

NIGERIAN COPYRIGHT SYSTEM IN THE MORDERN AGE AND ITS IMPLICATIONS^{*/**}

Abstract

This paper makes the assertion that though modern age provides window of opportunity for users and businesses, for speedy, cheap and global dissemination of information, knowledge, research, and entertainment through the internet, easy access to these technology has made duplication of works such as literary, musical and artistic works, movies, and video recordings, and so on. very anonymous, effortless and low-cost, thereby making the survival of copyright system more difficult Having faced with the difficulty of determining eligibility, protection and infringement of certain works particularly computer programs and software in a nonconventional system, the technological evolution has become a breeding tool for piracy, copying, distribution, and selling of another's intellectual works without authorization. This work seeks to consider the requirement of sufficient effort and fixation; fair use as an exception to copyright infringement; and identification of modern age copyright infringement activities that poses threat to protection of works in Nigeria and its implications. It also appraises how the copyright regime has fared in the face of modern day reality. Being that for a work to be protected, it does not require the creator's personal intellectual creativity, it is enough if sufficient skills, judgment and labour is contributed in making the work. It is therefore recommended that identifiable implementable solution, which includes use of digital technologies in combating these challenges be adopted to strengthen the copyright system in Nigeria.

Key Words: *Copyright, Modern Age, Infringement of Copyright, Digital Networks*

1. Introduction

Copyright is a legal right created by the law of a country that grants the creator exclusive rights for its usage and distribution.¹This means that Copyright protection is territorial. It strives to strike a balance between the right of creators to be incentivized and the interest of the public to access works. Literary, musical or artistic works are protectable under Copyright Act, where sufficient efforts (skills, judgment and labour) have been expended in making the work to give it an original character, and such work fixed in a definite medium of expression from which it may be perceived, reproduced, or communicated either for personal intellectual creativity of the creator, popularly known as test of originality.² Any work accessed or rendered in digital form, *via* website, chatroom, email services, or social networking site, can be reproduced rapidly, over and over again, at little cost, and each reproduced copy further reproduced without any loss of quality. This is a pointer that the acronym 'protectable works'

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¹ Copyright Act, Cap C28, Laws of the Federation of Nigeria (LFN)2004., section 6

² *ibid*, section 1.

is afflicted by modern age inventions and technological challenges. It is true that any person having access to internet can become a publisher, because downloading, uploading, saving or creating a derivative work is a very simple task. In modern times, digital technology has made taking content from one site, modifying or reproducing it on another site, through file sharing for example. This has become a tool for protection of work and also poses serious challenges for the traditional interpretation of rights and protection.

Copyright owners through digital technology by way of encryption, encoding, pin locking, serial key restrictions, copyright alert and so on, restrict the use and access to their works, but hackers also create circumventing technologies and schemes to bypass those restrictions. The essence of this paper ‘Nigerian Copyright Systems in the Modern Age and Its Implications’ is to find and adopt a suitable way, through digital technologies, to combat these challenges and strengthen the copyright system in Nigeria.

1.1 The Concept of Copyright

The concept of copyright presently governed by the Copyright Act³ is *sui generis*.⁴ Though, the Act defined ‘copyright’ simply as ‘*Copyright under the Act*.’⁵ A closer look at the length and breadth of the Act, on a broader perspective, copyright is the exclusive right to control, to do or authorize the doing of any of the acts restricted to the copyright owner.⁶ It is “...*the sole legal right to print, publish, perform, film or record a literary or artistic or musical work.*”⁷ It is an exclusive right given by law for a certain term of years to an author who can be a writer, composer, or designer, to print, publish and sell copies of her original work.⁸ Copyright protects the expression of artistic idea that is fixed in any tangible medium of expression, meaning that such expression should be written or printed on paper, painted on canvas, shaped in stone or recorded on film or videotape, and that the idea in the artist or author’s mind must take a physical form.⁹

Black’s Law Dictionary defines copyright, *inter alia* thus;

The right to copy; specifically, a property right in an original work of authorship (including literally, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.¹⁰

Copyright also applies to many different types of artistic works, including paintings, music, poems, plays, books, architecture and choreography, as well as to works that are generally not considered artistic such as computer software, maps and technical drawings.¹¹

³ Cap C28 Laws of Federation of Nigeria (LFN), 2004.

⁴ I M Olueze, *Nigerian Copyright Law* (Lagos: Maglink International Limited 1998) p2.

⁵ *Ibid* s. 51(1) interpretation section.

⁶ *I.J. Adenuga v. Ilesanmi Press Sons (Nig.) Ltd.* (1991) 5 NWLR [Pt. 189] 82.

⁷ United Republic of Tanzania Copyright and Neighbouring Rights Act, s. 4.

⁸ First Schedule Copyright Act of Nigeria.

⁹ TL Wherry, *Intellectual Property: Everything the Digital Age Librarian Needs to Know* (Chicago: American Library Association 2008) 3 and 52.

¹⁰ B A Garner (ed), *Black’s Law Dictionary* (9th edn, USA: West Publishing Company, 2009) 386.

¹¹ Nigerian Copyright Act 1988, section 51(1).

