

**STRENGTHENING COPYRIGHT
ENFORCEMENT IN THE NIGERIAN
FILM INDUSTRY (NOLLYWOOD)**

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ABSTRACT

Legal scholarship on the impact of copyright laws on the Nigerian creative industry has long been divided between two schools of thought. While some contend that copyright laws (and restrictions) have a chilling effect on creativity, others assert that a strong copyright regime encourages creativity and safeguards the interests of those who have invested their resources or labour into producing a creative piece of work. The Nigerian film industry, as the second largest film producer in the world, has blossomed in an environment with weak copyright laws and enforcement regime. However, Nollywood's revenue generation falls below expectation. Nollywood generates only about ₦265.5 billion annually. In comparison, Hollywood generates approximately \$10.24 billion making it the most profitable industry in the world. Operating Nollywood in an environment with weak copyright enforcement puts creators at best at a 'first-mover' advantage before infringing copies of their work flood the market limiting the economic exploitation of their creations. This dissuades investors, leads to the formation of underground markets where organised crime and money laundering activities thrive. There is therefore the need to enhance copyright laws, policy and enforcement mechanisms in Nigeria. This dissertation contends that not only are the existing copyright laws inadequate, there is a need to reform the existing enforcement framework to ensure real (as opposed to paper- tiger') protection of intellectual property rights. A reformed copyright law framework is especially important in view of technological advancements which have made the process of combating copyright infringements such as piracy and counterfeiting particularly challenging and has rendered existing copyright law in Nigeria weak, ineffective, and ill-equipped to meet the growing need for adequate copyright enforcement in the film industry.

INTRODUCTION

With more than 180 million people, 300 tribes and 500 languages, Nigeria is one of the world's culture capitals.¹ The country has diverse cultural traditions and lifestyles preserved and promoted by the creative industries through film, theatre, music, dance, literature, fashion, arts, and other creative expressions.

Nigeria's creative sector is reputed as having the "fastest growth rate in the world".² It comprises of three major industries: music, film and information technology industries. Of these three, the film industry ("Nollywood") stands out by far.

From humble beginnings in 1992, Nollywood now out-produces the United States and doubles the output of China and Japan, and only Bollywood (India) can match its prolificacy.³ In 2016, the film industry contributed ₦239, 000, 000, 000 to Nigeria's Gross Domestic Product (GDP) and was the second biggest employer of labour in Nigeria.⁴ Now, Nollywood accounts for ₦854, 000, 000, 000 (£1, 700, 000, 000) which is 1.42 percent of Nigeria's GDP.⁵

Nollywood leverages on talent and creativity in showcasing the worth of the human intellect and the ingenuity of Nigerians. This is hardly a surprise given the fact that Nigeria's rich cultural heritage readily offers "a wealth of material from which the country's filmmakers skilfully (*sic*) draw to recount simple stories of daily life that resonate with Nigerians, as well as audiences

¹ Sandra Oyewole, 'A Peek Inside Nigeria's Film Industry' (*WIPO Magazine*, April 2014) <https://www.wipo.int/wipo_magazine/en/2014/02/article_0001.html> accessed 20 July 2020.

² Naomi Uzor, 'Nigeria's Creative Industry, Fastest Growing in the World – Minister' (*Vanguard*, 15 April 2019) <<https://allafrica.com/stories/201904160055.html>> accessed 20 July 2020.

³ UNESCO, 'Nollywood rivals Bollywood in film/video production' (May 2009) <http://www.unesco.org/new/en/media-services/single-view/news/nollywood_rivals_bollywood_in_filmvideo_production/> accessed 22 July 2020.

⁴ Steve Omanufeme, 'Runaway Success' (*International Monetary Fund*, June 2016). <<https://www.imf.org/external/pubs/ft/fandd/2016/06/omanufeme.htm>> accessed 20 July 2020.

⁵ *Ibid.*

sharing a similar culture and heritage across Africa”.⁶ As Africa’s premiere film industry, Nollywood’s development is tied to economic activities that are concerned with the generation and exploitation of human knowledge. Thus, requires strong legal protection to prevent its outputs from piracy, counterfeit or misuse. For our purpose, piracy is “the unauthorised and illegal reproduction or distribution of material (physical and virtual copies) protected by copyright” without necessarily claiming its authenticity such as the recording of a screenplay by a person in the cinema.⁷ Counterfeit and Piracy are often used synonymously, however, counterfeit is distinguished in the context of film as it refers to the forgery or imitation and distribution or sell of such copies fraudulently representing it as an authorised copy.⁸ In the film industry, works can be misused in a number of ways; the use of popular scenes in a music video without consent, unauthorised broadcast or sharing of film or its content such as sound tracks. Irrespective of its form, these infringements have negative impacts on the film industry and this is where intellectual property (IP) protection plays its role.

Intellectual property is simply defined as “the legal right(s) which may be asserted in respect of the product of the human intellect”.⁹ The World Intellectual Property Organisation (WIPO) defines IP as the “creations of the mind, such as inventions, literary and artistic works; designs and symbols, names and images used in commerce”.¹⁰

⁶ *Ibid.* (n 1).

⁷ Omotayo F. Awomolo- Enujiugha, ‘Piracy and its Burden on Copyright in Nigeria: Challenges and Solutions’ (2020) 23 Journal of World IP 413.

<https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12158?saml_referrer> accessed 20 August 2020.

⁸ Kasim Waziri, ‘Intellectual Property Piracy and Counterfeiting in Nigeria: The Impending Economic and Social Conundrum’ (2011) 4 Journal of Politics and Law 196.

⁹ Jeremy Philip and Alison Firth, *Introduction to Intellectual Property Law* (London GB: Butterworths, 2001) 4; see also M.V.C. Ozioko, ‘International Law and the Protection of Intellectual Property Rights-Present Realities and Future Challenges’ (2004) 4 UNIZIK Law Journal, 137–146 at 137.

¹⁰ WIPO, ‘What is Intellectual Property?’ (WIPO, 2004) <<https://www.wipo.int/publications/en/details.jsp?id=99&plang=EN>> accessed 7 July 2020.

Intellectual Property covers the broad categories of:

- (a) Copyright and related rights (which is concerned with literary, musical, dramatic and artistic creations);¹¹
- (b) Industrial property (which covers rights in patents, trademarks, industrial designs among others).¹²

This dissertation has its focus on copyright, especially as it relates to the Nigerian film industry. This bias is founded on the fact that the film industry and indeed the entire creative sector—relies heavily, and obtains the highest level of protection, through copyright. As John Asein puts it, “copyright is the lifeblood of creativity”.¹³

In Nigeria, copyright is primarily governed by the Copyright Act, Chapter C28 Laws of the Federation of Nigeria, 2004 (Copyright Act). From the movie scripts to the soundtracks, camera work, dialogue and sounds, copyright is a significant right that protects the artistic expression and other creative elements in films. Copyright also lies at the heart of commercial exploitation of creative outputs in the film industry- from domestic and international exhibition rights, to reproduction or broadcast rights, video-on demand-rights, and download rights.¹⁴

In addition to legal protection, the Copyright Act instituted an enforcement structure through the establishment of the Nigerian Copyright Commission (NCC).¹⁵ NCC is vested with the power to

¹¹ Justine Pila and Paul Torremans, *European Intellectual Property Law* (Oxford University Press 2016) p 4; David Bainbridge, *Intellectual Property* (10th Edition Pearson Education 2018) p 72 < <https://www.vlreader.com/Reader?ean=9781292002651>> accessed 20 August 2020.

¹² *Ibid.*

¹³ John Asein, “Piracy is a hydra-headed problem’ (*The Nation*, 29 May 2019) <<https://thenationonline.net/piracy-is-a-hydra-headed-problem/>> accessed 20 July 2020.

¹⁴ WIPO, ‘From Script to Screen: Importance of Copyright in the Distribution of Films’ WIPO Publication No. 950E p 58 < https://www.wipo.int/edocs/pubdocs/en/copyright/950/wipo_pub_950.pdf> accessed 20 August 2020.

¹⁵ Section 34 Copyright Act, Chapter C28 Laws of the Federation of Nigeria 2004.

administer copyright and coordinate the fight against copyright infringement in Nigeria.¹⁶ The Copyright Act also provides for civil and criminal remedies for copyright infringement such as fines and imprisonment,¹⁷ all of which this dissertation will examine in detail.

Despite the enforcement mechanisms available under the Copyright Act, the shortfalls of these mechanisms such as undue delays in the justice system, inadequate remedies, ridiculous penalties and cost of enforcement, copyright infringements remain a problem in Nollywood. It would appear the available penalties- ₦100 (£ 0.20) fine for each infringing copy and/or six months imprisonment¹⁸ seem to rather encourage piracy by sending a clear message to copyright infringers that the penalty for infringement will amount to painless slap on the wrist. For instance, in *NCC v Oba Okechukwu*,¹⁹ the Federal High Court (FHC) sentenced the defendant to three months imprisonment and imposed a fine of ₦12, 600 (£ 25. 20) for the sale of 126 infringing copies of cinematographic and musical works. A number of similar cases evidencing the inadequacy of penalties for copyright infringement as provided for by the Copyright Act will be considered in the course of this dissertation.²⁰

Regrettably, “Nigeria is the largest market in Africa for counterfeit and pirated products and serves as a gateway to the rest of the continent for rampant illicit trade”, and according to a recent disclosure by the NCC at the 2019 World Intellectual Property Day, the country loses N918 trillion

¹⁶ Bob Aroture, ‘NCC Raids and Arrest Movie Pirates in Port Harcourt’ (NLIPW 2017) <<https://nlipw.com/tag/piracy-and-nollywood/>> accessed 30 July 2020; Adelanwa Bamgboye, ‘Nigeria: Copyright Commission Confiscates N22 Million Pirated Products’ (Daily Trust 2011) <<https://allafrica.com/stories/201105311094.html>> accessed 30 July 2020; *NCC v Oba Okechukwu* 55 NIPJD [FHC. 2012] ABJ/CR/96/2012.

¹⁷ Section 20, 21 Copyright Act, Chapter C28 Laws of the Federation of Nigeria 2004.

¹⁸ Section 20 (2)(A) Copyright Act, Chapter C28 Laws of the Federation of Nigeria 2004.

¹⁹ 55 NIPJD [FHC. 2012] ABJ/CR/96/2012.

²⁰ *NCC v Dominion Kalu* 55 NIPJD [FHC. 2012] ABJ/CR/12; *NCC v Nworie Anayo* 55 NIPJD [FHC. 2012] ABJ/CR/10/2012; *NCC v Godwin Obasi* 55 NIPJD [FHC. 2012] ABJ/CR/16/2013; *NCC v Eze Igwe* 56 NIPJD [FHC. 2013] ABJ/CR/93/2012; *NCC v Stanley Nwankwo* 55 NIPJD [FHC. 2012] ABJ/CR/14/2011.

(£1.84 trillion) annually and foreign direct investment to copyright infringement.²¹ Therefore, an examination of the available enforcement mechanisms and suggestions on reforms where the available mechanisms are ineffective is particularly important in the context of this dissertation as it emphasises the need to strengthen copyright enforcement. A number of legislative and policy reforms aimed at stimulating further conversations among the Nigerian regulators and industry players will be proposed.

