

# CRIMINAL ACCOUNTABILITY FOR COPYRIGHT INFRINGEMENT A COMPARATIVE ANALYSIS OF NIGERIAN AND SOUTH AFRICAN LAW

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## ABSTRACT

*In Nigeria and South Africa, copyright is the most common intellectual property right. The purpose of this study is to look at how criminalizing copyright infringement in Nigeria and South Africa has helped to reduce blatant copyright infringement. The study used qualitative research methodology and a doctrinal approach to trace: the definition of copyright as an industrial property subject; copyright infringement in Nigeria and South Africa; proof of copyright infringement in Nigeria and South Africa; and criminal liability for copyright infringement. According to the study, criminal liability for copyright infringement cannot be underestimated, given the increase in criminal activities in these countries, which has resulted from a massive increase in piracy and bootlegging, which has become a huge and highly profitable business. As a result, the paper suggests that the government of the day make a concerted effort to educate the populace, and that arrangements be made for widespread publicity on the importance of copyright in particular, and intellectual property law in general, on the individual owner of copyright as well as the nation's entire economic, social, and legal system.*

**Keywords:** Copyright Infringement, Criminal, Liability, Intellectual Property.

## INTRODUCTION

Copyright law tries to safeguard copyright owners' interests or property rights by preventing unauthorized use of such works. Two methods are used to prevent such unauthorised uses.<sup>1</sup> The first is by civil remedies.<sup>2</sup> The second method is by prosecution of infractions of the copyright owner's rights.<sup>3</sup> The essence of copyright laws is to ensure that writers' investment and originality are rewarded, as well as to serve as an incentive for authors to generate additional works for the educational, scientific, cultural, and literary growth of society (Adeyemi, 2020). Copyright laws are also important in balancing the private rights of copyright owners with the public's interests in having access to information, knowledge, and other cultural advantages in copyright works. Ensuring this balance is a government job, which is why there is discussion about whether criminalising copyright infringement is appropriate and if it fulfills this function.

Copyright infringement has always been regarded a civil wrong, and governments have been loath to make it a crime. However, technologies that affect the development, distribution, and exploitation of creative content are continually changing copyright law. To ensure that the copyright system continues to function, laws must be updated to reflect new technologies affecting the copyright industry. For example, with reproduction and digital technologies making the reproduction and dissemination of copyright works easier and less

expensive, piracy and flagrant copyright infringement have become widespread, significantly affecting the interests of copyright owners.<sup>4</sup>

As a result, this essay will look at Criminal Liability for Copyright Infringement: An Analysis of Nigerian and South African Law. Following this introduction, which serves as the first portion, the article is broken into six sections (Adeyemi, 2020).

In the second section, we look at copyright as a subset of industrial property. It asserts that the term "copyright" is commonly used to refer to the rights that an author has in his work. The rights granted to the holder of a copyright or a person authorised by such a holder permit him/her to control, utilise, and adopt the work exclusively. It also alleges that, notwithstanding the copyright granted by various agencies, the phrase lacks a distinct, definite, and generally acknowledged definition (Oriola, 2004).

The third segment focuses on copyright infringement in Nigeria and South Africa. It says that intellectual property infringement is defined as any act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner. It goes on to say that the wise decision to criminalise copyright infringement in Nigeria demonstrates the serious attention that the governments of Nigeria and South Africa have decided to give to the issue of copyright. It demonstrates that not only is theft of actual and physical goods punishable in our culture, but intangible rights (copyright) are also protected from being taken, not just to the prejudice of the individual owner of the copyright, but also to the society at large (Hardy, 2002).

Section 4 looks at how to prove copyright infringement in Nigeria and South Africa. It argues that it is an essential tenet of law that criminal culpability cannot exist until and unless the accused's guilt is established. Furthermore, it argues that the duty or onus of proving copyright infringement falls on the individual who says such infringement exists or has occurred under the law.

Section 5 discusses criminal liability for copyright infringement in Nigeria and South Africa. It contends that a penalty is the punishment imposed on a wrongdoer, usually in the form of incarceration or fine, particularly a sum of money exacted as punishment for either a state wrong or a civil wrong, as opposed to recompense for the injured party's loss. The sixth section of the essay includes suggestions for further reading (Onoyeyan, 2018).

## **COPYRIGHT AS A SUBSET OF INDUSTRIAL PROPERTY**

The Copyright Act of Nigeria and South Africa defined the phrase "copyright as copyright under this Act." To answer this question, it is necessary to refer to Section 2 of the South African Copyright Act, which states that, subject to the provisions of this Act, the following works, if original, are eligible for copyright: literary works; musical works; artistic works; cinematographic films; sound recording; broadcasts; programme - carrying signals; published editions and computer programmes. Section 2 of the Nigeria Copyright Act states that the following works are eligible for copyright under this Act: literary works, musical works, creative works, audio-visual works, sound recordings, and broadcast.