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In *MAI System Corporation v. Peak Computer*,¹² in which a copyright owner of the operating system successfully sued a computer repair company for copyright infringement of their OS software. The defendant was able to view the software program during assisting the plaintiff in diagnosing the problem. As Belgore J. in *Oladipo Yemitan v. The Daily Times Nigeria Ltd*¹³ noted “...the right of a man to that which he had originally made... must be protected” This protection should prohibit copying of another’s work or reaping fruits sown by the creativity of others.¹⁴

Similarly, in *Feist Publications Inc. v. Rural Tel. Serv. Co.*,¹⁵ the United States of America (U.S) Supreme Court noted that copyright benefits the society, and the author’s reward merely secures this benefit. The law of IP generally protects copyright, trademarks,¹⁶ industrial designs¹⁷ and patents.¹⁸ Copyright strives to strike a balance between the rights of creators to be incentivized against the interest of the public to access works. This is evident in Article 27 of Universal Declaration of Human Rights,¹⁹ thus:

Everyone has a right to the protection of the moral and material interests resulting from scientific, literary or artistic production of which he is the author... Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Lord Mansfield C.J in *Sayre v Moore*²⁰ noted that:

We must take care to guard against two extremes equally prejudicial: the one, that men of ability may not be deprived of their just merits, and the rewards of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.²¹

The rationale underlying the protection of Copyright was stated by the U.S Supreme Court, in *Mazer v. Stein*,²² thus: “the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare.” Technologies that is raising issues for copyright and its law are those related to storage, identification and transmission or distribution of works held in digital format. Aspects to these technologies that have implications for copyright law include making ease of reproduction and dissemination. Once a work is accessed or rendered in digital form, via a website, chatroom, email service, or social networking site, it can be reproduced rapidly, over and over again, at little cost and without loss of quality. Each copy can further be reproduced without any loss of quality. Any

¹² 911 F. 2d 511 (9th Cir, 1993).

¹³ [1980] FHCR 186 at 190

¹⁴ I A Cornish, P B Llewellyn and R T Aplin, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (8th edn, USA: Sweet & Maxwell, Thompson Reuters South Asian edn 2016) 413 para 10-39.

¹⁵ 499 U.S. 340, 349–50 (1991).

¹⁶ Trademarks identify the source of a particular good. The link between the proprietor and the market.

¹⁷ This protects shape, designs and other aesthetic features of a product.

¹⁸ This protects patentable inventions that is capable of industrial application.

¹⁹ Proclaimed and Adopted by General Assembly resolution 217A (111) 10 December 1948.

²⁰ (1785) 1 East. 361n 102 ER

²¹ *Ibid* 139.

²² 347 U.S. 201, 219 (1954).

person having access to internet can become a publisher because downloading, uploading, saving or creating a derivative work is a very simple task.

In modern times, taking content from one site, modifying or reproducing it on another site has been made possible by digital technology and this has posed serious challenges for the traditional interpretation of individual rights and protection. Due to global nature of the internet, infringement usually happens not only within one country but also across borders. This and many other issues has made the question of how to enforce copyright law on a global scale, not just in Nigeria, very imperative. Above notwithstanding, innovation and technologies of the modern age has encouraged various talents to be showcased. People can now take up blogging, graphics design, database management and so on as a full or part time endeavor. Digital networks aid in the dispersion of creative ability.²³

It is also apparent that technology makes the production and marketing of artistic works easier and cost effective. For example, computer software can be used to create and analyze full length music and videos. This dispenses with the need to purchase various equipment like a video camera, piano, guitar, keyboard and other instruments needed for the creation of audiovisual works. Also, with the innovation in digital technology, multimedia can be edited, mastered, re-mastered and appended. Digital technologies can be both significant threats to the legitimate interests of copyright holders and also a useful tools for their protection.²⁴

Under the Copyright Act of Nigeria, literary, musical or artistic works are protectable where sufficient efforts have been expended in making the work to give it an original character and such work is fixed in a definite medium of expression (now known or later to be developed) from which it may be perceived, reproduced, or communicated either directly or by means of a machine or other device.²⁵ This definition is clearly afflicted by all the problems and challenges which the modern age has engendered. Although, the Act attempts to anticipate improvements in technology and scientific knowledge, the intended flexibility and broadness are hampered by the other eligibility requirements and parameters for copyright protection stipulated in the Act.²⁶

From the above, copyright may be viewed as a personal right, which is of a tangible nature, once fixed in a definite medium of expression, being a creation of the statute, vested in the author, holder, and/or owner (originator or creator), the exclusive right in relation to such eligible work, which right does not remain in perpetuity. Copyright is a legal right created by the law of a country that grants the creator exclusive rights for its usage and distribution. This right is usually only for a limited time, and its exclusivity are not absolute having limitations and exceptions. Copyright subsists in certain specified type of works, and if a person performs any of the acts exclusive to another, the latter can sue for infringement of his

²³ E Klinenberg and C Benzecry 'Cultural Production in a Digital Age' [January 2005] (597) *Sage Publications* 6-18.

²⁴ B Hazucha, H C Liu, and T Watabe, 'Copyright, Technological Protection Measures and Their Acceptance by Consumers in Japan' *SERCI Annual Congress Conference Paper* 2013.