The first chapter of this dissertation introduces the nature and subject matter of copyright protection in Nigeria and contains a representation of this research's objectives and methodology. In the second chapter, the international, UK and Nigeria copyright legal frameworks are discussed. It further ascertains the rights obtainable in the Nigerian film industry and the impacts of the Beijing Treaty on Audio-visual performances 2012 on these rights. The third chapter examines the current copyright enforcement mechanisms (legal and administrative) under Nigerian laws and by extension the UK, gives credit to the on-going efforts by the NCC to protect copyright in the film industry. International best practices which may be adopted by Nigeria to improve copyright enforcement are discussed therein. It further identifies the challenges in copyright enforcement such as lack of awareness, delays in the court system, corruption, outdated copyright laws and inadequate remedies. Lessons for Nigeria are drawn from the copyright enforcement practices by the UK and WIPO such as the use of Specialist IP courts, Alternative Dispute Resolution (ADR) mechanisms and domestication of international treaties among others. Finally, the fourth chapter proffers specific legal and policy recommendations from the lessons learnt in chapter three on how Nigerian copyright enforcement framework can be strengthened such as introducing measures to

²¹ Sahara Reporters, 'Nigeria Loses N918trillion To Piracy Annually' (27 April) <<http://saharareporters.com/2019/04/27/nigeria-loses-n918trillion-piracy-annually>> accessed 3 July 2020.

curb online piracy, prescribing stronger punitive measures for copyright infringers, and creating a specialist IP court for trials involving copyright infringement.

1.1 THE NATURE AND SUBJECT MATTER OF COPYRIGHT IN NIGERIA

Copyright is generally regarded as a bundle of exclusive rights granted by statute to an author of a creative work to do certain acts in relation to the work and to prevent others from dealing with the work in any form or manner.²² These rights allow the author to gain some reward from his sweat, claim authorship and require his authorship to be indicated in connection with any of the above acts. It also entitles him “to seek relief in connection with any distortion, mutilation, or other modification of and any derogatory action in relation to his work, where such action would be or is prejudicial to his honour and reputation”.²³

Pursuant to Section 1 (1) of the Copyright Act, the following are protected by copyright:

- (a) literary works;²⁴
- (b) musical works- irrespective of musical quality;²⁵
- (c) artistic works- irrespective of artistic quality;²⁶
- (d) cinematographic films;²⁷

²² Justine Pila and Paul Torremans, *‘European Intellectual Property Law’* (Oxford University Press 2016) p 299.

²³ *Ibid.*

²⁴ *Nigerian Copyright Commission v Nwoke Isreal* [2013] 56 NIPJD L/159C/13; *British Oxygen Co. Ltd. v Liquid Air Ltd* [1925] 1 Ch 383; *Ager v Peninsula and Oriental Steam Navigation Company* (1884) 26 Ch D 637; *University of London Press v University Tutorial Press* [1916] 2 Ch 601; *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.* [1964] 1 All ER 465.

²⁵ *NCC v Oba Okechukwu* 55 NIPJD [FHC. 2012] ABJ/CR/96/2012.

²⁶ *Joseph Ikhuoria v Campaign Services Ltd* [1986] FHCR 308.

²⁷ *Nigerian Copyright Commission v CVL Technologies Ltd* [2012] 55 NIPJD L/268C/2009.

- (e) sound recordings (excluding a sound track associated with a cinematograph film);²⁸ and
- (f) broadcasts.²⁹

It is noteworthy that literary, musical, or artistic works are only eligible for protection in Nigeria if they are of an original character and fixed on a definite medium.³⁰

Films are usually derivative (result of an already existing work(s)). Therefore, section 1(1)(d) of the Copyright Act comprises a portfolio of rights which make up all aspects of a film from script to screen.³¹ This ranges from story to music, photography, artistic works and production amongst others. An example of a derivative film is the popular Nollywood movie “Living in Bondage: Breaking Free (2019)” which is a sequel to the 1992 Classic “Living in Bondage” produced and directed by different individuals. Many rights in the film industry are non- authorial but related rights such as broadcast rights. Therefore, other relevant subject matter includes non- authorial works such as broadcasts,³² performances and fixations of films.³³

It is essential to note that copyright only protects the form in which these ideas and opinions are expressed and not the ideas or opinions themselves (idea/ expression dichotomy).³⁴ In *Jeffrey v Boosey*³⁵ the court stressed “copyright is not concerned with the reproduction of ideas, but with

²⁸ *Ibid.*

²⁹ *Nigerian Copyright Commission v Joseph Daomi* [2012] 55 NIPJD (FHC. 2012) MKD/CR/38.

³⁰ Section 1 (1) Copyright Act, Chapter C28 Laws of the Federation of Nigeria 2004.

³¹ WIPO, ‘From Script to Screen: Importance of Copyright in the Distribution of Films’ WIPO Publication No. 950E p 58 < https://www.wipo.int/edocs/pubdocs/en/copyright/950/wipo_pub_950.pdf> accessed 20 August 2020.

³² Section 1 (1) Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004 and Section 1 Copyright, Designs and Patents Act 1988.

³³ *Ibid*; Justine Pila and Paul Torremans, ‘*European Intellectual Property Law*’ (Oxford University Press 2016) p 285.

³⁴ Article 9 (2) of the Agreement on the Trade- Related Aspects of Intellectual Property Rights 1994; Article 2 of WIPO Copyright Treaty 1996; Section 1 (2) and 31 of the Copyright Act, Chapter C20 LFN 2004; Paul Torremans, ‘*Intellectual Property Law*’ (7th Edition, Oxford University Press 2013) p 372.

³⁵ (1855) 4 HLC 815.

the reproduction of the form in which ideas are expressed. Ideas it has always been admitted are free as air...”³⁶

Owing to its colonial heritage, Nigeria’s copyright law is deeply connected to that of the United Kingdom. Thus, by the Copyright Act of Nigeria and the Copyright, Designs, and Patents Act (CDPA) 1988, the subject- matter of copyright protection in Nigeria and the UK are substantially the same. Irrespective of these similarities, significant differences exist in the methods of copyright enforcement such as the existence of specialist IP Courts such as the “Intellectual Property Enterprise Courts” in the UK and penalties for infringement.³⁷ These similarities and differences will be duly considered to underpin lessons Nigeria can learn from the UK copyright enforcement structure.

This chapter now examines the research question, objectives and methodology. A brief analysis of available literature on the research topic is also conducted to ascertain the contribution(s) of this dissertation to available pool of resource materials.

1.2 RESEARCH OBJECTIVES

The dissertation will:

- i. Examine the Copyright Act, CAP 28 Laws of the Federation of Nigeria, 2004 to ascertain the existence or otherwise of legal and/or administrative loopholes (such as the standard of protection(s) provided and adequacy or inadequacy of present enforcement regime) all of which make copyright more difficult to successfully enforce; and

³⁶ *Mag Jewellery Co. Inc. v Cherokee, Inc.* 496 F.3d 108, 116 (1st Cir 2007); *Novelty Textile Mills, Inc. v Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977); *Schultz v Holmes* 264 F.2d 942 (9th Cir. 1959).

³⁷ GOV.UK, Intellectual Property Enterprise Courts (2020) < <https://www.gov.uk/courts-tribunals/intellectual-property-enterprise-court>> accessed 20 August 2020.

- ii. Analyse the copyright enforcement structures available in Nigeria, the UK and WIPO in order to ascertain possible reforms to be made in the Nigerian copyright legal and enforcement regime in order to strengthen copyright enforcement in the Nigerian film industry.

1.3 LITERATURE REVIEW

The issue of the enforcement of copyright has been of topical interest in a host of literatures. In light of increasing globalisation and rapid advancements in technology, questions have arisen as to whether Nigerian copyright statute is still effective and as to the strength of Nigerian copyright enforcement mechanisms.

Generally, available literatures simply examine the Nigeria Copyright Act, the functions and challenges faced by the NCC- the body the responsibility of monitoring, administering and enforcing copyright laws, and ensuring proper implementation of set out rules and regulations.³⁸ Some others, such as Bankole Sodipo's *'Are Foreign Copyright Works Protected in Nigeria?'*, contain an extensive review of the forms of protections available to works ordinarily protected under Nigerian copyright laws without much emphasis on available copyright enforcement mechanisms or the need for legislative reforms.³⁹

³⁸ Aifuwa Edosomwan, 'Protecting intellectual property rights in Nigeria: A review of the activities of the Nigerian Copyright Commission' (2019) 58 WPI 1; Mary Nwogu, 'The Challenges of the Nigerian Copyright Commission (NCC) in the Fight Against Copyright Piracy in Nigeria' (2014) 2(5) GJPLR 22.

³⁹ Bankole Sodipo, 'Are foreign copyright works protected in Nigeria?' (2020) 10 (2) QMJIP 238-254; John Asein, *Nigerian Copyright Law and Practice* (2nd edition, Books & Gavel Publishing, Abuja 2012); Adejoke Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press and Bookshop Ltd 2015); Ifeoluwa Ayokunle Olubiyi, 'Reciprocal Extension of Copyright and National Treatment: *Microsoft Corporation v Franike Associates Ltd*' (2014) 2(1) SAIPL 98; Cynthia Onyinyechi Igodo, 'Enforceability of Foreign Copyright in Nigeria: A Review of the Court of Appeal's Decision in *Microsoft v Franike*' (2018) 44(2) CLB 227.

Analysing the evolution and future trends of copyright in Nigeria, Kunle Olatunji⁴⁰ gave an overview of the Nigerian Copyright Act, exploring the roles and initiatives of the Nigerian Copyright Commission (NCC) and other stakeholders in the Nigerian creative industry towards an improved copyright protection and enforcement standard. Kunle's work is restricted to NCC's activities and does not contemplate the very vital roles of court in the copyright protection and enforcement process as explained in page 9 above.

On the other hand, Nkem Itanyi's⁴¹ work is centered on the criminal and civil sanctions and remedies for infringing intellectual property rights (IPRs) and the roles of Nigerian court in enforcing IPRs. Not only is her work focused broadly on an extensive review of available sanctions under Nigerian IP laws (as against copyright, in particular), it also fails to consider how other jurisdictions have successfully treated the issue of enforcement. Indeed, in her conclusion, Itanyi appears to deem the current copyright enforcement regime as 'fairly satisfactory'⁴² and does not make any suggestions on legislative reforms. In her words, "the enforcement procedure of IPR [intellectual property right] infringement under Nigerian laws appears fairly satisfactory. The courts are urged to rise up to the challenge and always protect the rights of the IPR holder subject only to overriding public interest".⁴³ However, her work is neither focused on nor makes any reference whatsoever to the Nigerian film industry. This dissertation addresses this gap.

Samuel Andrews,⁴⁴ writing on the application of copyright laws in Nigeria in the film industry, studies the causes and consequences of piracy and states the need to fortify copyright protection

⁴⁰ Kunle Olatunji, 'Evolution and Future Trends of Copyrights in Nigeria' (2014) 2 JOAL 11.

⁴¹ Nkem Itanyi, "Enforcing Intellectual Property Rights in Nigerian Courts" (2018) 11 LDR 634.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Samuel Andrews, 'Reconceptualizing Nigerian Copyright Law to Protect Nollywood' (SSRN, 17 April 2018) <www.ssrn.com/abstract=3166875> accessed 29 June 2020.

in Nigeria. He concludes that for Nollywood to thrive and compete globally there is an urgent need for an enhanced copyright regime. In his analysis, however, he fails to conduct a comparative analysis of Nigerian laws with advanced regimes in other jurisdictions and does not discuss the various medium such as the administrative powers of the NCC, for copyright enforcement under Nigerian laws.

Justin Hughes,⁴⁵ writing on copyright and digital rights' management examines the birth and flowering of the Nigerian film industry in an environment with no means of copyright enforcement— or what he calls “the world’s greatest naturally occurring experiment in cultural production without copyright”.⁴⁶ However, his work does not contain an analysis of Nigerian copyright laws or a discourse on the current modes of enforcement in Nigeria’s film industry.

Finally, Geoffrey Adonu⁴⁷ conducts an extensive review of copyright protection in Nigeria and examines the impact of copyright infringement on the economy. He also notes a number of technical and legal mechanisms to enforce copyright rights such as a synergy between copyright enforcement agencies- NCC, the Police and Nigeria Customs Service.⁴⁸ Geoffrey’s work is not a comparative analysis and does not lay emphasis on mediums of legislative enforcement. It also fails to make recommendations for legislative reforms.