To minimise ambiguity, the South Africa Act also states that a work, other than a broadcast or programme-carrying signal, is not eligible for copyright until it has been written down, recorded, represented in digital data or signals (Yerima, 2003), or otherwise reduced to a substance. A broadcast or a programme-carrying signal is not eligible for copyright until it has been broadcast in the case of a broadcast and transmitted by a satellite in the case of a programme-carrying signal. A work must not be ineligible for copyright solely because its

creation or performance of any act in relation to the work entailed a violation of copyright. In some other works in Nigeria, a literary, musical, or artistic work shall not be eligible for copyright unless it 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 (Hardy, 2002). It further states that an artistic work is not eligible for copyright if the creator intends for it to be used as a model or pattern to be replicated by any industrial process at the moment the work is created. This appears to be an outlier (Akintoye, 2023). Finally, it states that a work is ineligible for copyright solely because the creation of the work or the performance of any act in relation to the work involves a violation of copyright in another work.

To understand the various provisions of the Act, it is necessary to analyse the ordinary meaning of the term copyright as defined by Oxford Advance Learner's Dictionary and Black's Law Dictionary.

The Oxford Advanced Learner's Dictionary defines copyright in terms of hypothetical examples, as follows:

“If a person or organisation owns the copyright to a piece of writing, music, or artwork, they are the only ones who have the legal right to publish, broadcast, or perform it, and others must get permission to use it or any portion of it.”

This is a common meaning or definition - Black's Law Dictionary defines copyright as follows:

The exclusive right to reproduce, adopt, distribute, perform, and display an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works, motion pictures and other audio-visual works, and sound recordings).

According to the foregoing, the Act appears to be exhaustive not only in terms of language, but also in terms of the scope, nature, and content of what amounts to or qualifies as copyright. These textual definitions also support this. With due respect, copyright is merely the right to create copies of a specific work and to prevent others from doing so without one's permission (Ocheme, 2000).

Copyright is defined as follows by a text writer: “a personal right that does not have a monetary value”.<sup>5</sup> It is a creature of statute, according to him, and it is vested in the author or originator of a protectable work, which does not enure in perpetuity but gives an exclusive right in connection to an eligible work. When he says that copyright is a creature of statute, it appears that this definition or explanation ignores common law copyright. It should be remembered that prior to the statutory protection of copyright, there was minimal copyright protection under common law. As a result, common law copyright is a property right that began at the time the work was created rather than when it was published.<sup>6</sup> However, it appears that the statute eventually did away with common law copyright (Elaigwu, 2006).

It is worth noting that in the case of *Adenuga v Ilesanmi Press Sons Nig. Ltd.*,<sup>7</sup> the court stated, “In regard to eligible work, copyright is the exclusive right to control, perform, or authorise the performance of any of the acts confined to the copyright owner (Adeyemi, 2020).”

Copyright recognition means that an author is granted a limited monopoly to exploit his original work if it falls into a recognised category in Nigeria and South Africa. First and foremost, this allows an author to be rewarded or compensated for his or her labour, creativity (Ocheme, 2000), effort, ability, and aptitude. Second, it acts as a motivator for the author to generate more and better works. The monopoly is just for a limited time. After the

applicable period expires, the author's work enters the public domain and may be freely utilised by others. In this way, a balance is achieved between the individual's and society's interests.

Copyright is a separate right from the author's personality. It will not attract protection as long as the author's action does not expand beyond that author's personality. When such activity gets an individual and independent character and is reduced to some outwardly apparent form, it gains economic worth and becomes an appropriate object of legal protection under copyright law. In the case of *Video Park Town North (Proprietary) Limited v Paramount Pictures Corporation*,<sup>8</sup> the court described the nature of copyright in the following terms:

When he, through his imagination, skill, or labour, or some or all of them, brings an idea to life in tactile, visible, or audible form (Awa, 2021), capable of being communicated to others as a meaningful conception or apprehension of his mind, a right or property in that idea is immediately created. The private interest in that object of knowledge is known as ownership, and it is referred to as "copyright".

In *Chiadzwa v S*<sup>9</sup> According to the court, copyright must be interpreted as a legal word that specifies the rights granted to creators for their artistic and literary works. Copyright protects the creators of original works, and they or their assignee have the basic right to the exclusive use or licence to others to use their works on specified terms.<sup>10</sup>

Despite the numerous definitions of copyright provided by various agencies, the term lacks a distinct, definite, and widely acknowledged meaning. As one text writer claims: "One of the most intricate and technically demanding disciplines of property law is copyright as a local concept. It is an esoteric realm populated only by "experts" who frequently hide behind an almost impenetrable maze of jargons."<sup>11</sup> However, based on the definitions, copyright refers to an intangible property in an eligible (written) work. After investigating the concept of copyright, a commentator comes to this conclusion (Hardy, 2002).

