

## A COMPARATIVE ANALYSIS OF COPYRIGHT ENFORCEMENT PROVISIONS IN NIGERIA: MAXIMISING THE CURRENT LEGAL REGIME<sup>1</sup>

### Abstract

*Like any other proprietary right, enforcement of rights is of utmost importance in copyright matters. It is however common knowledge that Nigeria has a very weak copyright enforcement regime and piracy remains a mammoth challenge. While so many factors have been adduced for piracy in Nigeria, the inadequacy and sometimes lack of effective copyright enforcement laws is of significance. This paper focuses on a critical appraisal of the copyright enforcement provisions (specifically the remedies available in an action for infringement) under the Nigerian Copyright Act. These remedies are compared with some of those available in other jurisdictions such as the United Kingdom, France and Germany. It is realized that while there is a need to amend the Act to incorporate more effective remedies, the law in Nigeria contains most fundamental remedies available in other advanced jurisdictions. There is however a need for lawyers and the court to begin to make use of the law to fill any lacuna in order for litigants to enjoy novel and effective remedies in an action for infringement. For justice to be done to a copyright owner in an action, the attitude of the court must also change towards respecting copyright as evidenced in judgments given.*

**Keywords:** Copyright, Enforcement, Infringement, Remedies, Nigeria

### 1. Introduction

The enforcement of intellectual property rights (IPRs) is a serious challenge in Nigeria. Many developing countries did not have intellectual property ('IP') laws prior to the Agreement on the Trade Related Aspects of Intellectual Property Rights ('TRIPS Agreement'), while those that had such laws had weak legislation or simply adopted that of their colonial masters.<sup>2</sup> Of the various IPRs, copyright is the most common. The popularity of copyright could be due to the rich cultural and creative industries in this region and the fact that copyright accrues automatically without the need for registration.<sup>3</sup> The creative industry particularly based on musical and literary works play an important role in the economy of these nations.<sup>4</sup> Despite this, there is a lack of understanding of copyright and a weak enforcement.<sup>5</sup>

Copyright enforcement refers to the prevention of infringement of rights or obtaining remedies for infringement of conferred rights.<sup>6</sup> Enforcement is important since without it, the law is of no use to those it seeks to protect.<sup>7</sup> Without effective enforcement, right owners cannot enjoy the right conferred on them by law. In the context of this article, copyright enforcement refers

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<sup>1</sup>By **Ifeoluwa Ayokunle OLUBIYI**, Lecturer, Department of Private and Business Law, College of Law, Afe Babalola University, Ado-Ekiti, Nigeria. Telephone no: +234(0)7066351126. Email: ifejemilugba@gmail.com ; olubiyia@abuad.edu.ng

<sup>2</sup>D Tully, 'Prospects for Progress: The TRIPS Agreement and Developing after the Doha Conference' <[https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bciclr/26\\_1/06\\_FMS.htm](https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bciclr/26_1/06_FMS.htm)> accessed 11 January 2014.

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works, 1886 (Paris Act of July 24, 1971), as amended on September 28, 1979 (Berne Convention), Article 5(2); Copyright Act 1998 (as amended), Cap C28, Laws of Federation of Nigeria (LFN), 2004, s.1(2) (b) require fixation for literary, musical and artistic works.

<sup>4</sup> WIPO 'Studies on the Economic Contribution of the Copyright Industries' (2012), pp.2&27 <[http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf)> accessed on 26 January 2014. For instance, in Kenya copyright industry accounted for 5.3% of the GDP and 3.3% of the employment in 2009. In South Africa, the industry accounted for 4.11% of the GDP and 4.08% of employment in 2011. This indicates the contribution of copyright industry to the economy of African countries.

<sup>5</sup> M Ouma, 'Copyright and the Music Industry in Africa' (2004) 7 *The Journal of the World Intellectual Property*, 920. In 2001, the level of music piracy in West Africa was estimated at between 85% and 90%.

<sup>6</sup> Ibid. p. 593

<sup>7</sup> Ibid

to the remedies or penalties that exist in the case of infringement with specific focus on judicial enforcement.

Inadequacy of appropriate enforcement laws is a major factor that has been stated to contribute to the weak copyright enforcement regime in Nigeria.<sup>8</sup> This paper therefore seeks to appraise the enforcement structures and laws available in Nigeria with focus on the remedies available to a copyright owner where there has been an infringement. Comparison shall be made with other jurisdictions in order to determine whether inadequate enforcement of laws is indeed a major militating factor in the battle against the prevalent rate of copyright infringement within the country. The paper concludes with recommendations on the need to maximize the current enforcement provisions as well as amend the Copyright Act in order to have a more effective enforcement regime.

## 2. Copyright Enforcement Regime in Nigeria

### 2.1. Civil Remedies

Copyright in Nigeria was governed by the English Copyright Act of 1911 which applied to the country by virtue of an Order in Council made under Section 25 of the Act.<sup>9</sup> This Act remained operative even after independence in 1960 till 1970 when a new law was promulgated as Decree No. 61 of 1970. A new Copyright Act was passed in 1988 which has been amended in 1992 and also in 1999.<sup>10</sup> The current law which forms the basis of copyright protection is the Copyright Act 1998 (as amended), Cap C28, Laws of Federation of Nigeria (LFN), 2004. The judicial remedies available to an alleged infringer under the Act are discussed hereunder.

The civil remedies available for copyright owners include conversion/delivery up<sup>11</sup>, damages, injunctions and accounts.<sup>12</sup> The inspection and seizure order available under the Copyright Act, similar to an Anton Piller order, is an effective tool for seizure and preservation of evidence.<sup>13</sup> Damages refer to monetary compensation paid to a copyright owner for infringement of his rights. There are different types of damages.<sup>14</sup> In an action for infringement of copyright, actual damage need not be proved as damages are at large.<sup>15</sup> Mere infringement

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<sup>8</sup>M I O Nwogu, 'The Challenges of the Nigerian Copyright Commission (NCC) in the Fight against Copyright Piracy in Nigeria' <<http://www.eajournals.org/wp-content/uploads/The-Challenges-Of-The-Nigerian-Copyright-Commission-Ncc-In-The-Fight-Against-Copyright-Piracy-In-Nigeria.pdf>> accessed 11 January 2014; See also U Nwokocha, 'Nigerian Intellectual Property: Overview of Development and Practice' (2012) 1 *NIALS Journal of Intellectual Property*, 110

<sup>9</sup>F O Babafemi, *Intellectual Property, the Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria*, 1st ed. (Ibadan, Justinian Books Limited, 2007) pp. 4-6

<sup>10</sup> Amended by the Copyright (Amendment) Decree No.98 of 1992 and Copyright (Amendment) Decree No. 62 of 1999.

