

**THE CONCEPT OF 'ORIGINALITY' UNDER THE NIGERIAN
COPYRIGHT LAW AND LITERAL DEFINITION OF 'ORIGINAL':
AN OVERVIEW**

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Abstract

Copyright as an Intellectual Property protects not just the creations and expressions of mind related to original Literary, Dramatic, Musical and Artistic works but also audio visuals and SoundRecordings. It is used to ascribe ownership and control of the rights to the use and distribution of certain works of creative expression, including, but not limited to, books, video, motion pictures and computer programs. Historically, Copyright law was enacted to balance the desire of culture to use and reuse creative works, which gave rise to the concept of "derivative work", against the rights of authors of art, literature, music and the like to monetize their work by controlling who can make and sell copies of the work. In a nutshell, copyrights only protect works which are ascribed the status of "Original work". The term 'originality' or 'original work' under the copyright is often confused and alluded to 'novelty' and as such, to most, any intellectual work which is not new is liable for an action for copyright infringement. The objective of this paper is to provide better understanding of the concept of Originality as a requirement in copyright protection in Nigeria. To better understand the concept, this paper adopted a theoretical framework by looking at other literature on the subject as basis for our findings and recommendations. Our findings reveal that the main reason for this confusion is that there is no express provision under the Act which defined the definition of the concept Originality as such, recourse is often had to Judicial definition of the concept, which sadly, might not be known to the 'Ordinary man' in the eyes of the law. It is therefore our recommendation that the Copyrights Act should be amended to accommodate the meaning of the 'Originality' or 'Original Work' as protected by the Act.

Keywords: Copyrights, Originality, Original Work, Copyrights Act

1.1 Introduction

Copyright is a fragment of Intellectual Property Law that primarily deals with the protection of the rights of an author over his/her creative works. Copyrights laws aim to give some sort of protection and recognition of the intellectual creative efforts of an author. It basically protects the original expressions of a creative work. Essentially, the purpose of copyright laws is essential to help these ingenuous, resourceful and innovative persons reap maximum profit and benefit from their creative works¹. It is worthy of note that ideas and creative works eligible to be protected under the Copyrights Law must be in definite and tangible form. Under the various Copyrights legislations, the words “Originality under the Intellectual Property law” and “Original Work in ordinary parlance” are both different and distinct concepts which are alluded different definitions. A firm grasp and understanding of these concepts helps to know if and when an action for Copyrights infringement can arise. Hence, it has been stated that eligibility to copyrights protection rests mainly on the requirement of originality which arguably is the main force in the creative process of all arts². Before a work can qualify for Copyrights Protection, it must satisfy the originality requirement in the sense of the contribution of the author’s independent creative skill and labour³.

1.2 Scope of Copyright

The term copyright has no general and definitive definition. Many authors, jurists, legal luminaries and even Court have defined Copyrights differently. The main Copyrights legislation in Nigeria, the Copyright Act, 2004⁴ (as amended) did not define copyright but merely described it and which works qualify for Copyrights protection⁵. Copyright can be defined as the right to prepare and distribute copies of an intellectual work without let or hindrance from others⁶. Copyrights was defined by Black’s law dictionary⁷ as the right of

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¹ Temitope Oloko, “Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective”, NAUJILJ 13 (1) 2022, pg. 112

² K.I Adam and I.A Yusuf, “Originality in Copyright and the Debate on Protection of Traditional Knowledge: A View on Nigerian Law”, KIU Journal of Social Sciences ISSN:1996902-3;3(1) @ 293.

³ J. H. Mike and G. Uloko, *Modern Approach to Intellectual Property Law in Nigeria*, 2nd Ed.(Princeton&Associates Publishing Co. Ltd).

⁴ The Copyrights Act, Cap C28 LFN, 2004. It was recently amended in 2022. (as amended).

⁵ Section 1(2) of the Copyrights Act, provides that “subject to the provisions of this section, the following works shall be eligible for copyright..”. it then went ahead to list the works which qualify for copyrights protection.