Aside from being an intangible incorporeal right, copyright is awarded to the author by statute. An author has the sole legal right to copy, reproduce, publish, sell, or transfer his creative works. It also includes the author's moral right to have his work kept largely in its original form, as well as the right to object to any distortion, alteration, or mutilation.<sup>12</sup>

## COPYRIGHT INFRINGEMENT IN NIGERIA AND SOUTH AFRICA

Infringement of intellectual property is defined as any act that infringes on one of the exclusive rights of a patent, copyright, or trademark owner.<sup>13</sup> In the context of copyright, infringement refers to the unauthorised use of copyrighted materials.<sup>14</sup> Furthermore, copyright infringement occurs when a person does or induces another person to do any of the restricted or banned activities in regard to a copyright work without the licence or authority of the copyright owner.<sup>15</sup> In order to determine (Ayoade, 1980), prove, or establish whether an infringement has happened, recourse should be made to current copyright law, because infringement can occur only in the context of legal provisions. In other words, whether infringement happened is a legal question that must be established based on the facts and data available (Falobi, 1976). The implication is that, subject to statutory exceptions, the exclusive right of the copyright owner granted and protected by law is a subject of infringement or violation, and when that occurs, remedies are granted by courts of law under civil proceedings, whereas punishments are imposed in some special situations where criminal proceedings are initiated.<sup>16</sup>

However, in Nigeria, the same person whose rights are alleged to have been violated can pursue both civil remedies and criminal sanctions at the same time.<sup>17</sup> It should be emphasised that the Act specifies what constitutes an infringement, as previously stated.

In South Africa, there are two kinds of infringement: direct and indirect.<sup>18</sup> *Section 23 of the South Africa Copyright Act* provides (Awa, 2021), “Infringement of copyright occurs when a person who is not the owner of the copyright does or causes another person to do, in the republic, any conduct that the owner has the exclusive right to perform or authorise.” In other words, infringement happens when a person engages in any of the limited acts over which the owner has sole authority. This amounts to unauthorised copying or commercial use of the material. Infringement can occur not only when the complete work is copied or misused, but also when a substantial portion of it is copied or misused. A significant portion is concerned with quality rather than quantity. As a result, unauthorised copying of a minor but critical component of a work becomes infringement.

Regarding reproduction and adaptation, Section 1 of the South African Copyright Act defines reproduction as follows: “In relation to-

- a. A reproduction in the form of a record or a cinematographic film is included in a literary or musical work or a broadcast;
- b. An artistic work contains a version created by transforming the piece into three dimensions or, if in three dimensions, converting it into two dimensions;
- c. Any work, including a reproduction made from a reproduction of that work, is considered a work.

The Act gives a broad definition to reproduction. It guards against both material and non-material infringement. This is significant in this day and age of computers, the internet, and e-commerce. Loading software and data into a computer, operating a computer programme, downloading material from the internet, displaying material on a computer screen, including material sourced from the internet, and incorporating material in a website are some examples of what would qualify as reproduction. In the case of reproductions of artistic works, particularly technical drawings, infringement can occur when one copies the drawing itself or copies the three-dimensional image.

Also, Section 1 of the South African Copyright Act outlines what constitutes an adaptation; for example, adaptations of literary works would be conversion of that work into a dramatic work for non-dramatic works; and conversion of that work into a non-dramatic work for dramatic works (Awa, 2021). Adaptation would also include translations.

Unless there is copyright, there can be no violation by replication or adaptation. For there to be an adaptation or reproduction, a link between the two works must be established. First, the courts determine if there is a substantial similarity between the works. Second, the courts consider whether there is a link between the plaintiff's original work and the defendant's alleged infringing copy. If either of these checks returns a negative result, then there is no copying.

In contrast to direct infringement, indirect infringement happens when certain acts are performed without the authorization of the copyright owner (Ayoade, 1980). Indirect infringement can be classified into two types: unauthorised dealing in infringing copies of a work and allowing a public performance of a work.

Indirect infringement occurs when

- a. Importing into South Africa for a purpose other than personal use;
- b. Selling, renting, or trading by offering or presenting for sale or hire;
- c. Distributing for commercial or non-commercial reasons in such a way that the owners of the copyright suffers a loss;
- d. Purchasing a product linked to a computer software in South Africa that is an infringing copy of a protected work, knowing that the item is an infringing copy.<sup>19</sup>

Allowing a location of public entertainment to be utilised for the public performance of a protected literary or musical work in circumstances where such public performance is itself an infringement, with knowledge that such public performance is an infringement, constitutes indirect infringement.<sup>20</sup>

In *Gramo Phone Co. Ltd v Music Machine (pty) Ltd and Others*<sup>21</sup> The court determined that guilty knowledge of an article's infringing character requires notice of circumstances that would imply to a reasonable person that a violation of copyright law was being committed.

Section 12 of the South African Copyright Act provides for exemptions from infringement, which means that any fair dealing with a literary, musical, or artistic work, or with a broadcast or a published edition, does not infringe that copyright when it is done in a fair manner.—

- a. For the purposes of research or private study by the person utilising the works, or for the person's personal private use;
- b. In order to criticise or assess that work or another work;
- c. In order to criticise or assess that work or another work;
- d. For the purposes of legal proceedings or judicial reporting;
- e. In order to quote from the work; and
- f. As an example for teaching reasons.