<sup>11</sup> Copyright Act 1988, s.18

<sup>12</sup> Ibid, s. 6(1). In Nigeria, it should be noted that there is a limitation to the grant of an injunction where it requires demolition of a building or prevention of its completion, in which case no such injunction would be granted (s.16(5)). This would apply to artistic works which includes plans, diagrams, and works of architecture in the form of building models (See s.51 for the interpretation of 'artistic works').

<sup>13</sup> Copyright Act 1988, s.25. See also *Anton Piller K.G v. Manufacturing Processes Ltd.* (1976) 1 All ER 779

<sup>14</sup> See generally J O Asein, *Nigerian Copyright Law & Practice*, 2<sup>nd</sup> Ed. (Abuja, Books & Gavel Publishing, 2012) pp.302-310.

<sup>15</sup> In *Emirates Airline v. Ngonadi (NO. 1)* [2014] 9 NWLR (pt 1413) 429 the court explained that damages at large is an award that has no exact measurement as it is essentially a compensation for non-economic or non-pecuniary loss. It could also consist of exemplary damages in certain cases and can be *inter alia* compensation for pain and suffering, loss of reputation or injured feelings. See also *Oladipo Yemitan v. The Daily Times (Nigeria) Ltd & Anor* (1980) (Unreported Suit No: FHC/L/1/1980), the court relied on the dictum of Lord Escher in *Exchange Telegraph Co. vs Gregory & Co.* 1891 .Q.B 1471 at p.153.

of copyright gives rise to damage to which the claimant is entitled. In *Claydon Architectural Metalwork Ltd v. D J Higgins & Sons*,<sup>16</sup> the court held that the normal measure of damages for copyright is the amount by which the value of the copyright as a 'chose in action' has been depreciated.<sup>17</sup>

Although the most common compensatory damages are general and special damages,<sup>18</sup> the court in copyright cases can also grant punitive or exemplary damages which are intended to punish the defendant and serve as a deterrent which are referred to as additional damages under the Act.<sup>19</sup> Section 16(4) of the Copyright Act provides for the grant of additional damages as the court may deem appropriate in the circumstances where it is satisfied that effective relief would not otherwise be available to the claimant. The court is to have regard, apart from all other considerations, to the flagrancy of the infringement and any benefit shown to have accrued to the defendant by reason of the infringement.

In *Oladipo Yemitan v. The Daily Times (Nigeria) Ltd & Anor*,<sup>20</sup> the defendants flagrantly infringed on the claimant's copyright in an article titled 'The Day the Lagoon Caught Fire' published in the Nigerian Magazine by reproducing same verbatim in the 'Headlines' No 52 of 1977 without consent. Upon writing to notify the defendants of this infringement, the defendants merely replied that they would investigate the allegation and did nothing further despite subsequent correspondence to them. After the trial, the defendants admitted the infringement. The court was of the view that the defendants took advantage of the claimant because few persons in the Nigeria were aware of their rights under copyright law and the defendants also believed that the profit to be realized from the infringement would outweigh any nominal damages the claimant may be entitled to. The flagrant infringement, the indifferent manner the letters written were treated, the nonchalant attitude of the defendants and the way the defence was prepared by denying obvious facts, making unfounded assertions and only admitting the infringement after a full trial, all convinced the court that the defendants should pay additional damages. Hence the court granted additional damages to the claimant for such a condescending treatment by the defendants.

Similarly in *Peter Obe v. Grapevine Communication Limited*,<sup>21</sup> the defendants were held to have infringed the copyright in the claimant's civil war photograph published in his book, 'Nigeria: A Decade of Crises in Pictures'. The defendants had earlier requested permission from the claimant to use some of the pictures in its maiden edition of Grapevine Magazine which permission was refused. Yet, the defendant went ahead to publish these photographs in its magazine. The claimant was awarded Five Hundred Thousand Naira (₦500,000.00) as general damages. On the issue of additional damages, it was established that the defendants

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<sup>16</sup> (1997) FSR 475

<sup>17</sup> A 'chose in action' is a term used in common law tradition to refer to an intangible property right which canonically can only be enforced by taking legal proceedings. This is distinguishable from a 'chose in possession' which is a term for a tangible personal property. See Fabunmi J.O, *Equity and Trusts in Nigeria* (2<sup>nd</sup>ed., Ile-Ife, OAU Press Ltd, 2006) p.87; *Julius Berger (Nig.) Plc v. T.R.C Bank Ltd* [2010] 8 NWLR (pt 1198) 80

<sup>18</sup> General damages are losses that flow naturally from the act of the defendant and its quantity need not be proved since it is generally presumed by the law. Special damages on the other hand are not presumed by law and it refers to losses that the claimant has to specifically prove and provide evidence before the court can grant it. See *M.M.A Inc v. N.M.A* [2013] 3 NWLR (pt 1333) 506; *Akingbola v. Chairman, E.F.C.C* [2012] 9 NWLR (pt 1306) 475; *British Airways v. Atoyebi* [2014] 13 NWLR (pt 1424) 253

<sup>19</sup> Copyright Act 1988, s.16(4); *Zenith Bank Plc v. Ekereuwem* [2012] 4 NWLR (pt 1290) 207; *F.C.D.A v. Unique Future Leaders Int'l Ltd* [2014] 17 NWLR (pt 1436) 213

<sup>20</sup> (Unreported Suit No: FHC/L/1/1980)

<sup>21</sup>(Unreported Suit No. FHC/L/CS/1244/97)

flagrantly infringed on the claimant's copyright. The defendants impertinently replied the claimant and went ahead to publish the photographs in another publication of the same magazine indicating that the publication was calculated to make profits. Furthermore, rather than apologizing, the defendants demanded for an offer of out-of-court settlement with apology from the claimant. The court therefore awarded the sum of Ten Million Naira (₦10,000,000.00) as additional damages.

An injunction is another important remedy for copyright infringement. It is essentially an equitable remedy which is granted at the discretion of the court compelling a party to do or refrain from doing an act.<sup>22</sup> An interlocutory injunction which is granted pending the final determination of a case on the merits is very effective in copyright infringement.<sup>23</sup> This ensures that the parties maintain status quo till the determination of the case. It is used by the copyright owner to restrain the alleged infringer from further acts of infringement in order to prevent irreparable damage.

