agencies in Nigeria such as the Police, International Police, Civil Defence Corps, the Customs Service, State Security Services, the Army, Navy, Air Force, etc. This will ensure that all hands are on deck in combating Copyright violation. Nigeria is a very large country and the most populous nation in Africa. It is believed that Copyright violators are in all the nooks and crannies of Nigeria in their numbers. It is therefore necessary to establish branch offices of the Nigerian Copyrights Commission in the Headquarters of all the Local Governments in Nigeria. Adequate Copyright awareness should be created to carry the Nigerian populace along. The social measures to be adopted include the enlightenment and awareness campaigns to the grass root level. This is achievable through commercial ringlets and advertisement in televisions and radios. There should also be an improved public education of the concept, nature and protection of Copyright through seminars, workshops, conferences, radio and television broadcasts, and by the introduction of Copyright as a course in the curricula of Primary, Secondary and Tertiary Institutions. Owing to the intricacies associated with Copyright cases, the Federal Government should set up Copyright Court in the country in the manner adopted by the Nation Industrial Courts in cases involving labour law. By doing so, only judicial officers who are versed in the field of Intellectual Property, especially Copyright should be appointed judges of the Copyright Courts. It is also recommended that Regional and International Copyright Courts should be established to tackle Copyright infringement at the international plane.