

## SPECIAL BRIEFING

# The Operation of Nigerian Copyright Laws in Cyberspace

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### Introduction

Copyright is a vast area of intellectual property law which protects the interests of creators by according the author with proprietary rights in the work created. Of the four common types of intellectual property (IP)—trade marks, copyrights, patents, and trade secrets—copyrights are arguably of paramount interest, universal, and widespread in the Internet context.<sup>1</sup> These proprietary rights over the works are recognised under national laws to further stimulate intellectual creativity and make the products of such labour available for public use, with reasonably limited restrictions for use by anyone other than the creator. The legal privilege known as copyright protects the owner of intellectual property from exploitation,

indiscriminate usage by unauthorised copying and distribution of the author's creations.<sup>2</sup> Also, these works, whether literary or artistic<sup>3</sup> can exist in analogue or digital form (or both). Therefore, copyright infringement in cyberspace<sup>4</sup> is a form of intellectual property theft, with socio-economic and legal consequences; the advent of the Internet, both as an educational, socio-economic and business medium, has in no way simplified the ensuing legal issues involved.

Copyright law is governed exclusively at the federal level. The Federal High Court in Nigeria has exclusive jurisdiction over claims arising under the Nigerian Copyright Act 2022.<sup>5</sup> Section 2 of the Copyright Act of 2022, the principal federal enactment of copyright law, provides that copyright extends to the subject matter categories outlined thereunder. Section 2(2) of the Copyright Act defines the broad scope of copyright:

“Notwithstanding the provision of subsection (1), literary, musical or artistic work shall not be eligible for copyright unless—(a) some effort has been expended on making the work, to give it an original character;<sup>6</sup> and (b) the work has been fixed<sup>7</sup> in any medium of expression known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.”

Further to falling within one or more of the subject matter categories listed in s.2(1) of the Copyright Act, any work that meets the requirements set out above in subs.(2) shall be eligible for copyright, notwithstanding the quality of the work or the purpose for which the work was created.<sup>8</sup>

Copyright protection enables an author<sup>9</sup> of these work(s), for a limited period of time, to exercise exclusive rights to reproduce, republish, use for commercial purposes and prevent others from exercising such rights conferred on the author (owner/creator). Simply, what an author creates, he is an exclusive owner of for a statutorily prescribed period of time.<sup>10</sup> Once a copyright on a work expires, that work is said to have fallen into the public

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<sup>1</sup> G.F. Ferrera et al, *CyberLaw: Text & Cases (International Edition)*, 3rd edn (Mason, OH: Cengage Learning, 2011), p.133.

<sup>2</sup> Among other things, intellectual property includes things like creative and literary works, computer programs, designs, marks, and innovations.

<sup>3</sup> Including books, music, works of fine arts, and technology-based creations such as computer programs and electronic databases.

<sup>4</sup> UK Government's National Cyber Security Strategy 2016–2021 defines cyberspace as ‘the interdependent network of information technology infrastructures that include the Internet, telecommunications networks, computer systems, internet connected devices and embedded processors. It may also refer to the virtual world or domain as an experienced phenomenon, or abstract concept.’

<sup>5</sup> See s.251(1)(f) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), s.51 of the Copyright Act 2022; and s.50 of the Cybercrimes (Prohibition, Prevention, etc.) Act, 2015. See also s.7(1) of the Federal High Court Act, Cap F12 Laws of the Federation 2004 states that the Federal High Court shall to the exclusion of any other court have original jurisdiction to try civil causes and matters arising from any Federal enactment relating to Copyright, patent, designs, trade marks and passing-off industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards.

<sup>6</sup> An author(s) of any work(s) may claim copyright ownership/protection only in works that they create. An “original” work is one created by the author, rather than found or copied from a pre-existing work. On the other hand, an author may claim copyright in works they create even where they are similar or identical to preexisting works as long as the author created the work independently and did not copy—see *Sheldon v Metro-Goldwyn Pictures Corp* 81 F.2d 49, 54 (2d Cir. 1936) cited in Ferrera et al, *CyberLaw: Text & Cases (International Edition)*, 3rd edn (2011), p.135.

<sup>7</sup> Although the Internet may seem less tangible than a book, digital works stored on hard drives and perceivable via the use of a computer are considered fixed and are therefore eligible for copyright protection.