Interim injunction is also very useful for copyright enforcement though it lasts for a short time, usually pending the happening of an event such as the hearing and determination of a motion on notice or until a named date.<sup>24</sup> It is granted only in cases of urgency requiring an immediate relief and usually made ex parte though in most cases there must be an accompanying motion on notice to be served on the other party.<sup>25</sup> This ensures that the opposing party is informed about the order and has an opportunity to be heard during the determination of the motion on notice. Because of the urgency, the applicant need not have instituted an action by filing or serving a writ.<sup>26</sup>

The conditions for the grant of an injunction are as stated in *American Cynamid Co. v. Ethicon Ltd.*<sup>27</sup> The claimant has to satisfy the court that he has an arguable case. This does not mean a strong case; a *prima facie* case would be sufficient. Damages must not be a sufficient remedy; where damages are sufficient, an injunction would not be granted. The court would also weigh the balance of convenience. The financial standing and ability to liquidate damages is also considered. Being an equitable relief, the conduct of the parties is important in the consideration of the court.<sup>28</sup> The claimant must not delay in bringing the action as this may be considered as acquiescence.<sup>29</sup> Usually, the claimant is also required to give an undertaking as to damages should it be proved that the injunction ought not to have been granted in order to protect the interest of the defendant.<sup>30</sup>

The Copyright Act also makes provision for account of profits which is available where an infringement has taken place but the defendant at the time of infringement was not aware or had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates.<sup>31</sup> In such instances, the claimant shall not be granted damages, he is however

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<sup>22</sup> *Jimoh v. Aleshinloye II* [2014] 15 NWLR (pt 1430) 277

<sup>23</sup> J O Asein(n14) p.311

<sup>24</sup> *Odutola v. Lawal* [2002] 1 NWLR (Pt. 749) 433; *Unibiz Nig. Ltd v. C.B.C.L Ltd.* [2003] 6 NWLR (Pt. 816) 402 at 433; *Gov. Lagos State v. Ojukwu* [1986] 2 NWLR (Pt. 18) 621; *S.C.B (Nig.) Ltd v. Braithwaite* [2014] 4 NWLR (pt 1397) 247

<sup>25</sup> Federal High Court Civil Procedure Rules (CPR), Order 9 Rule 7

<sup>26</sup> A Babalola, *Injunctions and Enforcement of Orders* (2nd ed., Ibadan, Afe Babalola, 2007) pp.29-30

<sup>27</sup> (1975) 1 ALL ER 504

<sup>28</sup> *Saraki V. Kotoye*[1989] 1 NWLR (Pt. 98) 419

<sup>29</sup> *Foseco Int. Ltd V. Fordath Ltd* (1975) F.S.R. 507

<sup>30</sup> Federal High Court CPR, Order 34 Rule 2(3)

<sup>31</sup> Copyright Ac 1988t, s.16(1) & (3).

entitled to an account of profits made by the defendant from commercially dealing with the copyright work. The onus of proving innocent infringement lies on the defendant. A claimant cannot have both damages and accounts of profits together in order to prevent double compensation.<sup>32</sup> However, according to the Act, once it is a case of innocent infringement, the claimant ceases to have a choice; he can only have an account of profits.<sup>33</sup> It is therefore important for copyright owners to put the copyright notice on their works in order to avoid such a situation. This means that their work should bear the copyright © symbol, the name of the copyright owner and the year of first publication placed in such manner and location as to give reasonable notice of the claim of the copyright owner.<sup>34</sup>

Account of profit is originally an equitable remedy which aim is to prevent the unjust enrichment of the defendant.<sup>35</sup> It is only awarded where the defendant has indeed made profits from the copyright work. Where this is not the case, it is not awarded.<sup>36</sup> The profit awarded is the net profit (gross profit excluding all expenses in the production of the work).<sup>37</sup> The court also has to determine the profit that came directly as a result of commercial dealings with the infringed work and not necessarily the entire business of the defendant.

A case in which this remedy was extensively considered is *Plateau Publishing Co. Ltd & Ors v. Chief Chuks Adophy*.<sup>38</sup> The respondents had sued the appellants for a sum of Two Hundred and Fifty Naira (₦250,000.00) as special and general damages for infringing on its work entitled 'After Tarka, What Next? Special Tribute,' which was substantially reproduced without consent. The appellant had raised the issue of innocent infringement in its appeal against the award of damages and contended that the respondent was only entitled to an account of profits. The court in arriving at its decision was guided by Halsbury's Laws of England where it was stated that:

This defence does not protect a person who knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner. A defendant cannot be protected by this defence by showing that he held an honest but erroneous view of the law or by showing that he reasonably believed that he had no reasonable grounds for suspecting the existence of copyright in a work if he made no inquiry whatever as to the source from which the work was derived.<sup>39</sup>

The court held further that where the court orders an account of profits, by that order it takes from the wrong doer all the profits he has made from his piracy and gives them to the party who has been wronged as the nearest approximation which it can make to justice.

Another essential remedy which serves as an effective tool in the hands of a copyright owner in the fight against infringement is the inspection and seizure order.<sup>40</sup> This order is essentially a statutory codification of its equivalent equitable remedy, the Anton Piller Order. It permits

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<sup>32</sup>*Caxton Publishing Co. Ltd v. Sutherland Publishing Co. Ltd* (1939) A.C 178 (HL)

<sup>33</sup> Copyright Act 1988, s. 16(3)

<sup>34</sup> Universal Copyright Convention 1952 (Entry into force in 1955), Article III.1

<sup>35</sup>*Potton Ltd v. Yorkdose Ltd* (1990) F.S.R. 11

<sup>36</sup>J O Asein (n14) p.315.

<sup>37</sup> K M Garnett, J E Rayner & G Davies, *Copinger and Skone James on Copyright* (14th ed., London, Sweet and Maxwell, 1999) p.653

<sup>38</sup> [1986] 4 NWLR 205

<sup>39</sup>Halsbury's Laws of England, vol. 9, 4th ed., paragraph 938

<sup>40</sup> Copyright Act 1988, s.25

the applicant to enter into the premises of the defendant to inspect for infringing goods and any other evidence that is essential to prove the applicant's case and it could also permit the applicant to seize and preserve such evidence. The essence of this order is the discovery and preservation of evidence where the defendant is likely to remove or destroy such evidence if notified which would be detrimental to the applicant's case. Hence, it is made *ex parte* in order to benefit from the surprise effect on the defendant.<sup>41</sup>

In *Anton Piller KG v. Manufacturing Processes Ltd*,<sup>42</sup> the court laid down the conditions for the grant of this order. It has to be an exceptional circumstance and the claimant must have a strong *prima facie* case. Potential or actual damage to the claimant should be serious and it should be clear that the defendant possesses vital evidence necessary for the claimant's case. There must also be a real possibility of the defendant destroying or disposing of such evidence in order to defeat the ends of justice. When these circumstances are fulfilled, the court may order the defendant to 'permit' the claimant to enter his premises to inspect and/or remove such evidence. Being an injunction, the conditions for granting an injunction must also be fulfilled before grant. The court in *Anton Piller KG* distinguished this order from a search warrant in that there can be no forceful entry into the premises. Rather the order puts pressure on the defendant or orders him to permit the entry of the claimant through a consequence of contempt of court if the order is disobeyed.