This dissertation will analyse the various contributions of these authors among others in its consideration of the subject matter with focus on Nollywood. It adopts a comparative analysis approach in evaluating the Nigeria Copyright Act and available literature on film copyright enforcement as against the CDPA and literature of the UK, and makes recommendations as to legal

⁴⁵ Justin Hughes, ‘Motion Pictures, Markets, and Copylocks’ (2016) 23 GEO MASON L REV 941.

⁴⁶ *Ibid.*

⁴⁷ Geoffrey Adonu, ‘Copyright Piracy in Nigeria: Untying the Gordian Knot’ (2017), 8 (No. 3) The Gravitas Review of Business and Property Law September 102.

⁴⁸ *Ibid.* p 111.

and structural reforms to be adopted by Nigeria in order to strengthen copyright enforcement in Nollywood. Some of these reforms would involve recommendations on strengthening copyright law itself by proposing an amendment of the existing law and the ratification and domestication of international agreement, the improvement of civil and criminal judicial enforcement procedures, and the expansion of copyright-related administrative and technical capacity building.

1.4 RESEARCH METHODOLOGY

A traditional legal research method will be adopted for this dissertation. Nigeria's copyright legislation, case laws and available doctrinal literature will be critically analysed, including copyright treaties applicable to Nigeria.⁴⁹ In order to address the legal issues raised in this dissertation, the author shall engage in a comparative analysis of the Nigerian and United Kingdom laws on copyright application and enforcement. This entails an examination of the content and context of the Nigerian Copyright Act and the UK Copyright, Designs and Patent Act (CDPA) 1988, to establish the current state of the copyright regime in Nigeria. Adopting the CDPA as benchmark, this research will seek to identify any lacuna and recommend reforms to the Nigerian Copyright Act. An analysis of the following legislations will be made: the Copyright Act, CAP C28 Laws of the Federation of Nigeria 2004, Copyright, Designs and Patent Act 1988, the Berne Convention for the Protection of Literary and Artistic Works 1886, WIPO Beijing Treaty 2012, WIPO Copyright Treaty 1996, WIPO Performances and Phonograms Treaty 1996 amongst others.

⁴⁹ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) DLR 83, 101.

The reform-oriented research methodology will be adopted to address the central research questions that form the basis of this dissertation. This research method will involve a conceptual analysis of the relevant legislation and literatures, to reveal the state of the law relevant to the research questions and will recommend ways on how the legislation can be improved. The reform-oriented research method will be used through the problem-based approach which will include these steps: assembling relevant facts, identifying and analyzing legal issues, locating primary material (including legislation, delegated legislation and case law, if any) and arriving at a tentative conclusion.⁵⁰

IP cases in Nigeria are mostly unreported and poses a great challenge on the research. Nonetheless, to facilitate this research, the author has access to materials from a range of primary and secondary sources which includes the digital version of the Laws of the Federation of Nigeria 2004 (the latest compilation of Nigerian statutes, including the Copyright Act), Nigerian Law Pavilion Electronic Law reports, the UK Intellectual Property Office, The Nottingham Trent Law Library, SSRN Papers Online, HeinOnline, Westlaw, WIPO Online Library, Research Gate, Taylor and Francis online, and African Journal Online.

To provide a better understanding of the shortfalls of the Nigerian copyright legal and enforcement structures, the international, UK and Nigeria copyright legal frameworks will now be considered.

⁵⁰ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) DLR 83, 101.

CHAPTER TWO

2.1 COPYRIGHT INTERNATIONAL LEGAL FRAMEWORK

As with most other areas of law, copyright has been modeled and influenced by older legal rights and interests such as the property interest of an owner of a copyrighted work which can be traced to ancient Roman, Jewish, and Greek law.⁵¹

By the late 19th century, copyright law had acquired wide recognition yet “nationalisation” persisted- that is, nations “enact[ed] legislations that protect[ed] their own citizens while leaving foreigners vulnerable”.⁵² Ultimately, the need to have a coordinated and uniform copyright law arose and became an important international discourse which resulted in the emergence of six *major* multilateral agreements with varying sets of Member States. There are various international and regional treaties governing copyright protection, however, this section of this dissertation briefly examines six major copyright- related multilateral agreements.

In 1886, the premier copyright treaty, the *Berne Convention for the Protection of Literary and Artistic Works*⁵³ was introduced to provide mutual recognition of copyright between Member States and to promote the development of international standards for copyright protection. Nigeria is a Member State to the Berne Convention which came into force in Nigeria in September 1993.⁵⁴

The Berne Convention establishes three fundamental principles:

⁵¹ Ronald Betting, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder, Colorado: Westview Press 1996).

⁵² Berkman Klein Center for Internet and Society, ‘The International Framework of Copyright Law’ (2020). <[https://cyber.harvard.edu/cx/The_International_Framework_of_Copyright_Law#:~:text=The%20WIPO%20Copyright%20Treaty%20\(WCT,of%20data%20or%20other%20material\).](https://cyber.harvard.edu/cx/The_International_Framework_of_Copyright_Law#:~:text=The%20WIPO%20Copyright%20Treaty%20(WCT,of%20data%20or%20other%20material).>)> accessed 29 July 2020.

⁵³ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 UST 1341, 828 UNTS 221.

⁵⁴ WIPO, ‘Administered Treaties’ (WIPO, 2020) < https://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1004C > accessed 3 September 2020.

- a) *National treatment*- works originating from a Contracting State(s) must be given the same protection in every Contracting State as granted to works of their nationals.⁵⁵
- b) *Automatic protection*- the enjoyment and exercise of protection granted must not be conditional or subject to the compliance with any formalities.⁵⁶
- c) *Independence*- copyright protection is independent of the existence of protection in the country of origin. However, protection may cease where the term of protection in the country of origin is exhausted.⁵⁷

It further provides that the countries of the Union “may provide that the term of protection for cinematographic works shall expire 50 years after the work has been made available to the public with the consent of the author or 50 years from the making of the work where no event marks the former”.⁵⁸ In Nigeria, Section 5 and 41 of the Copyright Act must be read in *pari materia* to give effect to the principle of national treatment. This is, however, not automatic as Section 41 requires the Minister charged with responsibility for culture to extend national treatment to countries which provide protections as those under the Copyright Act by an order in the Federal Gazette. The First Schedule to Section 2 of the Copyright Act replicates the minimum term of protection for cinematographic works provided for by the Berne Convention.

⁵⁵ Article 5 (1) Berne Convention 1886; WIPO, ‘Summary of the Berne Convention for the Protection of Literary and Artistic Works 1886’ [2020] WIPO Publications < https://www.wipo.int/treaties/en/ip/berne/summary_berne.html#_ftn1> accessed 28 August 2020.

⁵⁶ Article 5(2) Berne Convention 1886; WIPO, ‘Summary of the Berne Convention for the Protection of Literary and Artistic Works 1886’ [2020] WIPO Publications < https://www.wipo.int/treaties/en/ip/berne/summary_berne.html#_ftn1> accessed 28 August 2020.

⁵⁷ *ibid.*

⁵⁸ Article 7 (2) Berne Convention 1886.

Following the Berne Convention, the *Universal Copyright Convention (UCC)*⁵⁹ was adopted in 1952 under the aegis of United Nations Educational, Scientific and Cultural Organisation (UNESCO) “with a view to extend international copyright protection universally”.⁶⁰ The UCC contained more flexible provisions and imposed fewer minimum requirements on Member States. For instance, it provided the life of an author plus 25 years (as opposed to 50 years by the Berne Convention) after his death as minimum term of protection.⁶¹ Nigeria deposited its instrument of accession with UNESCO on 14 November 1961.⁶² The UCC has since lost its significance in Nigeria as the Copyright Act reflects to a large extent the position(s) of the Berne Convention.

With time, technological advancement encouraged easier and faster copyright infringement. For instance, tape recorders were used to generate copies of recorded works. This development called for a new regime, as the Berne Convention only applied to printed works. Thus, on 26 October 1961, the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)*⁶³ was adopted and entered into force on 18 May 1964. For Nigeria, the Rome Convention came into force in October 1993.⁶⁴ The Rome Convention extended copyright protection for the first time from authors to performers, producers

⁵⁹ Universal Copyright Convention, as revised at Paris, July 24, 1971 25 UST. 1341; TIAS 7868; 943 UNTS 178.

⁶⁰ UNESCO, ‘Universal Copyright Convention’ [2017] UNESCO Publications <[⁶¹ Article VI, Universal Copyright Convention 1952.](http://www.unesco.org/new/en/culture/themes/creativity/creative-industries/copyright/universal-copyright-convention/#:~:text=The%20Universal%20Copyright%20Convention%20(UCC,only%20in%20its%201971%20version.>” accessed 28 August 2020.</p>
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⁶² UNESCO, ‘Ratified Conventions- Nigeria’ (2020) <https://pax.unesco.org/la/conventions_by_country.asp?contr=NG&language=E&typeconv=1 > accessed 3 September 2020.

⁶³ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 (adopted on 26 October 1961, entered into force on 18 May 1964).

⁶⁴ WIPO, ‘Administered Treaties- Rome Convention’ (WIPO, 2020) <https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=17 > accessed 4 September 2020.

of phonograms, and broadcasting organisations. In Nigeria, while Section 1(f) and 26 of the Copyright protect broadcasting and performers' rights respectively, the Copyright Act currently makes no provision for the protection of phonograms in Nigeria.

The Agreement on the Trade- Related Aspects of Intellectual Property Rights (TRIPS)⁶⁵ was subsequently adopted in 1994. All 164 Members of the WTO (Nigeria included)⁶⁶ are by TRIPS bound by the provisions of Articles 1 through 21 of the Berne Convention with exception to Article 6bis (moral rights of an author).⁶⁷ In addition, TRIPS extended protection to data compilations and computer programs and stands out for its innovative sanctions and remedies such as *ex officio actions* which empowers competent authorities to act upon their own initiative from reasonable suspicion in suspending the release of infringing goods.⁶⁸ Although Section 12 of the Copyright Act *impliedly* recognises Moral Rights of an author, computer programs and data compilations are only found in Section 51 (interpretation) which interprets *literary works* to include “computer programmes written tables or compilations” (*sic*). Furthermore, the powers conferred on Copyright Inspectors under Section 38 of the Copyright Act falls short of the TRIPS standard. For instance, there are no border measures against imports of infringing goods. This evidences that the TRIPS Agreement has not been wholly domesticated in Nigeria.

⁶⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 UNTS 299, 33 ILM 81 (1994).

⁶⁶ World Trade Organisation 'Members and Observers' (2020)

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 4 September 2020.

⁶⁷ Article 9, Agreement on the Trade- Related Aspects of Intellectual Property Rights 1994.

⁶⁸ Article 58, TRIPS Agreement 1994; Berkman Klein Center for Internet and Society, 'The International Framework of Copyright Law' (2020).

In 1996, concerns over the rapid advancements in technology led to the development of the *WIPO Copyright Treaty (WCT) 1996*⁶⁹ and the *WIPO Performances and Phonograms Treaty (WPPT)*.⁷⁰ The WCT and WPPT are closely tied to the Berne Convention.⁷¹ While the WCT extends copyright protection to authors in the digital environment, granting copyright protection to computer programs and to databases,⁷² the WPPT enhances the intellectual property rights of performers and of producers of phonograms; vinyl records, tapes, compact discs among others, granting them economic rights such as the right of reproduction,⁷³ distribution⁷⁴ and rental.⁷⁵ Although these treaties came into force in Nigeria on 4 January 2018,⁷⁶ they have not been domesticated into Nigerian Laws.

The Nigerian Legal System mirrors that of the UK but its copyright framework has left more to be desired, particularly with respect to enforcement. A brief analysis of the relationship between the copyright laws of both countries will be considered below.

⁶⁹ WIPO Performances and Phonograms Treaty, December 20, 1996 S Treaty Doc. No. 105-17 (1997); 2186 UNTS 203; 36 ILM 76 (1997).

⁷⁰ WIPO Copyright Treaty, December 20, 1996 S. Treaty Doc. No. 105-17 (1997); 2186 UNTS 121; 36 I.L.M. 65 (1997).