<sup>8</sup> See s.2(3) of the Copyright Act 2022.

<sup>9</sup> See s.17(5) of the Copyright Act 2022 (‘in this section, “author” includes heirs and successors-in-title’).

<sup>10</sup> For instance, by virtue of s.19(1)(a) of the Copyright Act 2022, the duration of copyright conferred shall be, in the case of—(a) literary, musical or artistic works other than photographs, 70 years after the end of the year in which the author dies.

domain and may be used freely by anyone.<sup>11</sup> As a threshold question, a plaintiff who claims copyright infringement must show: (1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner's exclusive rights under the Copyright Act.<sup>12</sup>

An equitable and efficient approach for determining the consequences for copyright infringement, whether online or physically, would balance the interests of protecting artists and treating defendants fairly, while providing clear rules for judges administering the law.<sup>13</sup> For instance, two possible rationales for the existence of copyright have been suggested by the 1909 United States' Congress House Report: a natural rights rationale and a utilitarian or welfare rationale. The former emphasises a person's inherent connection with the fruits of that person's creative labour and views it as unfair to allow others to copy the creator's works without compensation, while the latter views copyright primarily as a means to promote the overall public welfare through the stimulation and dissemination of creative works. Under the natural rights approach, copyright is viewed as necessary because the unauthorised use of another's work is morally repugnant, whereas the utilitarian approach views copyright as necessary to the extent that authors will create fewer works if they are unable to recoup the costs of creation and distribution. A leaning towards the natural rights viewpoint or utilitarian approach to copyright would have profound effects for the application of copyright law on the Internet.<sup>14</sup>

Copyright, as the word implies, provides rights owners the ability to exclude others from making copies of a given work. Further, the reproduction right is only one of several rights at the copyright owners' disposal. Section 9 of the Copyright Act provides that copyright owners have the following exclusive right to do and authorise the doing of any of the acts outlined in the said section. As one might imagine given the simplicity and ease, quality, and speed of reproducing on the Internet, the reproduction right is a frequent subject of litigation. On any given day, the Internet has the power to become a world stage.<sup>15</sup> Furthermore, the Internet stage spans the entire globe, all

12 time-zones at once, enabling cyberspace artists<sup>16</sup> to exploit an audience of an estimated 220 million active users, and counting. Therefore, it is opined by the authors that although the Internet has drastically reduced the costs and time associated with copying and distribution, the Copyright Act has struggled to implement the appropriate response to this phenomenon.

The Copyright Act 2022 offers fair advantages to creators, inventors, and brand owners, particularly those operating in the digital environment, and strives to achieve an equilibrium between ensuring fair and proper compensation for artists and promoting public interest in accessing new works and intellectual creations; however, if copyright legislation is aimed at successfully curbing the menace of infringement at both the brick-and-mortar (physical) location as well as in cyberspace, a more robust and practical body of statutes specifically dealing with cyber-technology must be employed to sustain any economical advancements emanating from Nigeria's booming economy.

## International copyright protection obligations

The first Treaty relevant to copyright was the Convention of the International Union for the Protection of Literary and Artistic Works which was signed at Berne on September 9, 1886,<sup>17</sup> and is known as 'the Berne Convention'. By this Treaty, the states acceding to it were constituted as a copyright union, known as the Berne Union. The basis of the Treaty was that all member states should confer an agreed standard of protection, and that any work first published in a union country should enjoy international protection in all other states of the union. After its inception, subsequent modifications and additions were applied to the Treaty.<sup>18</sup> Copyright law was governed in Nigeria by the English Copyright Act 1911 which was made applicable to the British Colony of Her Majesty by virtue of an Order in Council under s.25 of the Act of 1911 of Great Britain, which subsequently birthed the passing of the Copyright Act 1970.<sup>19</sup> The primary legislation is the Nigerian Copyright Act Cap. C.28, Laws of the Federation of Nigeria 2022.

<sup>11</sup> The term 'public domain' refers to works (1) whose original copyright has expired; (2) whose authors have abandoned the copyright; and (3) created by the US Federal Government. See ONLINE LAW 178 (Thomas J. Smeding-hoff ed., Addison-Wesley Publishing Co. 1996), cited in J.M. Driscoll, "It's a small world after all: Conflict of laws and copyright infringement on the information superhighway" (2014) 20(4) U. Pa. J. Int'l Econ. L. 939, available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1319&context=jil>.