However, under section 25, it seems that the defendant is not simply ordered to 'permit' the entry of the claimant. The permission to enter is given by the court directly to the claimant. It has been argued that this order, by its nature, negates the constitutional right of fair hearing.<sup>43</sup> However the court has permitted its use justifying it by the fact that the order is granted only in extreme cases, and having regard to the urgency of the situation, it must be granted where it is possible that no appreciable harm will be done if the parties are given time to argue the merit of the case.<sup>44</sup> In *Akuma Ind. Ltd v. Ayman Ent. Ltd*<sup>45</sup>, the court held that Anton Pillar order, although seemingly appearing as a monstrosity, has become accepted within the vortex of our legal doctrines and jurisprudence. Under the Act, the applicant is accompanied by a police officer not below the rank of an Assistant Superintendent of Police (ASP).<sup>46</sup> The penalty for providing false information is only a paltry sum of One Thousand Naira (₦1000.00).<sup>47</sup> Such an amount is in no way deterrent and would not be useful to the applicant if the defendant furnishes false information.

Anton Piller order was first granted in Nigeria in *Ferodo Limited v. Unibros Stores*<sup>48</sup> by Anyaegbunam C.J in reliance upon the decision in *Anton Piller KG v. Manufacturing Processes Ltd (supra)*. The case of *Akuma Ind. Ltd (supra)* illustrates how this order is executed in Nigeria. The claimant/applicant had requested for and granted an Anton Piller order instructing the defendant to permit the solicitor of the Applicant, an employee from the applicant's solicitor's firm, a police officer not below the rank of an assistant superintendent of police, accompanied by the bailiff and four other persons authorized by the Applicant to enter into the

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<sup>41</sup> Ibid: J O Asein (n14) p.320

<sup>42</sup> *Anton Piller K.G v. Manufacturing Processes Ltd.* (1976) 1 All ER 779

<sup>43</sup> This argument was upheld in a decision of the Federal High Court of Nigeria in *Solignum Ltd v. Adetola* (1992) F.H.C.L.R 157 and *Rokana Industries Ltd v. Maun* (1993) FHCLR 243

<sup>44</sup> *Akuma Industries Ltd v. Ayman Enterprises Ltd* [1999] 13 NWLR (Pt. 633) 68; see also the qualification in the Copyright Act 1988, s.25.

<sup>45</sup> [1999] 13 NWLR (Pt. 633) 68

<sup>46</sup> Copyright Act 1988, s.25(1)

<sup>47</sup> *ibid*, s.25(2).

<sup>48</sup> [1980] F.S.R. 489

defendant's premises (named in the order) for the purpose of searching, photographing and taking into possession and removing into the custody of the Applicant's solicitors all infringing products and materials and relevant documents. This order was to be executed within any day of the week from Monday to Saturday between 8am and 6pm.

Upon appeal by the defendants, the court emphasized the importance of acting circumspectly before granting an Anton Piller order which has a nature of invading into the privacy of the other party without having been heard. The appellate court condemned the wide nature in which the order in this instance was granted which had the effect of paralyzing all activities in the defendant's factory. The applicant had asked for an order to remove all (not just a sample of) infringing products, materials and relevant documents as evidence of the infringement. It further requested that the defendants deliver up possession of other such materials that may come into their possession within 48 hours of the service of the notice of the order on the defendant. Yet the defendant may not apply to vacate the order unless a 48-hour notice is given to the applicant. The trial court had without any variation granted the Anton Piller order as requested. The appellate court condemned the wholesome and comprehensive tenor and application of the order and the fact that by granting such an order, the trial judge had thrown all caution to the wind, neglecting the fact that it only relied on the affidavit of one party. It was the opinion of the court that the order was all embracing and appeared to have settled the matter with a note of finality and it ought not to have been made in such a wide way.

This position of the court is supported as Anton Piller order is a special form of interim injunction and not intended to dispose of a case finally in favour of the successful party on the application. Otherwise, there would be nothing left to try in the matter. In *N.W.L Limited v Woods*<sup>49</sup>, the English court held that where the grant or refusal of such an injunction will have the effect of finalizing the case because the harm caused to the losing party by its grant or refusal is complete and of a kind which money does not constitute a worthwhile recompense is a factor that the judge ought to bring into the balance in weighing the risk of injustice that his decision on the application may cause.

Although there is no judicial pronouncement or practice direction to regulate the execution of Anton Piller order in Nigeria, *Akuma's* case illustrates that the court must also seek to balance the interest of the defendant/respondent. The order must be narrow and specific only as required to search, obtain, seize and preserve evidence for the trial and nothing more. Where it is so wide and all-embracing as to cripple the defendant's business or settle the matter without a trial, such an order would be vacated on appeal or opposition.

Lawyers handling cases of copyright infringement can also explore the use of Mareva injunctions in satisfying judgment debts against alleged copyright infringers. This would ensure that a copyright owner whose right has been infringed obtains adequate and worthwhile compensation for the wrong done by the infringer. Mareva injunction is granted *ex parte* and used to freeze the assets of the defendants such as his bank accounts, property and goods.<sup>50</sup> It is granted where there is a strong *prima facie* evidence against the defendant, a real risk of removal or dissipation of assets in order to avoid satisfaction of any judgment sum awarded. Generally, it requires evidence of dishonesty on the part of the defendant. Although this is not

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<sup>49</sup> [1979] 3 All ER 614

<sup>50</sup> *Mareva Compania Naviera SA v. International Bulkcarriers SA* (1980) 1 ALL E.R 21

incorporated in the Copyright Act, it is generally available under the civil procedure law of Nigeria.<sup>51</sup>

A copyright owner can also have the infringing materials and/or the equipment used in their production converted to him. The court can also order that such goods be delivered up to the copyright owner or for destruction.<sup>52</sup> Under the Act, infringing works and materials/equipment used in their production are deemed to be the property of the copyright owner and the latter can institute proceedings to have these converted to him.<sup>53</sup> However, in order to prevent double compensation, such a copyright owner would not be entitled to damages anymore.<sup>54</sup>

## 2.2. Criminal Remedies

Copyright infringement also carries criminal liability with penalties of fine and terms of imprisonment. Criminal prosecution of copyright infringement is usually undertaken by the Nigerian Copyright Commission (NCC). Civil and criminal actions can be instituted concurrently against an infringer. Therefore, the copyright owner is not precluded from instituting civil proceedings in order to recover damages despite the fact that NCC has instituted criminal proceedings.<sup>55</sup>

There is no general penalty for all infringement offences rather the Act seems to portray some infringing acts as more grievous than the others consequently the penalties for various infringing acts differ.<sup>56</sup> Where an offender made or causes an infringing work, master tape/plate or equipment to be made, he is liable to a fine not exceeding One Thousand Naira (₦1000.00) for every copy he dealt with or a term of imprisonment not exceeding 5 years or both.<sup>57</sup> An offender who sells, hires, distributes infringing copies or has them in his possession for these purposes is liable to a fine of One Hundred Naira (₦100.00) per copy or a term of imprisonment of 2 years or both.<sup>58</sup> An offender who infringes the copyright owner's right of distribution through rental, hire, lease, loaning or similar arrangement is liable to a fine of One Hundred Naira (₦100.00) per copy or imprisonment for 6 months or both.<sup>59</sup>