⁷¹ Article 1, WIPO Copyright Treaty 1996.

⁷² Berkman Klein Center for Internet and Society, 'The International Framework of Copyright Law' (2020). <[https://cyber.harvard.edu/cx/The_International_Framework_of_Copyright_Law#:~:text=The%20WIPO%20Copyright%20Treaty%20\(WCT,of%20data%20or%20other%20material\).](https://cyber.harvard.edu/cx/The_International_Framework_of_Copyright_Law#:~:text=The%20WIPO%20Copyright%20Treaty%20(WCT,of%20data%20or%20other%20material).>)> accessed 29 July 2020.

⁷³ Article 7, WIPO Performances and Phonograms Treaty (1996) 2186 UNTS 203.

⁷⁴ *Ibid* (Article 8).

⁷⁵ Article 9, WIPO Performances and Phonograms Treaty (1996) 2186 UNTS 203.

⁷⁶ WIPO, 'Administered Treaties- WPPT' (2020) <https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20> accessed 3 September 2020; WIPO, 'Administered Treaties- WCT' (2020) <https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16> accessed 3 September 2020.

2.2 RELATIONSHIP BETWEEN COPYRIGHT LAWS OF NIGERIA AND THE UK

The UK Copyright Legislation can be traced to the Statute of Anne.⁷⁷ Formally titled '*An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned*', the Statute of Anne established authors' rights to control the reproduction of their work, creating fixed terms of protection for copyrighted works.

Throughout the late 18th and 19th centuries, the Statute of Anne grew in importance and influenced the development of similar copyright laws across Europe. Two decades after the Statute of Anne, the UK enacted a unified Copyright Act of 1911- a comprehensive legislation which repealed all previous copyright statutes enacted in the UK to cover different aspects of copyright such as the Dramatic Copyright Act 1883, Copyright (Musical Composition) Act 1888, Musical Copyright Act 1906, Fine Arts Copyright Act, 1862. This was followed by the UK Copyright Act of 1956 and the Copyright, Designs and Patents Act 1988 (CDPA). The CDPA 1988 remains in force in the UK till date.

The UK 1911 Act applied to and governed copyright matters in Nigeria being a colony that Britain administered for a little over 100 years (circa 1862-1960). The 1911 Act was applicable in Nigeria until 1970 when Nigeria enacted her first indigenous copyright statute, the Copyright Decree of 1970.⁷⁸ Decree 1970 was divided into 20 sections and three schedules containing the basics of a copyright statute such as eligibility for copyright protection, ownership and transfer of copyright, and methods of copyright enforcement in the event of an infringement.⁷⁹ However, Decree 1970

⁷⁷ Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 21 (1710) (Gr. Brit).

⁷⁸ Decree No 61 of 1970.

⁷⁹ John O. Asein, Nigerian, *Copyright Law & Practice* (2nd ed. books and gavel ltd 2012).

reduced the term of copyright protection from 50 years as contained in 1911 Act to 25 years after the life of an author.⁸⁰ It also made no provision for the establishment of a competent body to administer and enforce copyright in Nigeria. This made copyright enforcement difficult. As Tony Okoroji states:

The very weak provisions of Decree No. 61 of 1970, the copyright law then in force, was identified as the major obstacle to effective confrontation of the copyright problem. The civil provisions were cumbersome and had many loop holes. The criminal sanctions...were laughable. There was no provision for any imprisonment. There was therefore very little legal deterrent against piracy. It became very clear that the most important and urgent task was to get an effective copyright law promulgated in Nigeria.⁸¹

Following the convergence and recommendations by policy makers, legal practitioners, and industry players, the 1970 Decree was repealed by the 1988 Copyright Act⁸² which came into force 19 December 1988 and remains in force in Nigeria till date as the Copyright Act. The Copyright Act sought to correct the errors inherent in the 1970 Decree such as duration of protection by extending protection to the life time of the author plus 70 years after the death of the author.⁸³ It also established a statutory body vested with the task of administering copyright in Nigeria⁸⁴ and provided for heavier criminal sanctions- imprisonment not exceeding a term of five years or a fine

⁸⁰ Olukunle Ola, *Copyright Collective Administration in Nigeria: Lessons for Africa* (springer 2013).

⁸¹ Tony Okoroji, *Copyright Neighbouring Rights and the New Millionaire (The Twist and Turns in Nigeria)* (tops ltd 2009).

⁸² No. 47 1988, now Chapter C28, 2004 Laws of the Federation of Nigeria (LFN), formerly Chapter 68, 1990 Laws of the Federation of Nigeria (LFN).

⁸³ First Schedule, Section 2, CAP 28 LFN 2004.

⁸⁴ Section 34, CAP 28 LFN 2004.

not exceeding ₦1000 for every infringing copy or both.⁸⁵ There are also civil proceedings available to a right- holder. The Copyright Act was amended twice- in 1992 and 1999. A reform of the 1998 Act (2015 draft Copyright Bill) was launched in 2012 with the key objective of “strengthening and repositioning the creative industries for greater growth and capacity to compete effectively in the global market place and to satisfy its obligations under various international copyright obligations it has either ratified or indicated interest in ratifying”.⁸⁶ Notable amendments include the provision for stringent anti- piracy measures under Sections 43- 46 such as requiring publishers to maintain copyright registers failure of which they will be liable to a fine not exceeding ₦100, 000 (£200) and recognition of online copyright infringement in Sections 47- 54. Section 13 of the Bill also expressly provides for moral rights of copyright owners.

The rights obtainable under the Copyright Act will now be considered.

2.3 VARIOUS RIGHTS OBTAINABLE IN THE NIGERIAN FILM INDUSTRY

The Nigerian Copyright Act defines a ‘cinematograph film’ to include the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film.⁸⁷ This definition is sufficiently flexible to accommodate a wide scope of visual images fixed in different media such as video tapes, CD, DVD provided such visual images are capable of being shown as moving pictures and of being reproduced.⁸⁸

⁸⁵ Section 20, CAP 28 LFN 2004.

⁸⁶ Preamble, Nigerian Copyright Commission, the Draft Copyright Bill, 2015.

⁸⁷ Section 51 Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004.

⁸⁸ Olabode Oyewunmi, *Nigerian Law of Intellectual Property*, (Lagos: University of Lagos Press, 2015).

Generally categorized as a dramatic work,⁸⁹ a cinematograph film usually consists of various authors who make up different portions of a work. This is almost always the case in the film industry where there are simply too many elements and a large number of contributors at play. Thus, anyone who desires to exploit the different works that make up a film needs to own or otherwise obtain the authority to use those works.⁹⁰ The authors retain the moral rights in their works and this is not transferrable although it can be waived.⁹¹ Moral rights include the right to be identified as the author of a copyright work (the "right of paternity") and the right to object to derogatory treatment of a copyright work (the "right of integrity").

The key elements in films generally fall into: the film as a 'finished product', the screenplay (or script), and the soundtrack(s). It is from these elements that principal rights in cinematograph film accrue. Generally, the right in a film belongs to the author of the film and subsists until 50 years after the end of the year in which the work was first published.⁹² The Nigerian Copyright Act defines the author of a film as "the person by whom the arrangements for the making of the film were made, unless the parties to the making of the film provide otherwise by contract between themselves".⁹³ This definition recognises that cinematograph works are collective projects that often involve the contribution of several individual authors. In film making, the interests of the director are most recognised. However, other persons may have interests in a film such as commissioning parties or sponsors. Given the complex nature of interests accruing in a film, the

⁸⁹ *Norowzian v Arks Ltd (No.2)* [2000] FSR 363.

⁹⁰ Tim Papfield, *Copyright for Archivists and Records Managers*, (4th.ed, London: Facet Publishing, 2010); *Raconteur Productions Limited v Dioni Visions Entertainment Limited* [2017] Suit No. FHC/L/CS/740/2017.

⁹¹ Article 6bis, Berne Convention 1886.

⁹² First Schedule, Section 2, CAP 28 LFN 2004.

⁹³ Section 51 (1) Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004.

author of a cinematograph film is “obliged to conclude, prior to the making of the work, contracts in writing with all those whose works are to be used in the making of the work”.⁹⁴

The economic rights of the author(s) of a film in Nigeria as stipulated in Section 6 of CAP 28 include: to make copies of the film; to cause the film, in so far as it consists of visual images to be seen in public and, in so far as it consists of sounds, to be heard in public; to make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track; to distribute to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.⁹⁵

In the absence of any contract to state otherwise, the screenplay of a film, although not expressly stated in the Copyright Act, is protected as original literary work,⁹⁶ and the author(s) of a screenplay reserve the right to reproduce the work in any material form; publish the work; perform the work in public; produce, perform or publish any translation of the work; distribute to the public for commercial purposes copies of the work by way of rental, lease, hire, loan or similar arrangement; broadcast or communicate the work to the public by a loudspeaker or any other similar device; make any adaptation of the work; and make any film or a record in respect of the work. This was established by the celebrated case *Raconteur Productions Limited v Dioni Visions Entertainment Limited*⁹⁷ where a claim for copyright infringement of screenplay was made against the popular Nigerian film *Okafor's Law* and an injunction granted to the plaintiff preventing the defendant from holding its *premiere* event. Nonetheless, the FHC in its decision delivered on 2 May 2019 gave judgment against the plaintiff who had failed to establish copyright ownership in the screenplay.

⁹⁴ *Ibid* (Section 10 (4)).

⁹⁵ Second Schedule, Section 6 (1) (c) Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004

⁹⁶ *Ibid*.

⁹⁷ (2017) FHC/L/CS/740/2017.

Film soundtracks are also protected as part of the film when the film is shown in cinemas or broadcast on television. Thus, Section 51 of CAP 28 defines ‘cinematograph film’ to include ‘the recording of a sound track associated with the cinematograph film’. In the UK, film soundtracks are also protected as sound recording in other circumstances unrelated to the soundtrack being used in a film.⁹⁸ The author(s) of a soundtrack to a film can also exercise the right enumerated above as attaching to the authorship of a screenplay.⁹⁹

In addition to the elements discussed above, the relevant derivative or underlying works in a film include individual songs or other musical works comprised in the soundtrack,¹⁰⁰ the underlying book or play adapted as screenplay, unscripted words spoken or acts performed by actors or presenters that could potentially be protected as copyright works, poems quoted in the film, or excerpts from other films appearing in the film. It is important to note that the actors and/or actresses who give life to an otherwise bare script or sing the soundtracks also have what is called the performers’ right.¹⁰¹ Performers have the “exclusive right to control, *in relation to his performance*, the following acts:

- (a) performing;
- (b) recording;
- (c) broadcasting live;
- (d) reproducing in any material form; and
- (e) adaptation of the performance”.¹⁰²

⁹⁸ Section 5B(2), *Copyright, Designs and Patents Act 1988* (c 48).

⁹⁹ Second Schedule, Section 6 (1)(a) CAP 28, LFN 2004.

¹⁰⁰ Section 1(1)(a), *CDPA Copyright Designs and Patents Act 1988*.

¹⁰¹ Section 26, CAP 28 LFN 2004

¹⁰² *Ibid.*

Performer's right subsists, in relation to the performance, until the end of the period of 50 years from the end of the year in which the performance first took place.¹⁰³ Given the large number of efforts which sum- up film production; from the script writer to the cameramen and editors, and performers, it is impractical to treat each participant as a "joint author" of the film. This is the why the copyright law vests authorship in the director or such other person who must have, prior to the making of the film, concluded a contract with all the participants involved in the process and who may have one right or the other.¹⁰⁴ The rights of these actors and actresses have been further recognised and sought to be strengthened by the Beijing Treaty which will now be considered.

2.4 THE BEIJING TREATY AND ITS EFFECT ON NOLLYWOOD AND THE CDPA

The WIPO Beijing Treaty on Audiovisual Performances (the Beijing Treaty)¹⁰⁵ is a multilateral treaty which regulates "related rights" in copyright protection for audiovisual performances and expands the performer's rights. Its adoption became necessary as the first international treaty to protect the rights of performers- the Rome Convention of 1961,¹⁰⁶ granted no moral rights to performers and no economic rights to audiovisual fixations. The WIPO Performances and Phonograms Treaty (WPPT)¹⁰⁷ which updated protections for performers and producers of phonograms also failed to provide adequate protection to performers for audiovisual fixations.

