



Original Article

## Challenges of Protecting Music Intellectual Property in the Digital New Age in Nigeria

Olariyike Damola Akintoye<sup>1\*</sup>

<sup>1</sup> Kwara State University, P.M.B. 1530, Malete, Nigeria.

\* Author for Correspondence ORCID ID: <https://orcid.org/0009-0009-3019-0371>; email: [riyikeakintoye222@gmail.com](mailto:riyikeakintoye222@gmail.com)

Article DOI: <https://doi.org/10.37284/eajle.6.1.1189>

DatePublished: **ABSTRACT**

26 April 2023

**Keywords:**

*Challenges of Protecting  
Musical Intellectual  
Property in Nigeria,  
Digital New Age,  
Copyright.*

This article examines the challenges the Music Industry faces in the area of protection of its intellectual property. The protection of a country's intellectual property should be the priority of all responsible governments. In Nigeria, the Copyright Act 2004 (Cap C28 Laws of the Federal Republic of Nigeria (LFN) used to be the principal legislation for the protection of innovative works. However, on March 17, 2023, the Nigerian President, Major General Muhammadu Buhari (retd.) signed the Copyright Bill into law. The House of Assembly passed the Bill for an Act to Repeal the Copyright Act 2004 and enact a new Copyright Act in July 2022. The purpose of this paper is to identify the ways the new Act can better protect the rights of musicians and ensure just rewards and recognition for their intellectual efforts. The paper found out that the new Act intends to, among others, expand the rights of authors, raise the sanctions of criminal infringements and address the challenges posed by digital and online use of copyright works. The paper recommends, among others, the creation of strong enforcement mechanisms so that the new Copyright Act 2023 can achieve the purpose for which it was enacted which are to guard intellectual creations against all forms of infringements and to boost the nation's creative economy in order to make it more globally competitive in the digital new age.

### APA CITATION

Akintoye, O. D. (2023). Challenges of Protecting Music Intellectual Property in the Digital New Age in Nigeria. *East African Journal of Law and Ethics*, 6(1), 15-29. <https://doi.org/10.37284/eajle.6.1.1189>

### CHICAGO CITATION

Akintoye, Olariyike Damola. 2023. "Challenges of Protecting Music Intellectual Property in the Digital New Age in Nigeria." *East African Journal of Law and Ethics* 6 (1), 15-29. <https://doi.org/10.37284/eajle.6.1.1189>.

### HARVARD CITATION

Akintoye, O. D. (2023) "Challenges of Protecting Music Intellectual Property in the Digital New Age in Nigeria.", *East African Journal of Law and Ethics*, 6(1), pp. 15-29. doi: 10.37284/eajle.6.1.1189.

### IEEE CITATION

O. D. Akintoye. "Challenges of Protecting Music Intellectual Property in the Digital New Age in Nigeria.", *EAJLE*, vol. 6, no. 1, pp. 15-29, Apr. 2023.

## MLA CITATION

Akintoye, Olariyike Damola. "Challenges of Protecting Music Intellectual Property in the Digital New Age in Nigeria." *East African Journal of Law and Ethics*, Vol. 6, no. 1, Apr. 2023, pp. 15-29, doi:10.37284/eajle.6.1.1189.

## INTRODUCTION

Nigeria, like other developing or developed countries of the world have copyright laws whose aim is to guarantee the protection of citizens' right over their creative work. Nigeria is however a country with an array of good laws which are hardly implemented or enforced.<sup>1</sup> Most of the time, these laws are there on paper, but there are no proper enforcement mechanisms put in place to enforce them. One good enforcement mechanism is the application of punishment for whosoever refuses to abide by laid down laws. Many Nigerians do not obey laid down laws because of weak enforcement mechanisms which allows many to go away without obeying rules and regulations.<sup>2</sup> Agu emphasised that there are challenges in enforcing intellectual property rights in the West African States, and these have a devastating attendant effect on the economy in the region.<sup>3</sup> In view of the fact that a new Copyright Act has just been passed into law, the paper will compare and contrast the new and the repealed Act to identify some of the changes or improvements introduced by the new Act and to offer suggestions on how the country can benefit maximally from the new law.

Any nation wishing to develop its creative sector must do everything to protect the intellectual property of its creative minds. The recognition and protection of the rights of an inventor over his creative work will not only serve as an incentive to come up with better ideas and inventions and a higher rate of productivity but will also boost the nation's creative economy by way of generating higher revenue to the government. In Nigeria, The President, Major General Muhammadu Buhari (retd.) has signed the Copyright Bill recently passed by the National Assembly into Law<sup>4</sup> to replace the erstwhile Copyright Act 2004<sup>5</sup> which used to be the principal legislation for the protection of intellectual property.

The principal objectives of the new Copyright Act as outlined in its Section 1, are to:

*Protect the rights of authors and ensure just rewards and recognition for their intellectual efforts; provide appropriate limitations and expectations to guarantee access to creative works; facilitate Nigeria's compliance with obligations arising from relevant international copyright treaties and conventions and; enhance the capacity of the Nigerian Copyright*

<sup>1</sup> Justice Emmanuel Agim (2023) delivering the lead judgement in the case brought by three state governments - Kaduna, Kogi, and Zamfara, against the Federal Government at the Supreme court seeking an order invalidating the Central Bank of Nigeria's (CBN) recent banknotes redesign, declared that, "the rule of law upon which our democratic governance is founded becomes illusory if the President of the country or any authority or person refuses to obey the order of courts" Premium Times, Editorial: CBN, the rule of law and Nigerian democracy, March 11, 2023 <[premiumtimesng.com](https://www.premiumtimesng.com)> accessed 20 April 2023

<sup>2</sup> M M Akanbi and Ajepe Taiwo Shehu, 'Rule of Law in Nigeria' *Journal of Law, Policy and Globalization* Vol.3, 2012 <[www.iiste.org](https://www.iiste.org)> accessed 21 April 2023

Ngozi J. Udombana, 'Addressing the Implementation Challenges of Institutional Obligations and Reporting Requirements under the Nigerian Freedom of Information Act 2011' *Beijing Law Review* Vol.10 No.5, December 2019 accessed 21 April 2023