⁶ J.O. Odion and N.E.O. Ogba, *Essay on Intellectual Property Law: Copyright, Trademarks, Patents, Industrial Designs*, (Benin: Ambik Press, 2010) p.2

⁷ Bryan Gardner, *Black’s Law Dictionary*, 8th ed

literary property recognized and sanctioned by positive law. An intangible, incorporeal rights granted by statute to the author, originator of specific literary or Artistic productions, is vested for a specific period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them. In **Adenuga vs. Ilesami Press & Sons Ltd**⁸, the Court held that copyright concerning eligible works is the exclusive rights to control do or authorize any of the acts restricted to the copyright owner. Thus it can be stated that that 'copyright is a monopoly of limited duration'⁹, albeit 'unlike most monopolies, it is a legitimate monopoly created by the law and enjoyed by the author of an original work'¹⁰. As earlier stated, the Nigerian Copyright Act did not expressly define the term copyright. However, in its Section 6¹¹, the Copyrights Act provided that copyright in a work shall be the exclusive right to control, the doing of certain acts restricted to the copyright owner. In a nutshell, Copyright can be defined as the right to prepare and distribute copies of an intellectual work without let or hindrance from others¹².

Copyrights protect literary works, artistic works, musical works, sound recordings, audiovisual works, and broadcasts. In Nigerian jurisprudence, the list of copyrightable works is exhaustive. There is no room for addition or subtraction on intellectual properties which are subject to copyright. The provision of Section 2(1) of the Act¹³, which provides for eligible works, is clear. Eligible works simply put means works of copyright which the law will protect¹⁴. Although Section 2(1) of the Act provides for a list of works that will qualify for copyright protection, such protection is not automatically conferred on such eligible works. To qualify for copyrights protection, such works as provided for under Section 2(1) of the Act¹⁵ must meet two essential requirements as provided for under Section 2(2) of the Act. Such eligible work must be in a fixed medium of expression and must satisfy the requirement of originality.

Copyright does not inure in perpetuity. It is conferred for a definite period of time. The duration of copyright granted to eligible and qualified works depends on the specific

⁸ (1991) 5 NWLR pt. 189.

⁹ A Drone, *Treatise on the Law of Property in Intellectual Productions* 2nd ed (London, Butterworths Publishers 2000) 44

¹⁰ H Faga, 'Limits of Copyright Protection in Contemporary Nigeria: Re-Examining the Relevance of the Nigerian Copyright Act in Today's Digital and Computer Age' (2011) 2 NAUJILJ 214

¹¹ Section 6 of the Copyrights Act

¹² J.O. Odion and N.E.O. Ogba, *Essay on Intellectual Property Law: Copyright, Trademarks, Patents, Industrial Designs*, (Benin: Ambik Press, 2010) p.2

¹³ Section 2(1) of the Copyright Act, 2022

¹⁴ F. O. Babafemi, *Intellectual Property: The Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria* (Ibadan: Justinian Books Limited, 2007) p.7

¹⁵ Section 2(2) of the Copyright Act, 2022.

aspect of copyright protected under the Act¹⁶. The philosophy behind copyright work is the reward of industry and talent; coupled with the discouragement of laziness manifested in copying and reproduction of existing works unlawfully¹⁷. Copyright protect only the author's expression of ideas and not ideas themselves¹⁸. Once a work is created, copyright is automatically conferred and its enjoyment and exercise is not subject to any formality. In other words, once a work has been created, it ought to enjoy the protections conferred by copyright without the need to comply with formality such as registration¹⁹

1.3 Originality in Copyrights

As stated earlier, for an eligible work to tap into the protection offered by the copyrights legislation in Nigeria, it must meet two essential requirements, viz, the work must be in a fixed medium of expression and the work must meet the requirement of originality, that is to say, the work must be an original work.