A law like the above that does not impose a maximum fine as penalty would imply that the offender would be paying a substantial amount of money where he deals in large quantities of the infringing work. However, where he deals in few quantities such as a rental club that has just two copies of an infringing work or a production plant that has just one machine or plate, then the amount of fine would be too small to be deterrent. Therefore, in such instances, imposing terms of imprisonment is a better penalty to deter such infringers and other intending infringers. For instance, in *NCC v. Ali A. Bala*,<sup>60</sup> the accused was sentenced to pay One Hundred Naira (₦100.00) fine or 3 months imprisonment. Similarly in *NCC v. Nwali Sunday*,<sup>61</sup> the accused was sentenced to pay Three Hundred Naira (₦300.00) fine. There are however still

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<sup>51</sup> It is available under the Federal High Court Civil Procedure Rules, Order 17 as an interim attachment of property.

<sup>52</sup> J O Asein (n14) pp.317-318; Copyright Act 1988, s.20(4) & (5)

<sup>53</sup> Copyright Act 1988, s.18

<sup>54</sup> J O Asein (n14) pp.317-318

<sup>55</sup> Copyright Act 1988, s.24

<sup>56</sup> Ibid, ss.20 & 22

<sup>57</sup> Ibid, s.20(1)

<sup>58</sup> Ibid, s.20(2)

<sup>59</sup> Ibid, s.20(3)

<sup>60</sup>(Unreported Suit No: FHC/ABJ/CR/127/2013 at the Federal High Court Abuja, FCT Division). Conviction for book piracy

<sup>61</sup>(Unreported Suit No: FHC/L/153C/13at the Federal High Court, Lagos Division). Conviction for book piracy



cases where the fine imposed are higher. The highest in recent times has been One Hundred and Fifty Thousand Naira (₦150,000.00) in *NCC v. Ibrahim Dan Almajiri*.<sup>62</sup>

It should also be noted that the offender would not be liable if he can prove to the satisfaction of the court that he did not know and had no reason to believe any such copy was an infringing copy of a copyright work or that the plate/master tape or equipment was not for the purpose of making infringing copies.<sup>63</sup> From the wording of this section, it appears that a guilty knowledge is already imputed on the alleged offender and the onus lies on him to prove his innocence. This is in contradistinction with what obtains in criminal cases where an accused person is presumed innocent until proven guilty.<sup>64</sup> The burden usually lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. However, under section 20 of the Copyright Act, it is the accused person that has to prove his innocence.

### 3. Comparison of Copyright Enforcement Provisions in Some Other Jurisdictions

It is pertinent at this point to consider the criminal remedies obtainable under the Ghanaian Copyright Act. By Section 42 of the Ghanaian Act, it has to be proved that the alleged offender knew or had reasonable grounds to know that his action induces, enables, facilitates or conceals an infringement of copyright or related rights protected under the Act without the authority of the copyright owner and his agents. Hence, the burden of proving guilty knowledge lies on the prosecution. Nigeria's position of a presumption of guilty knowledge on the part of the alleged infringer may have been necessitated by the high prevalence of piracy, bootlegging and other forms of copyright infringement in the country. However, the court must also consider the fact that a large percentage of Nigerians are ignorant of the concept of copyright ownership and infringement. Most people think copyright is all about books and music. Many have no knowledge of the need for consent, allowable and non-allowable act. The court therefore has an important duty to balance the need to curb the prevalence of flagrant copyright infringement in the country as well as protect the interests of the public.

Furthermore, under the Ghanaian Act,<sup>65</sup> the offender is liable on summary conviction to a fine not more than 1,000 penalty units and not less than 500 penalty units or a term of imprisonment not more than 3 years or to both. If it is a continuing offence, a further fine of not less than 25 penalty units and not more than 100 penalty units can be imposed for each day during which the offence continues. It should be noted that 1 penalty unit is 12 Ghanaian Cedis (GHC 12.00).<sup>66</sup> Where it is not a continuing infringement, the maximum penalty would therefore be GHC 12,000.00. The court can order that the infringer pays the fine for the offence to the right owner as well as a forfeiture and disposal of the infringing goods.<sup>67</sup> While the fines specified under the Nigerian Copyright Act are paltry, those imposed under the Ghanaian Act are more deterrent. There is therefore a need for the Nigerian Act to be amended to inculcate more deterrent fines.

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<sup>62</sup> (Unreported Suit No: FHC/KD/45C/2009 at the Federal High Court, Kaduna Division). Conviction for sale, distribution, possession of pirated optical discs. Although in *NCC vs Sunday Ayodele* (unreported) FHC/KD/8C/12, a fine of ₦250,000 was imposed.

<sup>63</sup> Copyright Act 1988, s.20

<sup>64</sup> Constitution of the Federal Republic of Nigeria 1999, s.36(5)

<sup>65</sup> Copyright Act 690, s.43

<sup>66</sup> Copyright Office, 'Frequently Asked Questions' <<http://www.copyright.gov.gh/faqs>> accessed 26 January 2014.

<sup>67</sup> Ghanaian Copyright Act 690, s.46; Nigerian Copyright Act 1988, s.20(4) & (5) In Nigeria, the court can order that the infringing goods and equipment used in producing them should be destroyed or delivered up to the copyright owner.

Although the Inspection and Seizure (Anton Piller) Order under Section 25 of the Nigerian Copyright Act is an important tool for gaining access to evidence, no provision is made to make the grant of this order subject to the protection of confidential information of the defendant as is obtainable in some other jurisdictions where the law expressly provides for this.<sup>68</sup> Nevertheless, nothing stops a defendant in Nigeria from protecting his confidential information by opposing such an application and stating his reasons in his counter-affidavit.<sup>69</sup> The court would usually consider the arguments of the parties and make a ruling on whether such a document may be admitted/used as evidence in the case or not. Other ways of obtaining evidence in the control of the opposing party under the civil procedure law include the discovery procedure which could be in form of interrogation or inspection.<sup>70</sup> Since an applicant can ask the court for a relief by bringing an application to the court supported by an affidavit setting out the facts and attach all evidence upon which he relies, litigants must explore this avenue.<sup>71</sup> Such a relief may be granted based on the provisions of the law and at the discretion of the court.