The South African Act contains no definition of fair dealing, and English case law is equally unhelpful because fair dealing is evaluated on a case-by-case basis. As a result, we must consider the American method, as outlined in Section 107 of the United States Copyright Act, which specifies a series of criteria to be considered for determining fair use of a work:

- a. The use's purpose and character;
- b. The copyrighted work's nature;
- c. The size and importance of the piece used; and
- d. The impact on the prospective market of the copyright holder.

These criteria have also been applied in Australia, with the addition of a fifth criterion - whether the job can be obtained in a reasonable amount of time at an acceptable commercial price.

However, a balance must be struck between the author's or copyright holder's desire to prevent replicas of his work and the public's right to utilise the works for the purposes mentioned.<sup>22</sup>

In Nigeria, Section 36 of the Copyright Act states that any person who uses a copyright without the permission of the owner of the copyright infringes on it (Section 135, 2011):

- a. Does or induces another person to do anything that violates the exclusive rights granted by this Act;
- b. Import or cause to be imported into Nigeria any copy of a work that, if manufactured in Nigeria, would be considered an infringing copy under this Act;
- c. Sells, offers for sale, or hires any work whose copyright has been infringed under paragraph (a);
- d. Plates, master tapes, machineries, equipment, or contrivances made or in his possession for the sole purpose of manufacturing infringing copies of the work;
- e. Allows a place of public entertainment or business to be used for a public performance of the work if the performance constitutes an infringement of the work's copyright, unless the person allowing the place to be used was unaware and had no reasonable grounds to suspect that the performance constitutes an infringement of the copyright;
- f. Allows the reproduction of a copyright work within its premises; or
- g. Perform or cause to be performed any work in which copyright exists for the purposes of trade or business or the promotion of a trade or business.

Any of the acts referred to in this section must be performed in relation to the entire or a major portion of the work, either in its original form or in any form recognisably derived from the original.

According to *Section 108 of the Nigeria Copyright Act*, "reproduction" denotes the manufacturing of one or more copies of a literary, musical, or artistic work, audio-visual work, or sound recording. While "adaptation" refers to the conversion of a pre-existing work from one type of work to another or the alteration of a work within the same type to make it appropriate for various exploitation conditions, it may also include changing the composition of the work.

*Sections 20 to 27 of the Nigeria Copyright Act* provide for copyright exceptions, which include:

Fair dealing for private use; parody, satire, pastiche, or caricature; non-commercial research and private study (Nwachukwu & Ekakitie, 2022); criticism, review, or reporting of current events, subject to the condition that, if the use is public, it shall, where practicable, be accompanied by an acknowledgement of the title of the work and its author, except where the work is incidentally included in a broadcast; provided that (i) the goal and nature of its use; (ii) the nature of the job; (iii) the volume and significance of the piece used in relation to the entire work; and (iii) the effect of the use on the potential market or value of the work; public reading or recitation, not for commercial purposes, of any reasonable extract from a published literary work, if accompanied by an acknowledgment of the title of the work and its author; any use of a work made by, or under the direction or control of, the government or such public libraries, non-commercial documentation centres, as well as scientific or other institutes as mandated, when the use is in the public interest, provided that no revenue is generated and the use has no significant impact on the potential market or value of the work; a work reproduced by or under the direction or control of a broadcasting organisation, where the reproduction or any copies are intended solely for a lawful broadcast and are destroyed before the end of the six-month period immediately following the making of the reproduction, or such longer period as may be agreed upon between the broadcasting organisation and the owner of the relevant part of the copyright in the work, provided that any reproduction of a work made under this paragraph: (i) may be retained in the broadcasting organization's archives if it is of remarkable documentary quality; (ii) shall not be used for any other purpose without the prior written permission of the owner of the copyright in the relevant portion of the work (Nwogu, 2015) and (iii) A "lawful broadcast" is one that does not infringe on the work's copyright. Daily news for public broadcast or other public communication; any use of a work for the purpose of judicial or legislative proceedings or the reporting of such proceedings; the creation of no more than three copies of a book for the use of a public library by or under the guidance of the person in charge of a public library if such a work is not available for purchase; reproduction of an unpublished literary or musical work held in a library for research or private study, The public has access to museums and other such institutions; temporary and incidental reproduction, which are inherent and necessary aspects of a technical process, whose main goal is to facilitate transmission of a work between third parties through an intermediary or other permissible use, when such usage has no independent commercial significance; Without prejudice to Section 26 of this Act, usage for the benefit of people with disabilities and for non-commercial purposes to the extent required by the specific disability; usage of a creative work in the form of a building model, design, or plan of a building for the purpose of reconstruction; Communication or making available to members of the public works and other material that are not subject to purchase or licencing terms for the purpose of research or private study via dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums, and articles.