Ladan Muhammed , 'An Overview of the Child Rights Act, 2003, November 15, 2021 Available at SSRN <https://ssrn.com/abstract=4015384> or <https://dx.doi.org/10.2139/ssrn.4015384> accessed 21 April 2023

<sup>3</sup> Chudi C. Nwabachili, Chioma O Nwabachili and Helen U. Agu, 'The Challenges of Enforcing Intellectual Property Rights across the Economic Community of West African States: The Nigerian Experience' *Journal of Law, Policy and Globalisation*, Vol. 34, 2015 accessed 20 April 2021

<sup>4</sup> The new Copyright Act 2022 was passed on Wednesday 6<sup>th</sup> April 2022 and assented by the President on Friday 17<sup>th</sup> March 2023. The Act repeals the Copyright Act, Cap C28, Laws of the Federation of Nigeria and enact the Copyright Act 2022 to provide for the regulation and administration of copyright.

<sup>5</sup> Cap C28 Laws of the Federation of Nigeria (LFN), 2004

*Commission for effective regulation, administration, and enforcement.*<sup>6</sup>

In addition to the above, the new Act expands the rights of authors, raises the sanctions for criminal infringements and more adequately addresses the challenges posed by the digital and online use of works. The Act also provides specially for the visually impaired and print-disabled persons to have access to learning and reading materials in accessible formats.

The new Act like its predecessor, recognises various kinds of innovative and intellectual property works, namely: literary works, musical works, artistic works, cinematography films, sound recordings and broadcasts.<sup>7</sup>

This article focuses on the Copyright Act and the Challenges of protecting musical works against copyright infringement in the digital new age in Nigeria. The focus is on music as it is a unifying factor for different cultures and races.<sup>8</sup> Music has also been noted as not a static art, as it has the ability to revolve to keep up with the changes and reflect the general situation in society. In addition, the music industry is being focused on because according to the international business publication Stears, the industry generates over \$2 billion in

revenue per year, making it one of the largest music industries in the world.<sup>9</sup>

## COPYRIGHT AND THE MUSIC INDUSTRY

Oyewumi in her book<sup>10</sup> quoting Copinger and Skone James<sup>11</sup> described copyright as “one of the three branches of intellectual property law” which gives the owner the exclusive right to authorise or prohibit certain uses of his work by others” The Nigerian music industry is one of the biggest music industries in Africa. According to a report by Price Waterhouse Coopers (PWC), Nigeria was expected to have the fastest-growing entertainment and media industry in the world between 2017 - 2021.<sup>12</sup> The Nigerian music industry is a massive economic force as it is one of the largest music industries in the world.<sup>13</sup> Revenue generated from Nigerian Music increased from \$26 million in 2014 to \$34 million in 2018 and by 2023, the revenue is projected to amount to \$44 million.<sup>14</sup> Furthermore, according to a 2022 report by the International Federation of the Phonographic Industry, there was a 9.6% growth in streaming in sub-Saharan Africa in 2021.<sup>15</sup> By 2025, Africa is expected to generate up to \$500 m in streaming revenue, with Afrobeats (which has its hub in Nigeria) as the torchbearer.<sup>16</sup>

One of the main challenges faced by any music industry is the invention of new technologies that make access to music and musical works easier. The

<sup>6</sup> Section 1, Nigeria Copyright Act, 2022.

<sup>7</sup> The Copyright Act 1988 Cap C28, Laws of the Federation of Nigeria (LFN) 2004 [“Copyright Act”].

<sup>8</sup> Georgina Barton, *The Relationship Between Music, Culture, and Society: Meaning in Music: Implications for Classroom Practice in the book; Music Learning and Teaching in Culturally and Socially Diverse Contexts* (pp.23-41) 2018

<sup>9</sup> Adebayo Adebisi, ‘Nigerian Music Industry is the Second Best-Performing Entertainment and Media Consumer Market Globally (Stears Business, 1 September 2022) <[www.pulse.ng](http://www.pulse.ng)> accessed 05 January 2023

<sup>10</sup> Adejoke O. Oyewumi, *Nigerian Law of Intellectual Property* (University of Lagos Press and Bookshop Ltd 2015) 21

<sup>11</sup> G. Copinger & Skone James on Copyright (15<sup>th</sup> Ed, London: Sweet & Maxwell, 2005)1.

<sup>12</sup> Deborah Bothun and Brad Silver, ‘Perspectives from the Global Entertainment and Media Outlook 2017–2021’ (PWC,

8 June, 2017) <https://www.pwc.com/gx/en/entertainment-media/pdf/outlook-2017-curtain-up.pdf> accessed 05 January 2023.

<sup>13</sup> Premium Times Nigeria, *how big is the Nigerian Music Industry?* 16 Feb 2023 <<https://www.premiumtimesng.com>> accessed 10 March 2023.

<sup>14</sup> Marie Charlotte Götting, ‘Music industry revenue in Nigeria 2014-2023’ (Statista, 8 January, 2021) <https://www.statista.com/statistics/939157/nigeria-music-industry-revenue/#statisticContainer> accessed 05 January 2023.

<sup>15</sup> IFPI, ‘IFPI Global Music Report: Global Recorded Music Revenues Grew 18.5% In 2021’ (IFPI, 22 March 2022) <https://www.ifpi.org/ifpi-global-music-report-global-recorded-music-revenues-grew-18-5-in-2021/> accessed 05 January 2023.

<sup>16</sup> Ibid.

irony of this is that the exponential rate at which the music industry has been rising in recent years is a result of these newly introduced technologies. Therefore, even though the introduction of technological innovations is very important to growth and development, the fact still remains that it has also brought about some negative impacts, particularly on the music industry. These negative impacts are in the area of governance and administration, particularly as it relates to law-making and enforcement.