²⁵ *Ibid* s. 1(2).

²⁶ N Itanyi and C Ngwu, 'Expanding the Frontiers of Nigerian Copyright Laws in the Age of Social Media' [March 2018] (9) (1) *The Gravitas Review of Business & Property Law* 96-107.

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copyright and obtain remedies by way of damages and injunction, among others. A copyright may be designated by ©²⁷ and ®²⁸

1.2 Eligible Works.

Section 1 (1) of Copyright Act provides that the following works shall be eligible for copyright.²⁹

- a. Literary work³⁰
- b. Musical work³¹
- c. Artistic work³²
- d. Cinematograph film³³
- e. Sound recording³⁴
- f. Broadcast³⁵

1.3 Duration of Copyright³⁶

The duration of copyright is as follows:

- a. In the case of literary, musical and artistic works (other than photographs), 70 years after the end of the year in which the author died.
- b. If a body corporate: 70 years after the end of the year in which the work was published.
- c. In the case of Cinematograph films, sound recordings, broadcasts and photographs: 50 years after the end of the year in which the work was published or the broadcast first took place.
- d. For literary, musical and artistic works with anonymous or pseudonym authors: 70 years after the end of the year of first publication. If the author becomes known, 50 years after the end of the year in which he died.

In the case of joint authorship of a literary, musical or artistic work; 70 years after the end of the year in which the last joint author died.³⁷

²⁷ The copyright symbol which a circled capital letter 'C' is the symbol used in copyright notices for works other than sound recordings.

²⁸ The sound recording copyright symbol which a circled capital letter 'P' is the symbol used in copyright notices for sound recordings.

²⁹ Copyright Act, Cap C 28, Laws of Federation of Nigeria, section 1(1). Eligibility is conferred irrespective of quality, and this list is not exhaustive.

³⁰ These are works expressed in print and writing. It covers all written and printed material and they include writings such as books, novel, art, poetry, essays, stories, features, biographies and computer programmes, encyclopaedia, dictionaries, letters, memoranda reports, teleplays, etc.

³¹ This includes all musical works, whether accompanied by lyrics or instrumental.

³² It includes paintings, drawings, etching, lithographs, woodworks such as sculptures, engravings, prints, plans, map, photographs, works of architecture in the form of a building model, etc.

³³ Described as first fixation of a sequence of visual images capable of being shown as a moving picture and of being an object of reproduction and includes films of all sorts, whether or not they are to be shown as a moving picture.

³⁴ It covers all sounds that can be perceived aurally, excluding sound tracks associated with cinematograph films.

³⁵ This simply covers all broadcasts through television, radio, cable, satellites etc.

³⁶ The First Schedule of the Copyright Act 1988, Cap C28 LFN 2004.

³⁷ *Ibid* s. 2(4). The end of the year should imply December 31st. In the case of an assignment, the relevant determinant is the death of the author not the licensee or assignee.

1.4 The Requirement of Sufficient Effort and Fixation.

S. 1(2) of the Copyright 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.³⁸

Sufficient Effort³⁹

Originality is a fundamental theme of copyright, so also is the requirement of sufficient effort. In the U.S, this requirement is referred to as the “sweat of the brow principle.”⁴⁰ Originality in this context does not refer to novel or unique works. It does not mean that the work/idea itself should be ingenious or totally new.⁴¹ It is the manner and style of expression that should be original. The work must not have been copied⁴²... it must have originated from the author’s independent skill and judgment.⁴³

As Lord Atkinson noted in *Macmillan and Co Ltd v Cooper*⁴⁴ that “it is the product of one man’s skill, labour and capital that must not be appropriated by another”. Not the elements or raw materials. In *University of London Press Limited v. University Tutorial Press*⁴⁵ the Court noted that:

Copyright Acts are not concerned with the originality of ideas but with the expression of thought” (in this present case of a literary work; the expression of thought in writing.) Furthermore, “original means that such expression must originate from the author and must not be copied.

As such, it can be seen that independent skill, effort and judgment must have been expended in producing the literary, musical or artistic work... it must not be a mere copy of another’s work.⁴⁶ The author must have “earned” the exclusive right over the work.”⁴⁷ In summary, a copyist cannot enjoy copyright.⁴⁸ As the moral bases upon which the principles of the protective provisions of copyright vests is the ‘eight commandment thou shall not steal.’⁴⁹

³⁸ Copy Right Act Cap C28 Laws of Federation of Nigeria, section 1(2)

³⁹ For literary, musical and artistic works, s. 1 (2a).

⁴⁰ That is protection of labour and sweat instead of creativity and originality.

⁴¹ H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs* (London: Butterworth 1995) 1.7

⁴² *Ladbroke Ltd v. Hill* [1964] 1 All ER 435.

⁴³ *University of London Press limited v. University Tutorial Press* [1916] 2 Ch.601.

⁴⁴ (1924) 40 TLR 186.

⁴⁵ [1916] 2 Ch.601.

⁴⁶ *Chicago Record-Herald v. Tribune Association* (7 Cir, 231 F. 2d 550, 553), where the same manner, format and style of presentation was copied. The court held that there was infringement.

