

**THE PRECONDITIONS FOR COPYRIGHT PROTECTION IN NIGERIA
BY
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1.0 INTRODUCTION

Without dwelling so much on the historical beginning or origin of the grant of copyright licenses, it can be safely submitted that the concept of copyright as it is known today evolved at the inception of the industrial era with the development of the printing press as a means of large scale production of paper works or writings and it became important due to the emergence of large number of literate members of the society who are reading the prints. It was equally no longer fashionable to imitate classical styles or form of expression over and above one's original thought. Hence, the development of copyright. In this regard, Akpan, A.E.¹ observes that:

as the world has moved into this new millennium, there is every reason to believe that the computer and other information based technologies, as well as the products of creative talents will become increasingly important to world trade and cultural exchange. While developing countries may still be behind in the mainstream technologies, their natural endowment in other creative faculties is not in doubt and there is every reason to believe that they are capable of matching talents from other parts of the world. As the international community moves into the next stage in the protection of works of the mind, copyright will play an increasingly central role in meeting the challenges of the new millennium.

This paper seeks to identify works that are eligible for copyright protection and the basis for such eligibility under the extant Nigerian Copyright Act vis-à-vis laws of other jurisdictions as well as International Conventions on Intellectual Property Law and Copyright Law in particular. Thereafter, recommendations are made for a viable Copyright regime in Nigeria.

2.0 COPYRIGHT AND ISSUES OF DEFINITION

Copyright, like several other legal terms do not lend itself to any precise definition, it is however necessary to attempt a definition by looking at those proffered by statutes and scholars alike in order to have a basic understanding of the concept. The Nigerian Copyright Act² simply defines copyright as "copyright under the Act". This definition, Rose Oluaina

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¹ Akpan, A.E. Copyright Protection in Nigeria: Prospect for National Growth and Development. *Fountain Quarterly Law Journal*, Vol.II, No. 2, 2005, p.103.

² CAP C28, Laws of the Federation of Nigeria (LFN), 2004. [hereinafter Copyright Act/the Nigerian Act], Section 51(1) thereof.

Ugbe, points out, “does not enable laypersons to really understand what copyright means”.³ Another author submits that this definition, “is grossly inadequate and imprecise”.⁴ It is rather abysmal that the extant Nigerian Copyright Act has no clarifying definition for the concept – the basis for the promulgation of the Act. An amendment to reflect a clear definition of the concept is strongly recommended.

By reason of the difficulties posed by the definition of copyright as proffered by the Nigerian Act to laypersons, it is apposite to seek clarity from other jurisdiction.

Under the UK Laws⁵, copyright is defined as

... a property right which subsists in accordance with their part in the following descriptions of work –

- a. original literary, dramatic, musical or artistic works,*
- b. sound recordings, films or broadcasts, and*
- c. the typographical arrangement of published editions.*

Copyright is the area of the law that provides protection to “original works of authorship” including paintings, sculpture, music, novels, poems, plays, architecture, dance, instruction manuals, technical documentation, and software, among other items. Legal protection flows from the fact that an author independently creates the work and that his or her “expression” of an idea is original, rather than copied from another person.⁶ It extends only to the expression of ideas and concepts, and not to the ideas or concepts themselves.⁷

Asein⁸ suggests that the word “copyright” evokes three possible meanings. First, it suggests the right that a person has over the physical copy of his work. This was true in earlier times when the author of a work exercised effective control over his physical manuscript. It is obvious that this is hardly possible today and the author cannot be content with the mere possession of the physical copy of his work. The second idea is the right to copy, i.e. the right that the owner of a work has to reproduce his work. This sense of the word is probably the closest to the modern concept of copyright. The third connotation suggests that the work must be copied “right”. This suggests a license to copy on the condition that the copying

³ Ugbe, R.O. Originality and Fixation as Basis for Copyright in Music. *University of Maiduguri Law Journal-U.Maid. L.J.*, Vol.V, 2002, Pp23-24.

⁴ AKPAN, A.E., 2005. Op cit. at p.103.

⁵ Section 1(1) Copyright, Designs and Patents Act, 1988.

⁶ Idris, K. *Intellectual Property A Power Tool for Economic Growth*. Geneva: WIPO Publication No.888 at 190.

⁷ It is ‘works’ that are protected and not ‘ideas’. If ideas can be taken without copying a ‘work’, the copyright owner cannot interfere. Thus, if a photograph is taken of a scene which is identical with a former photograph of the same scene, that person will have copyright in his own photograph although the idea of taking the photograph was derived from his having seen the first photograph. Infringement of copyright would however arise if an artist were to sit down with the photograph in front of him and make a painting out of it. See, Babafemi, F.O. *Intellectual Property The Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria*. 1st Edition. (Ibadan: Justinian Books Ltd, 2007) p7 footnote 1.

⁸ Asein, J.O. *Nigerian Copyright Law & Practice*. 2nd ed. (Abuja: Books and Gavel Ltd., 2012), p

would be done in a manner prescribed or permitted by law; leaving the copyright owner with a right to be remunerated.

Benjie Ogwo opines that,⁹ copyright is simply the right to make copies of a given work and to stop others from making copies without one's permission.

In what appears to be a more comprehensive definition, the World Intellectual Property Organization¹⁰ describes copyright as "generally considered to be the exclusive right granted by law to the author of a work to disclose it as his own creation, to reproduce it and distribute or disseminate it to the public in any manner or by any means, and also to authorize others to use the work in specified ways..."¹¹

In *Adenuga v. Ilesanmi Press Sons (Nig) Ltd.*¹² copyright in relation to eligible work was defined as the exclusive right to control, to do or authorize the doing of any of the acts restricted to the copyright owner.