Despite the provisions of Section 9 of this Act, reproduction of a copy or adaptation of a computer programme is permitted if the copy or adaptation is required for: use with a computer for the purpose for which the computer programme was obtained, archival purposes, or as a replacement if the original copy of the computer programme is lost, destroyed, or rendered unusable; and the activation of a machine that lawfully contains an unauthorised copy of the computer programme for the sole purpose of machine maintenance or repair, subject to the condition that such new copy is used in no other way and is destroyed immediately after the maintenance or repair is completed; and Any computer programme or part that is not required for the machine to be activated is not accessed or used other than to produce such fresh copy as a result of the machine's activation (Section 135, 2011).

- a. Any contractual provision that purports to limit or hinder the performance of any act authorised by this Act is void;
- b. Acts for the purpose of instruction or testing;
- c. Educational institutions' recording of broadcasts;
- d. Educational institutions are prohibited from making reprographic copies;
- e. Following that, dealing with authorised copies;
- f. Provisions for archives, libraries, museums, and art galleries;
- g. Special considerations for blind, visually challenged, or otherwise disabled people who print; and
- h. Special provisions apply to sound recordings of musical works.

## **HOW TO PROVE COPYRIGHT INFRINGEMENT IN NIGERIA AND SOUTH AFRICA**

It is a fundamental premise of law that criminal culpability cannot exist until and until the accused's guilt is established.

In general, the burden or onus of proving copyright infringement falls on the person who says such infringement exists or has occurred under the law.<sup>23</sup>

Under the Nigeria and South Africa Copyright Act, it appears that to establish an infringement of copyright in the work, the plaintiff must first show a valid ownership of copyright in the work alleged to have been infringed, and secondly that there was a substantial copying of the copyright work by the alleged infringer (Nwogu, 2015).

*Section 26 of the South African Copyright Act* establishes the burden of proof in legal actions. Where, in the case of a literary, musical, or artistic work or a computer programme, a name purporting to be that of the author appeared on copies of the said work or programme as published or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appeared shall, in any proceeding brought under this chapter, be presumed, unless the contrary is proven, to be the author.

In the case of a work or programme alleged to be a work or programme of joint authorship, subsection (1) applies to each person alleged to be one of the authors of the work or programme as if references in that subsection to the author were references to one of the authors where it is established in any proceedings brought under this chapter with respect to an anonymous or pseudonymous literary, musical, or artistic work or computer programme:

- a. That the work or programme was first published in the Republic and did so during the 50-year period ending with the commencement of the calendar year in which the proceedings were brought; and
- b. If a name purporting to be that of the publisher appeared on copies of the work or programme as first published, copyright shall be preserved in the work or programme, and the person whose name so appeared shall be presumed to have been the owner of that copyright at the time of publication: provided, however, that this subsection shall not apply if the actual name of the author of a pseudonymous work is widely known.



Whereas in any proceedings brought pursuant to this chapter involving a literary, musical, or artistic production or a computer programme. If the author of the work or programme is proven or conceded to be deceased, the work or programme is believed to be an original work or programme unless the contrary is proven. Subsection (4) also applies when a work or programme is published and:

- a. The publishing was anonymous or under a name that the plaintiff or the state claimed was a pseudonym; and
- b. It is not demonstrated that the work or programme has ever been published under the author's genuine name or a name by which he was commonly known, or that a person without prior knowledge of the facts can establish the author's identity via reasonable inquiry.

If it is proven in any proceedings brought under this chapter regarding the alleged infringement of copyright in a cinematograph film that the name purporting to be the name of the author of that film appears thereon in the prescribed manner, the person whose name appears thereon shall be presumed to be the author of that film, unless the contrary is proven.

Where it is proven in any proceedings brought under this chapter with respect to the alleged infringement of copyright in a sound recording that records embodying that recording or a portion thereof were issued to the public and that at the time those records were so issued, the following claims appeared on a label or any other printed matter affixed to such records or in or on anything in which they were contained, i.e.

- a. That the sound recording was created by a person mentioned on the label or written content; or
- b. The fact that the recording was first published in a year and at a location described on the label or written content shall be adequate evidence of the facts thus stated, unless the reverse is proven.

A claim considered in Subsection (7) may be made by using the sign "c" in conjunction with the name of the person in question, and a claim contemplated in Subsection (7) may be made by using the symbol "p" in conjunction with the year and place in question. In any proceedings brought under this chapter for alleged violation of copyright in a cinematograph film registered under the Registration of Copyright in Cinematographic Films Act, 1977.<sup>24</sup> It shall be presumed:

- a. That every party to those proceedings was aware of the particulars placed in the copyright register referred to in Section 15 of the said Act as of the date of the application to record those particulars.
- b. Unless the opposite is proven, the individual who is accused of infringing the relevant copyright did so without the necessary authority.

Any person trading in the selling, letting, or destruction of copies of any of the said works, and who was found in possession of a copy of any of such works, said or let for hire or by way of trade offered or exposed for sale or hire such copy;

If it is proven in any proceedings under this chapter regarding the alleged infringement of the copyright in a work that the person alleged to have done an act that allegedly infringes the relevant copyright did such act without the authority of the exclusive licensee, it is presumed, unless the contrary is proven, that the relevant act was also done without the authority of the owner of the copyright concerned.