⁴⁷ JO Asein, *Nigerian Copyright Law & Practice* (2nd edn Abuja: Books and Gavel Publishing, 2012)75

⁴⁸ *ICIC (Directory Publication Limited) v. Ekko Delta (Nigeria Limited) and another* (1977) FHCLR 346.

⁴⁹ Lord Atkinson’s Statement in *Macmillan and Co. v Cooper* (1923) 40 TLR 186 at 187.

Fixation⁵⁰

This requirement simply means that copyright cannot exist in ideas.⁵¹ Copyright protection basically involves the expression of an idea, not the idea itself.⁵² As Amedee noted; “ideas’ for instance, though upon them civilization is built, may never be ‘owned’, the law does not protect them at all, but only their expression.”⁵³ Similarly, in *University London Press Ltd. v. University Tutorial Press Ltd.*⁵⁴ Peterson J. noted:

...copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of ‘literary work’ with expression of thought in print or writing...

For example; In *Tate v. Thomas*⁵⁵ “A” conceived an idea for a play. “B” wrote down the lyrics and dialogues. The Court held that B had copyright since he fixed the idea in a definite medium of expression.⁵⁶ A similar conclusion was reached in *Donoghue v Allied Newspapers Ltd*⁵⁷ where the Court held that the owner of an idea has not copyright in a product/expression which another produces notwithstanding that it embodies the idea.

Although this requirement appears unfair to the person that conceived the idea, it is necessary to prevent frivolous and unfounded litigations. Everybody can have an idea but few can take the additional step of putting it into writing (or actualizing it as the case may be). The implication is that a literary, musical or artistic work must be fixed in a definite medium of expression from which it can be communicated or perceived.

2. Infringement of Copyright

2.1 Acts amounting to Infringement of Copyright

Conventionally, Nigerian Copyright Act grants owners of copyright the power to control the doing of certain acts in relation to the work. Section 15 of the Act provides that infringement occurs where a person without license or authorization of the owner does any act which only the owner of copyright has the right to do.⁵⁸ In the U.S, the author is advised to display a

⁵⁰ S.1 (2b).6

⁵¹ The United States’ Copyright Act 1976 section 102.

⁵² *Hollinrake v Truswell* (1894) 3 Ch 420, 63 LJ Ch 719, 7 R 568, 38 Sol Jo 706, 71 LT 419, 10 TLR 633, CA.

⁵³ E A Turner ‘The Law of Trade Secrets’ [December 1962] (6) (2) *Michigan Law Review* DOI <<http://www.Jstor.org/stable/1286817>> Accessed on 2 February 2020.

⁵⁴ [1916] 2 Ch. 601.

⁵⁵ [1921] 1 Ch. 503.

⁵⁶ Note however that where the person fixing the idea on the direction of the conceiver, he is regarded as a mere tool. See, *Donoghue v. Allied newspapers ltd* [1938] Ch. 106. Example, a person dictating to his typist would have copyright notwithstanding the fact that the typist is the one that fixed the words.

⁵⁷ [1938] Ch. 106.

⁵⁸ It provides, “(1) Copyright is infringed by any person who without the licence or authorisation of the owner of the copyright- (a) does, or cause any other person to do an act, the doing of which is controlled by copyright; (b) imports into Nigeria, otherwise than for his private or domestic use, any article in respect of which copyright is infringed under paragraph (a) of this subsection; (c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection; (d) distributes by way of trade, offer for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright infringed under paragraph (a) of this subsection; (e) makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work; (f) permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be used is not aware, and had no reasonable ground for

notice at the title page ©. This would notify users of the work that copyright protection subsists *therein*.

In *Francis Day and Hunter Limited v. Bron*,⁵⁹ the Court of Appeal held that to constitute infringement, there must be sufficient similarity between both works and a causal connection. In *Hawkes v. Paramount Films Services limited*,⁶⁰ the Court held that playing a half minute extract from the four minutes work of the plaintiff amounted to an infringement because it constituted a substantial part and “it could be recognized by everyone who heard it”. Infringement is actionable at the suit of copyright owner, assignee or exclusive licensee,⁶¹ with jurisdiction vested in the Federal High Court where the infringement occurred.⁶²

2 Exceptions to Copyright Protection/Infringement⁶³

Doctrine of Fair Dealing

Commonly referred to as “fair use” in the U.S.⁶³ “A middle ground between rights holders and users... a breathing space.”⁶⁴ This doctrine allows violation to go unpunished if the copying constitutes a use that has been deemed fair or reasonable by the courts.⁶⁵ The infringer is exculpated where his acts fall within the fair use limitation.⁶⁶ Article 9 (2) Berne Convention states;

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Lord Denning M.R. noted in *Hubbard v Vosper*,⁶⁷ that:

It is impossible to define what is ‘fair dealing.’ It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them... Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.⁶⁸

suspecting that the performance be an infringement of the copyright; (g) performs or cause to be performed for the purposes of trade or business or as supporting facility to a trade or business or as supporting facility to a trade business, any work in which copyright subsists.”

⁵⁹ [1963] Ch. 587 (Eng.).

⁶⁰ [1934] 1 Ch. 593 (CA).