Notwithstanding the plethora of definitions of copyright given by different authorities, the term is devoid of specific, definite and generally acceptable meaning.¹³

Copyright is a transient and exclusive legal right vested in an author, artist or copyright owner to copy, reproduce, publish, sell or transfer his creative works. It encompasses the author's lawful right to have his creativity preserved in its substantially original form and to object to any unlawful reproduction, alteration or outright mutilation.¹⁴ This means that the works are protected against unauthorized use because the law regards these creations as property which, like other properties, entitles the owner to the exclusive right of usage. This right extends to the right to share in any earnings from the use of the public as well as the right to claim authorship and respect for the essential character or integrity of the protected works.

As a legal right, copyright is separable from the protected object, but it hovers and lurks around to constrain the ownership of a buyer of an object which is subject to copyright to the limits set by law. It is a proprietary interest which differs fundamentally from others by its intellectual composition. Yet copyright law neither protect ideas nor give monopoly to any

⁹ Ogwo, B. Criminal Liability for Copyright Infringement under the Copyright Act, 2004. *Commercial and Industrial Law Journal, Faculty of Law, Kogi State University, Anyigba*, Vol. I No. I, 2008, p65.

¹⁰ The United Nations specialised agency responsible for intellectual property (including copyright) matters.

¹¹ WIPO. 1980. *Glossary of Terms of the Law of Copyright and Neighbouring Rights*. Geneva: WIPO.

¹² (1991) 5 NWLR (Pt. 189) 82.

¹³ Ogwo, B. 2008. *op cit*. Copyright is further described as a legal concept is one of the most complex and technically difficult branches of property law. It is an arcane area populated only by 'experts' who often hide behind an almost impenetrable arcade of jargons. See Ocheme, P. *The Law and Practice of Copyright in Nigeria*, (Zaria: ABU Press Ltd., 2000), p22, citing the ABC of Copyright a UNESCO publication 1982, p1.

¹⁴ Yerima, T.F. Copyright Protection of Computer Programmes and the Question of Ideal Expression Dichotomy. *University of Ibadan Journal of Private & Business Law – UIJPBL*, Vol. III, 2002, p146.

particular form of works or designs, it only protect the expression of ideas in writing or any tangible form from where it could be translated or reproduced.¹⁵

It does not confer on the owner the right to prevent others from creating identical work in so far as the identical work is conceived of independently.¹⁶ It is a negative right to prevent the appropriation of the work of one man by another.¹⁷

3.0 SUBJECT MATTER FOR COPYRIGHT PROTECTION

The subject matter of Copyright refers to the kind of works of Intellectual Property in which Copyright may subsist or works that are eligible for Copyright Protection. Many factors come to bear in assessing the copyright status of a material. First, it must be determined whether the material in question is indeed a “work” in terms of Copyright Laws. A “work” is defined¹⁸ to include ‘translation, adaptation, new version or arrangements of pre-existing works, and anthologies or collection of works which, by reason of the selection and arrangement or their content, present an original character.’¹⁹

The first task of a student of copyright law is to distinguish the different types of work eligible for copyright protection and to understand the essential questions surrounding them: is the material of the kind that attracts copyright? If so, for what duration? Who initially is entitled to ownership? What acts constitute infringement?²⁰ Thus, Babafemi observes in what looks like an answer to the first question above that eligible works, simply put, means “works” of copyright which the law will protect.²¹

Works eligible for copyright protection are, as a rule, all original intellectual creations. Various countries in this regard, have their list of eligible works for copyright protection in their various Copyright Laws. To be protected, an author’s work must originate from him; they must have their origin in the labour of the author. But it is not necessary to qualify for

¹⁵ See *Kilvington Bros Ltd. V. Goldberg*, where it was held that copyright is not intended to protect the idea in a work...

¹⁶ For example, two photographers may each take a photograph within minutes of each other from the same spot using similar cameras, lenses and films, after selecting the same exposure times and aperture settings. The two photographs might be indistinguishable from each other but copyright will, nevertheless, subsist in both photographs separately. The logical reason for this situation is that both of the photographers have used skill and judgment independently in taking their photographs and both should be able to prevent others from printing copies of their respective photographs. See Bainbridge, D. “Intellectual Property” London: Butterworth, 8th Edition, (1970), at p.87.

¹⁷ Thus, it was held in *Oladipo Yemitan v Daily Times & Gbenga Odusanya* (1980) FHC 180 that, the function of copyright law is to protect from annexation by other people the fruits of another’s work, labour, skill or taste. And in *Macmillan & Co. v Cooper* (1923) 40 TLR 186. 187 Lord Atkinson held that, the moral basis on which the principle of the protective provisions of Copyright Act rests is the Eighth Commandment, “thou shall not steal”.

¹⁸ See S.5 of the Nigerian Act.

¹⁹ Asein, J.O. 2012. *Op cit.* p.42. This postulation indicates that the Act does not offer a definition of works but confirms what may qualify as works.

²⁰ Cornish, W.R., 1999. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights.* 4th Edition. London: Sweet and Maxwell, at 377.

²¹ Babafemi, F.O., 2007. *op cit.*

copyright protection, that works should pass a test of imaginativeness. The work is protected irrespective of the quality thereof and also where it has little in common with literature, art or science, such as purely technical guides or engineering drawings, or even maps.²²

Generally, all jurisdictions seem to provide protection for the following: literary works, musical works, artistic work, maps and technical drawings, photographic works, motion pictures or cinematographic works, as well as computer programmes.²³

It has been observed that the categories of works listed as eligible subject matter under the Nigerian Act is exhaustive. So, aside from neighbouring rights, there can be no copyright in any work or material that does not come expressly or impliedly within the six categories of works enumerated.²⁴

To ascertain the exact scope of each of these works, it is pertinent to have a proper or closer examination of each.