Nigeria lacks a practice direction on Anton Piller order; nevertheless, lessons can be learnt from the United Kingdom (UK) where the country inherited this legal remedy. This lack of a clear-cut practice direction results in the abuse of the order by litigants as evidenced in *Akuma Ind. Ltd (supra)*. This order is now referred to as the Search and Seize order in the UK.<sup>72</sup> *Chappell v United Kingdom*<sup>73</sup> explains the content of the order in the UK:

An Anton Piller order will normally contain restrictive or mandatory injunctions: prohibiting the defendant from dealing with materials that are the subject of the action; requiring the defendant to disclose the whereabouts of all such materials and details of suppliers and customers, and to deliver up the materials to the claimant; requiring the defendant to make an affidavit containing all the information to be disclosed by him under the order; requiring the defendant to permit the claimant to enter the premises for the purpose of searching for the items. As regards this last injunction, *the court will confine the items specified to documents and materials directly relating to the action. It will also restrict the time of entry and the number of persons who are to be permitted to enter (very rarely more than four or five). The latter will include the claimant's solicitor, who is an officer of the court.*<sup>74</sup>

Before granting the order, the court must be satisfied that the claimant has made out an extremely strong *prima facie* case that his claim will succeed on the merits; the actual or potential damage is very serious for him; there is clear evidence that the defendant has in his possession incriminating documents or things, and that there is a real possibility that if he is forewarned, he may destroy such material.<sup>75</sup> Both the solicitor and the claimant are required to make undertakings as determined by the court in its discretion.<sup>76</sup> This could be an undertaking

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<sup>68</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, Article 7(1)

<sup>69</sup> Federal High Court CPR, Order 9 Rule 14

<sup>70</sup> *Ibid*, Order 33

<sup>71</sup> *Ibid*, Order 9 Rule 1

<sup>72</sup> G Tritton *et al*, *Intellectual Property in Europe* (3rd ed., London, Sweet& Maxwell, 2008) p.1135

<sup>73</sup> [1990] 12 EHRR 1

<sup>74</sup> Emphasis added

<sup>75</sup> Harms L, *The Enforcement of Intellectual Property Rights: A Case Book* (3rd ed., Geneva, WIPO, 2012) p.413

<sup>76</sup> *Ibid*, pp.413-414

as to damages and also that the order and other relevant documents (affidavit evidence, writ instituting the proceedings, notice of the next hearing) will be served on the defendant.<sup>77</sup> The undertaking by the solicitors to wit: to explain to the person served, fairly and in everyday language, the meaning and effect of the order, and to inform him that he has the right to obtain legal advice before complying with the order provided such advice is obtained forthwith; to retain in their custody any items taken by or delivered to them pursuant to the order; to answer any question from the defendant as to whether an item is within the scope of the order; to prepare, before their removal from the premises, a list of the items taken; to use any information or document obtained under the order to ensure that the exercise of rights under the order remains at all times under the control of a solicitor.<sup>78</sup>

The defendant can apply for the variation or discharge of the order on notifying the claimant usually 24 hours or less.<sup>79</sup> The court will not grant this request except it was applied for soon and it will serve some practical purposes. In addition to this or in the alternative, the defendant can seek damages under the claimant's cross-undertaking on the ground that the order was improperly obtained or executed.<sup>80</sup> Where the claimant or his solicitors breach their undertakings under the order or the latter acted improperly in executing it, the defendants may proceed against them for contempt of court.<sup>81</sup>

It is therefore clear that the requirements for and execution of the Search and Seize Order in the UK is such as to ensure justice to both the right owner as well as the alleged infringer. A strict burden is placed on the copyright owner to prove that this order is indeed necessary and there must be an undertaking as to damages and to serve the alleged infringer the necessary court processes. The claimant's solicitor also has a duty to explain the order to the alleged infringer and take a list of all evidence that was taken. This will probably be the duty of the court bailiff in Nigeria.

Unlike the practice in the UK, section 25 is couched in such a way that it is difficult to protect the interest of the alleged infringer during the execution of the inspection and seizure order. A police officer not below the rank of an Assistant Superintendent of Police is to be present in the execution of the order. This is indeed intimidating. Although the writer is aware that there have been instances where raids on infringers were met with aggression and lynching by the alleged infringers,<sup>82</sup> this does not mean that the rights of the alleged infringers should not be protected. Nothing in Section 25 also provides for an opportunity for the alleged infringer to be given time to seek legal counsel or call his lawyer. The Act is also silent on the right of the defendant to apply to revoke this order. The Act therefore needs to be amended to do justice not only to the copyright owners but also the alleged infringers. The law must not weigh excessively in favour of copyright owners.

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<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> *Chappell v United Kingdom* [1990] 12 EHRR 1

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup>For instance, when the NCC raided Ariaria International market, Aba, Abia State in July 2014 and seized pirated books from the traders, this was met by aggression, pelting of the NCC officials with stones, water and other objects. The traders smashed the windscreen of one of the vehicles used in the operation. Some officials were also physically attached. See Riverine Reporter, 'NCC Officials, Police Escape Lynching in Ariaria Market Raid' <<http://riverinenews.com/ncc-officials-police-escape-lynching-in-ariaria-market-raid>> accessed 16 February 2014.

In France, the order for preservation of evidence is the *saisie-contrefaçon*.<sup>83</sup> It is usually granted upon proof of the Intellectual Property Right (IPR) relied upon and some infringing copies. The police usually accompany the execution of this order. An equivalent order in the Netherlands is the *kortgeding* which does not require the applicant to institute proceedings on the merit before its grant.<sup>84</sup> However, the applicant must institute proceedings on the merit within a reasonable time and cannot rely forever on this provisional measure.<sup>85</sup> The bailiff executes the order and an independent technical expert may accompany the bailiff if necessary. Also in the Netherlands, preserving evidence does not mean access to the seized evidence. The applicant has to bring an application to access the seized evidence before such can be disclosed to him or used in the proceedings.<sup>86</sup>

In Germany, an inspection order allows the applicant to gain opinion of a court-appointed expert on the question of infringement who inspects the alleged infringing works on the premises of the defendant. §809 of the German Civil Code (Bürgerliches Gesetzbuch [BGB]) and §485 of the German Code on Civil Procedures (Zivilprozessordnung [ZPO]) allow for independent proceedings for the preservation of evidence and also §935 ZPO permits a preliminary court order. During such procedures, the claimant's counsel is the one who takes the evidence and keeps all information confidential even from the claimant. The inspection can be delayed for at least 2 hours at the request of the defendant so he can seek legal counsel. An applicant must prove urgency before such preliminary injunctions can be granted.<sup>87</sup>

Furthermore, some foreign jurisdictions provide for right of information which applies only where it has been decided that infringement has indeed taken place.<sup>88</sup> The claimant can make a justified and proportionate request that the court orders that information on the origin and distribution networks of the infringing goods or services be provided by the infringer and/or any other person who was found in possession of the infringing goods or using the infringing services in commercial scale, found to be producing commercial services used in infringing activities or was indicated by any of the above persons as being involved in the production, manufacture or distribution of the goods or the provision of the services. It applies also to third parties or intermediaries who may not be infringing. This provision is indeed effective as it helps the IPR holder to be able to get detailed information about the infringing persons and activities.