⁶¹ Copyright Act Cap C28, Laws of the Federation of Nigeria, 2011 as amended, s.16.

⁶² *Ibid* s. 46.

⁶³ Second Schedule, Cap C28 LFN 2004. We shall however delve only on Fair Use.

⁶⁴ US Copyright Act of 1976, 17 U.S.C. §106-107.

⁶⁵ The opinion of the Court in *Campbell v. Acuff-Rose Music Inc.*, 510 US 569 [Acuff-Rose]: Justice Souter at 579.

⁶⁶ W W Fisher III, ‘Promises to Keep: Technology, Law, and the Future of Entertainment’ (2004) 43.

⁶⁷ JO Odion and NEO Ogba, *Essays on Intellectual Property Law: Copyright, Trade Marks, Patents, Industrial Designs* (Benin: Ambik Press 2010) 41.

⁶⁸ [1971] 1 All ER 1023.

⁶⁹ *Ibid* 84.

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Fair use is a question of degree⁶⁹ which varies based on the facts of each case and the nature of the alleged infringing act. The Courts have also required that the copyright owner must be acknowledged, and the use should not be commercial in nature nor should it prejudice the author's economic or moral interest/honour.⁷⁰ Factors to be considered in determining 'fair use' under U.S laws are as follows:⁷¹

- a. the purpose and character of use;
- b. the nature of the copyrighted work;
- c. the amount and substantiality of the portion used; and
- d. the effect of the use upon the potential market for and value of the copyrighted work.

This exception was approved in *Sony Corp. of America v. Universal City Studios*⁷² and the case of *Kelly v Arriba Soft Corporation*⁷³ and *Castle Rock Entertainment Inc. v Carol Publishing Group Inc.*⁷⁴ provided it was not prohibitive and flagrant. In United Kingdom (UK), the 'fair use' doctrine is narrower. Section 29 (1) UK Copyrights, Patents and Designs Act (CDPA) 1988 provides:

Fair dealing with a literary, dramatically, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

Other exempted purposes include; criticism and review, helping the visually impaired, review or reporting current events, library and archival usage and incidental inclusion in an artistic work, sound recording, film, broadcast or cable program.⁷⁵ The Copyright and Related Rights Regulations 2003 of the UK, was also enacted to provide for fair dealing. The fair dealing was limited to non-commercial use of copyrighted materials. This has been confirmed in *CHH Canadian Ltd v Law Society of Upper Canada*.⁷⁶ Fair use provisions can also be found in the various laws of other countries.⁷⁷ In Nigeria, exceptions to copyright protection and infringement can be enumerated as follows:

- a. Educational purpose. Use in an approved educational Institution for that purpose, provided it is destroyed within a specified period or 12 months after it was made.⁷⁸
- b. Public Interest, provided it is non-commercial.⁷⁹
- c. Parody, pastiche.
- d. Incidental inclusion in a film or broadcast: form which it can be viewed by the public.
- e. Approved broadcasting.
- f. Research/Private Study.
- g. Direction of the government.

⁶⁹ *Beloff v. Pressdram Ltd* [1973] 1 All ER 241.

⁷⁰ *Peter Obe v. Grapevine Communications Ltd* (Suit No. FHC/L/CS/1247/97), where the court advocated for referencing the author of the work.

⁷¹ U.S Copyright Act, s. 107.

⁷² 464 U.S 417, 448, 454 (1984)

⁷³ 335 F.3d 811 (9th Cir. 2003)

⁷⁴ 150 F.3d 132 (1998)

⁷⁵ S.30 of the Act provides for more details.

⁷⁶ [2004] 1 SCR 399, para 16-84.

⁷⁷ Australia Copyright Act 1968, ss 40 and 41, for example.

⁷⁸ Copyright Act of Nigeria, second Schedule, s. 6(1)

⁷⁹ *Ibid.*

- h. Where not more than three copies of the book is made available in a public library: provided the book is not available for sale in Nigeria.⁸⁰
- i. Conversion of copyrighted works into braille for the blind by Government approved Institutions.⁸¹

2.3 Nature of Modern Age Copyright Infringement Activities and Implications

Copyright laws usually grant owners of copyright the power to control the doing of certain acts in relation to the work. The sustenance of the above phrase to the modern age has many implications. Technologies, like many innovations, are both promising and potentially harmful to various parties interested in the use and exploitation of works of authorship, from books and music to films and web pages.⁸² The infringement includes;

a. File Swapping.