3.1 Literary Works

By virtue of the Interpretation Section of the Nigerian Act,²⁵ “literary work” includes, irrespective of literary quality, any of the following works or works similar thereto: novels, stories and poetical works; plays, stage directions, film scenarios and broadcasting scripts; choreographic works; computer programmes; text-books, treaties, histories, biographies, essays and articles; encyclopedias, dictionaries, directories and anthologies; letters, reports and memoranda; lectures, address and sermons; law reports, excluding decisions of courts; written tables or compilations.

This provision of the Act seems to be, to a very large extent, exhaustive. Aside the fact that it has a long and all-embracing list of what amounts to literary work, it left a room for further improvement or development on what literary works are or to mean. This is evident from the

²² WIPO. 2004. *Intellectual Property Hand Book*. 2nd Edition, Geneva: WIPO, at 42.

²³ In Nigeria, works eligible for copyright protection are provided for by the Act as follows:

Subject to this section, the following shall be eligible for copyright – Literary works; Musical works; Artistic works; Cinematograph films; Sound recording; and Broadcasts. See section 1(1) of the Nigerian Copyright Act.

²⁴ Asein, J.O. 2012. op cit. p. 45. It should be noted however, that each of the six categories is broadly defined to accommodate a wide range of material. An example is the definition of literary works to include computer programme thereby protecting copyright in computer programme even though it is not mentioned expressly in S.1(1) as one of the categories of works eligible for protection.

²⁵ Section 51. See also Article 2 of the Berne Convention for the Protection of Literary and Artistic Work, 1979 which defines literary and artistic works in the following words: The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

use of the expression “or works similar thereto” in the definition. Thus, Olueze²⁶ observes and correctly too, that “to give effect to the general intendment of the Act, liberal and purposive approach should be adopted in the interpretation of the expression ‘literary works’”. Hence, in *University of London Press v. University Tutorial Press*,²⁷ the University of London assigned to the claimant publishers copyright in examination papers set by it for school matriculation examinations. The defendants published a number of these papers without license, together with criticisms of them and model answers. Peterson J, held *inter alia* that although a literary work is not defined in the Act²⁸, s.35 states what the phrase includes: the definition is not a completely comprehensive one, but the section is intended to show what, amongst other things, is included in the description ‘literary work’, and the words are “‘literary works’ includes maps, charts, plans, table and compilations.” It may be difficult to define literary work as used in this Act, but it seems to be plain that it is not confined to literary work in the sense in which the phrase is applied. The expression literary work covers works which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word literary seems to be used in a sense somewhat similar to the use of the word ‘literature’ in political or electioneering literature, and refers to written or printed matter.²⁹

It therefore mean, that the meaning of ‘poetical work’ may be extended to include nursery rhymes; ‘text-books’ may encompass pamphlets, booklets or loose-bound publications³⁰, and so on.

The Nigerian Act also attempts to keep up to date with technological growth and development by providing for computer programmes as part of literary works eligible for copyright protection. The Act³¹ defines computer programme to mean ‘a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.’ Since, computer programmes are simply put, software, it is an indication that the physical components of a computer system (the hardware) is not covered by the Copyright Act as literary work for the purpose of protection. Those other components of a computer can be properly covered by other aspects of intellectual property laws like patent and industrial design.

²⁶ Olueze, I.M. 1998. *Nigerian Copyright Law*. Apapa, Lagos: Maglink International Limited, at p.17.

²⁷ (1916) 2 Ch. 601.

²⁸ The English Patent and Designs Act.

²⁹ Ibid. at 608. see also *Masterpiece Investments Ltd v. Worldwide Business Media Ltd* (1997) FHCR 494, *Sweeney v. Macmillan Publishers*(2002) RPC 651 Ch. D.

³⁰ Olueze, I.M. 1998 *op cit.* at 17. See also, *Nisbet v. Golf Agency* (1907) 23 TLR 370, *Ladbroke (Football) Ltd v. WilliamHill (Football) Ltd* (1964) 1 All E.R. 465.

³¹ Section 51.

Another issue that may arise is whether the Nigerian Copyright Act accords protection to works expressed on the internet/digital environment. The Nigerian Act as it were, did not make express mention of such works.

However, Nigeria is a signatory to several International Treaties on Intellectual Property and Copyright in particular among which are the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty which are together known as the WIPO Internet Treaties. The treaties empowers a signatory state to protect works on the internet and to use right management system for such works.³²

TRIPS agreement provides as follows:

*Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.*³³

By the Agreed statement concerning Article 1(4)³⁴, the reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.³⁵

Regrettably, Nigeria has not domesticated the WIPO Internet Treaties the implication of which is that there not applicable to Nigeria at the moment.³⁶

It is our humble submission that, regardless of the non application of the WIPO Internet Treaties in Nigeria pending its domestication, the definition of literary works under the Nigerian Act can be extended to include works expressed on the internet/digital environment. Thus, Asein posits that, since the list of literary works is not exhaustive and the court may, by reasonable extension, include works that are not expressly mentioned, the potential scope of literary works is open.³⁷

³² Other such Treaties are: the Universal Copyright Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), Berne Convention for Protection of Literary and Artistic Works, Agreement on Trade Related Aspect of Intellectual Property (TRIPS), etc.

³³ Article 10(2) thereof. Underlined supplied for emphasis.

³⁴ WIPO Copyright Treaty (WCT).

³⁵ See The Agreed Statements of the Diplomatic Conference that adopted the Treaty (WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions) concerning certain provisions of the WCT.