Evidence to prove violation of copyright in a work may be used in any proceedings brought under this chapter:

- i. The continuation of the copyright in that work; or
- ii. Any person's title to such copyright, whether by ownership or licence, may be adduced by affidavit, and the mere submission of such affidavit in such proceedings shall be prima facie proof of the relevant facts.

The court in which the affidavit referred to in paragraph (a) is produced may, in its discretion, order the person who made the affidavit to give oral evidence in the proceedings in questions, or may cause written interrogatories to be submitted to such person for reply,

and any reply purporting to be a reply from such person shall also be admissible in evidence in such proceedings.

Section 42 of the Copyright Act of Nigeria states that any of the following facts shall be admitted in any proceeding without further proof if stated in an affidavit made before a commissioner for oaths, notary public, or other person competent to administer an oath in terms of the law of the country where the oath is made, by or on behalf of the owner of the copyright in a work, that:

- a. Copyright exists in the work at the time given;
- b. The named individual owns the work's copyright;
- c. A true copy of the work is one that is shown in the affidavit;
- d. The author of the work is a citizen or resident of one of the countries listed in the affidavit;
- e. The work's author is a legal entity founded or incorporated by or under the laws of the country indicated in the affidavit;
- f. The work was created or published for the first time in the country stated in the affidavit; and
- g. The certificate attached to the affidavit is a true copy of the incorporation's certificate or registration.

*Section 43 of the Act* states that where a work has been registered under Section 82 of the Act, the following will be presumed in any action for infringement of copyright in a work, whether civil or criminal:

- a. That copyright is present in the work that is the subject of the alleged infringement;
- b. That the name appearing on the work purported to be the author's name is the author's name;
- c. That the name purported to be that of the work's publisher or producer is the name of such publisher or producer;
- d. Where the author is no longer alive, the work is considered original; and
- e. That it was published or produced at the location and date indicated on the work.

It is argued that the effectiveness of this provision is based on and determined by the strength of the affidavit evidence<sup>25</sup> previously considered. The implication is that the affidavit evidence requirement and the legal presumption are cumulative, not alternative. It appears that Ocheme<sup>26</sup> He backs up this point of view by claiming that “According to one point of view, the combination of the aforementioned provisions<sup>27</sup> Clearly express the legal burden on the defendant (in civil procedures) or the accused (in criminal proceedings) to refute either ownership or a copyright infringement.”

The combined effect of this Act's two provisions<sup>28</sup> is that there is a legally rebuttable presumption of regularity. Of course, the defendant or accused can, depending on the circumstances, refute this legal presumption. The plaintiff's legal presumption of regularity is not rebutted by the defendant simply opposing the plaintiff's ownership of copyright and subjecting him to stringent evidence thereof,<sup>29</sup> as it would be under usual pleading standards. According to the basic rule of affidavit evidence denial, the defendant can only refute these presumptions by opposing them with affidavit evidence as well. He can do so by filing a counter-affidavit. As a result, in *Alhaji Agbaje v Ibru Seafoods Ltd*<sup>30</sup> The court held that if the facts sworn to by the plaintiff's affidavit are not challenged by the defendant by filing a counter affidavit, and the plaintiff's facts are not blatantly false or inaccurate to the court's knowledge, the court is free to act on the plaintiff's depositions.

Naturally, discrepancies of affidavit evidence between that attested to by the plaintiff and the defendant or the accused with respect to proof of ownership of copyright in the work and copying of a large portion of the copyright work by the alleged infringement are to be expected. Of course, when such a controversy arises, it becomes the court's responsibility to resolve it. The court is expected to follow specific procedural standards when resolving discrepancies in affidavit evidence submitted by both parties. For example, if the affidavit evidence is irreconcilably in conflict with the documentary evidence before the court, the judge may order the parties to present oral evidence to reconcile the differences.<sup>31</sup>

## CRIMINAL LIABILITY FOR COPYRIGHT INFRINGEMENT IN NIGERIA AND SOUTH AFRICA

Section 27 of the South African Copyright Act states that any person who, at the time when copyright exists in a work, without the authority of the owner of the copyright:

- a. Produces for sale or hire;
- b. Sells or rents out for hire, or makes trade offers or exposes for sale or rent;
- c. By way of public trade shows;
- d. Imports entering the Republic for purposes other than personal or domestic use;
- e. Distributes for commercial purposes; or
- f. Distributes articles that he knows to be infringing copies of the work for any other purpose, to such an extent that the owner of the copyright suffers an adverse effect, is guilty of an infringement.

Any person who makes or has in his possession a plate knowing that it will be used to produce infringing copies of a work while copyright exists in the work is guilty of an offence. Any person who causes a literary or musical works to be performed in public knowing that copyright subsists in the work and that performance constitutes an infringement of the copyright shall be guilty of an offence.