In practice, the law never seems to meet up to fully address the various activities that can be done through the internet. Some have argued that digital technology has made copyright law so obsolete that a different kind of law is required to govern it.<sup>17</sup> Major companies representing the entertainment industry have instituted actions against these technology companies. Their argument is that the entertainment industry will crumble if copyright laws are not strengthened to address the threat of new technologies.<sup>18</sup> On the other hand, some are of the opinion that since technological developments give room for cultural exchange, there is no need for increasing the scope of the law as it will only amount to a hindrance to technological progress.<sup>19</sup>

According to Depoorter, technology by creating rapid and unpredictable change, has two major effects on copyright law: legal uncertainty and legal delay.<sup>20</sup> According to him, legal uncertainty is caused by the general social and economic ramifications that are unknown whenever a new technology is introduced.<sup>21</sup> This, in turn, results in legal delay because the dynamic and unpredictable nature of these technological advancements creates

uncertainty, which postpones the process of enacting new laws to address the changes.

Technological innovations make it difficult to apply the existing legal definitions and make the classification of rights to be ambiguous. However, some have argued that while the internet and technological innovations increase the tendency of infringement, the nature of infringements remains the same as the kinds in existence prior to the advent of digital technology.<sup>22</sup> Therefore, they are of the opinion that there is no particular need to change the law since it does not render existing laws obsolete. In other words, although the advent of digital technology has made piracy easier, the nature of piracy is basically as they were before the advent of digital technology. While this argument might seem logical, it is difficult to agree with the submission that the changes do not make the laws obsolete, as the case seems to be the opposite in reality.

In this 'digital age', an influx of technological innovations has impacted negatively on the music industry. This article will examine some issues currently facing the Nigerian music industry, such as the relevance and applicability of the Nigerian copyright laws in the current digital new age and whether these laws have succeeded in curbing the theft of intellectual property in the music industry in Nigeria.

This article will therefore analyse the legal/administrative framework put in place for copyright protection of musical works in Nigeria. It will look at the practical effects of these laws and their ability to ultimately influence the behaviour of people with respect to the use of musical works. The article will also discuss the shortcomings in these

<sup>17</sup> John Perry Barlow, 'The Economy of Ideas' (*Wired*, 1 March 1994) <<https://www.wired.com/1994/03/economy-ideas>> accessed 20 January 2023.

<sup>18</sup> *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* (2005) 545 US 913; *Eldred v Ashcroft* [2003] 537 US 186; *N.Y. Times Co v Tasini* (2001) 533 US 483; *Re Verizon Internet Services, Inc* (2003) 240 F2d 24.

<sup>19</sup> Jessica Litman, 'Sharing and Stealing' (2004) 27 HCELJ 1,37.

<sup>20</sup> Ben Depoorter, 'Technology and Uncertainty: The Shaping Effect on Copyright Law' (2009) 157 UPLR 1831 <http://ssrn.com/abstract=1420059> accessed 20 January 2023.

<sup>21</sup> *Ibid*.

<sup>22</sup> M J Meurer, 'Price Discrimination, Personal use and Piracy: Copyright Protection and Digital Works' (1997) 44 BLR 845.

legislations and based on the findings, the final part will discuss potential ways of improving the legal and administrative framework for protecting musical works in Nigeria. This will include a recommendation for the creation of strong enforcement mechanisms and a review of the Nigerian Copyright Act to meet up with the new media and advancement in digital technology.

### Copyright Infringement in the Nigerian Creative Sector

Copyright basically means to ‘copy rightly’. The Nigerian Copyright Act which is the principal legislation on copyright in Nigeria fails to give a descriptive definition of the term ‘copyright’ in its definition section. However, section 6 of the Act states that copyright in work shall be the exclusive right to control the doing of certain acts in Nigeria in respect of that work. In the United Kingdom, a somewhat different approach is taken in this regard. The relevant statute defines copyright as a property right in certain works.<sup>23</sup>

The court in *Adenuga v Ilesanmi Press and Sons (Nig) Ltd* held that copyright is the exclusive right to control, to do or authorise the doing of any of the acts restricted to the copyright owner.<sup>24</sup> Many legal scholars in the field of copyright law have given several definitions which are somewhat similar to the definition given under the Acts. Newcombe gave a very basic definition when he said, ‘copyright is in its practical acceptance the right of producing copies’.<sup>25</sup> Cornish and Llewelyn have a

very similar view, they see copyright as the right given against copying.<sup>26</sup>

The Copyright Act makes provisions for different categories of works which will be eligible for copyright.<sup>27</sup> They include; literary works, musical works, artistic works, cinematograph works, sound recordings and broadcasts. This paper is particularly concerned with musical works.

In the Copyright Act, musical works are defined as musical compositions, irrespective of musical quality, including works composed for musical accompaniment.<sup>28</sup> This definition is broad as it includes the combination of sounds that make up the music as well as the lyrics of songs.<sup>29</sup> Similarly, Olueze says that a musical work may be two-pronged, that is, the song itself and the accompanying instrumentals.<sup>30</sup> However, J. O Asein says that musical works or compositions should be distinguished from lyrics in that the lyrics only qualify as literary works.<sup>31</sup> He relied on the English case of *Chappell & Co Ltd v Redwood Music Ltd*,<sup>32</sup> where the House of Lords held that the music and lyrics of a song each had its own separate copyright.

Consequently, a song might have two copyrights, one in the music and one in the words of the music, making it possible for the two copyrights to exist in two or more separate persons, especially when separate persons are involved in writing the lyrics and the music.<sup>33</sup> The lyrics however, will be regarded as literary works, except they are accompanied by musical notations.<sup>34</sup>

<sup>23</sup> Copyrights, Designs and Patents Act, 1988, s 1(1).

<sup>24</sup> (1991) 5 NWLR 189.

<sup>25</sup> E L Newcombe, ‘Copyright’ (1902) 1 CLR 377.

<sup>26</sup> W Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (Sweet and Maxwell 2007) 8.

<sup>27</sup> Copyright Act, s 1.

<sup>28</sup> Copyright Act, s 51.

<sup>29</sup> Adejoke Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press 2015) 29.

<sup>30</sup> I M Olueze, *Nigerian Copyright Law*. (Maglink International 1998).

<sup>31</sup> J O Asein, *Nigerian Copyright: Law & Practice* (2<sup>nd</sup> edn, Books and Gavel Ltd 2012) 59.

<sup>32</sup> (1981) R P C 337.