³⁶ See S12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁷ Asein, J.O. 2012. op cit. p.55.

3.2 Musical Works

Musical work “means any musical composition, irrespective of musical quality and includes works composed for musical accompaniment.”³⁸ It therefore mean that any musical composition (whether it be ‘simple choruses’, juju, rock and roll, afro beat, gospel, etc.), the quality being immaterial, provided it is original and fixed in a particular medium qualifies as musical work for the purposes of the Act.³⁹ In *Anikulapo-Kuti v. Iseli*,⁴⁰ it was held that the requirement of fixation simply means that the musical work must be in a tangible medium. The court did not specify the particular pattern fixation must take. This requirement according to Asein, “is broad enough to cover just about any medium”.⁴¹

The song alone or the accompanying music alone or both, qualify as musical works for the purpose of copyright protection. According to WIPO, “whether serious or light; songs, choruses, operas, musicals, operettas; if for instructions, whether for one instrument (solos), a few instruments (sonatas, chamber music, etc.), or many (bands, orchestras) qualifies as musical work for copyright.”⁴²

Section 3(1) of the English Copyright, Designs and Patents Act 1988, defines ‘musical work’ as “a work consisting of music exclusive of any words or action intended to be sung, spoken or performed with the music.” From the English point of view, the trite law seems to be that where words are set to music, the two remain distinct works for copyright purposes, and as a matter of fact, if copyright subsist in each – the words and the music, and lyric writer and composer are not the same person, the two copyrights will usually expire on different dates.⁴³ “Secondary” activities like arranging music (by adding accompaniments, new harmonies, new rhythms, etc.) and transcribing it for different musical forces have been held to attract their own musical copyright protection.⁴⁴ In *Sawkins v. Hyperion*,⁴⁵ Sawkins created three modern performing editions of music by Michel-Richard de Lalande. Lalande was a composer to the Court of Louis XIV and left scores of his works that, for performance today, needed interpretation, correction and addition. Musical recordings from these performing editions, featured on a CD issued by Hyperion, gave rise to the present proceedings by Dr. Sawkins. The main question was whether Dr. Sawkins’ performing editions qualified as

³⁸ Section 51 of the Nigerian Act.

³⁹ Section 1(2) (a). See also Olueze, I.M. 1998. *op cit.* at 18.

⁴⁰ Unreported. Suit No. FHC/L/CS/720/2000.

⁴¹ Asein, J.O. 2012. *op cit.* p. 61.

⁴² Intellectual Property Hand Book *op cit* at 42.

⁴³ Cornish, W.R., *op cit.* at 387.

⁴⁴ *Ibid.* See also *Austin v. Columbia* (1917-1923) Mac. C.C. 398, *Melzler v. Curwen* (1928-1935) Mac. C.C. 127, *Wood v. Boosey* (1868) L.R. 3 Q.B. 223, *Redwood Music v. Chappell* (1982) R.P.C. 109.

⁴⁵ (2005) R.P.C (32) 808, C.A.

original musical work. Patten J. held at first instance that it qualifies. On appeal, it was further held that the work of Dr. Sawkins has sufficient aural and musical significance to attract copyright protection.

However, he could be guilty of infringing the copyright in the earlier piece of music (for which any of the “secondary” activities above followed), should copyright still subsist in it, if he makes his arrangement without the permission of the copyright owner.⁴⁶ It is therefore safe to submit that, the broad nature of the definition of ‘musical works’ under the Nigerian Act places the situations in Nigeria and the UK as far as the extent of what musical work is for the purpose of copyright protection, *intadem*.

3.2 Artistic Work

The Nigerian Act defines ‘artistic work’ to include “irrespective of artistic quality, any of the following works or works similar thereto - paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; maps, plans and diagrams; works of sculpture; photographs not comprised in a cinematograph film; works of architecture in the form of building models; and works of artistic craftsmanship and also (subject to subsection (3) of Section 1 of this Act)⁴⁷ pictorial woven tissues and articles of applied handicraft and industrial art.⁴⁸

The above definition is open-ended; it creates room for other category of works like “charts”, and “designs” within the context of artistic work. It was therefore submitted that the phrase “or work similar thereto” shall be construed *ejusdem generis* in view of its accommodation of other category of works.⁴⁹

May it be stressed for the purpose of emphasis that copyright in literary content of a book may be separate from copyright in the diagrams or designs in the book which may be protected as artistic work.

By Section 51 of the Nigerian Act, artistic work includes photographs. The Act does not expressly define photograph. Assistance may therefore be sought elsewhere.

Charlesworth’s Mercantile Law Dictionary,⁵⁰ defines photograph as “any product of photography or any process akin to photography, other than part of a cinematograph film.”

⁴⁶ This falls within the meaning of making an adaptation, one of the acts restricted by S.21(3) (b) of the English Act. See also S.6 of the Nigerian Act.

⁴⁷ S.1(3) provides that an artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process.

⁴⁸ Section 51. See also Article 2 of the Berne Convention for the definition of literary and artistic works.

⁴⁹ Olueze, I.M. 1998. *op cit.* at 19.

⁵⁰ Schmitthoff, C.M. & Sarre, D.A.G. *Charlesworth’s Mercantile Law Dictionary*. 14th Edition at 625, cited by Olueze, I.M. 1998. *op cit.* at 20.

Also, the English Act⁵¹ provides that “photographs means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced and which is not part of a film.”

Both definitions above in an in-depth look are in conformity with the Nigerian Copyright Act, in that, photographs forming “part of cinematograph film” or “part of a film” is excluded from those works protectable as artistic works.