<sup>12</sup> See s.36 of the Copyright Act 2022. Thus, for the plaintiff to succeed in any action that he may bring, in the words of Romer LJ in alluding to this sub-section in *Hogg v Toy & Co Ltd* [1935] Ch. 497 at 515; (1935) All E.R. Rep. at 623 he would have to prove two things—first, he would have to prove that he has copyright that exists in the work in question, and, secondly, that he is the owner of the copyright.

<sup>13</sup> Driscoll, "It's a small world after all: Conflict of laws and copyright infringement on the information superhighway" (2014) 20(4) U. Pa. J. Int'l Econ. L. 939. See B.G. Joseph, "The New WIPO Copyright and Phonograms Treaties: Twenty-One Days in Geneva and the Return to Washington", in *Global Trademark and Copyright: Protecting Intellectual Property Rights in the International Marketplace* (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-4019, 1997), pp.371, 435 (arguing that without "balanced legislation that creates fair boundaries of copyright liability, the growth and development of the Internet will be jeopardized by legal uncertainty and burdensome litigation").

<sup>14</sup> Ferrera et al, *CyberLaw: Text & Cases (International Edition)*, 3rd edn (2011), pp.136-137.

<sup>15</sup> Driscoll, "It's a small world after all: Conflict of laws and copyright infringement on the information superhighway" (2014) 20(4) U. Pa. J. Int'l Econ. L. 939. With such diverse and rich offerings, the Internet, and Internet enabled systems, stand to supplant older technologies, not internet-supported, as the entertainment medium of choice.

<sup>16</sup> "Artist" and "Author" are used interchangeably throughout this article.

<sup>17</sup> i.e. the International Convention for the Protection of Literary and Artistic Works (Berne, 9 September 1886; 77 BFSP 22, Cm1212). The Convention as originally made is set out in the Order in Council, dated 24 June 1912, regulating Copyright Relations with the Foreign Countries of the Berne Copyright Union, SR & O 1912/913, Sch.2 (revoked).

<sup>18</sup> The Additional Act (Paris, 4 May 1896) (regulating Copyright Relations with the Foreign Countries of the Berne Copyright Union); the Berlin Convention (Berlin, 13 November 1908) A further Protocol (Berne, 20 March 1914) was completed in 1914; the Rome Convention (Rome, 2 June 1928).

<sup>19</sup> Glory Onoyeyan, "Copyright Law and Photocopying Practice in Nigeria" (2018) *Library Philosophy and Practice (e-journal)* 2179, available at: <https://digitalcommons.unl.edu/libphilprac/2179/>.

The Government of Nigeria has acceded to a few Treaties of the Berne Union including the Berne Convention for the Protection of Literary and Artistic Works (September 14, 1993), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (October 29, 1993), the Convention Establishing the World Intellectual Property Organization, WIPO (April 9, 1995), and the WIPO Copyright Treaty which was ratified by Nigeria on January 5, 1998; and this is the relevant text for the interpretation of the Copyright Act 2022.

These Conventions are not part of the municipal law of this country, but they may be of assistance in arriving at the proper construction of the legislation founded upon their provisions. It is important to note that an International Treaty or Convention can only have force of law in Nigeria when it has been enacted into law by the National Assembly.<sup>20</sup> The relevant portion relating to ratification of international treaties is s.12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which reads as follows:

- “(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.”

By the combined provisions of ss.1(c) and 8 of the Copyright Act, Copyright *shall* be conferred on a work if on the date of its first publication the author(s) is a citizen of or habitual resident in, or body corporate established by or under the laws of a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party, or the work is first published in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party. Further, where the question arises as to whether a country is a party to an obligation in a treaty or other international agreement to which Nigeria is also a party, a certification from the Copyright Commission<sup>21</sup> to that effect shall be conclusive proof of that fact.<sup>22</sup> In this article, it is opined that inconsistent national copyright laws are a barricade to safely expand the reach of creative or artistic works common to the territorial market beyond its geographical constraints into the boundless cyberspace,

without encountering the menace of copyright infringement. It is further discussed that each copyright law mirrors a nation's distinctive outlook on the artist's rights over works and the relevance of public access.<sup>23</sup>