<sup>33</sup> M I Obianuju Nwogu, ‘Copyright Law and the Menace of Piracy in Nigeria’ (2015) 34 JLPG 113.

<sup>34</sup> M J Umaru, ‘Nature, Subsistence and Scope of Copyright’ in J O Asien and E S Nwauche (eds), *A*

The fact that a work falls under the type of works referred to in section 51 of the Copyright Act (in defining musical works) does not automatically confer copyright protection on such work. For copyright to subsist in a musical work, certain elements and factors must be established. They are the originality of the work, fixation of the work and a qualifying factor connecting the work to Nigeria.<sup>35</sup>

Generally, all works protected by copyright enjoy both economic and moral rights. The economic rights come in the form of granting the author exclusive rights to control the exploitation of the work.<sup>36</sup> The moral rights protect the integrity of intellectual creations (*droit au respect de l'oeuvre*) and give him the right to claim authorship (*droit de paternite*) as an extension of the author's personality.<sup>37</sup> Section 6(1)(a) of the Copyright Act provides a list of acts in which the owner of the copyright has the right to do or authorise the doing of such acts in respect of literary and musical works. These acts include; reproducing the work in any material form; publishing the work; performing the work in public; producing, reproducing, performing or publishing any translation of the work; making any cinematograph film or a record in respect of the work; distributing to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement; broadcasting or communicating the work to the public by a loudspeaker or any other similar device; making any adaptation of the work; and to do in relation to a translation or an adaption of the work, any of the above-specified acts in relation to the work.

The general rule is that ownership of the copyright in musical work vest initially in the author even if such author was paid by someone else to create the

work, except a written contract stipulates otherwise.<sup>38</sup> This means that, provided there is a written contract to that effect, ownership and authorship may be vested in different persons in respect of the same work. It is important to make the distinction between the author and the owner of the protected work (especially when they are vested in different persons) because it is the owner of the copyright that can institute an action for infringement of copyright.<sup>39</sup>

Section 15 of the Copyright Act stipulates acts which constitute an infringement of copyright and this essentially involves carrying out one or more of the rights that are exclusive to the owner or licensee of the copyright without the owner/licensee's consent.

The challenges faced in protecting musical works against infringement in Nigeria are discussed below.

## Copyright Infringement in the Nigerian Music Industry

### *Challenges with Defining the Scope of Protection for Musical Works*

The Copyright Act permits the unauthorised use of small portions of works, provided that sufficient effort was expended in doing the work.<sup>40</sup> For example, the court in *Ladbroke (Football) v William Hill*<sup>41</sup> held that copyright subsisted in the respondent's work which was an arrangement of the compilations of an existing work prior to the advent of digital technology. With the advent of digital technologies such as compression formats, MP3 file formats, Digital Audio workstations and sampling, protected works can be easily manipulated and

*Decade of Copyright in Nigeria* (Nigerian Copyright Commission 2002).

<sup>35</sup> Copyright Act, ss 1-5.

<sup>36</sup> Bankole Sodipo, *Copyright Law: Principles, Practice and Procedure* (2<sup>nd</sup> edn, Swan Publishing 2017) 154-155.

<sup>37</sup> *Ibid.*

<sup>38</sup> Copyright Act, s 10.

<sup>39</sup> *Distinct Universal Ltd v Bonag Nigeria Ltd* (1997-2003) 4 IPLR 437.

<sup>40</sup> Copyright Act, s 1(2)(a).

<sup>41</sup> (1964) 1 WLR 273.

sampled with little or no effort.<sup>42</sup> It has been said that with musical works, where there is a modification of the original music, it is a question of degree as to whether such modification is sufficient enough to entitle the work to copyright protection.<sup>43</sup>

In music, infringement can come in different forms such as sampling of a song, beat, the use of song lyrics, or copying a music video.<sup>44</sup>

Some might argue that the law already provides that the consent of the copyright owner needs to be sought when making an adaptation of a pre-existing work and therefore the Act of sampling should be considered as an infringement.<sup>45</sup> When digital technology and sampling were just being used, artists whose music was being sampled had little or no care for the infringing Act. However, when music incorporating samples became very commercial, sampled artists began to take legal actions.<sup>46</sup> The legality of music sampling then became an important issue in copyright law. Some have argued that the court has to take into consideration the quality and quantity of intellectual property taken.<sup>47</sup>

There is no doubt that the law protects compilations and arrangements of pre-existing works, such as making samples of different works and combining them into a single body of work.<sup>48</sup> However, with these new technologies, different kinds of works such as pictures, videos and music can be combined

into a single file format.<sup>49</sup> Consequently, the challenge is that the law does not state how to determine authorship or share royalties in these kinds of work.

Section 1(2)(b) of the Copyright Act posits that a musical work shall not be eligible for copyright unless the work has been fixed in a definite medium of expression from which it can be perceived, reproduced, or otherwise communicated either directly or through any machine or device.

The interpretation of this section in this internet and information age may pose some problems, particularly with regard to the permanence of the medium in which the work is fixed. As a result, it has been recommended that, since the whole point of the requirement of fixation was to serve as proof of creation then temporary fixations of works (like posts on social media and websites) should be deemed to meet the requirement of fixation.<sup>50</sup>

However, Adebambo Adewopo does not agree with this. He is of the opinion that since the requirement of fixation secures evidential value for the protected work and since the kind of fixation required to vest protection is well beyond the transient projection, the medium in which it is fixed must allow for some sustained presence of permanent nature.<sup>51</sup>

Jean Omokri JCA in *Ubi Bassey Eno v NCC*<sup>52</sup> held that the appellant was liable for infringement by way of illegally broadcasting the respondent's

<sup>42</sup> Mac Vaughn, 'History of DAW' (*Logitunes*, 10 October 2014) <[logitunes.com/blog/history-of-daw/](http://logitunes.com/blog/history-of-daw/)> accessed 06 February 2023.

<sup>43</sup> O. Adejoke Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press 2015) 41.

<sup>44</sup> Unini Chioma, "Copyright Infringement: An Overview of Music Plagiarism in Nigeria" March 20 2022

<sup>45</sup> Copyright Act, s 6(1)(a)(viii).