Anyone who causes a broadcast to be rebroadcast or transmitted in a distribution service while knowing that the broadcast contains copyright and that such rebroadcast or transmission constitutes an infringement of the copyright is guilty of an offence.

Any person who distributes programme-carrying signals to a distributor for whom they were not intended, knowing that copyright exists in the signal and that such distribution constitutes a violation of the copyright, is guilty of an offence (Elaigwu, 2006).

A person guilty of an infraction under this section faces the following penalties:

- a. In the case of a first conviction, a fine not exceeding five thousand rand or imprisonment for a period not exceeding three years, or both such fine and such imprisonment, for each article to which the offence relates;
- b. In any other case, a fine of not more than ten thousand rand or imprisonment for a period not exceeding five years, or both, for each article to which the crime pertains.
- c. While *Section 44 of the Nigeria Copyright Act* provides for grounds for criminal liability for copyright infringement, which is the core of this article, for clarity and avoidance of doubt, as in South Africa's provision, and proper appreciation of the issues, the section is reproduced below as follows:
  1. Any person who:
    - a. Makes or causes to be created any infringing copy of a work in which copyright exists for sale, hire, or for the purposes of commerce or business;
    - b. Imports or causes to be imported into Nigeria, other than for private or home use, a copy of any work that would constitute an infringing copy if created in Nigeria; or
    - c. Has any plate, master tape, machining equipment, device, or contrivance in his possession for the purpose of making any infringing copy of any such work, commits an offence and is liable on conviction to a fine of at least N10,000.00 for each copy dealt with in violation of this section, or imprisonment for at least five years, or both.
  2. Any person who
    - a. Sells, lets for hire, or exposes or offers for sale any infringing copy of a work for the purposes of commerce or business;
    - b. Distributes an illegal copy of a work for commercial or business purposes;
    - c. Has any infringing copy of a work in his possession that is not for his personal or domestic use; or
    - d. Has in his possession, sells, lets for hire, or distributes for trade or business purposes, or exposes or offers for sale or hire any copy of a work that, if made in Nigeria, would be an infringing copy, commits an offence and is liable on conviction to a fine of at least N10,000.00 for each copy dealt with in violation of this section, or imprisonment for at least three years, or both.
  3. A person is not guilty of an offence under Subsection (1) or (2) if he proves to the court's satisfaction that he did not know and had no reason to believe that the copy was an infringing copy of any work or that the

plate, master tape, machine, equipment, or contrivances were for the purpose of making infringing copies of any such work.

4. Any person who distributes copies of a work in which copyright exists to the public for commercial purposes without the consent of the owner commits an offence under this Act and is liable on conviction to a fine of at least N1,000.00 for each copy dealt with or imprisonment for at least three years, or both.
5. Whether the alleged offender is convicted or not, the court before which any proceeding for an offence under subsection (1), (2), or (4) is brought may order infringing copies of the works, plates, master tapes, machines, equipment, and contrivances in the alleged offender's possession to be destroyed or surrendered to the owner of the copyright or dealt with as the court deems fit.
6. If a law enforcement officer seizes an article in connection with a suspected offence under this Act, a court may, on the application of a copyright officer or the owner of the copyright in the article, order that the article be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court deems fit, even if no one has been charged with the suspected offence.
7. A person who communicates to the public or makes the work available to the public by wire or wireless means without the consent of the owner of a work in which copyright exists for commercial purposes commits an offence under this Act and is liable on conviction to a fine of at least N1,000,000.00 or imprisonment for at least five years.
8. A person who commits an offence under this Act by performing any of the acts specified in Section (1) (a) - (e) of this Act in relation to a broadcast without the consent of the owner of a copyright commits an offence and is liable on conviction to a fine of at least N1,000,000.00 or imprisonment for at least five years, or both.
9. The commission shall have the authority to compound any offence under this Act by taking such sums of money as it deems appropriate in the circumstances, but not more than double the minimum fine to which the offender would have been responsible if convicted of the offence.

Section 45 of the Nigeria Copyright Act states that any person who aids or procures another person to commit an offence under this Act is guilty of an offence and shall be liable on conviction to the same punishment as prescribed under this Act for the commission of the main offence (Falobi, 1976), whereas *Section 46 of the Nigeria Copyright Act* states that any person who aids or procures another person to commit an offence under this Act is guilty of an offence and shall be liable on conviction to the same punishment as prescribed under this Act.

Notwithstanding anything in Subsection (1), if a body corporate commits an offence under this Act and it is proven that the offence was committed with the consent or connivance of any director, manager, secretary, or other officer of the body corporate, such director, manager, secretary, or other officer is also deemed to have committed that offence and is liable to be prosecuted and punished accordingly.

"Body corporate" refers to a company or other group of people, while "Director" refers to a partner in a company (Akintoye, 2023).

If a body corporate is convicted of an offence under this Act, the court may order that its assets and properties be forfeited unless the body corporate establishes to the court's satisfaction that such assets were not the proceeds of the offence for which the body corporate was convicted.