## Copyright infringement in cyberspace

The Internet has raised the stakes in the international copyright debate.<sup>24</sup> The concept of having a pervasive audience access to and ability to copy and further disseminate works of authorship challenges the traditional roles played by information providers and the individuals who create the works. Copyrightable works such as videos, recordings of musical performances, and texts can be posted anywhere on earth via a computer system, retrieved from any database in a foreign nation, or made accessible by online service providers to subscribers on a global scale. Whether it is flagrant theft or just 'fair dealing' or "fair use" of publicly available material challenges the traditional concept of the author's exclusive rights of reproduction.<sup>25</sup> Fair dealing has a narrower scope compared to fair use as the former can be applied only for the purposes which it was given, while the latter should only pass the test of fairness even if used for a purpose not specified. Although s.20 of the Copyright Act provides a list of activities that may be more likely to constitute fair use, including "criticism, review or the reporting of current events",<sup>26</sup> there are no hard and fast rules.

A substantial amount of online content is protected under the Nigerian Copyright Act, including computer programs, music, recordings, performances and web pages (in the Act referred to as 'online location'). Therefore, it is prudent for a business owner to assume that any content it did not create itself is subject to the exclusive rights of others, unless the business has a particular reason to believe otherwise.<sup>27</sup> The Internet has drastically impacted the ability of the public to copy and distribute copyrighted works. For now, the Nigerian Government has reacted by enacting the Copyright Act 2022, which provides that the owner of copyright in a work, in respect of which copyright has been infringed, may issue notice of the infringement to the relevant service provider requesting the service provider to take down or disable access to any

<sup>20</sup> See *Emirates Airlines v Orji Prince Chu-Ikem* (2023) LPELR-59968 (CA) per Otisi JCA, p.50, paras E-F.

<sup>21</sup> See s.77 of the Copyright Act 2022 which establishes that Nigerian Copyright Commission and Copyright Administration, referred to as "the Commission", responsible for all matters relating to copyright, including administration, regulation and enforcement in Nigeria, and other related matters.

<sup>22</sup> Also, see s.64 of the Copyright Act 2022, which states that the rights granted to a performer under this Act shall apply in respect of any performance if—(b) the performance takes place or is first fixed in Nigeria or in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party.

<sup>23</sup> In this article, "public access" is defined as the ability of one artist to borrow from an earlier work without infringing its copyright. See Zechariah Chafee Jr, "Reflections on the Law of Copyright" (1945) 45 Colum. L. Rev. 503, 511: "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his [creative work]." See Driscoll, "It's a small world after all: Conflict of laws and copyright infringement on the information superhighway" (2014) 20(4) U. Pa. J. Int'l Econ. L. 939.

<sup>24</sup> See J.C. Ginsburg, "Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure" (1995) 42 J. Corp. Society 318, 330 ("In principle, there is no such thing as 'international copyright'; instead, there are multiplicities of copyright regimes. An author and international copyright owner possesses no rights that transcend established national boundaries...").

<sup>25</sup> "Fair use" and "fair dealing" are terms that relate to situations where using a copyrighted work would not require the authorisation or a license from the copyright owner. Fair use (in United States law) is a doctrine that brief excerpts of copyright material may, under certain circumstances, be quoted verbatim for purposes such as criticism, news reporting, teaching, and research, without the need for permission from or payment to the copyright holder, whereas "fair dealing" is used in relation to copyright exceptions in the United Kingdom.

<sup>26</sup> See s.20(1)(d) of the Copyright Act 2022 ("...subject to the condition that, if the use is public, it shall, where applicable, be accompanied by an acknowledgment of the title of the work and its author except where the work is incidentally included in a broadcast...").