Work of architecture in the form of building model by the provisions of the Act, falls under artistic work and is protected as such. Even though it is related to a building plan, it is treated separately and independently. In *Meikle v. Maufe*,⁵² it was held that copyright in works of architecture in the form of a building is independent of the copyright in plans on which a building is based.⁵³

Also, the Act does not specifically define the expression ‘works of artistic craftsmanship’, and there is no judicially agreed formula of general application for determining whether a work is one of artistic craftsmanship; the word ‘artistic’ is to be given its ordinary and natural meaning, and it is the function of the court to decide on the evidence in the particular case whether the work is one of artistic craftsmanship. Thus, in *George Hensher Ltd. v. Rest-Awile Upholstery (Lancs) Ltd.*,⁵⁴ the House of Lords held that in determining whether a work was one of artistic craftsmanship within the meaning of the Act, the court should not make an aesthetic judgment but should view the matter generally in accordance with all the evidence. It is always a question of fact on which evidence shall be led in respect of the work.⁵⁵

It was further held that mere originality of design and eye appeal were insufficient to make the prototype of a new suite of furniture a work of artistic craftsmanship; the question whether the prototype which was a mere “knock up” could be a work of craftsmanship was not decided. In *Burke and Margot Ltd. v. Spicers*,⁵⁶ the Plaintiff/Company claimed an injunction to restrain the defendant from infringing the copyright which Mrs. Burke claimed in her sketch and the copyright which the Plaintiff/company alleged subsisted in the “fork” made from the sketch. The court held that the Plaintiff/Company copied the “fork” from the sketch of Mrs. Burke. Consequently, the “fork” was not an original “work of artistic craftsmanship” within the meaning of the definition of “artistic work” as the

⁵¹ S.3 CDPA 1988, See also Halsbury’s Laws of England 4th Edition, Vol. 9, London: Butterworths (1974) at 538.

⁵² (1941) 3 All E.R. 144.

⁵³ See also Halsbury’s Laws of England *op cit*.

⁵⁴ (1976) A.C. 64.

⁵⁵ There is no hard and fast rule in determining works of artistic craftsmanship, the work must however, possess artistic elements of origin of which is traceable to the originator of the work.

⁵⁶ (1936) Ch. 400; (1936) 1 All E.R. 90.

plaintiff/company were not the originator of the artistic element in the work. Lord Clauson J. in an effort to ascertain the essential ingredients of work of artistic craftsmanship put the following poser: “but where did the artistic element which has become connected with this work of craftsmanship originate? It certainly did not originate in the workpeople. All they did was by purely mechanical processes to reproduce the article; they are craftsmen; but they are not ‘artistic’ craftsmen, they borrowed the artistic qualities of the article from the inspiration of Mrs. Burke in her sketch.”

Pictorial woven tissues and articles of applied handicraft and industrial art also constitute works of artistic craftsmanship. These, are however subject to S.1 (3) of the Nigerian Act which provides that “an artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process.” The determinant here is the intention of the author at the time the work was made and this is a question of fact based on the circumstances of each case. Hence, once such intention is ascertained to the negative, the work becomes protectable as an artistic work notwithstanding that the work was subsequently applied industrially. However, if the intention is in the affirmative, such work should better seek refuge under Industrial Designs. Hence, in *Conplank Ltd. v. Kolynos Inc.*,⁵⁷ the plaintiff sought to recover damages for infringement of the plaintiff’s copyright in two sketches. The court held that the sketches were designs which were capable of being registered under the Patents and Design Act, and as they were used or “intended to be used as models or patterns to be multiplied by an industrial process,” they are not protectable under the Copyright Act.

The phraseology – “irrespective of artistic quality” as used in the Act and not being defined therein, is an indication that evidence of artistic quality is immaterial. Thus, in *Mercantile Adventures Ltd. v. M. Grew & Co. Ltd.*⁵⁸ the publication on which the plaintiff relied was the reproduction of two dimensional drawing in three dimensional forms as electric light fittings and the subsequent sale of such fittings to the public. Thus, the making of electric light fittings in accordance with the plaintiff’s drawing constitutes reproduction of such drawing in three dimensional forms.

⁵⁷ (1925) 2 K.B. 804.

⁵⁸ (1922) 1 Ch. 242.

3.4 Cinematograph Film

The Cinematograph Act⁵⁹ defines “cinematograph” to include any apparatus for the projection of enlarged images by means on a screen or elsewhere. The same section also defines “film” as a film designed for use with a cinematograph (not being a film of eight millimeters or less width) and includes film containing celluloid or other materials of an inflammable or dangerous nature as may be prescribed by regulations under this Act.

The Act defines “cinematograph film” to include the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film.⁶⁰

Cinematograph can therefore in a narrow sense be restricted to motion picture produced on a screen by projection of light. Simply put, cinematograph film means any sequence of visual images fixed in a medium of any description, capable of being shown as a moving picture and being subject or capable of reproduction. Sound track accompanying a video or motion picture is also treated as part of the cinematograph film. It covers cases of video recordings of sequence of visual images whether on tape, disc or any material on which visual images are capable of being shown as motion pictures and also capable of visual reproduction.⁶¹

Fixation even though *strictu sensu* not a requirement for copyright protection of cinematograph film,⁶² for the purpose of evidence, that the work is fixed on any video recording apparatus suffices. The court, it is suggested should liberally interpret the expression “first fixation” as used in the Act to include such other copy or copies reasonably derived from the original of the fixation, although the probative value to be attached to such a subsequent copy or copies in evidence is a different thing altogether.⁶³

3.5 Sound Recording

The Nigerian Act defines sound recording as the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound track associated with a cinematograph film.⁶⁴ The implication is that any sound recorded or fixed on audio cassette tapes, compact disc and other form of sound carrying apparatus other than sound track associated with a cinematograph film qualifies as sound recording for the purposes of copyright protection.