Section 42 of the Nigeria Copyright Act states that, notwithstanding the provisions of any other law to the contrary, both criminal and civil actions may be brought in relation to the same violation under this Act.

## CONCLUSION

We looked at the definition of copyright as a topic of industrial property, copyright infringement in Nigeria and South Africa, proof of copyright infringement in Nigeria and South Africa, and criminal culpability for copyright infringement in Nigeria and South Africa

in this study. The rationale for criminalising conducts hostile to the rights of the owner of copyright was examined in this paper in order to protect and preserve our country's legal, social, economic, and cultural values in relation to the rights of the owners of copyright in particular and intellectual property law in general. The study concludes that criminal liability for copyright infringement cannot be underestimated in light of the increase in criminal activities in these countries, which has resulted from a tremendous increase in piracy and bootlegging, which has become a huge and highly profitable business in these countries. As a result, the paper suggests that the government of the day make a concerted effort to educate the populace, and that arrangements be made for widespread publicity on the importance of copyright in particular, and intellectual property law in general, on the individual owner of copyright as well as the Nation's entire economic, social, and legal system.

### END NOTES

<sup>1</sup>Hardy I.T. "Criminal Copyright Infringement" William and Mary Bill Rights Journal 11(1) (2002): 305.

<sup>2</sup>Nigeria Copyright Act 2022; South Africa Copyright Act No. 98 of 1978.

<sup>3</sup>Section 44, 46, and 49 Copyright Act 2022; Section 27 Copyright Act No. 98 of 1978.

<sup>4</sup>Ifeoluwa O. "Criminal Copyright Infringement in Nigeria" Miyetti Quarterly Law Review Vol. 3 (2) (2018): 35–36.

<sup>5</sup>Olueze I.M. (1998). Nigeria Copyright Law (Lagos: Maglink International Ltd), 3.

<sup>6</sup>Ogwo B. "Criminal Liability for Copyright Infringement under the Copyright Act 2004" Commercial and Industrial Law Journal, Kogi State University, Vol. 1 No. 1, 63 – 66.

<sup>7</sup>Adenuga v. Ilesanmi Press Sons Nig. Ltd. (1991) 5 NWLR (pt. 189), 82.

<sup>8</sup>(1986) 2, S.A. 623 T.

<sup>9</sup>Chiadzara v S. (2004) JOC 12871 (Zimbabwe).

<sup>10</sup>Eric L. and Ryan T. (2005). "South Africa: Introduction to the Law of Copyright" <<http://wwwmondaq.com/southafrica/copyright/36570/introducton-to-the-law-of-copyright>> Accessed 30th November 2023.

<sup>11</sup>Ocheme P.A (2000). The Law and Practice of Copyright in Nigeria (Zaria: Ahmadu Bello University Press Ltd), 1; Plowman E.W and Hamiton I.C. (1980). Copyright (London: Rutledge and Keyan Paul), 2.

<sup>12</sup>Yermia T.F. (2002). "Copyright Protection of Computer Programmes and the Question of Ideal Expression Dichotomy". University of Ibadan Journal of Private and Business Law (U.I.T.P.B.L) Vol. 3, 146; Ogwo B., supra note 9, 66.

<sup>13</sup>Bryan A.G, supra note 7, 796.

<sup>14</sup>Yerima T.F. (2003). "Remedies for Copyright Infringement: An Anglo Nigeria Comparison" Unilorin Journal of Business Law (UJBL) Vol. 1 No. 1, 105.

<sup>15</sup>Olueze I. M., supra note 8, 89.

<sup>16</sup>Ogwo B., supra note 9, 67.

<sup>17</sup>Section 47 Copyright Act 2022.

<sup>18</sup>Eric L. and Ryan T., supra note. 13.

<sup>19</sup>Section 23(2) of the South Africa Copyright Act.

<sup>20</sup>Section 23(3) Ibid.

<sup>21</sup>1973 (3) SA 188 (w).

<sup>22</sup>Eric L. and Ryan T., supra note 14.

<sup>23</sup>Section 135, 136, and 137 of the Evidence Act Cap. 21, Laws of the Federation of Nigeria (LFN) 2011 (as amended).

<sup>24</sup>Act No. 62 of 1977.

<sup>25</sup>Section 42 of the Nigeria Copyright Act (Ibid).

<sup>26</sup>Ocheme P. A. (2000). "The Law and Practice of Copyright in Nigeria" Ahmadu Bello University Press Ltd.

<sup>27</sup>Section 42 and 43 of the Nigeria Copyright Act (Ibid).

<sup>28</sup>Ibid.

<sup>29</sup>Section 146 Evidence Act (Ibid).

<sup>30</sup>(1927) 7 NSCC 338.

<sup>31</sup>Falobi v Falobi (1976) NWLR 169; Akinsele v Akinditire (1966) 1 All NLR 147; Anamma Co. v First Marine Trust Bank (2000) 1 NWLR (pt. 640) 309.

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