<sup>27</sup> Ferrera et al, *CyberLaw: Text & Cases (International Edition)*, 3rd edn (2011), p.166.

infringing content or link to the content, hosted on its system or network.<sup>28</sup> Further, a service provider, upon receiving notice of infringement under s.54 of the Act shall promptly notify the subscriber responsible for the content for which the notice relates informing him of the content of the notice, and shall expeditiously take down or disable access to the infringing content or links to such content hosted on its system or network and, thereafter, notify the owner of the copyright accordingly.<sup>29</sup> As a result, in order to reduce uncertainty and promote the development of online businesses, the Copyright Act 2022 includes limitations to a business's liability for copyright infringement for certain online activities, such as the (a) neutral, automatic and passive activities of a service provider;<sup>30</sup> (b) storage, at the direction of a user, of material that resides on a system or network controlled or operated by or for the service provider (or business owner);<sup>31</sup> if the service provider<sup>32</sup> does not have actual knowledge that the subject material is infringing, and does not receive financial benefit (whether directly or indirectly) attributable to the infringing activity; (c) where the business refers or links users to an online location containing infringing material or activity, by using information location tools.<sup>33</sup> However, in order to benefit from these protections, internet service providers (ISPs) must meet the detailed requirements of 'Part VII' of the Act, which basically requires good faith efforts to cooperate with copyright owners to mitigate third party infringement. The courts ought to determine the issue of likely infringement of the owner's exclusive rights by weighing the factors on the imaginary scales of justice and may consider other relevant factors, a few of which are based on the (i) purpose and character of its usage, (ii) nature of the work, (iii) amount and substantiality of the portion used in relation to the work as a whole, and (iv) effect of the use upon the potential market or value of the work, and (v) the inclusion in an audiovisual work or a broadcast of an artistic work situated in a place where it can be viewed by the public. These factors, as contained in s.20 of the Copyright Act are nonexclusive factors for courts to consider in making a "fair use" determination. Section 20 envisages that the question of whether the defendant's use of an author's work is "fair" requires a case-by-case analysis in which the statutory factors are not treated in isolation but are weighed together, in light of the purposes of the copyright.

As it has been often stated, the function of copyright law is to protect works from annexation by other people, the fruits of another's work, labour, skill or taste and the defendant having a monetary benefit from such an

annexation is a secondary consideration.<sup>34</sup> From the wordings of the Act above, there arises three principal forms of secondary copyright liability, to wit: direct, contributory and vicarious liability. Recall that an author's copyright is infringed when any person, without the authorisation of the owner of the copyright, does or causes any person to do an act which constitutes a violation of the exclusive rights conferred under the Act. Therefore, to prove a claim of direct copyright infringement a plaintiff must show that he owns the copyright and that the defendant himself violated one or more of the plaintiff's exclusive rights under the Copyright Act. Contributory liability arises where one has knowledge of another party's infringing activities and materially contributes to them. Vicarious liability occurs when one profits from another's infringement while declining to exercise a right to control or prevent the infringement.

It is obvious that in cyberspace the determination of these difficult and controversial questions of copyright liability prompts for an immediate response by the Government of Nigeria to address the codification of these principles with regard to the virtual world, hence, in reaction to the evolving copyright protection regime in the 21st century this prompted the United States (US) Congress to enact Title II of the Digital Millennium Copyright Act (DMCA), the Online Copyright Infringement Liability Limitation Act (OCILLA), which is an endeavour to facilitate cooperation among ISPs and copyright owners "to detect and deal with copyright infringements that take place in the digital networked environment", in order to provide "greater certainty to service providers concerning their legal exposure for infringement that may occur in the course of their activities". A case worthy of note on the issue is *Ellison v Robertson*<sup>35</sup> where Harlan Ellison (the plaintiff), the author of numerous science fiction novels and short stories who also owned valid copyrights to those works, alleged that AOL<sup>36</sup> infringed his copyright works. Sometime in the year 2000, Stephen Robertson electronically scanned and copied a number of Ellison's fictional works to convert them to digital files which were subsequently uploaded onto the USENET news-group (used primarily to exchange unauthorised digital copies of works by famous authors, including Ellison), which then made the infringing copies of Ellison's works accessible to the news-group, the works were forwarded and copied throughout the USENET to servers all over the world, including those belonging to AOL.

<sup>28</sup> See s.54 of the Copyright Act 2022. The said notification under s.54(1) 'shall' be in writing and may be transmitted electronically, or by any other means, to the service provider or his designated agent and shall include the list of requirements outlined in subs.(2), paras (a)-(f).

<sup>29</sup> See s.55 of the Copyright Act 2022.

<sup>30</sup> See s.62(1) of the Copyright Act 2022, which is similar to routing and transmission, as used in the DMCA.