⁵⁹ CAP 49 Laws of the Federation of Nigeria 1990, Section 9.

⁶⁰ Section 51 of the Nigerian Copyright Act.

⁶¹ Olueze, I.M., *op cit.* at 23.

⁶² See Section 1(2) (a) and (b).

⁶³ Olueze, I.M., *op cit.* at 23.

⁶⁴ Section 51 of the Nigerian Act.

The difference between sound recordings and cinematograph films is in relation to the sensory system of perception. Sound recording refers to sounds capable of being perceived aurally, while cinematograph film relates to visual images capable of being shown as motion picture.⁶⁵

3.6 Broadcasts

The Nigerian Act provides that broadcast means “sound or television broadcast by wireless telegraphy or wire or both, or by satellite or cable programmes and includes re-broadcast”.⁶⁶ The Act further defines cable programmes to mean “any visual images, sounds or other information sent by means of telecommunication system otherwise than by wireless telegraphy for reception – at two or more places (whether for simultaneous reception or at different times) in response to request by different users; or for presentation to members of the public.”⁶⁷

The Act does not define satellite programmes. Satellite transmission involves broadcasting through installations located in the orbit where the aerials are stationed in the space from where radio and television signals are relayed back to the earth.

Furthermore, broadcast includes rebroadcast which means a simultaneous or subsequent broadcast by one broadcasting authority of the broadcast of another broadcasting authority. Broadcasting authority means any authority established under any law in Nigeria or elsewhere providing broadcasting services for public reception.⁶⁸ By implication, all broadcasting organizations in Nigeria duly licensed, and their counterparts in other countries duly registered under their various laws qualify as broadcasting authority under the Act.

Under the English Act, copyright subsist also in broadcast and cable programmes. A broadcast which consists of visual images, sounds or other information is a transmission by means of wireless telegraphy of visual images, sounds or other information which is capable of being lawfully received by members of the public, or which is transmitted for presentation to members of the public.⁶⁹ An example of a transmission for presentation to the public is where a football match is transmitted to a sporting arena in a different part of the country from where the match is held, to be displayed on a large screen to members of the public who pay an entrance fee.

⁶⁵ Olueze, I.M., *supra* note 25 at 23.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Bainbridge, D. 1970. *Intellectual Property*. 8th Edition. London: Butterworth, at 55.

In *Australian Performing Right Association Ltd. v. Telstra Corp Ltd.*,⁷⁰ the Federal Court of Australia held that transmission to mobile telephones from base stations were not broadcasts for the purposes of the Australian Copyright Act 1968.

By way of comparison, one can comfortably hold that transmission to mobile telephones in Nigeria qualifies as broadcast against the position in Australia. This argument is anchored on the fact that under Section 51 of the Act,⁷¹ cable programmes is defined to include “other information sent by means of *telecommunication system* other than by wireless telegraphy...”⁷² Mobile telephone falls within “telecommunication system” and as such, broadcast via mobile telephones is capable of protection. Thus, any broadcast on mobile DSTV for instance (as it currently exist), qualifies as broadcast for the purpose of copyright protection in Nigeria.⁷³

4.0 ORIGINALITY AND FIXATION AS *SINE QUA NON* FOR COPYRIGHT PROTECTION

There are certain works eligible for protection that the Act further enunciates special or particular criteria for their eligibility. Thus, for copyright to subsist in musical, artistic or literary works, such works must satisfy the requirements of originality and fixation.⁷⁴

Crystal clear from the provision of S.1(2) of the Nigerian Copyright Act is that, literary, artistic and musical works are subjected to similar rules with an artistic work going a little further,⁷⁵ cinematograph films to somewhat different rules, while sound recordings and even though broadcast seemed not to be talked about at all, it can however be implied.

These criteria shall be discussed hereunder seriatim.

4.1 Originality

By the provisions of S.1(2)(a) of the Act, “a literary, musical or artistic work shall not be eligible for copyright protection unless sufficient effort has been expended in making the work to give it an original character.” There is no gainsaying that this provision deals with

⁷⁰ (1994) RPC 299.

⁷¹ The Nigerian Copyright Act.

⁷² Italics added for the purpose of emphasis.

⁷³ This comparison is based on the 1968 Australian Act as applied in 1994. However, we hope that by now, it probably would have been amended considering the technological development trend and the dynamism of law.

⁷⁴ S.1(2) of the Nigerian Act provides that A literary, musical or artistic work shall not be eligible for copyright unless –a. sufficient effort has been expended on making the work to give it an original character; b. the work has been 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.

⁷⁵ S.1(3) of the Nigerian Act provides that “an artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process.”

the originality of such works. It simply means that the creator of the work must have put enough effort in making the work, so as to make it original and different from works of others and not merely copying another's work.

Unfortunately, the Act does not define the term 'original' for one to appreciate its contextual import in all ramifications. Ocheme⁷⁶ observed that the original character of the work, qualifying it for copyright, "denotes that which is new, not copied or imitated from another work." Nchi⁷⁷ views the word as "emerging for the first time as opposed to a reproduction."

W.R. Cornish⁷⁸ defines originality as "a root requirement that sufficient skill, judgment, and labour or selection, judgment and experience or labour, skill and capital be expended by the author in creating the work."

This requirement of originality is necessary and important because as one of the consequences of copyright protection is that the creator of the work will have exclusive right of exploitation, in order to be conferred with such a right, it is fair and reasonable that he should have done a unique thing. It is therefore not sufficient that he appends his name to a work in which sufficient work has not been put to make it original, in order to claim exclusively.