<sup>46</sup> National Public Radio, 'Digital Music Sampling: Creativity or Criminality?' (*NPR*, 28 January 2011) <http://www.npr.org/2011/01/28/133306353/Digital-Music-Sampling-Creativity-Or-Criminality> accessed 06 February 2023; <sup>47</sup> For example, Jay-Z was sued for sampling Baligh Hamdi's 'Khosara Khaira' in his 1999 hit song 'Big Pimpin'.

<sup>47</sup> M W Krasilvosky, Sidney Shemel and J M Gross, *This Business of Music: Definitive Guide to the Music Industry* (10<sup>th</sup> edn, Watson-Guption Publications 2007).

<sup>48</sup> Copyright Act, s 1(2)(a); *Ladbroke (Football) v William Hill* (1964) 1 WLR 273; *Express Newspapers Plc v News (UK) Ltd* (1990) FSR 359.

<sup>49</sup> Phillips, 'Sony Develops New Disk Technology' (1986) 6 *WSJ* 35.

<sup>50</sup> *Ibid*, n33 at 43.

<sup>51</sup> Adebambo Adewopo, *Nigerian Copyright System: Principles and Perspectives* (Odade Publishers 2012) 20.

<sup>52</sup> (2006) NIPJD 49.

programmes. In this case, the court treated each rebroadcast as an infringing copy.<sup>53</sup> This case, in a way recognises the impact of digital technology on copyright because we can infer from the decision that the reproduction of digital files through P2P networks or other media constitutes ‘making copies’, which in turn constitutes infringement. Although, According to Bankole Sodipo, since there was evidence showing that the rebroadcast was being made simultaneously with the broadcast, there is no possible way to say they are making ‘copies’.<sup>54</sup> According to him, there are certain conditions that must be satisfied before a person is to be held criminally liable for infringement. These are; the work must have been reproduced, the reproduction must be in a material form, the copy must be an infringing one and the infringer must have done at least one of the acts listed under section 20 of the Copyright Act.<sup>55</sup> Therefore, they cannot be criminally liable but can only incur civil liability. If we are to accept this view, it seems that an infringer can hardly be rightly convicted for infringements done through the use of digital technologies that allow access to contents without necessarily making copies of them.

### CHALLENGES WITH THE APPLICABILITY OF THE FIRST SALE DOCTRINE

According to the first sale doctrine, a purchaser of a work protected by copyright can resell, lease, or gift out the work.<sup>56</sup> Some have opined that the doctrine also covers private display and personal copying of a protected work by a purchaser.<sup>57</sup> In other words, a copyright owner is precluded from restricting the use of his work by way of resale, lease, personal copying or display of his work after he has sold the

work. It should be noted that this doctrine does not cover the lease of a work by a copyright owner.<sup>58</sup>

Copyright experts have recommended that the law ought to make provisions restricting the scope and application of the first sale doctrine in respect of digital works.<sup>59</sup> This is because digital technology has made it so easy and cheap to copy a work. For example, unlike physical copies of protected works, a purchaser of a digital work can post such work on his or her social media account, giving millions of people access to the work and claiming that he/she is protected by the first sale doctrine.

In the US, there is an exception to the first sale doctrine with respect to sound recordings. That is, a sound recording cannot be lent, rented, or leased for commercial purposes without the consent of the copyright owner.<sup>60</sup> The Nigerian Copyright Act is silent on the first sale doctrine. In light of digital technology, both the Nigerian court and the Copyright Commission are yet to endorse the ‘digital first sale doctrine’ to enable users freely retransmit digital copies of protected works over the internet.<sup>61</sup>

### Challenges with the Applicability of the Doctrine of Fair Dealing

The second schedule of the Nigerian Copyright Act provides for exceptions from copyright control. The first exception relates to fair dealings, and private use falls under the category of fair dealing in the Act. Expressly put, the Act states that the rights conferred on a copyright owner do not include the right to control the doing of the acts stated in section 6 by way of fair dealing for the purpose of private use. This is, however, subject to the condition that

<sup>53</sup> Ibid.

<sup>54</sup> Bankole Sodipo, *Copyright Law: Principles, Practice and Procedure* (2<sup>nd</sup> edn, Swan Publishing 2017).

<sup>55</sup> Ibid.

<sup>56</sup> *Bobbs Merrill Co v Strauss* (1908) 210 US 339.

<sup>57</sup> Jessica Litman, ‘Revising Copyright Law for the Information Age’ (1996) 75 ORL 19, 21.

<sup>58</sup> Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press 1994).

<sup>59</sup> Ibid, n33 at 43.

<sup>60</sup> Copyright Act of 1976, Section 109.

<sup>61</sup> I S Afegbua, ‘Librarians and Copyright Protection in Nigeria’ (Biennial Workshop of Judicial Librarians, Abuja, May 2017).



if the use is public, it should be accompanied by an acknowledgement of the title of the work and its authorship.<sup>62</sup> Fair dealing is considered a full defence.<sup>63</sup>

Asides from the above, the law does not state the meaning of private use. The effect of this vacuum in the law is in fact, amplified with the advent of the internet and new digital technologies. In other words, with the help of digital technology (such as social media), a private individual can decide to post a protected work online through his social media account and claim that it is for his private use. This therefore infers that the law fails to define the scope of private use.

In America, the doctrine of fair use is termed an equitable rule of reason and is based on the facts of each case.<sup>64</sup> Section 107 of the 1976 Copyright Act further gave four factors to consider in determining fair use. They are; the purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for or value of the copyrighted work.<sup>65</sup>

Under this Act, four types of private uses were recognised; format shifting, time shifting, librarying and sharing.<sup>66</sup> Despite these provisions, the American courts still had problems in determining whether certain acts fell under the scope of private use owing to the advent of digital technology.<sup>67</sup>

---

<sup>62</sup> Copyright Act, sch 2(a).

<sup>63</sup> Ibid, n43 at 212.

<sup>64</sup> US Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* (US Government Printing Office, 1986).

<sup>65</sup> The Copyright Act of 1976, s 107.

<sup>66</sup> Ibid, s 106.