<sup>31</sup> See s.58 of the Copyright Act. The section would only apply if the business meets the conditions stipulated under paras (a)-(d).

<sup>32</sup> Service provider may be used interchangeably with business owner.

<sup>33</sup> See s.59 of the Copyright Act 2022.

<sup>34</sup> Per Belgore J in *Oladipo Yemitan v The Daily Times (Nig.) Ltd* Suit No. fhc/11/1980; (1980) F.H.C.R. 186 at 190.

<sup>35</sup> *Ellison v Robertson* 357 F.3d 1072 (9th Cir. 2004) cited in Ursula Furi-Perry, *Social Media Law: A Handbook of Cases & Use*, 3rd edn (Chicago: ABA Book Publishing, 2019), pp 20, 23-24.

<sup>36</sup> America Online Inc is an American web portal and online service provider based in New York City.

Sometime in April 2000, after Ellison had learned of the infringing activity and received legal counsel, in compliance with the notification procedures the Digital Millennium Copyright Act requires, Ellison's counsel sent an email correspondence to agents of AOL (amongst other service providers) to notify the service providers of the infringing activity; AOL never acknowledged receipt because it claimed that it had never received the email. Ellison filed an action against AOL and others in the United States District Court for the Central District of California. After receipt of Ellison's complaint, AOL restricted its subscribers' access to the news-group at issue. AOL asserted the safe harbour limitations to liability under Title II of the Digital Millennium Copyright Act. The district court, in aligning with AOL's submissions, found that: (1) the evidence failed to establish Ellison's claims of direct and vicarious copyright infringement; (2) whether AOL was liable for contributory copyright infringement presented a triable issue of fact; (3) the evidence showed that AOL met the threshold eligibility requirement of 17 U.S.C. § 512(i) for the safe harbour limitations from liability under OCILLA (Title II of the Digital Millennium Copyright Act); and (4) AOL qualified for the 'safe harbor' limitation on liability under 17 U.S.C. § 512(a).<sup>37</sup> Ellison has appealed the district court's final pronouncement.

It is worthy of note that to be eligible for any of the four limitations on liability in Title II, a service provider<sup>38</sup> must meet the conditions for eligibility set forth in OCILLA.<sup>39</sup> The safe harbour limitations of liability only apply to a service provider that: (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures.<sup>40</sup> In the event a service provider fails to meet these threshold requirements, it is not entitled to invoke OCILLA's safe harbour limitations on liability. However, the failure of a service provider to qualify for any of the limitations to a service provider's liability does not necessarily make it liable for copyright infringement. The plaintiff must still demonstrate that they are the owner, and that the defendant has infringed or violated one or more of its

exclusive rights; and the provider may still avail itself of any of the defences, such as fair use, that are available to copyright defendants generally.<sup>41</sup>

## A comparison of jurisdictions

Although the existing copyright legislation in Britain does not provide adequate protection when faced with Internet piracy, attempts at curbing infringement have been relinquished to the courts where the law is obviously inadequate. The absence of cases against Internet piracy may be caused by loopholes in the United Kingdom (UK) law. It has been opined that a person that infringes copyright without economic benefit may not be held liable in the UK.<sup>42</sup> Lloyd argues that according to the Copyrights, Designs and Patents Act of 1988 (CDPA), copyright is infringed when a person "sells, hires, exhibits or distributes an infringing copy of a copyright work in the course of business". The author points out that this may exclude situations in which an individual is not acting in a normal course of business. As it has been discussed in this article that very often copyright infringement on cyberspace does not involve an economic incentive for the benefit of the infringer distributing the copyrighted works.

In the United States, copyright exists not to protect the integrity of the author, but to "promote the progress of Science and useful arts."<sup>43</sup> Under United States copyright laws, a monopoly is tolerated only to the extent that it offers benefits to the public i.e. "fair use": without this privilege to use copyrighted materials, copyright would not serve its constitutional purpose 'to promote the progress of Science and Useful Arts.' Thus fair use limits the copyright owner's monopoly by reserving to others the right to make reasonable uses of copyrighted materials without the specific consent of the author. The rationale behind this disposition toward the author's exclusive right over works would probably be that the public has a right to read and review intellectual property; to quote from it; to make copies of portions for personal and educational use. In the United States, another exception to the author's exclusive rights is the first sale doctrine.<sup>44</sup> Under the *first sale doctrine*, the owner of a particular copy of a copyrighted work may resell or otherwise dispose of that copy without the permission of the copyright owner. Unlike the fair use doctrine, which limits all of the exclusive rights, the first sale doctrine limits the exclusive

<sup>37</sup> Ellison has appealed the district court's final pronouncement.