¹⁰³ Section 27, CAP 28 LFN 2004.

¹⁰⁴ Section 10 (4) Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004.

¹⁰⁵ Beijing Treaty on Audiovisual. Performances. (adopted Beijing, 24 June 2012, entered into force on 28 April 2020).

¹⁰⁶ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 (adopted on 26 October 1961, entered into force on 18 May 1964).

¹⁰⁷ WIPO Performances and Phonograms Treaty, December 20, 1996 S Treaty Doc. No. 105-17 (1997); 2186 UNTS 203; 36 ILM 76 (1997).

The Beijing Treaty complements the Rome Convention and the WPPT.¹⁰⁸ By Article 6 of the Beijing Treaty, performers are entitled to four kinds of economic rights:¹⁰⁹

- (i) the right of reproduction;
- (ii) the right of distribution;
- (iii) the right of rental; and
- (iv) the right of making available.

Furthermore, the moral rights of the performers are recognised.¹¹⁰ Performers also have economic rights in unfixed performances covering the fixation and broadcasting of such unfixed performances.¹¹¹

Although a comprehensive analysis of the Beijing Treaty is beyond the scope of this dissertation, it suffices to state that the Beijing Treaty was adopted to:

- a) develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible;
- b) provide adequate solutions to the questions raised by economic, social, cultural and technological developments;
- c) harmonize the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances and maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information.¹¹²

¹⁰⁸ Article 1, Beijing Treaty on Audiovisual Performances 2012.

¹⁰⁹ Articles 7, 8, 9, and 10 Beijing Treaty on Audiovisual Performances 2012.

¹¹⁰ Article 5, Beijing Treaty on Audiovisual Performances 2012.

¹¹¹ *Ibid.* (Article 6).

¹¹² Preamble to the Beijing Treaty on Audiovisual Performances 2012.

With respect to the UK film industry, most issues addressed by the Beijing Treaty especially in terms of the economic rights available to performers are covered by the CDPA.¹¹³ Irrespective of Brexit, the CDPA remains applicable to the UK, however, a substantial part of the CDPA is derived from the EU copyright framework. As a result, the UK has introduced, under the powers of the European Union (Withdrawal Act) 2018, Regulations to remove or correct references to the EU or EEA Member States in the CDPA.¹¹⁴

Although the UK signed the Beijing Treaty on 11 June 2013, it has not been ratified.¹¹⁵ Therefore, until the Beijing Treaty is ratified, the CDPA would continue to apply as it is. The CDPA provides for the moral rights of performers in their live performances¹¹⁶ and in their sound performances,¹¹⁷ but not in respect of performances incorporated into audiovisual fixations. The CDPA would need to make changes in this regard to provide audiovisual performers with similar rights to those currently enjoyed by performers in their sound performances.

Although the CDPA currently provides for performer's rights in relation to sound recordings, there is need for the CDPA to be amended in line to reflect Article 11(1) of the Beijing Treaty which vests in performers the exclusive right to authorise the broadcast and communication to the public of their performances in audiovisual fixations. Furthermore, the CDPA should vest in performers a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixation as it currently fails to protect performers' rights in audiovisual fixation(s).¹¹⁸

¹¹³ Section 180- 184, Copyright, Designs and Patents Act 1988.

¹¹⁴ The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations (2019) No. 605.

¹¹⁵ WIPO, 'Contracting Parties > Beijing Treaty on Audiovisual Performances' (WIPO ONLINE) <https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=841> accessed 5 August 2020.

¹¹⁶ Section 6A, 180 and 182 (1) (b) CDPA 1988.

¹¹⁷ Section 6A, CDPA 1988.

¹¹⁸ Article 11 (2) Beijing Treaty on Audiovisual Performances.

With respect to Nigeria, in the 57th meeting of the WIPO General Assembly in Geneva in 2017, Nigeria deposited its instrument for the ratification of the Beijing Treaty with WIPO undertaking to implement the obligations under the treaty.¹¹⁹ However, the Beijing Treaty has no force of law in Nigeria until *domesticated*.¹²⁰ Therefore, as remarkable as the contributions of the Beijing Treaty are, the Beijing Treaty currently has no direct impact on Nollywood. As a result, some of the obvious lacuna that currently exist in Nigerian copyright framework stems from the absence of provisions for a performer's moral right and economic right to fixed audiovisuals. There is no provision safeguarding the right of performers in a cinematograph film that is broadcast to the public; and there is no provision covering the collective administration of dramatic performances.

However, with the existence of the 2015 Draft Copyright Bill projected to bring Nigeria's copyright law in conformity with international treaties acceded to or ratified by Nigeria, its implementation as law is projected to "ensure that performers are adequately protected, especially on digital platforms, and that structures are put in place to remedy infringement on [their] rights".¹²¹ This will raise the economic conditions and professional statuses of actors, singers, and other performers in Nigeria.

There is no doubt that the relevance of statutory rights lies in the enforcement of these rights. This dissertation now considers existent mechanisms for the enforcement of these rights canvassed in 2.3 and 2.4 above.

¹¹⁹ *Abacha v Fawehinmi* [2000] FWLR (Part 4) 553 at 586; *Attorney General of Federation v Attorney General of Abia & Ors* [2002] FWLR (Part 102) 1 at 92-93.

¹²⁰ Section 12, Constitution of the Federal Republic of Nigeria 1999.

¹²¹ Aderonke Alex-Adedipe, 'Nigeria: provisions and impact of the Beijing treaty on the draft copyright bill' (FurtherAfrica, 1 June 2020) <<https://furtherafrica.com/2020/06/01/nigeria-provisions-and-impact-of-the-beijing-treaty-on-the-draft-copyright-bill/>> accessed 1 August 2020.

CHAPTER THREE

These rights obtainable in the film industry, such as right to reproduction and distribution, are exploited either directly by the copyright owner or indirectly by persons authorised to act in the position of the copyright owner(s).¹²² However, since the first known case of piracy- the illegal reproduction of an indigenous movie “Orun Moru” in 1982,¹²³ piracy and other forms of copyright infringement have plagued the Nigerian film industry. Its cancerous nature on Nollywood adversely affects the lives of the right- holders and the Nigerian economy at large.¹²⁴ Thus, where an infringement occurs, copyright owners rely on various mechanisms to enforce their rights and obtain reliefs. It is the enforcement of these rights that gives teeth to the Nigerian Copyright Legislation. This chapter therefore discusses the existent copyright enforcement mechanisms in Nigeria and briefly considers enforcement best practices from the UK and WIPO to determine areas of weakness(es) which should be strengthened to further protect the rights of players in the film industry.

These mechanisms are herein categorised under “Legal/ Judicial and Administrative” approaches. While the former will focus on the pursuit of legal remedies by legal rights holders, the latter

¹²² Ayoyemi Lawal- Arowolo, ‘Copyright Exploitation: The Nollywood (Nigeria) Film Market’ [2020] SSRN 3 <
<https://poseidon01.ssrn.com/delivery.php?ID=868103003064115112118102075078103092016007037010053025100075080026028103071001018108063043035060033044107114031080091085110005057048087011059009086118123000087092098060066087075110005024031098082118109106022084031121010122103094116104107071100111100002&EXT=pdf>> accessed 29 August 2020.

¹²³ *Ibid.*

¹²⁴ Sahara Reporters, ‘Nigeria Loses N918trillion To Piracy Annually’ (27 April) <
<http://saharareporters.com/2019/04/27/nigeria-loses-n918trillion-piracy-annually>> accessed 3 July 2020; Omotayo Awomolo- Enujiugha, ‘Piracy and its Burden on Copyright in Nigeria: Challenges and Solutions’ (2020) 23 Journal of World IP 413
 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12158?saml_referrer> accessed 20 August 2020.

focuses on the enforcement powers of the NCC and those of other government agencies whose statutory powers impact on the enforcement of copyright in Nigeria.

3.1 THE LEGAL/JUDICIAL APPROACH TO ENFORCEMENT

There are copious enforcement provisions under the Nigerian Copyright Act. With regard to the institution of copyright actions before a court of competent jurisdiction- the FHC (a tier 3 Court) is exclusively the court of first instance for copyright matters,¹²⁵ the Copyright Act vests *locus standi* on an owner, assignee or exclusive licensee of copyright.¹²⁶ Appeals from the FHC proceed to the Court of Appeal (COA) of Nigeria which is a tier 2 Court.¹²⁷ The Apex Court of the land- the Supreme Court of Nigeria is vested with exclusive jurisdiction to entertain appeals from the COA.¹²⁸

Per Section 251(1) (f) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN), the FHC has exclusive jurisdiction in respect of copyright civil matters. It provides thus:

*Notwithstanding anything to the contrary contained in this Constitution ... the Federal High Court shall have and exercise exclusive jurisdiction to the exclusion of any other court in civil causes and matter... any Federal enactment relating to copyright.*¹²⁹

This provision *prima facie* creates a lacuna as to jurisdiction for criminal copyright matters especially given that these infringements such as piracy and counterfeiting are more criminal than

¹²⁵ Section 251(1) (f), Copyright Act, CAP C28 LFN 2004.

¹²⁶ Section 16, Copyright Act, CAP C28 LFN 2004.

¹²⁷ Section 243, 1999 Constitution of the Federal Republic of Nigeria; *Adeokin Records & Anor v Musical Copyright Society of Nigeria (Lte/ Gte)* LER [2018] SC. 336/ 2008; *Egbe v Adefarasin* [1985] NWLR (Part 3) 549.

¹²⁸ Section 232 (1), 1999 Constitution of the Federal Republic of Nigeria; *Musical Copyright Society of Nigeria (Lte/ Gte) v Compact Disc Technology Limited & Ors* [2018] LPELR- SC. 425/ 2010.

¹²⁹ Section 251 (1) (f) 1999 Constitution of the Federal Republic of Nigeria (as amended 2011).

civil matters. Its effect amounts to a concurrent jurisdiction on such criminal cases between the FHC and State High Court.¹³⁰ However, Section 251 (3) CFRN provides that the FHC shall also have and exercise jurisdiction in respect of causes of which jurisdiction is conferred by subsection (1). The Copyright Act in Section 16 Reinforces Section 251 (1) (f) CFRN but provides no such limitation. It Copyright Act further provides for criminal liability¹³¹ but makes no express reference to the FHC. Notwithstanding, the Copyright Act in its Interpretation Section defines “the Court” used within the legislation as the FHC.¹³² All these provisions read in *pari materia* result in that which is obtainable in practice- the FHC exclusively exercises jurisdiction over civil and criminal copyright causes as a court of first instance. In addition, both civil and criminal cases may be taken simultaneously in respect of the same infringement under the Copyright Act.¹³³

Section 15 of the Copyright Act carefully enumerates the different categories of conducts that may amount to civil infringement of copyright. This includes situations where a person does any act which is reserved for a copyright holder or where the person otherwise exhibits, distributes, sells or offers for sale infringed copies of a protected work.¹³⁴ Similarly, Section 20 provides that a person is criminally liable who makes or sells an infringing copy or copies of any work in which copyright subsists; or imports, distributes or has in his possession other than for his private or domestic use, any infringing copy of any such work. Although section 20 criminalises these actions, there is a claw back to that provision to the extent that “ignorance” is a defence.¹³⁵ This defence is also available to a defendant in civil cases of copyright infringement.¹³⁶ Where a

¹³⁰ See *Abbas v Commissioner of Police* [1998] 12 NWLR (Part 577) 308; *Mandara v Attorney- General of the Federation* [1984] 1 SCNLR 311.

¹³¹ Section 20, Copyright Act, CAP C28 LFN 2004.

¹³² Section 51, Copyright Act, CAP C28 LFN 2004.