## Challenges with the Implementation and Enforcement of Existing Laws

With the advent of digital technology, copyright laws have become somewhat difficult to enforce. This is due to various reasons. Digital technologies have revolutionised the method of copying and distributing music by making it easy and cheap while still maintaining the quality of the product. These impressive advantages of digital technology results in more actual and potential infringements, which consequently makes it more difficult to enforce the existing laws.

Also, owing to the fact that digital technologies allow infringing actions to be done in the comfort of one's house and with a personal mobile phone, copyright infringements have become more difficult to prove or even detect. Apart from the fact that a warrant will be needed to conduct a search on a person's property, a person hoping to obtain a warrant must show that there is reason to believe that infringing actions are being conducted in such a house.<sup>68</sup> This renders the provisions on 'conversion rights' and 'anti-piracy measures' in the Nigerian Copyright Act almost unenforceable.<sup>69</sup>

Public attitudes have been formed concerning the acceptability or otherwise of online copying and sharing, particularly in this part of the world. An average Nigerian consumer does not find anything wrong with the unauthorised copying or sharing of files. This perception of the legitimacy of online sharing emanates from the underlying socio-cultural values of a society, making internet users perceive online music as a free public good.<sup>70</sup> This is largely owed to the fact that we have become accustomed

<sup>67</sup> *Sony Corp v Universal City Studios Inc* (1984) 464 US 417; L J Raskind, 'A Functional Interpretation of Fair Use' (1986) 33 JCS 601, 619.

<sup>68</sup> The Police Act 1943, s 28.

<sup>69</sup> Copyright Act, ss18 and 21 which provide for conversion of infringing copies and seizure of anti-piracy devices respectively.

<sup>70</sup> Dolfsma Wilfred, 'Mediated Preferences: How Institutions Affect Consumption' (2002) 36 JEI 2, 449.

to the practice of getting materials and files for free. Since the law is always slow to respond to changes occasioned by technological innovations, society gets used to the benefits of such technology (such as ‘free use’) and therefore opposes the ban or regulation of such technologies.<sup>71</sup>

### Challenges with Suing Facilitators

Due to the influence of digital technology and the internet on the music industry and copyright law, copyright owners rarely sue individual infringers. The trend has been to take actions for contributory infringement against facilitators such as software developers, internet service providers, owners of search engines and the likes.<sup>72</sup>

The suing of facilitators of copyright infringement is partly because it is more cost-effective than using millions of direct individual infringers who will only be liable for minimal damages.<sup>73</sup> It is also partly because they do not directly benefit from the innovations of these facilitators.<sup>74</sup> Although the law made some sort of provisions for contributory infringement,<sup>75</sup> the kind of contributory infringements being carried out by these service providers and internet facilitators were not envisaged by the drafters of the copyright law. This resulted in uncertainties as to the nature and extent of liability of these facilitators. Consequently, the courts in some jurisdictions have had to adapt rules and requirements for proving contributory

infringement, particularly as it relates to internet service providers and other digital facilitators.<sup>76</sup>

In the *Betamax* case, the Supreme Court of the United States of America applied the staple article of commerce doctrine.<sup>77</sup> In the case, the court held that the ability of an innovation to carry out commercially significant non-infringing uses serves as a good defence against the secondary liability for copyright infringement.

In *Amstrad Consumer Electronics Plc v British Phonograph Industry Ltd*,<sup>78</sup> the English court seemed to apply this same line of thought by holding that the machines were capable of other non-infringing uses. It is quite clear that it is very possible for this doctrine to be abused as almost all innovations are capable of both non-infringing and infringing uses. Consequently, when music copyright owners sued Napster for the infringement done by the Napster users, Napster relying on the *Betamax* case, argued that the software was capable of substantial non-infringing uses.<sup>79</sup> The court however, dismissed this claim and gave a narrow interpretation to the doctrine. According to the court, the doctrine was only for the purpose of barring the court from imputing constructive knowledge on the defendant if the software was capable of being used for other non-infringing uses. It was then held that since Napster had actual notice and knowledge of the infringing activities being done on its software, they were liable for contributory infringement.

<sup>71</sup> Geoffrey Neri, ‘Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms’ (2005) 93 GLJ 733.

<sup>72</sup> For example, cases like, *MGM Studios Inc v Grokster Ltd* (2003) 259 F Supp 2d 1029; *Universal City Studios, Inc v Corley* (2001) 273 F3d 429; *Studios v Metro-Goldwyn-Mayer Studios* (2004) 307 F Supp 2d 1085; *Kelly v. Arriba Soft Corp* 336 F 3d 811 (9th Cir. 2003); *Nintendo of America, Sega America, and Electronic Arts Inc v Yahoo* (ND Cal. filed 2000, but was dropped in 2001); *Hendrickson v eBay* (2001) 165 F Supp 2d 1082.

<sup>73</sup> M A Lemley, U C Berkeley, ‘Reducing Digital Copyright Infringement Without Restricting Innovation’ (2004) 20 SLR 102.

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

<sup>75</sup> The Copyright Act, s 15.

<sup>76</sup> B K Murai, ‘Online Service Providers and the Digital Millennium Copyright Act: Are Copyright Owners Adequately Protected’ (1999) 40 SCLR 285.

<sup>77</sup> *Sony Corp of America v Universal City Studios* (1984) 464 US 417.

<sup>78</sup> (1986) FSR 159.

<sup>79</sup> *A&M Records Inc. v. Napster* (2001) 239 F 3d 1004.

In the case of *Technology Centre v Netcom*,<sup>80</sup> the action was taken against Netcom Online Communications, Inc. for direct, contributory, and vicarious copyright infringement. Netcom had allowed a third party to store infringing materials on its system and connect to the internet. The court held Netcom to be liable for contributory and vicarious copyright infringement but not for direct infringement. In this case, the court gave two requirements needed to prove contributory infringement. Firstly, the facilitator must have had knowledge of the infringing activity.<sup>81</sup> In this case, Netcom was in fact notified of the content posted on its system but refused to take it down. However, Netcom argued that there was no way they would have known that the content of the material actually constituted an infringement of copyright. Secondly, the court held that the facilitator must have substantially participated in the distribution of the infringing content. It was particularly on this ground that the court found Netcom liable for contributory infringement.