As with the meaning of copyright, the Copyrights Act did not also define originality. It merely provided that a work is required to have an original character²⁰. The requirement for originality entails that sufficient efforts must have been put into the making of the work as to give it an original character²¹.

1.4 Does 'original work' protected under the Copyright Act mean New or novel?

It has been established that for an eligible work to qualify to be protected under the Copyright Act, the work must satisfy the originality requirement, that is to say that, the work is an original work or creation of the author. It is quite easy to confuse the term originality under the copyright and originality in the literal sense of it. The question now is, what then does originality entail? Does it entail that the work must be an original (new or novel) work developed by the author or does original work have another meaning ascribed to it under the copyright protection. Is there any difference between originality in the literal sense of it and originality as a requirement for copyrightability?

To understand the meaning of and distinction (if any) between, originality under the copyright and literal meaning of originality, there is need to answer the above questions posed. Literally, originality has been defined as the ability to think independently and

¹⁶ First Schedule, Copyrights Act

¹⁷ J.O. Odion and N.E.O. Ogba (supra)

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¹⁹ Benson Okwuchukwu Okoro, "Resolving Ownership Rights in the Copyright Works Of Cinematograph Film and Sound Recording in Nigeria" *IJOCLLEP* 2 (2) 2020 @ pg. 100

²⁰ Section 15(a) of the Copyright Act

²¹ GN Okeke & K Uzor, 'An Appraisal of the Protection of Copyright under International Law' (2014) 6 (1) *JL&CR* 11.

creativity or the quality of being novel or unusual which suggests that there is a connection between originality and creativity²².

According to Collins Dictionary²³ original is the first and genuine form of something, from which others are derived; fresh and unusual; novelty. It went further to state that if something such as a document, a work of art or a piece of writing is an original, it is not a copy or later version and the word originality is synonymous to novelty or creativity. Similarly, Cambridge dictionary²⁴ states that, an original as a piece of work such as a painting, etc. is produced by the artist and not a copy. It also defined originality as the quality of being special and interesting and not the same as anything or anyone else. On the other hand, Miriam Webster Dictionary²⁵ defines an original as (a) a work composed firsthand. (b) not secondary, derivative or imitative. (c) being the first instance or source from which a copy, reproduction or translation is or can be made. (d) Independent and creative in thought or action.

From the above definitions of the word original, it can be deciphered that literally, original means a new, primary and first creation of an author and is synonymous to novelty.

Under the copyright law, originality or original work is not synonymous with novelty. Copyright merely requires that to qualify for copyright, the work must be created independently and have at least a degree of autonomous creativity²⁶. The work is original if it owes its origin to the author, that is, it is the result of independent effort, and not the result of copying²⁷. According to the Law Insider, original work means that the text was created by this writer and no one else. It may include original retellings of traditional literature, provided that the words are the author's own²⁸.

1.5 Concept of Originality as a Requirement for Copyrights Protection

For any work which is eligible for the grant of protection under the copyright law to be granted such protection, such work must satisfy the requirement of originality. The Act²⁹ expressly provided that a literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character. Because the Act did not make provision as to what constitutes original

²² K.I Adam and I.A Yusuf, (supra)@ 293.

²³ www.collinsdictionary.com. Assessed 30/08/2024.

²⁴ www.dictionary.cambridge.org assessed 30/08/2024

²⁵ www.miriam-webster.com/dictionary. Assessed 30/08/2024

²⁶ J. H. Mike and G. Uloko, (supra) p. 69

²⁷ www.nolo.com/dictionary/original-work. Assessed 30/08/2024.

²⁸ www.lawinsider.com/dictionary/original. Assessed on 30/08/2024.

²⁹ Section 2(1)(b) Copyrights Act.

character in a work, recourse will be had to judicial decisions and works of legal luminaries who have written on the subject for an in-depth analysis of the concept.

Copyright essentially protects the right to express, not the first to think³⁰. It allows the author to draw upon existing knowledge or artistry and build upon common facts, as long as it bears as an independent creative character³¹. It is concerned with the originality in a work, not the natural raw and unexpressed conceived ideas of the authors or prospective author³².