¹³³ Section 24, Copyright Act, CAP C28 LFN 2004.

¹³⁴ Section 15, Copyright Act, CAP C28 LFN 2004.

¹³⁵ Section 20 (1), Copyright Act, CAP C28 LFN 2004.

¹³⁶ Section 16 (3), Copyright Act, CAP C28 LFN 2004.

defendant proves his ignorance to the satisfaction of the court, a right- holder at best can be entitled to an account of profits,¹³⁷ a remedy which rarely restores the copyright owner to the position he would have been in the absence of such infringement. This is because such infringers are less likely to render a true account of the profits made for the duration of the infringement.

An action for copyright infringement can be brought upon the reasonable suspicion of a threat of infringement (*ex parte*) or an occasion of actual infringement.¹³⁸ This is particularly significant in copyright enforcement as the use of injunctions (Anton Pillar Order) in preventing the circulation of infringing copies of a work proves more effective than the retraction of already circulated copies.¹³⁹

Where the plaintiff successfully proves his/ her claim or where the infringer pleads guilty of an infringement, the FHC may grant reliefs such as damages, injunctions, accountings, conversion and any other remedies as the court may deem fit to award in the circumstances such as an order for inspection and seizure.¹⁴⁰

Irrespective of the loose ends of the Copyright Act with respect to enforcement, the legal/ judicial approach to enforcement appears under- utilised by right- holders. This may be influenced by the cost and delays of the judicial process in Nigeria. Finally, it goes without saying that an alleged infringer may avoid liability where it is proven that copyright does not subsist in the work(s) for which the infringement is said to have occurred or the plaintiff is neither an owner nor an assignee or exclusive licensee of the copyright.¹⁴¹

¹³⁷ *Plateau Publishing Co. Ltd & Ors v. Chief Chuks Adophy* [1986] 4 NWLR 205

¹³⁸ Section 25, Copyright Act, CAP C28 LFN 2004.

¹³⁹ *Anton Piller KG v Manufacturing Processes Ltd* (1976) 1 All ER 779.

¹⁴⁰ Section 25, Copyright Act CAP C28 LFN 2004.

¹⁴¹ *Adeokin Records & Anor v Musical Copyright Society of Nigeria (Lte/ Gte)* LER [2018] SC. 336/ 2008.

3.2 THE ADMINISTRATIVE APPROACH TO ENFORCEMENT

3.2.1 THE NIGERIAN COPYRIGHT COMMISSION (NCC)

Section 34 of the Copyright Act establishes the NCC and vests it with the power to administer copyright and coordinate the fight against copyright infringement in Nigeria. The Commission has the power to initiate criminal actions against infringers on behalf of copyright holders and has prosecuted tens of criminal cases since its establishment in 1989. In the past decade alone NCC has “recorded a good number (about 60) of convictions and many more cases are at different stages of completion. This is remarkable considering the lean resources and the fact that criminal prosecution of copyright offenders in Nigeria only commenced about 20 years ago”.¹⁴²

In addition to its efforts at prosecution, the NCC has also increased its surveillance capabilities in the past decade and continues to carry out anti-piracy operations in several parts of the country. To buttress this, “in the last decade, the NCC has arrested over 730 suspected pirates; removed about 9.3 million units of assorted pirated copyright works comprising books, software, DVDs, CDs, MP3 and contrivances... with estimated market value of 9.6 billion”.¹⁴³

The Commission also actively works with other agencies such as the Nigeria Customs Service (NCS) and the Nigerian Police Force (NPF) to enforce copyright. This is especially necessary because although Section 38 of the Copyright Act empowers the NCC to appoint Copyright Inspectors vested with the power to enter, inspect and examine premises reasonably suspected to be used for infringing activities, seize such items and arrest suspects,¹⁴⁴ their powers are limited.

¹⁴² John Asein, ‘Piracy is a hydra-headed problem’ (The Nations, 29 May 2019) <<https://thenationonlineng.net/piracy-is-a-hydra-headed-problem/>> accessed 24 August 2020.

¹⁴³ *Ibid.*

¹⁴⁴ Section 38, Copyright Act, Chapter C28 LFN 2004.

For instance, inspectors are not authorised to use arms which may sometimes be required for arrests of absconding suspects.

The NCC's collaboration with other agencies has yielded noticeable results. In 2019, NCC in partnership with the NCS confiscated 28 shipping containers loaded with pirated books, musical and film works of local and foreign titles at different seaports across the country".¹⁴⁵ Furthermore, over 99.3 million units of pirated copyright works comprising literary works, musical works, films and contrivances with estimated value of ₦10.3 billion were recorded publicly destroyed pursuant to court orders.¹⁴⁶

As recent as 18 August 2020, the NCC announced its partnership with the National Film and Video Censors Board (NFVCB). This partnership is designed to enhance "intelligence sharing, antipiracy operations and manpower development"¹⁴⁷ between the agencies, especially in view of the fact that fighting piracy effectively truly requires an inter-agency approach. As the Director General of the NCC stated thus "our synergy in checking piracy can only bring about a win-win situation in the film sector as there are legislative provisions empowering the NCC to prescribe anti-piracy devices such as the hologram making it an offence for anyone to counterfeit or be in unlawful custody of the hologram..."¹⁴⁸

In addition, the NCC has launched a number of anti- piracy initiatives, such as the Strategic Action Plan against Piracy (STRAP) launched in 2005 and the Copyright Litigation and Mediation

¹⁴⁵ John Asein, 'Piracy is a hydra-headed problem' (The Nations, 29 May 2019) <<https://thenationonlineng.net/piracy-is-a-hydra-headed-problem/>> accessed 24 August 2020.

¹⁴⁶ *Ibid.*

¹⁴⁷ Nigerian Copyright Commission, 'NCC, NFVCB Renew Partnership on Anti-piracy' (21 August 2020) <<https://copyright.gov.ng/ncc-nfvcb-renew-partnership-on-anti-piracy/>> accessed 28 August 2020.

¹⁴⁸ *Ibid.*

Program (CLAMP) 2006 which is the Alternative Dispute Resolution (ADR) arm of STRAP.¹⁴⁹ To add to its effort to combat copyright infringement, the NCC has passed a number of Regulations such as the Copyright (Collecting Societies) Regulations 1993, the Copyright (Video Rental) Regulations 1999, the Copyright (Security Devices) Regulations 1999, Copyright (Optical Discs Plants) Regulations 2006, and the Copyright (Collective Management Organisation Regulation) 2007.

Furthermore, the NCC has established alliances with a number of development agencies and international organisations such as the Swedish International Development Agency, WIPO, the United Nations Conference on Trade and Development, UNESCO, the African Regional Intellectual Property Organisation (ARIPO) and the World Customs Organisation to enhance the scope and effectiveness of its anti-piracy operations and awareness drive.¹⁵⁰

Perhaps the most commendable of NCC's effort towards an effective and meaningful copyright enforcement is traceable to its effort in drafting an amendment to the Copyright Act- the Nigerian Copyright Bill 2015 intended to domesticate the international treaties that Nigeria is a party to and incorporate provisions that enable the protection and enforcement of copyright in a digital age. The amendment is projected to entirely revolutionize copyright protection and enforcement in Nigeria.

¹⁴⁹ WIPO, 'STRAP and CLAMP- Nigeria Copyright Commission in Action' [WIPO Magazine, September 2008] 5/ 2008 <https://www.wipo.int/wipo_magazine/en/2008/05/article_0009.html> accessed 5 September 2020.

¹⁵⁰ Afam Ezekude, 'Nigeria's Anti-Piracy Drive Yields Results' (WIPO Magazine, June 2012) <https://www.wipo.int/wipo_magazine/en/2012/03/article_0004.html> accessed 20 August 2020

3.2.2 OTHER REGULATORY AGENCIES IN NIGERIA

As earlier indicated, there are other regulatory agencies in Nigeria whose statutory powers greatly impact on the protection and enforcement of copyright in Nigeria. These agencies have become an important intermediary, especially as Nigeria's unique judicial framework is saddled with cost and inexpediency. A copyright holder may approach the Department of Customs and Excise of the NCS and declare that he is the owner of the copyright in a specified work and request that the NCS restricts the importation of the copies of such work printed outside Nigeria but which would constitute infringing copies of the work if made in Nigeria.¹⁵¹

The NPF is also actively involved in copyright enforcement in Nigeria. Collaborative efforts of the NCC and the NPF have been described in 3.2.1 above. However, the NPF charged with maintaining law and order in Nigeria, is also instrumental in the enforcement of court order(s) by right- holders or judgement creditors or even in taking pre- emptive measures against infringement. Section 4 of the Police Act provides "the police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged."¹⁵²

Similarly, the NCC works with the Nigeria Ministry of Trade and Commerce in prescribing "any design, label, mark, impression or any other anti- piracy device for use on, in, or in connection with any work in which copyright subsists".¹⁵³ This helps to check the importation of unauthorised-

¹⁵¹ Section 44, Copyright Act, CAP C28 LFN 2004.

¹⁵² Section 4, Police Act, CAP P19 LFN, 2004.

¹⁵³ Section 21, Copyright Act CAP C28 LFN 2004.

counterfeit or pirated copies of copyrighted works into Nigeria as goods without the prescribed impressions are *prima facie* considered unauthorised.

Irrespective of these enforcement mechanisms put in place by the NCC and other regulatory bodies, Nigeria's copyright enforcement system is faced with challenges and falls short of expectation causing a strain of hardship on the Nigerian film industry. Some of these challenges are considered below.

3.3 CHALLENGES IN COPYRIGHT ENFORCEMENT IN THE NIGERIAN FILM INDUSTRY

Copyright infringement remains a major problem in Nigeria especially in the film industry where an estimated £1.5 billion is lost to piracy every year.¹⁵⁴ The effects of these infringements are not limited to the devastating economic losses which have stifled growth in Nollywood. There are other far-reaching consequences; loss of investment in Nollywood, tax revenue and foreign direct investment.¹⁵⁵ As Nigeria's former President, Chief Olusegun Obasanjo states:

Expectedly, investors are wary and the younger generation is not encouraged to pursue careers in the arts and entertainment industry. We are all confronted by an

¹⁵⁴ Oludayo Tade, 'The who and how of pirates threatening the Nollywood film industry' (The Conversation, 20 April 2016) <<https://theconversation.com/the-who-and-how-of-pirates-threatening-the-nollywood-film-industry-56952>> accessed 20 August 2020.

¹⁵⁵ Afam Ezekude, 'Nigeria's Anti-Piracy Drive Yields Results' (WIPO Magazine, June 2012) <https://www.wipo.int/wipo_magazine/en/2012/03/article_0004.html> accessed 20 August 2020.

attack on our culture and future as a people. We are faced with the reality of a declining economic resource and a source of pride as a nation.¹⁵⁶

The challenges in copyright enforcement in the film industry are categorised and discussed under the following sub-headings:

(i) LACK OF AWARENESS

This appears quite basic and innocuous. However, lack of awareness especially on the part of copyright right- holders, consumers, and regulatory officials remains one of the biggest challenges in copyright enforcement. Copyright holders are not properly educated and even where they recognise their rights in these works, they are ignorant as to the available enforcement options in the event of an infringement. On the other hand, consumers of creative works fail to understand the impact of purchasing pirated works or even recognise the fact that an offence is being committed. Finally, regulatory officials neither possess proper training and skill on their powers of enforcement nor the technical know- how to track or maintain adequate record of copyright works, infringing works and infringers.

(ii) DELAYS IN THE COURT SYSTEM

Given Nigeria's judicial structure, copyright enforcement suits can take unreasonable periods of time as discussed in 3.1 above. Consequently, parties have gradually lost their patience with the court system. Acquiring justice for an infringement can pose a difficult, painstakingly slow, expensive and deeply frustrating process and as William E. Gladstone, Former Prime Minister in

¹⁵⁶ Banwo & Ighodalo, 'Strengthening Intellectual Property Rights And Protection In Nigeria' (16 September 2016) <<https://www.banwo-ighodalo.com/grey-matter/strengthening-intellectual-property-rights-and-protection-in-nigeria?leaf=4>> accessed 27 August 2020.

the late 1800s said “justice delayed is justice denied”. These delays are influenced by a number of factors; corruption, indiscriminate transfer of judges, inadequate funding of the court system among others. Perhaps, the creation of a specialised IP court handling copyright infringement issues in Nigeria would improve the adjudication process of copyright cases.