Summarily, a person who, with knowledge of the infringing activity or activities, induces, causes, or materially contributes to the infringing conduct of another may be liable as a contributory infringer. At the same time, a person will be vicariously liable if he has the power to supervise the infringing activity and gains direct financial interest in such activity.<sup>82</sup>

What is clear is that, prior to the enactment of the Guidelines for the Provision of Internet Service (applicable in Nigeria),<sup>83</sup> there were still many

uncertainties as regards the liability of online infringement facilitators. Because the courts were reluctant to hold them liable, the music industry decided to go after individual infringers having secured an order from the court allowing the service providers to release the names of their subscribers and users.<sup>84</sup>

It should be noted that although Napster shut its servers down for failing to comply with the court's requirement, other similar and more sophisticated peer-to-peer technologies came up.<sup>85</sup> Unlike Napster, the new networks did not have a central server, making it harder to track and prosecute them.

### *How the Law Has Responded to These Challenges*

The advent of the internet broke the national barriers that once existed between nations. However, there is no uniform or binding international copyright law that protects intellectual property rights across borders.<sup>86</sup> The best we have are multilateral agreements like the Berne Convention,<sup>87</sup> TRIPS Agreement<sup>88</sup> and the WIPO treaty,<sup>89</sup> which require member nations to have laws that recognise and protect works made in other member nations.

The WCT, which was enacted in 1996, is the most recent international treaty that addresses copyright protection in the digital age. Article 11 of the WCT posits that all member nations must create their own national laws that will protect technological measures that prevent copyright infringement. The enactment of the DCMA<sup>90</sup> (particularly sections 1201-1205) in the US was a response to this

<sup>80</sup> (1995) 907 F Supp 1361.

<sup>81</sup> Ibid.

<sup>82</sup> *Gershwin Publishing Corp. v. Columbia Artists Management Inc* (1971) 443 F 2d 1159, 1162.

<sup>83</sup> The Guidelines are made pursuant to Section 70(2) of the Nigerian Communications Act of 2000.

<sup>84</sup> Reuters, 'Music Industry Readies Fresh Wave of Net Lawsuits' *The New York Times* (New York, 8 June 2004)

<sup>85</sup> O V Pavlov, 'Dynamic Analysis of an Institutional Conflict: Copyright Owners against Online File Sharing' (2005) 39 JEI 3.

<sup>86</sup> Jane Ginsburg, 'International Copyright: From a Bundle of National Copyright Laws to a Supernatural Code?' (2000) 47 JCS 265, 266.

<sup>87</sup> Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 (revised 24 July 1971 and amended on 28 September 1979).

<sup>88</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, 15 April 1994.

<sup>89</sup> World Intellectual Property Organization Copyright Treaty (WCT), 20 December 1996, Treaty Doc No 105-17.

<sup>90</sup> Digital Millennium Copyright Act, 17 USC [hereinafter called "DMCA"].

requirement. Similarly, the EU Copyright Directive of 2001, the Copyright Amendment (Digital Agenda) Act 2000 of Australia, Japan's amendment of its Copyright and Unfair Competition Prevention Law 1999 were all responses by individual member nations to the provisions of the WCT.

In Nigeria, the Nigerian Copyright Commission (NCC) is the body charged with the responsibility of the administration of copyright. The NCC introduced the Strategic Action Against Piracy (STRAP) in 2005 to fight piracy in the copyright-based industries in Nigeria (such as the music and film industry).<sup>91</sup> Based on the Commission's regulatory power<sup>92</sup> and the objectives of STRAP, the Optical Discs Regulations of 2006 were made. Its main purpose was to facilitate the regulation, monitoring, and control of the operations of optical disc replicating plants in Nigeria.<sup>93</sup> In order for the Commission to be able to carry out unscheduled inspections of the plants, all-optical disc plants must compulsorily obtain the license and register with the Commission before they can operate in Nigeria.

The Copyright (Levy on Materials) Order 2012 was made pursuant to section 40 of the Nigerian Copyright Act, which provides that there shall be payment of levies on materials capable of being used to infringe copyright in a work. The 2012 Order provides a list of equipment and devices in respect of which levy is payable. Included in this list are digital jukeboxes, MP3 players, mobile phones, photocopying machines, CD recorders, DVD recorders, Blu-ray recorders etc.<sup>94</sup> Furthermore, levies are also payable on media storage devices like mini discs, Hi-MD, CDs, DVDs, videocassettes, SD memory cards, USB flash, I-pods and photocopying paper.<sup>95</sup> About 1-3% of the price of the device is to

be paid into the fund of the Commission, which shall, subject to the approval of the minister, be distributed in the manner set out in the Order.<sup>96</sup> This order has created a sort of balance between the creators' interest and the interest of the public.<sup>97</sup> That is, instead of the seemingly impossible task of making everyone who downloads and share protected works through new technologies liable for infringement, the law ensures that these creators get some form of compensation for the 'unauthorised' use of their work.

It is ordinarily more convenient for copyright owners to sue online/internet service providers (ISP) rather than going after individual infringers. If the law places unqualified liability on these ISPs for the unauthorised acts of their subscribers, it might cause the ISPs to overly place censors on their sites. Consequently, this will generally result in limited access to information. Therefore, there ought to be a balance between the need to protect digitised works and the need to limit the liability of ISPs.

To this extent, the Guidelines for the Provision of Internet Service were made pursuant to Section 70(2) of the Nigerian Communications Act of 2003. Paragraph 5 of the guidelines requires ISPs to ensure that users and subscribers are well informed of statements of cybercrime prevention or acceptable internet use as published by the Nigerian Communications Commission or any other authority.<sup>98</sup>

Paragraph 11 of The Guidelines provides that an ISP will not be liable for transmitting any content posted by a user or for providing access to such content if the ISP acted as a mere conduit for the content or

<sup>91</sup> Adebambo Adewopo, 'Legal Framework for Copyright Protection in Nigeria' (1995) 1 LSULJ 82,196.

<sup>92</sup> The Copyright Act, s 45.

<sup>93</sup> Copyright (Optical Discs Plants) Regulations 2006.