In the UK, this is achieved through the Norwich Pharmacal order.<sup>89</sup> This is an application to obtain names and addresses of infringers from third parties. It was first used in *Norwich Pharmacal v. Commissioners of Customs and Excise*.<sup>90</sup> The order is useful where without disclosure, the claimant cannot bring an action against the wrongdoer because he does not know who he is and the applicant has a cause of action against the respondent in relation to the same wrong or that party's services are being used to facilitate wrong doing. The essence of the

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<sup>83</sup> G Tritton *et al* (n 71) p.1135

<sup>84</sup> See the Dutch Code of Civil Proceedings, Article 1019 (b),(c ), (d) and (e). Dutch Civil Law, 'Code of Civil Proceedings' <<http://www.dutchcivillaw.com/civilprocedureleg.htm>> accessed 16 February 2014.

<sup>85</sup> *Hermes International v. FHT Marketing Choice* [1998] E.C.R I-3603 (Case C-53/96)

<sup>86</sup> Dutch Code of Civil Proceedings, Article 843a

<sup>87</sup> M Hans, 'The Enforcement of Patent Rights in Germany' (2000) 31 *International Review of Industrial Property and Copyright Law* (IIC), 657.

<sup>88</sup> See generally the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, Articles 7(1) & 8

<sup>89</sup> Guy Tritton, 'Interim Remedies in Intellectual Property Cases' in *IP Remedies: What are the Limits* (2003) Hogarth Chambers, Royal College of Surgeon 17-18

<sup>90</sup> [1973] FSR 365

Norwich Pharmacal relief is that an innocent but involved party should assist an applicant in relation to an action against a wrongdoer. In the Netherlands, the grant of this kind of order is a question of the balance of interests and also at the discretion of the court.<sup>91</sup> In Germany, this can be obtained through the *Auskunftsanspruch* procedure.<sup>92</sup>

In *Golden Eye (International) Ltd and Others v Telefonica UK Ltd*,<sup>93</sup> Golden Eye (International) Ltd and 13 others brought a claim for Norwich Pharmacal orders against Telefonica UK Ltd (trading under the name O2). The essence was to obtain disclosure of the names and addresses of O2 customers who were alleged to have committed copyright infringement through peer-to-peer (P2P) file sharing using the Bit Torrent protocol. The court granted the order to only Golden Eye and Ben Dover on the condition that their letter to the alleged infringers was in a form approved by the judge and that any proceedings that might be brought would proceed in the Patents County Court (PCC). The court granted the order after it was satisfied that the said claimants indeed intended to seek redress for the wrongs done and that a disclosure was necessary to enable them do so. It concluded that the claimant's interest in enforcing their copyright outweighs the intended defendant's interest in protecting their privacy and data protection rights.

At the moment, the Nigerian Copyright Act has no provision that allows a successful copyright owner to have access to information within the confines of the infringer or relevant third parties. The Act needs to be amended to incorporate such an order. This is necessary in order to effectively curb infringement. Through such an order, the copyright owner can frustrate the infringing activities of a syndicate or chain of infringers. Till such an amendment is made, a copyright owner must consider exploiting the procedures available under civil procedure law by bringing an application before the court that an infringer discloses the necessary information in his purview that the applicant could make use of to another infringer. It is unknown whether the courts would be willing to grant such an order especially where the order is sought against a third party/ an intermediary who is not a party to the suit. The writer is not aware of any case in which such an order has been brought before the court. Such an application would have to be brought before the courts to test whether such would be granted. However, such an application must not prejudice legal provisions that govern the use of such information in civil or commercial proceedings. The applicant must also take responsibility for the misuse of the right of information. The respondent must be given an opportunity to refuse to provide information if it would force the affected person to admit to his/her participation or that of his/her close relatives in an infringement of an IPR. Provisions that govern confidentiality of information sources or the processing of personal data must also be put into consideration in such an application.

Another legal remedy that is relevant for Nigerian copyright enforcement regime is that of the payment of the legal costs and other expenses incurred by the successful party by the unsuccessful party except equity does not allow this. This is a strong deterrence for infringers and would-be infringers. In the UK, this would amount to a recovery of about 75%-80% of the legal costs incurred by the successful party.<sup>94</sup> It should be noted that this does not mean all the

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<sup>91</sup> Dutch Code of Civil Procedure, Article 1019

<sup>92</sup> Hans M, The Enforcement of Patent Rights in Germany' vol.31 (2000) *International Review of Industrial Property and Copyright Law* (IIC), p.656

<sup>93</sup> [2012] EWHC 723 (Ch)

<sup>94</sup> Ibid

costs incurred by the successful party. There is usually a table for calculating the costs as set by the court in many countries.<sup>95</sup>

In Nigeria, the civil procedure rule provides for remedies in form of costs though not in strong terms as in Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.<sup>96</sup> The court has the discretion to determine who shall pay the cost of the whole suit, of particular or every proceeding.<sup>97</sup> The court does not however have the power to order the successful party to pay the cost of the whole suit of the unsuccessful party.<sup>98</sup> Conversely, it means that the court has the power to order the unsuccessful party to pay the cost of the whole suit to the successful party. The amount of costs to be paid is at the discretion of the court which, if practicable, may be summarily determined by the court.<sup>99</sup> The practice is to include this as part of the claims in a party's Statement of Claims as special damages. The successful party must therefore insist on it during the final/written address and provide evidence as to the legal cost if the court is to grant a substantial amount.

For instance, in *A.C.B Ltd v. Ajugwu*<sup>100</sup> the court elucidated on the award of costs. The award of costs is at the discretion of the court which discretion must be exercised judiciously and judicially. Costs follow events and a successful party is entitled to costs except where there are special circumstances depriving him of such which must be shown by the judge. However, costs are not imposed as a punishment to the party who lost nor are they awarded as a bonus to the successful party. A party awarded should only be indemnified for his out of pocket expenses and compensated for the true and fair expenses for the litigation. Costs merely serve as a cushioning or palliative effect on the financial burdens of the successful party and cannot cure all the financial loss. It is awarded in the ordinary principle of genuine and reasonable out of pocket and normal counsel cost usually awarded for a leader and one or two juniors. The court acknowledged in this case that there is no universal table for fixing costs because costs follow the events; the court must therefore take the peculiar circumstances of each case into consideration in forming its opinion. In this suit, the trial judge first took up the case on 4/12/2000 and judgment was delivered on 3/6/2004. On the whole there were 22 appearances during the period under review. The court held that for a suit handled by a Senior Advocate of Nigeria, it seemed that the award of ₦25,000.00 in favour of the respondent cannot be properly termed outrageous or done *mala fide*.