(iii) CORRUPTION

Corruption has eaten deep into the fabric of every sector of the Nigerian society. Thus, it is not surprising that piracy is sustained by informal networks of pirates who are confident that they can bribe their way through any enforcement action, especially those carried out by regulatory agencies. The Nigerian environment “supports extortion and incentivises the pursuit of individual gain at the expense of the [film] industry.”¹⁵⁷ This makes breaking the underground structure which promotes the illegal stream of piracy activities difficult and renders any real attempt at enforcing copyright an effort in futility. As Oludayo Tade puts it:

If there were a real threat of arrest and prosecution, these clandestine networks would be more likely to break down. This would allow [copyright] holders to have access to their legitimate gains. Until then, Nollywood may continue to grow- but at a cost”.¹⁵⁸

(iv) INADEQUATE REMEDIES

The inadequacy of remedies (such as fines and stipulated terms of imprisonment) to copyright infringement is an under- emphasised challenge in enforcing copyright in Nigeria and stems from

¹⁵⁷ Oludayo Tade, ‘The who and how of pirates threatening the Nollywood film industry’ (The Conversation, 20 April 2016) <<https://theconversation.com/the-who-and-how-of-pirates-threatening-the-nollywood-film-industry-56952>> accessed 20 August 2020.

¹⁵⁸ *Ibid.*

the outdated copyright law. It not only dissuades copyright holders but renders any effort at enforcement an unrewarding adventure. The civil remedies available in terms of damages under the Copyright Act are grossly insufficient and completely inadequate and the penal sanctions are meagre and bear absolutely no deterrent effect.¹⁵⁹

In fact, the available penalties seem to encourage piracy by sending a clear message to copyright infringers that if they ever get caught, they will only get a painless slap on the wrist. Thus, in addition to *NCC v Oba Okechukwu*¹⁶⁰ discussed in the introduction of this dissertation, other instances include *NCC v Dominion Kalu*,¹⁶¹ where the accused was found in possession of a staggering 502 infringing copies of local and foreign musical works and cinematograph films. The accused pleaded guilty to the charge and court imposed a sentence of six months imprisonment with *an option* of ₦ 20, 000 (£40) fine.

Similarly, in *NCC v Eze Igwe*,¹⁶² the accused was charged with possession and offering for sale 250 copies of infringing works in DVDs, VCDs, and CDs. The accused was found guilty and sentenced to six months imprisonment with *an option* of ₦ 5, 000 fine (£10).¹⁶³ There are a host of cases which have met similar fate as the jurisdiction of the court to award specific damages is limited to that which is provided for by the Copyright Act- not more than two years imprisonment or ₦100 for civil or ₦1000 for criminal liability for each infringing copy.¹⁶⁴

¹⁵⁹ Section 20, Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004.

¹⁶⁰ *NCC v. Oba Okechukwu* (2012) FHC/ABJ/CR/56/2012

¹⁶¹ *NCC v. Dominion Kalu* (2012) FHC/ABJ/CR/12/2012

¹⁶² *NCC v. Eze Igwe* (2012) FHC/ABJ/CR/93/2012

¹⁶³ *NCC v. Nworie Anayo* (2012) FHC/ABJ/CR/10/2012; *NCC v. Godwin Obasi* (2012) FHC/ABJ/CR/16/2012; *NCC v. Stanley Nwankwo* (2011) FHC/ABJ/CR/14/2011.

¹⁶⁴ Sections 15 and 20, Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004.

(V) OUTDATED COPYRIGHT LAW

A major challenge in the enforcement of copyright in the film industry is operating an outdated law in a world that has since become digital. Thus in 2015, concerted efforts were made by stakeholders to conduct the most comprehensive review of copyright law in Nigeria which birthed the Copyright Bill 2015 which seeks to address some of these concerns. For instance, Section 43 (Anti- piracy measures) of the Draft Copyright Bill 2015 increases fine payable upon conviction of piracy from ₦100 (£0.20) for each infringing copy to ₦500, 000.00 (£1000) and/ or imprisonment not exceeding three years. Sections 20- 23 and 44 addresses issues such as peer- to-peer file sharing, the licensing of online content, and the widespread sharing of content on social networks – all of which are prevalent in the film industry. This is especially important because the present legislation did not contemplate and does not provide for digital copyright infringements and Nollywood has over the years grown massive online relevance. To address the issues with adjudication, Section 81 provides that copyright disputes shall be heard at the FHC and by “*Summary Trial*”. Although the Copyright Bill addresses some of the challenges identified, Nigeria has failed to adopt it as law- a major step towards the strengthening of the copyright framework in Nigeria.

Having analysed the enforcement mechanisms available under current Nigerian copyright law and the accompanying challenges, the enforcement mechanisms currently available under the UK law and those implemented by WIPO will now be examined to ascertain lessons, if any, Nigeria can learn from these practices.

3.4 ENFORCEMENT BEST PRACTICES (THE UK AND WIPO)

3.4.1 ENFORCEMENT BEST PRACTICES IN THE UK

As in Nigeria, copyright enforcement in the UK can also be strictly compartmentalized into the legal/judicial and administrative approaches.

With respect to the legal approach, the CDPA establishes a Copyright Tribunal, an independent body with wide mandates that include the resolution of disputes regarding commercial licensing of copyright and royalties.¹⁶⁵ Notwithstanding the existence of the Copyright Tribunal, a copyright holder can approach the court system to enforce their right in the UK. However, unlike the Nigerian system where the Federal High Court has an exclusive jurisdiction to entertain copyright matters, jurisdiction in the UK is determined by the value of claims and Cause of Action.

Thus, a civil copyright suit arising from its film industry may be commenced in any of the following specialist courts: Intellectual Property Enterprise Court List within the Business and Property Courts (IPEC) and County Court Hearing Center in the Business and Property Courts list. The High Court is usually the venue for copyright matters of substantial value while lower- value matters “are litigated in the IPEC, which has a fixed scale of recoverable costs capped at £50, 000 and damages awards capped at £500,000”.¹⁶⁶ In addition, a full- time IP specialist judge presides over the IPEC and the Business and Property Courts of the High Court have several IP specialist judges to whom copyright matters are most often allocated to.¹⁶⁷ Notwithstanding, copyright holder also has the right to seize infringing copies of his work without having to first obtain a court

¹⁶⁵ Section 145, Copyright, Designs and Patents Act (CDPA) 1988.

¹⁶⁶ Neville Cordell and Beverley Potts, Allen & Overy, ‘Copyright litigation in UK (England and Wales): overview’ (Practical Law UK, 2020) [https://uk.practicallaw.thomsonreuters.com/w-011-3729?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-011-3729?transitionType=Default&contextData=(sc.Default)&firstPage=true) accessed 20 August 2020

¹⁶⁷ *Ibid.*

order.¹⁶⁸ Parties are further encouraged to adopt ADR before proceeding to court for reliefs.¹⁶⁹

Where a party fails to consider ADR following an invitation from the court or respond to a request for mediation, costs may be imposed on him.¹⁷⁰

A copyright holder may commence a criminal copyright suit¹⁷¹ against an infringer at the “Magistrates Court or the Crown Court, depending on the severity of the alleged offence”.¹⁷²

Usually carried out through a private prosecution or by the police and Trading Standards officers, “the maximum penalty for [criminal copyright suits] is ten years imprisonment, and/or an unlimited fine (both for online and traditional copyright infringement)”.¹⁷³

Unlike the FHC in Nigeria, IPEC procedures in relation to IP disputes are clearly stated in an IPEC Guide issued in 2019.¹⁷⁴ Of particular interest is the existence of IP *pro bono* services for indigent parties of an IP suit under IPEC. This does not exist under the FHC.

From an administrative perspective, there is an Intellectual Property Office (IPO) responsible for implementing the national framework governing IP rights (copyright inclusive). The IPO in conjunction with the City of London Police have set up the Police Intellectual Property Crime Unit to fight organised crimes, especially those involving copyright piracy on digital media.¹⁷⁵ Also

¹⁶⁸ sections 100 and 196, Copyright, Designs and Patents Act 1988.

¹⁶⁹ *Cowl v Plymouth City Council* [2001] EWCA Civ 1935.

¹⁷⁰ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 573; *PGF II SA v OMFS Company* [2013] EWCA Civ 1288.

¹⁷¹ sections 107 and 198, Copyright, Designs and Patents Act 1988.

¹⁷² Neville Cordell and Beverley Potts, Allen & Overy, ‘Copyright litigation in UK (England and Wales): overview’ (Practical Law UK, 2020) [https://uk.practicallaw.thomsonreuters.com/w-011-3729?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-011-3729?transitionType=Default&contextData=(sc.Default)&firstPage=true) accessed 20 August.

¹⁷³ *Ibid.*

¹⁷⁴ HM Court and Tribunal Services, ‘Intellectual Property Enterprise Court Guide’ (2019) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823201/intellectual-property-enterprise-guide.pdf > accessed 4 September 2020.

¹⁷⁵ City of London Police, ‘PIPCU Disrupts £719 Million Worth of Crime’ (January 2019) <http://news.cityoflondon.police.uk/r/1184/pipcu_disrupts_719_million_worth_of_ip_crime> accessed 3 September 2020.

within the IPO is the Intelligence Hub, which is comprised of researchers, financial investigators, analysts and intelligence officers.

Another governmental body that plays a key role in copyright enforcement is Her Majesty's Revenue and Customs (HMRC), which is responsible for developing and implementing national policy governing the enforcement of copyright and other forms of IP at the UK border. The HMRC collaborates with the Border Officials to detain infringing goods, usually in response to an Application for Action submitted by a copyright holder. These wholistically provide a better platform to curb film copyright infringement in the UK.

3.4.2 WIPO ENFORCEMENT BEST PRACTICES

As stated in chapter two of this dissertation, the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)¹⁷⁶ are designed to govern the protection and enforcement of copyright in the fast-growing, global digital environment. In terms of enforcement measures, both treaties oblige contracting parties to provide legal remedies against the circumvention of technological measures (such as encryption) used by authors in connection with the exercise of their rights.¹⁷⁷ Member States are further obliged to provide legal remedies against persons who remove or alter information, such as certain data that identify works or their authors, necessary for the management (licensing, collecting and distribution of royalties) of their rights.¹⁷⁸ Also, each contracting party are required to make enforcement procedures available under their laws so as to permit effective action against any act of infringement of rights covered by the

¹⁷⁶ The two Treaties were concluded in 1996 at the World Intellectual Property Organisation in Geneva. The WCT entered into force on March 6, 2002, and the WPPT on May 20, 2002.

¹⁷⁷ Article 11, WIPO Copyright Treaty 1996; Article 18, WIPO Performances and Phonograms Treaty 1996.

¹⁷⁸ Article 12, WIPO Copyright Treaty 1996; Article 19, WIPO Performances and Phonograms Treaty 1996.

treaties. WIPO also encourages Alternative Dispute Resolution (ADR) of IP cases. This is more relevant for the film industry than ever as Nollywood continues to grow its online presence on movie streaming platforms such as Netflix to a global audience.