Originality in this sense does not imply novelty as in Patent Law. The creator or author of a work is only required to show that his work is a product of skill, labour and judgment, that is, his form of expression should be different from that of any other author of similar work. It is in this light that WIPO stated that:

For a work to enjoy copyright protection however, it must be an original creation. The ideas in the work do not need to be new but the form, be it literary or artistic, in which they are expressed must be an original creation of the author.⁷⁹

From the above definitions, it can be seen that originality in this context means that the creator is creative in his work, that the expression of his ideas is fresh or newly created and not copied from pre-existing work. However, it does not mean that the work must be the expression of inventive or original as against the case of Patent Law. What copyright law is concerned with is the expression of thought and not the originality of ideas.⁸⁰

⁷⁶ The Law and Practice of Copyright in Nigeria *Supra* note 13 at 31.

⁷⁷ Nchi, S.I. (2000), *The Nigerian Law Dictionary*, 1st Edition, Jos: Green World Publishing Ltd., at 382.

⁷⁸ Cornish, W.R. *op cit.* at 45.

⁷⁹ WIPO. 1998. *Intellectual Property Reading Material*. Geneva: WIPO at 38.

⁸⁰ Ugbe, R.O. 2002. Originality and Fixation as Basis for Copyright Protection in Music. *op cit.* at 26.

According to David Bainbridge,⁸¹ one can be excused for believing that the word ‘original’ require that the work must be new or innovative in some sense, but in copyright law, ‘original’ does not have its ordinary dictionary meaning and the courts have interpreted the concept very loosely. The work does not have to be unique or even particularly meritorious – rather originality is more concerned with the manner in which the work was created and is usually taken to require that the work in question originated from the author, its creator, and that is not copied from another work. In *Hollinrake v. Truswell*,⁸² the House of Lords stated that copyright is confined to the expression of such ideas, and that if such expression is not copied then copyright is not infringed.

Also, Lord Farwell in *Donoghue v. Allied Newspapers Ltd.*⁸³ held that there is no copyright in an idea or ideas. A person may have a brilliant idea for a story or for a picture or for a play and one which appears to him to be original, but if he communicates that idea to an author or an artist or playwright, the production which is the result of the communication of the idea to the author or the artist or playwright is the copyright of the person who has clothed the idea in form whether by means of a picture, a play or a book and the owner of the idea has no right in that production.⁸⁴

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which is described, explained, illustrated or embodied in such work. In *University of London Press v. University Tutorial Press*,⁸⁵ Lord Peterson J, opined that the word original does not in this connection mean that the work must be the expression or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, 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. But the Act does not require that the expression must be in original or novel form, but that the work must not be copied from another work that it should originate from the author.

Obviously, the provision of S.1(2)(a) of the Nigerian Act underscores the need to expend sufficient effort in the making of the work, so much so that the creator or maker must justify his claim to copyright in his work. To give further credence to the theory of originality, it

⁸¹ Bainbridge, D. op cit. at 39.

⁸² (1894) 3 Ch. 420.

⁸³ (1938) Ch. 106.

⁸⁴ That is the law in its strict application. But we believe that the law should be reviewed so as to proffer some form of compensation for the originator of the idea especially where it is not shown that the person that “clothed the idea in form...” paid for or bought the idea from its originator.

⁸⁵ (1916) 2 Ch. At 608-609.

was held in *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*⁸⁶ that, to determine whether a work has the originality requisite to render it original work within the Act, it is right to take into account the considerable skill, judgment and labour expended by the author in the work central to copyright is the originality of expression of thought other than the originality of ideas. “Originality therefore, must not by any dint of imagination be stretched to mean novelty of thought or idea. Generally, ideas, theories, facts, formulae, inventions, discoveries, etc. are within the realm of public domain and, invariably, outside the protection of copyright.”⁸⁷

The fact that a work contains portions derived from pre-existing work does not *ipso facto*, foreclose it from copyright protection. The key factor is that a sufficient conceivable independent skills, labour or judgment must have been expended on the work. Also, that a work contains some unoriginal matters does not prevent it from copyright protection. In *Warwick Film Productions Ltd. v. Eisinger & Ors*,⁸⁸ where the plaintiff company claimed to be the exclusive licensee of copyright in a book called “The Trials of Oscar Wilde” and also to be entitled to copyrights in an anonymous book called “The Trials of Oscar Wilde: Three Times Tried.” The court dismissed the action and held that whilst both books contain much “unoriginal matters” they were both literary works in their own rights and ones in which copyright subsisted. Also, copyright can subsist in a work which itself is an infringement of copyright.⁸⁹

What is paramount in considering the originality of a copyright work is that the work must originate from the author. It definitely must have its origin in the labour of the author, his property and his creation.⁹⁰

4.2 Fixation

By S.1(2)(b) of the Nigerian Act, literary, musical and artistic works must be fixed in a particular medium. It states that a literary, musical or artistic work shall not be eligible for copyright unless the work has been 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.

⁸⁶ (1964) 1 All E.R. 465.

⁸⁷ Olueze, I.M., *supra* note 25 at 26.

⁸⁸ (1969) 1 Ch. 508.

⁸⁹ See *Macmillan & Co. Ltd. v. K.J. Cooper* (1923) 40 T.L.R. 186.

⁹⁰ Keller, B.P. & Cunard, J.P. 2004. *Copyright Law: A Practitioner's Guide*. New York: Practising Law Institute, at pp 2-18.

It must be noted that this is a second requirement for which any literary, musical or artistic work must meet in addition to originality for the purposes of copyright protection. There must be ample evidence that the work has been fixed in any definite medium of expression from which it can be perceived, reproduced, or otherwise communicated either directly or with the aid of any device.