This remedy is not as developed or commonly used in Nigeria as it is in other jurisdictions. The attitude of the court is generally negative towards a claim for solicitor's cost despite satisfactory proof by the claimant. The few instances the court has granted such a claim, it has been a meager sum ranging from ₦2,000.00 to ₦10, 000.00.<sup>101</sup> For example, in *Emirates Airline v. Tochukwu Aforka & Anor*<sup>102</sup> the Court of Appeal held that:

Claims for both special damages and general damages or for solicitor's fees are not appropriate in an action for breach of contract

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<sup>95</sup> M Hans (n. 92) p.668

<sup>96</sup> Federal High Court CPR, Order 52

<sup>97</sup> Ibid, Rule 3

<sup>98</sup> Ibid, Rule 4

<sup>99</sup> Ibid, Rule 6

<sup>100</sup>[2012] 6 NWLR (pt1295) 97

<sup>101</sup> In *Shukka v. Abubakar* [2012] 4 NWLR (pt 1291) 497, only ₦8,000.00 was awarded as costs

<sup>102</sup> (2014) LPELR-22686 (CA)

except where there is an agreement by the parties to that effect... The claim for Refund of the sum of ₦2.5m (Two million, Five Hundred Thousand Naira) paid by the Plaintiffs to its Solicitors is not recoverable because there was no agreement to that effect and it was not a loss foreseeable from the breach of contract.<sup>103</sup>

Another decision that illustrates the attitude of most judges in Nigeria to a claim for payment of solicitor's cost is *Guinness (Nig) Plc v. Nwoke*<sup>104</sup> where the Court of Appeal held as follows:

It is also unethical and an affront to public policy to pass on the burden of Solicitor's fees to the other party, in this case the cross-respondent... I am of the strong view that this type of claim is outlandish to the operation of the principle of special damages and it should not be allowed. It is absolutely improper to allow the cross-appellant to pass his financial responsibility couched as 'special damages' to the cross-respondent.<sup>105</sup>

This position was not different at the apex court as the Supreme Court in *Christopher Nwanji v. Coastal Services (Nig.) Ltd*<sup>106</sup> adopted the decision of the Court of Appeal in *Simon U. Ihekwoaba & Anor. v. African Continental Bank Ltd. & Ors*<sup>107</sup> and held that 'The issue of damages as an aspect of solicitor's fees is not one that lends itself to support in this country.'<sup>108</sup> It is therefore clear that before the payment of legal costs can be effective as a means of deterrence, the court must be willing to change its attitude by granting costs of higher monetary values. The grant of solicitor's fees becomes an effective tool particularly in cases where a defendant has flagrantly infringed on the plaintiff's copyright and refused to stop its act of infringement despite warning letters sent to the defendant.

Fortunately, the apex court seems to have overruled itself in this regard as seen in its recent decision in *Union Bank of Nigeria PLC v. Mr. N.M. Okpara Chimaeze*<sup>109</sup> which has become a precedent upon which a successful litigant may rely on to claim solicitor's cost. The Plaintiff in this suit claimed the sum of ₦250,000.00 as special damages for his solicitor's fees. The Supreme Court affirmed the decisions of the lower courts on the basis of the principle that a claimant who has suffered special damages and proves same such that the court can glaringly see and appreciate the nature of the damage or loss is entitled to the award of such special damages.

Another remedy that would be beneficial in copyright enforcement in Nigeria is the publication of judicial decisions at the request of the copyright owner at the expense of the infringer. Such remedy is essential to be able to show customers and others that have commercial dealings with a party to the suit that he or she is not infringing, or serve as deterrent to other intending infringers that the copyright owner would not accommodate an infringement of his rights. While the Copyright Act does not provide for this remedy, it may not be impossible for a

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<sup>103</sup> Ibid, 42-43

<sup>104</sup> [2000] 15 NWLR (pt 689) 135

<sup>105</sup> Ibid, 150. See *Joseph Nduka Igbo v. Gabriel Kalu Agwu* (Unreported. Suit No: FCT/HC/CV/1670/2013) where it was held that the courts are not in favour of a party to a suit passing the burden of his solicitor's fees to the other party as the plaintiff wanted the Court to do in the instant case.

<sup>106</sup> [2004] 11 NWLR (Pt. 885) 552

<sup>107</sup> [1998] 10 NWLR (Pt. 571) 590

<sup>108</sup> *Christopher Nwanji v. Coastal Services (Nig.) Ltd* [2004] 11 NWLR (Pt. 885) 552, 569

<sup>109</sup> [2014] 9 NWLR (pt 1411) 166; (2014) LPELR-22699(SC)

copyright owner to request such an order from the court where he provides evidence to prove that it is necessary such as is done in defamation cases. Otherwise, he would not have such a remedy as a matter of course.

In the absence of certain remedies in Nigeria, copyright owners can maximize the flexibility of the law in obtaining effective remedies. The Nigerian Copyright Act makes a non-exhaustive provision for civil remedies: ‘... all such reliefs by way of damages, injunction, accounts *or otherwise* shall be available to the claimant as is available in any corresponding proceedings in respect of infringement of other proprietary rights’.<sup>110</sup> Although the law and remedies in Nigeria are not as developed as that of some other countries, there may be possibilities of obtaining similar remedies within Nigeria. Parties may not have been maximizing the possibility of asking for more effective remedies.

The fact that cases from other common law jurisdictions such as the UK can be cited, though merely of persuasive effect, may also be helpful in persuading the courts in granting novel remedies which are not available explicitly in the laws of Nigeria. More so, the courts have been known to fill any lacuna that exists in the laws and some laws have developed from the practice of the courts. This may be employed to combat the challenge where the laws of Nigeria do not provide for an appropriate remedy.

#### **4. Conclusion**

Having compared the remedies available for copyright infringement under the Nigerian legal system with those of other jurisdictions, certain salient points are clear. Nigeria has most remedies that are also available in other jurisdictions such as precautionary measures, measures for access to and preservation of evidence through injunctions, search and seize, and inspection orders. There are also measures such as the protection of confidential information, right of information, payment of legal costs of the successful party by the unsuccessful party which are not present in the Copyright Act in Nigeria. The country therefore has a lot to learn from the mode of execution or practice associated with these remedies and also needs to incorporate the absent remedies. Copyright enforcement in Nigeria can be improved with more explicit provisions and an amendment of the law.

Despite this, it is clear from the comparison made that the laws as they are at the moment provide for major remedies for the general enforcement of copyright. If these laws are used effectively, they would go a long way in reducing the spate of copyright infringement in Nigeria. Litigants and their lawyers are therefore encouraged to maximise the current copyright enforcement provisions as well as ask for novel remedies that will encourage a more effective copyright enforcement regime.

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<sup>110</sup> Copyright Act 1988, s.16(1). Emphasis added