In 1994, WIPO as a global IP management and promotion body established an Arbitration and Mediation Center (AMC), an international and cross- border dispute resolution provider with headquarters at WIPO in Geneva, Switzerland and an office in Singapore. The WIPO AMC offers time and cost- effective ADR mechanisms; mediation, arbitration, expedited arbitration and expert determination. The WIPO AMC has administered about 250 mediation and arbitration most of which were international disputes filed in the last five years.¹⁷⁹ The WIPO AMC has developed tailored rules specifically to address and aid the resolution of disputes in the film and media sectors. They are referred to as the WIPO Mediation and Expedited Arbitration Rules for Film and Media.¹⁸⁰ They are administered by a panel of expert mediators and arbitrators. The Rules contain a mediation procedure and an expedited arbitration procedure and parties are at liberty to choose either or both procedures in resolving their disputes, taking a maximum of four and six months respectively.¹⁸¹ This aid swift determination of disputes at both national and international levels.

It is relevant to state that WIPO, through its Nigeria Office, has since 2020 entered into a Memorandum of Understanding with the NCC on encouraging Alternative Dispute Resolutions Mechanism (ADR) in copyright dispute resolutions in Nigeria. A discussion of enforcement practices adopted by the UK and WIPO paints a picture of practices which may be adopted by

¹⁷⁹ WIPO, 'WIPO Arbitration and Mediation Centre' (2020)

<<https://www.wipo.int/amc/en/center/background.html>> accessed 3 September 2020.

¹⁸⁰ WIPO Mediation and Expedited Arbitration Rules for Film and Media (Effective from January 1, 2020) <https://www.wipo.int/amc/en/film/rules/> accessed 25 August 2020

¹⁸¹ *Ibid.*

Nigeria at its national level to strengthen copyright enforcement in the film industry. These lessons will be considered in 3.5 below.

3.5 ENFORCEMENT BEST PRACTICES: LESSONS FOR NIGERIA

There are a number of lessons Nigeria can learn from the enforcement best practices canvassed in 3.4 above. First, it will be noted that to prevent court delays, the UK has specialised courts to handle copyright enforcement matters- a good lesson for Nigeria. Furthermore, the UK provides for an ‘expedited hearing process’ in cases of urgency and a right- holder may apply for default judgment, where the defendant has failed to file an acknowledgment of service or defence. The establishment of specialised courts in Nigeria will not only guarantee expeditious disposal of matters but enhance confidence of the masses in the copyright enforcement or adjudication system. An adoption of a similar IP *pro bono* initiative, as is obtainable with IPEC, will extend copyright enforcement to the indigent but highly creative locals who are victims of copyright theft.

In addition, Nigeria can learn from the expansive jurisdiction of the UK Copyright Tribunal. Nigeria, per Section 37 of the Copyright Act, established a similar body known as Copyright Licensing Panel. Unlike the Nigerian Copyright Licensing Panel, the UK Copyright Tribunal is not only empowered to grant compulsory licences but to determine disputes relating to the applications and references relating to performances, database rights, the use of sound recordings in broadcasts, and applications to settle royalty and sums payable for the lending of certain works.¹⁸² It may be relevant that an expanded jurisdiction such as that of the UK Copyright Tribunal be considered in addition to the grant of compulsory licenses by the Copyright Licensing

¹⁸² Section 145, Copyright, Designs and Patents Act 1988.

Panel in Nigeria. This could help reduce the work load of the NCC, thereby making for efficiency in the determination of disputes arising from applications among others.

Another key lesson from the UK is found in how government agencies have recognised that no single agency can effectively tackle the problem of piracy and adopt cross-agency, multi-sector partnerships and approaches. For instance, the Police Intellectual Property Crime Unit (PIPCU) in partnership with the creative and advertising industries developed an initiative whereby legitimate brand advertisements on infringing websites are replaced with banners warning that the relevant site is under investigation, and advising users to exit the site.¹⁸³ Whilst the establishment of an IP Crime Unit in Nigeria may be desirable, there should be proper training of Police officers on Nollywood relevance and the need to protect film copyright. Film associations such as the Actors' Guild of Nigeria (AGN), Directors' Guild of Nigeria (DGN), Nigeria Society of Cinematographers and so on should enlighten its members on film copyright protection. In the addition, the Federation of Nollywood Guilds and Associations can establish better partnership within the industry and enforcement agencies on film copyright protection and enforcement.

In addition to the adoption of ADR at national and international levels, Nigeria must advance its remedies to address real life situations. For instance, judges can grant a blocking injunction preventing an Internet Service provider (ISP) from providing access to illegal or infringing content on infringers' websites, which is a really effective tool in combating piracy in digital environments.¹⁸⁴

¹⁸³ PIPCU, 'About the PIPCU' (2020) <<https://www.cityoflondon.police.uk/police-forces/city-of-london-police/areas/city-of-london/about-us/about-us/pipcu/>> accessed 3 September 2020.

¹⁸⁴ *Twentieth Century Fox Film Corporation v British Telecommunications plc* [2011] EWHC 1981; *FA Premier League v BT & ors* [2017] EWHC 480 (Ch).

Having considered a number of general recommendations in the form of enforcement best practices, lessons learned from the UK and WIPO, this dissertation considers specific and concise suggestions in the form of law and policy reforms in chapter four.

CHAPTER FOUR

There is no doubt that the Nigerian film industry holds enormous potentials. It is also clear that unless certain fundamental issues surrounding copyright enforcement are addressed, the industry will continue to operate below its potentials, putting government revenue, jobs, and industry growth at risk. Both the government and industry players must be involved and all efforts made must be deliberate and sustained. As mentioned in this dissertation, some of the biggest issues facing the film industry is piracy and counterfeiting. According to the World Bank's estimate for every legitimate movie sold, nine others are pirated. It further estimates that where appropriate enforcement measures are taken, a million more jobs could be created in the industry.¹⁸⁵ This would be a huge development especially in a country with 27.1% unemployment rate (about 21.7 million Nigerians are currently unemployed).¹⁸⁶ To this end, the following specific reforms are recommendations.

¹⁸⁵ Rebecca Moudio, 'Nigeria's film industry: a potential gold mine?', (Africa Renewal 2013) <http://www.un.org/africarenewal/magazine/may-2013/nigeria%E2%80%99s-film-industry-potential-gold-mine> accessed 6 September 2020.

¹⁸⁶ Oladeinde Olawoyin, 'UPDATE: Nigeria's unemployment rate rises to 27.1% – NBS' (Premium Times, 14 August 2020) <https://www.premiumtimesng.com/news/top-news/408790-nigerias-unemployment-rate-rises-to-27-1-nbs.html> accessed 4 September 2020.

4.1. LAW REFORMS

1. Although significant progress has been made in the legislation of the Copyright Bill, Nigeria must speed up the process of passing the 2015 Copyright Bill, which as discussed in this dissertation, will provide deterrent effect of civil penalties, guarantee adequate remedies for copyright owners whose right has been infringed, address some of the common issues posed by advancements in technology, and generally bring the enforcement regime in Nigeria up to international standards.
2. There is the need to amend the Nigerian constitution for the establishment of specialised and independent courts to entertain copyright and other intellectual property matters. This will ensure the speedy and expeditious disposal of suits. It should, in addition, create or enable the creation of intellectual property tribunals in the various states in Nigeria. This will complement the efforts of the Nigerian Copyright Panel and the Federal High Court.
3. Other legislative measures to strengthen the enforcement powers of relevant agencies should also be considered. It is recommended that Nigeria promulgates Enforcement Guidelines for the various sectors of the entertainment industry. In addition, the Customs and Excise Management Act (CEMA)¹⁸⁷ should be amended to expressly introduce anti-piracy and counterfeiting border enforcement procedures. This is necessary as Nigeria is reputed as having “the largest market in Africa for counterfeit and pirated products and serves as a gateway to the rest of the continent for rampant illicit trade”.¹⁸⁸

¹⁸⁷ CAP C45, Laws of the Federation 2004.

¹⁸⁸ Business Action to Stop Counterfeiting and Piracy, ‘Promoting and Protecting Intellectual Property in Nigeria,’ (15 July 2015, International Chamber of Commerce) < <https://iccwbo.org/publication/promoting-protecting-intellectual-property-nigeria/#:~:text=Establish%20an%20inter%20agency%20approach,administering%20and%20enforcing%20>

4.2. POLICY REFORMS

1. Emphasis should be laid on the methods for improving knowledge, enhancing training, and developing skill, capacities and competences of IP institutions, government agencies and officials, such as those offered by specialist IP enforcement representatives from all over the world; the World Customs Organisation, Interpol, Europol and the United Nations Inter-Regional Crime and Justice Institute (UNICRI). This is especially important in light of the fact that copyright enforcement is hindered by poor training, limited resources and understaffing. Even the NCC, which is at the forefront of copyright enforcement in Nigeria has offices in only 13 out of 36 states in Nigeria. In addition, the judiciary should attach as much importance to IP cases as other areas of law- they should be reported on law reports to enable easy access to IP case law.
2. There is the need for inter- agency collaboration and information sharing as is currently obtainable in the UK where several agencies and departments, private sector players, and trade associations such as the Anti-Counterfeiting Group work together to enforce copyright. Relying on a Memorandum of Understanding, these bodies could establish an Enforcement Committee to facilitate the internal workings of the different actors, set up and implement technical infrastructure to enable swift, safe, and secure information sharing systems, make available technological tools and systems to prevent copyright infringement particularly in the film industry. Furthermore, handbooks and manuals on copyright enforcement should be circulated periodically for the education of the public.

3. Nigeria should develop a national IP protection and enforcement policy. This policy may include, the technical trainings of IP professionals to be organised by the NCC, Ministry of Trade and Investment and other relevant regulatory authorities; the proper education of right- holders through seminars, outreaches, workshops, and trainings; industry-specific innovation hubs in certain localities where technology and innovation thrives; and the creation of a Nigerian Observatory on Counterfeiting and Piracy, which could serve as a platform for assisting the Nigerian public authorities in their policy, legal and enforcement duties.
4. ADR must be encouraged in copyright enforcement in Nigeria and litigation a last resort. It is noteworthy that in 2018, the Federal High Court released the Federal High Court (Alternative Dispute Resolution) Rules 2018 to enhance access to justice by providing alternative mechanisms to supplement litigation in the resolution of disputes. This laudable effort has been under- utilised as many IP practitioners and parties are not aware of its existence.

CONCLUSION

Copyright is considered the lifeblood of creativity. It is the legal construction that makes all the efforts, skills, and resources poured into a creative work worthwhile. Copyright is especially useful in filmmaking which is a combination of elements which are products of the intellect. However, like most film industries, Nollywood faces the peculiar problem of piracy, a phenomenon accentuated by lack of adequate copyright protection laws and enforcement mechanisms.

This dissertation has critically analysed existing rights obtainable in the film industry, the copyright protection and framework in Nigeria especially in relation to Nollywood and has determined that there is a need for the improvement of current regime to reflect current technological realities, check infringement and generally provide for stronger enforcement mechanisms. To achieve this, this dissertation examined copyright in the international and Nigerian context, highlighted the various rights obtainable in the Nigerian film industry, and considered the effect of the Beijing Treaty on Nollywood.

In the third chapter of the dissertation, a critical analysis of current copyright enforcement processes (legal and administrative) is carried out and some of the major challenges in enforcement are highlighted: from lack of awareness to delays in the court system, bribery and corruption, an outdated copyright law, and inadequate remedies. This chapter also examines enforcement best practices in the UK and under the WIPO, with a view to recommending lessons for Nigeria.

There is the need for future legal research on the subject matter. Copyright infringement disputes should be analysed to ascertain the duration, outcome, nature of judgements of the Court, applicability of orders and the effectiveness of remedies in the film industry. This will create relevant data required to further establish the practical ineffectiveness of current copyright

enforcement framework in the film industry and can influence the adoption of the Copyright Bill and creation of practical enforcement mechanisms some of which have been proffered in this dissertation.

It is noteworthy this research leads to one conclusion- current copyright protection and enforcement mechanisms in Nigeria are weak, ineffective, and ill-equipped, and there is a clear and urgent need to carry out legislative and policy reforms. Not only will this bring Nigerian copyright laws in consonance with global standards, it will also encourage creativity and innovation in an already thriving film industry, boost investors' confidence and stimulate renewed foreign interest and investment. These will ultimately create a sustainable income sector for Nigeria.

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