Known as peer-to-peer file sharing is the transmission of digital files, usually large, from one computer to another using internet or data.⁸³ A decade back floppy disk was used, which provided around 3 MB storage space. Then came pen drives, CDs, and DVDs. File sharing however is regarded as the network of personal computers, each of which acts as both client and server, capable of exchanging files and email directly with every other computer on the network.⁸⁴ Peer-to-peer networks are less expensive than client/server networks but less efficient when large amounts of data need to be exchanged.⁸⁵ Some applicable file swapping websites are Google Drive,⁸⁶ Dropbox, 4shared, Mediafire, Apple iCloud, OneDrive, Zippyshare, Sharing Box,⁸⁷ others are Mega upload, File Stube, Rapid share, The Pirate Bay, File serve, Hot foil, Torrents, deposit file, Mp3skull and Hulk share.⁸⁸ These websites allow one to share files privately as well as publicly. It is through these sites and more that artistic and literary works are shared illegally.

b. Downloading

This is receiving of information, typically a file from another computer using a modem.⁸⁹ This mainly affects music and film industry, but the situation is worst in the former. People are free to download, for example e-books, at the following websites, Project Gutenberg, Open Library, Google eBookstore, Amazon, Internet Archive, ManyBooks, bookboon.com, Library Genesis, Freebookspot, Free eBook.⁹⁰ The question is whether the owner of the work permit such action to be performed. Sometimes, the artists themselves post or give permission for the work to be accessed. Other times however, it can either be owners of the sites or the

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² G Clack and M Peters, 'The Challenge of Copyright in Digital Age', *U.S. Department of State Bureau of International Information Programs Focus on Intellectual Properties Rights*, 2006, p.50

⁸³ V Sharma, *Information Technology Law and Practice* (3rd edn, New Delhi: Universal Law Publishing Company, 2011) p 466.

⁸⁴ R Deibert *et al*, *Security, Identity, and Resistance in Asian Cyberspace* (London: The MIT Press, 2012).

⁸⁵ <<http://www.thefreedictionary.com/File+swapping>> Accessed 4 February 2020.

⁸⁶ Free cloud storage.

⁸⁷ <<http://www.buzz-cnn.com/free-file-sharing-sites/amp/>> Accessed 3 June 2020.

⁸⁸ *ibid.*

⁸⁹ Downloading is the transmission of a file from one computer system to another. From the Internet user's point-of-view, to download a file is to request it from another computer (or from a Web page on another computer) and to receive it. <<http://searchnetworking.techtarget.com/definition/downloading>> Accessed 14 January 2020.

⁹⁰ <<http://www.tckpublishing.com/websites-download-free-ebooks/>> Accessed 3 June 2020.

subscribers of the sites who make such work available to the public without the permission of the copyright owner.

c. Uploading

In downloading, information is received, quite different from uploading whereby a person instead of receiving information, sends information typically a file from another computer using a modem.⁹¹ Many blog owners upload so many things in their blogs. It can be pictures, music, videos, articles, books and other things which most probable are copyrighted.⁹² We have academic sites, for example, academia.edu. The sites provide opportunities for academics to upload their various research papers. However, some of the papers are not well presented in terms of acknowledging the source of the information, making them susceptible to copyright infringement. The same apply to pictures, music and videos. From small computer user's point of view, to download is to receive a file, and to upload is to send a file. When you send an attached file with e-mail note, it is an attachment not a download or an upload. In practice, some people use "download" and "upload" rather indiscriminately, we need to understand the context. Once the instruction says "download (or upload) such a file by email" it mean "send as an attachment."⁹³

d. Browsing

Browsing is defined as “a quick examination of the relevance of a number of objects which may or may not lead to a closer examination or acquisition/selection of (some of) these objects.”⁹⁴ In internet world, browsing is to inspect something leisurely and casually: browsed the newspaper; browsing the gift shops for souvenirs, to read (websites) casually on the internet.⁹⁵ The bad use of browsing may result to copyright infringements. An example is a person browsing a website where free copies of books, movies, or songs are available without the owner's permission, and went ahead downloading it.

e. Caching

Caching is a common technique used to reduce the time it takes for a computer to retrieve information. The term cache is derived from the French word *cache*, meaning ‘to hide’. Recently accessed information is stored in a cache so that a subsequent repeat access to that same information can be handled locally without additional access time or burdens on network traffic.⁹⁶ In order for a cache to operate successfully, it must make identical copies of all cacheable information that travels across its path. Much of the information transmitted across the internet receives copyright protection because it consists of files containing graphics, sounds, and text. When protected works are copied and stored by computer caches, the rights of authors and the public interest of maintaining a workable internet collide.⁹⁷ The

⁹¹ Transmission in the other direction: People who share images with others on bulletin board systems (BBS) upload files to the BBS. <<http://searchnetworking.techtarget.com/definition/uploading>> Accessed 4 March 2020.

⁹² C S Kian and R Y Meng, *E- Commerce Law* (Singapore: Time Book International, 2001)p45.

⁹³ <<http://searchnetworking.techtarget.com/definition/downloading>> Accessed 4 February 2020.

⁹⁴ B Hjørland, ‘Theoretical clarity is not “Manicheanism”: A reply to Marcia Bates’ [2011] (37) (5) *In Journal of Information Science* 546-552. <http://pure.iva.dk/files/31053333/JIS_1568_v3.pdf> Accessed 5 February 2020.

⁹⁵ <<http://www.thefreedictionary.com/Browsing>> Accessed 5 March 2020.

⁹⁶ B Hjørland, ‘Theoretical clarity is not “Manicheanism”: A Reply to Marcia Bates’ *op. cit.* (n 84).

⁹⁷ R S Vermet ‘File Caching on the Internet: Technical Infringement or Safeguard for Efficient Network Operation?’ [1997] (4) *J. Intell. Prop. L.* 273. <cyber.law.harvard.edu/metaschool/fisher/ISP/cache1.html> Accessed 5 March 2020.

action of Caches of duplicating and saving the information they retrieve from a web server for the future use of any other person who request them amount to reproduction and distribution of the original work.