The aims for the legal requirement of fixation are: first, it is of evidentiary value, since works that are not fixed in any medium from which they can be perceived, would themselves be difficult to produce in evidence before a law court in order to compare them with an alleged infringing copy.

Secondly, since copyright law essentially protects expressed ideas and not mere ideas, such expression are better done through a particular medium from which they can be perceived, otherwise, the argument disappears.⁹¹ Thus, in *Hollinrake v. Truswell*,⁹² it was held that copyright is confined to the expression of such ideas and that if such expression is not copied, then copyright is not infringed. This is particularly so in the areas of literary, artistic and musical works where it would be impracticable to speak of any such work without a medium.

We submit that it is also impossible to argue that the condition for fixation is not necessary for the other works not listed expressly as the only way to our mind to express an idea, is to have it fixed in a medium perceivable. There is no particular prescription under the Act of any standard or form required of the fixation. The work may be fixed in any medium of expression presently known or later to be developed.⁹³

5.0 COPYRIGHT BY CONNECTION OF WORKS WITH NIGERIA

S.3(1) of the Nigerian Copyright Act bestows Copyright on works which are ordinarily not subject of Copyright pursuant to S.2(1) of the Act. Section 3(1)(c) of the Act confers Copyright on every eligible work, other than broadcast viz.:

- a. in the case of a literary, musical or artistic work or a cinematograph film, the work is first published in Nigeria; or
- b. in the case of sound recording, the work is made in Nigeria.

Olueze,⁹⁴ explained the above provisions to be that Copyright shall be conferred on every eligible work provided that it is not eligible by virtue of the author being a qualified person

⁹¹ Ocheme, P. 2000. *op cit.* at 29.

⁹² *Supra.*

⁹³ S.1(2) (b) of the Act.

⁹⁴ Olueze, I.M. *Nigerian Copyright Law, op cit.* at p.36

under Section 2(1); it is not a broadcast; in the case of literary, musical or artistic work or a cinematograph film, but it is first published in Nigeria; or in the case of sound recording, it is made in Nigeria.

Deducible from the above is that a literary, musical or artistic work or cinematograph film shall be ineligible for Copyright if it was first published in a country other than Nigeria. However, a work previously published in another country and subsequently published in Nigeria shall be treated as having been first published in Nigeria if the two publications took place within a period of not more than thirty days.⁹⁵

The question that comes to the fore is; what is the fate of the author of an unpublished work as well as the author of a manuscript? In *Merchant Adventures Ltd. V. M. Grew & Co. Ltd.*,⁹⁶ the Court held that, even if a work is unpublished, the author may prove that such work was made by a “qualified person”.⁹⁷

In the case of the author of a manuscript, Section 13(1) of the Nigerian Act, provides that notwithstanding any assignment or sale of the original work, the author has an inalienable right to an interest in any sale of that manuscript by public auction or through dealership. The right conferred only applies to the sale of the original of such manuscript.⁹⁸

Olueze, further opined that the moral of Section 13(1) of the Nigerian Act is to confer economic or pecuniary interest on authors of manuscript but never copyright so to say.⁹⁹

Furthermore, persons who are neither Nigerian citizens nor domiciled in Nigeria but who are citizens of or domiciled in a country that is a party to an obligation in a Treaty or other International Agreement to which Nigeria is a party can claim Copyright over their works, where such work is first published -

1. in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party.
2. By the United Nations or any of its specialised agencies.
3. By the Organization of African Unity (now African Union)
4. By the Economic Community of West African States.¹⁰⁰

In the same vein, if a company is a body corporate established by or under the laws of a country that is a party to an obligation in a treaty or other international agreement to which

⁹⁵ See Section 39(2)(c) of the Nigerian Act. In *Merchant Adventures Ltd. V. M. Grew & Co. Ltd* (1972) 1 Ch. 242, it was held that a work is deemed to be published if copies of it have been made available in a manner sufficient to render the work accessible to the public. See also Section 39(2)(a) of the Nigerian Act. Note that where only part of a work is published, that part should be treated as separate work while the other part remains unpublished.

⁹⁶ (1972) 1 Ch. 242

⁹⁷ See Section 2(1) of the Nigerian Act.

⁹⁸ See Section 12(2) of the Nigerian Act.

⁹⁹ Olueze, I.M. 1998. *Nigerian Copyright Law, op cit.* at p.36.

¹⁰⁰ Babafemi, F.O. 2007. *op cit.* at p.40-41. See also Section 5(1) of the Nigerian Act. See further Section 41 of the Nigerian Act on the reciprocal extension of protection.

Nigeria is a party, Copyright, as in the above case, shall be conferred by reference to the international agreement.¹⁰¹

On the whole, Article 3(1) of the TRIPS agreement is particularly instructive as relates the obligation of member states in treatment of works of Intellectual Property where it provides that “each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement...”¹⁰²

6.0 CONCLUSION/RECOMMENDATION

X-rayed is the fact that the extent of works eligible for copyright protection under the Nigerian Copyright Act is exhaustive even though couched in a manner that allows for expansive interpretation. For instance, the Act may not have mentioned protection of works on the internet/digital environment, however, the wordings of the Act on fixation in any perceivable medium now known or later to be developed suggests that works on the internet are protected as well.

That notwithstanding, it is our humble recommendation that the Nigerian Copyright Act be reviewed to expressly provide for works on the internet/digital environment or in the alternative, Nigeria should domesticate the WIPO Internet Treaties so that we be in tune with international realities of modern times. This we submit will prevent the numerous interpretation that could be given by different judges on the fixation of works on the internet.

¹⁰¹ See Section 5(1)(b) of the Nigerian Act.

¹⁰² See also Article 3(1) of the WIPO Performance and Phonograms Treaty (WPPT).