<sup>94</sup> Copyright (Levy on Materials) Order, 2012 Cap C28, LFN 2010, Sch.

<sup>95</sup> Ibid.

<sup>96</sup> Copyright (Levy on Materials) Order, 2012 Cap C28, LFN 2010, r 4.

<sup>97</sup> O Adejoke Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press 2015) 94.

<sup>98</sup> Guidelines for the Provision of Internet Service, made pursuant to Section 70(2) of the Nigerian Communications Act of 2003, [Hereinafter called "The Guidelines"] para 5.

temporarily stored or hosted it.<sup>99</sup> Like the DMCA, these guidelines make provisions for takedown notices. That is, ISPs must have procedures put in place for receiving and responding to notices to disable access to infringing content placed on their site.<sup>100</sup> Quick responses to takedown notices can help in absolving an ISP from liability.<sup>101</sup>

## CONCLUSION

It is clear that copyright law, both in Nigeria and other countries, is one of the very few areas of law that try to keep up with societal changes, particularly with respect to technological advancements and innovations. The history of copyright law actually shows us that the formal birth of copyright law was catalysed by the need to address the changes brought about by technological advancements.

Though quite similar in nature, the degree and level of impact of digital technology on the music industry are quite higher than what was faced by the literary industry when printing technology was developed. Even then a total reformation of the law was needed and in fact, effected.

The advent of several technological innovations has made it very easy for the public to access musical works. This provides publicity which is a very important factor in every musician's career, among other things. In other words, digital technology gives music consumers nearly unlimited access to as much music as possible. The musician or artist also enjoys cheap production, copying, marketing and distribution of his music, which ultimately reduces the cost of producing music and increases the number of potential listeners and consumers.<sup>102</sup> The question however is how does an artist balance between the need to make his content available to

the public and the need to make money from his/her Art? This problem is mostly faced by upcoming artists whose works have not been heard by a good number of the public so as to gain their audience. To what extent should the law then interfere in order to create a sufficient balance between these conflicting interests? That is, between the interest of the artist and the interest of the public.

In balancing these interests, what the law has done is impose restrictions on the access and use of creative works by the public while also limiting the level at which an author can exercise a monopoly over his/her own work. However, in reality, it seems the scale is tilting in favour of the public to the detriment of the authors/musicians.

It is true that Nigerian law has tried to address some of the challenges faced with protecting musical works by enacting certain laws that govern the use of new technologies in creating, copying, or accessing music. However, the question remains; how effective are these laws? More specifically, are these laws sufficient and capable of influencing the societal behaviour of online infringement and illegal downloading? An average Nigerian still feels that since the content is available online, then it is free and therefore downloading such content does not constitute infringement. It seems that Nigerian society is not ready to change and adapt to the realities brought about by technological advancements. This is unfortunate, given the estimated potential revenue that can be recuperated if there are adequate laws that govern these online activities.

## Recommendations

Perhaps the most obvious legal response to the impact of new media on the music industry will be

<sup>99</sup> Paragraph 11 of the guidelines generally provides for instances when an ISP will be held liable for infringing content on its site.

<sup>100</sup> The Guidelines, para 12.

<sup>101</sup> The Guidelines, paras 11(a)(iv), 11(b)(v) and 11(c)(v).

<sup>102</sup> Paul Petrick, 'Why DRM Should Be Cause for Concern: An Economic and Legal Analysis of the Effect of Digital Technology on the Music Industry' (2004) 9 BCIS 1 [http://papers.ssrn.com/abstract\\_id=618065](http://papers.ssrn.com/abstract_id=618065) accessed 05 February 2023.

to address the law governing it. Nigerian lawmakers should emulate the American Digital Millennium Copyright Act (DMCA) by making adequate provisions for anti-circumvention technologies. There should be laws monitoring and restricting the invention and use of technologies principally aimed at circumventing copyright protective measures. Fortunately, there is a new copyright Act which has just been assented to by the Nigerian President. The new Copyright Act 2023 aims to improve the effective administration, regulation, and enforcement of copyright in the digital environment. Worthy of note is section 108 of the Act, which defines “copy” as reproduction in any form, including a digital copy.

Likewise, strong enforcement mechanisms should be implemented to enforce these laws. Particularly, there will be a need for the establishment of a separate body charged with the responsibility of monitoring and enforcing the provisions of the various laws on copyright. The appointment of copyright inspectors as provided under the Act is clearly not enough to address the problem of enforcement and implementation.

Similarly, the administrative body in charge of copyright in Nigeria, the Nigeria Copyright Commission (NCC) should be reformed. All staff should be trained on IT-related issues and the new technologies that promote music copyright infringement. There should be a unit within the Commission that is principally charged with the responsibility of dealing with IT issues. One major setback faced by the NCC and other administrative bodies is the lack of sufficient funds that will enable them to perform their roles and responsibilities adequately. Consequently, it is recommended that these administrative bodies should not be made to only rely on the government for funding. They should be allowed to engage in profit-making

businesses that will enable them to raise the required funds to perform their duties.

Artists/musicians and all key players in the music industry should be sensitised on emerging issues and how they can enforce their rights to prevent infringement of their protected works. The NCC as well as associations like the Copyright Society of Nigeria and the Music Copyright Society of Nigeria, should organise programs and seminars involving their member artists and educate them on their rights.

One of the major problems faced by the music industry today is the various technological advancements that have made copying and distribution of music easier. It is only realistic to employ technological measures to limit the way music can be copied and distributed over the internet. The key players in the music industry, as well as artists, should not be reluctant to invest heavily in these technologies. It will be more profitable to invest in these technological measures especially when the cost of these investments is weighed against the possible loss if such investments are not made.<sup>103</sup> Digital Rights Management Systems (DRMs) are one such technology which is designed to prevent purchasers and other users from making unauthorised uses of protected works.<sup>104</sup>

---

<sup>103</sup> J A Rothchild, ‘The Social Costs of Technological Protection Measures’ (2007) 34 FSULR 1181, 1198.

<sup>104</sup> D L Burk & J E Cohen, ‘Fair Use Infrastructure for Rights Management Systems’ (2001) 15 HJLT 41,48.