In *Playboy Enterprises, Inc. v. Frena*,⁹⁸ Playboy sued the operator of a computer bulletin board, or the BBS. The defendant placed to protect works online in the form of photographs belonging to the plaintiff. The plaintiff alleged violations of its exclusive rights, including the exclusive right of public distribution. Playboy case is significant to the issue of file caching because cache servers are very similar in their operation to computer bulletin boards. They store a large number of files which are copied and then sent to any user that requests them. By placing cache servers on the internet, they are accessible to any of the millions of users connected to the internet. As a consequence, a public distribution makes the first time a cached file is hit.

The Playboy Court focused on another point of law that is controlling on file caching. The Court found that "*it does not matter that the defendant Frena claims he did not make the copies itself.*" The fact that the computer was controlled by users and followed the instructions given by them is not relevant. While caches copy the information to their hard disks, they are only distributed upon the request of a user. Under this rationale, the cache server operator is liable even though the copies are made automatically and done solely at the request of a user.⁹⁹ Caching is not famous like other means of copyright infringements, many users are yet to understand the term, and how it works, but suffers the consequences caused by it.

f. Mirroring

This is the act of improving service for the users by replicating a web site across various servers all over the world and make available the critical information to all users at all the times.¹⁰⁰ In computing, a mirror is an exact copy of a data set. On the internet, a mirror site is an exact copy of another internet site. Mirror sites are most commonly used to provide multiple sources of the same information, and are of particular value as a way of providing reliable access to large downloads. Mirroring is a type of file synchronization.¹⁰¹ As long as the information is obtained through these mirrored sites, copyright infringement may be available to artistic and literary works.

g. Copying and Pasting.

This is the most form of copyright infringement through digital medium. The word copying has two meanings. As a verb, copying means reproducing the same content from one work into another work.¹⁰² The copying may also be regarded in terms of transforming into another form. E.g., a person may copy Tuface Idibia, "Africa Queen" CD into his iPod. Pasting means, to insert a text, graphics, or other data into a document or file.¹⁰³

⁹⁸ 839 F.Supp. 1552 (1993).

⁹⁹ R S Vermut, *op. cit.* (n 132).

¹⁰⁰ V Sharma, *Information Technology Law and Practice, op. cit.* (n 78) 466.

¹⁰¹ Examples of mirroring sites are Wikileaks, Sourceforge, and Torrents. Torrent used mirroring when the site was under the threat of being closed due to the various claim of copyright infringements of various artist works. This is why it is very difficult to avoid the site.

¹⁰² We normally say one song was "copied" from another song, for instance Tanzanite's song (Uchawi na Wanga) was copied from Diamond's song Mbagala.

¹⁰³ <<http://www.thefreedictionary.com/pasting>> Accessed on 5 December 2019.

Therefore, the two terms ‘copying and pasting’ simply means, to reproduce and insert the work. This has become a problem in modern age, and has also affected academics. The developments of digital word have made copying and pasting easy, no acknowledgement of the source of the material, technically known as plagiarism. An example is a Lecturer who found some notes on the internet which had resemblance with his course outline, and decided to take the same notes teaching his students and intending to continue teaching by using the same notes for the coming semesters. This amount to copyright infringement, the doctrine of fair use cannot exist in such circumstances.¹⁰⁴

h. Scanning

Scanning ordinarily means the technique often use to look up a word in the telephone book or dictionary for searching key words or ideas. Scanning involves moving your eyes quickly down the page seeking specific words and phrases. Once you have scanned the document, you might go back and skim it.¹⁰⁵The developments of science and technology have transformed the means of how people used to scan documents through the use of electronic device known as a scanner.¹⁰⁶ Hence, it is easy for a person to scan a book, picture, lyrics or any written documents of another person in a matter of a second and stored it in a computer, thereby infringing on another’s work.

2.4 Implications of Modern Age Copyright Infringement Activities

Engaging in activities such as caching, scanning, file swapping, browsing, copying and pasting, downloading and uploading usually results in:¹⁰⁷

- a. Transmission of information from one computer system to another, involving temporary storage (RAM).
- b. Such unauthorized storage amounts to violation of the copyright owner’s exclusive rights, such as the right to make copies.
- c. It affects the right to distribution, for instance caching and mirroring activities.
- d. The appearance of a copyrighted image in a web browser infringes the right to public display.
- e. The right to derivative works is also infringed.

2.5 Containment of Infringement Activities through Digital Rights Management (DRM)

This unique approach enables copyright owners to restrict the use and access to their works through digital technology by way of encryption, encoding, pin locking, serial key restrictions, copyright alert¹⁰⁸and so on. The keys to such encrypted works have to be purchased by the user. This practice has been approved in *Apple computer INC v Franklin Computer Corporation*¹⁰⁹and *Sega v Accolade*.¹¹⁰ Although hackers usually create

¹⁰⁴ Jeremy Phillips *et al*, *Whale on Copyright* (London: Sweet & Maxwell 1997) 15.