In *Fraser vs. Thames Television Ltd*³³, Justice Hirst was of the opinion that the idea must have some significant element of originality not already in the realm of public knowledge. The originality may consist in a significant twist or slant to a well-known concept. It follows that for such a work to qualify, the author must have expended some resources intellectually³⁴.

In *University of London Press Ltd vs. University Tutorial Press Ltd*³⁵, while determining on whom copyright over the question paper lies, the court while rejecting the argument of the Defendant that the exam papers lacked originality and so could be freely copied be all, noted that even question papers required a compilation of questions with intelligence and a reasonable consideration. Justice Peterson had this to say;

“...in this connection, the word original does not mean that the work must be the expression of the original or inventive thought. Copyright acts are not concerned with the originality of ideas but with the expression of thoughts and, in the case of literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. However, the Act does not require that the expression is in an original or novel form but that the work must not be copied from another work but should originate from the author. In the present case, it was not suggested that any of the papers were copied...”

The Court went further to explain ‘originality of thought’ thus;

³⁰ S. S. Shikyil and U. J. Nwabueze, *Intellectual Property Law and Practice in Nigeria: An Introduction*, (Jos University Press 2016) p. 67

³¹ J. H. Mike and G. Uloko, (supra), p. 70

³² S. S. Shikyil and U. J. Nwabueze (supra), p. 68

³³ (1984) QB 44.

³⁴ In *Macmillan & Co vs. K&J Cooper* (1924) 40 T.R.L 186 @ 188 (P.C), it was held that for a work to be original, it has to be a product of the author’s labour, skill and capital and not a copy of someone else’s work.

³⁵ (1916) 2 CH. 601 (UK).

“...proved that they had thought out the questions they set and that they made notes for the purposes of the questions they set. The papers they prepared originated from themselves and were, within the meaning of the Act, original...”.

An indepth analysis of the provision of Section 2(1) of the Act suggests that the criterion of originality is not applicable to all works eligible for copyright. It clearly suggests that this originality eligibility applies only to Literary, Musical or artistic works³⁶. The Act suggests that the first three works [literary works, musical works and artistic works] are creative works. They form the core of copyright while the last three [cinematograph films, sound recordings and broadcasts] are derivative works. They are by products of the first three. They are the economic and commercial end of the first three³⁷. According to Oyewunmi³⁸ ‘creative works falling within the first three categories – literary, musical and artistic works are subjected to dual requirements of originality and fixation³⁹. They also need to have connection to Nigeria.

1.6 Conclusion

From the foregoing, it can be deciphered that the concept of originality in the context of copyright is quite different from originality in the literal sense of it. The originality requirement for the protection of copyright essentially deals with the manner in which the work was created and produced by the author.

Although the Copyrights Act did not specifically define what the concept of ‘Originality’ entails, it can be seen that when determining if a work is eligible for copyrights protection, it is immaterial that the work or idea might have been in existence⁴⁰, what the law looks out for is the creative effort of the author and the presentation of such work in a tangible form. The law provides protection of such creativity which is an efficient way of exploiting such work ethically and economically.

It is therefore our recommendation that the Copyrights Act should be amended to accommodate the meaning of the ‘Originality’ or ‘Original Work’ as protected by the Act.

³⁶ J. H. Mike and G. Uloko, (supra), p.73

³⁷ Benson Okwuchukwu Okoro, (supra) pg. 102

³⁸ A.O. Oyewunmi, *Nigerian Law of Intellectual Property*, (Lagos: University of Lagos Press, 2015) p.27. 20 CR

³⁹ Section 1(2) Copyrights Act.

⁴⁰ According to J. H. Mike and G. Uloko, (supra), the law may allow a person obtain a copyright in work identical to an earlier work or identical to another expression so long as the author did not copy from the work either consciously or unconsciously.