¹⁰⁵ R S Vermut ‘File Caching on the Internet: Technical Infringement or Safeguard for Efficient Network Operation?’ [1997] (4) *J. Intell. Prop. L.* 273. <cyber.law.harvard.edu/metaschool/fisher/ISP/cache1.html> Accessed 5 March 2020.

¹⁰⁶ A scanner is a device that captures images from photographic prints, posters, magazine pages, and similar sources for computer editing and display. <<http://whatis.techtarget.com/definition/scanner>> Accessed on 5 December 2019.....You need to reassess this, as the present year is 2021

¹⁰⁷ V Sharma, *Information Technology Law and Practice*, *op. cit.* (n 78) 466.

¹⁰⁸ This technology runs a script/notification message which warns the user when he is about to contravene copyright in the work. If the user proceeds, then it may be difficult for him to claim that his infringement was innocent.

¹⁰⁹ 16 714 F.2d 1240 (3d cir 1983).

¹¹⁰ CA9 (1992).

circumventing technologies and schemes¹¹¹ to bypass restrictions. This is why Article 11 of the WIPO Treaty 1996 enjoins Member-States to make provisions against such circumvention.

3. Conclusion

For a work to be protected, it does not require personal intellectual creativity of the creator (test of originality) rather contribution of sufficient skills, judgment and labour in making the work is enough. The commercial achievements of owners of copyrights are largely dependent on the internet.

However, the internet serves major negative aspects in the protection of such right. File sharing on the internet is a useful platform for upcoming Artists to become known, gain popularity and possibly raises revenue, but it encourages online infringement of copyright.

Copyright infringement online may occur anywhere but copyright protection is territorial, since the cyberspace does not recognize boundaries, enforcement, including actual place to sue may be difficult. This jurisdictional problem is evidently apparent. On Fair use, in the U.S, the use should neither be commercial in nature nor prejudice author's economic or moral interest/honour. In the UK, the use was limited to research purposes, private study and non-commercial usage, same is applicable to Nigeria among few other purposes. Legitimate and genuine works are usually seen to be expensive to purchase. Users of internet appears to be tempted to opt for cheaper, pirated and or infringing alternative.

4. Recommendations

This paper recommends as follows:

The Use of Digital Technologies to combat Infringement can be utilized to protect and restrict the use of works. Internet Service Providers crawlers can also be used to monitor subscribers and block unauthorized websites. This has been done by the Chinese government through their internet censorship program. Therefore, the same technology that threatened copyright could also be used to protect copyright.¹¹²

It is also recommended that the term of protection be reduced to 3 years after the work has been published. This reflects the present day situation because works are disseminated quickly and in the digital age; latest songs, videos, fashions and trends die out quickly. This would give infringers the patience to wait. This is the common practice in the movie industry where original formats of new movies can only be viewed in the cinemas until after a reasonable period has elapsed (usually 8 month). In *Eldred v Ashcroft*¹¹⁴ the Court also advocated for reduction in the term of protection.

It is also recommended that forward looking Legislations be made. Words like "Limitations" and "exceptions" were defined in a narrow manner. This cannot adapt so easily to changing technologies. Nigeria currently does not consider piracy as a constructive force. Some Nigerian musicians believe piracy helps to promote their careers by contributing to the formation of a fan base that will later support their concerts, through encouraging piracy of

¹¹¹ M L Mills, 'New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change' 65 Chi.-Kent. L. Rev. 307 (1989).

¹¹² D Price, 'Fighting Fire with Fire: Monitoring IP in a Digital Age', *Copyright World*, 2001, pp14-1.

¹¹⁴ U.S 186, 199 (2003).

their own work, by going to markets or bus stations and paying for their music to be included into pirated compilations.¹¹⁵ Legislations should discourage such belligerent attitude and adopt a purposive and modernized approach.

Pricing policies of online publishers and software producers should be reviewed to help reduce unauthorized copying and to facilitate access to their products in developing countries like Nigeria. The extension of free on-line access initiatives for developing countries to cover all academic journals is a good example of what could be done in order to improve access to copyrighted works and achieve their goals for education and knowledge transfer. The implementation of international copyright standard in the developing world must be undertaken with a proper appreciation of the dire need for improving the availability of these products, and their crucial importance for social and economic development.

Donor partners should review policies for procurement of computer software in developing nations, to ensure that options for using low-cost and/or open source software products are properly considered and their costs and benefit carefully evaluated. In order that software can be adapted to local needs, developing countries should ensure that their national copyright laws permit the reverse engineering of computer software programmes, in ways that are consistent with relevant international treaties which they have signed.

Internet users in developing nations should be entitled to fair use rights such as making and distributing printed copies from electronic sources in reasonable numbers for educational and research purposes, and using reasonable excerpts in commentary and criticism. Where suppliers of digital information or software attempt to restrict “fair use” rights by contract provisions associated with the distribution of digital material, the relevant contract position may be treated as void. Where the same restriction is attempted through technological means, measures to defeat the technological means of protection in such circumstances should not be regarded as illegal.

¹¹⁵ A S Rutschman, ‘Weapons of Mass Construction: The Role of IP. in Nigeria’s Film and Music Industries’ [2015] (29) *Emory International Law Review* 32