<sup>38</sup> For purposes of the first limitation, relating to transitory communications, "service provider" is defined in s.512(k)(1)(A) as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." For purposes of the other three limitations, "service provider" is more broadly defined in s.512(k)(1)(B) as "a provider of online services or network access, or the operator of facilities therefor." See the U.S. Copyright Office Summary (December 1998), The Digital Millennium Copyright Act of 1998, available at: <https://www.copyright.gov/legislation/dmca.pdf>.

<sup>39</sup> Under OCILLA's four safe harbours, service providers may limit their liability for claims of copyright infringement. These safe harbours provide protection from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools.

<sup>40</sup> "Standard technical measures" are defined as measures that copyright owners use to identify or protect copyrighted works, that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers. See the U.S. Copyright Office Summary (December 1998), The Digital Millennium Copyright Act of 1998.

<sup>41</sup> See the U.S. Copyright Office Summary (December 1998), The Digital Millennium Copyright Act of 1998.

<sup>42</sup> Ian Lloyd, *Information Technology Law*, 2nd edn (London: Butterworths, 1997), p.355.

<sup>43</sup> United States Constitution art.1, §8, cl.8.

<sup>44</sup> Ferrera et al, *CyberLaw: Text & Cases (International Edition)*, 3rd edn (2011), pp.151-152.

right of distribution. In addition, it only applies where the subject matter copy was lawfully made. Advocates of a digital first sale doctrine have suggested that the first sale doctrine be expanded to cover the sale of digital works over the Internet. However, the transmission of an electronic work does not actually entail a transfer. Instead, an additional copy of the work must be created on the recipient's computer, while the original copy simultaneously remains on the sender's computer.<sup>45</sup>

Another loophole similar to that contained in the UK law (Copyrights, Designs and Patents Act) exists in the United States law (Digital Millennium Copyright Act).<sup>46</sup> The loophole became evident in the case of *United States v LaMacchia*.<sup>47</sup> The brief facts of this case are that David LaMacchia was a student who ran an electronic Bulletin Board Service (BBS) through the Internet in which he posted illegal copies of software that could be downloaded by users of the BBS. He was charged with copying and distributing illegal software. His case was dismissed because there was no commercial motive behind his activities. However, this loophole has been resolved by the 'No Electronic Theft Act 1997' (NET Act), a federal law which provides for criminal prosecution of individuals who engage in copyright infringement under certain circumstances, even when there is no monetary profit or commercial benefit from the infringement.

In conclusion, unless authors have access to meaningful and impactful legal remedies, the current state of the Internet is at risk. As one commentator stated, "if...creators do not believe that their works will be protected when they put them online, then the Internet will lack the creative content it needs to reach its true potential."<sup>48</sup> Further, the burdens placed on alleged infringers do nothing more than to restrict the free flow of information on the Internet.

## A way forward

As technologies are advancing in speed and capacity in the manner we organise our daily lives, the laws and the courts ought to keep up with the pace of such advancement. A cursory overview of the Nigerian laws enacted to combat online copyright infringement and cybercrime are lacking in the "grunt and bite" so urgently needed to scale this hurdle. The magnitude of threats is unprecedented, with the technological feasibility making it possible not only for easier piracy but also for easier distribution of the pirated works to the masses, simply by the tap of a key. The correlation between the rise of Internet-based piracy and ebbing revenue from media sales has made online copyright infringement an issue in the media and technology industries that must be "nipped at the bud". From the above article, it can be gleaned that the experiences gained from foreign government anti-piracy interventions ploughed back into constitutional and national law reforms, with regard to copyright remedies and enforcement in cyberspace, it has become imperative to synthesise these results for more effective government and private interventions. However, no one path is a panacea for the problem posed by piracy.

Finally, law and technology need to be combined for effective solutions with regard to cyberspace challenges specifically relating to copyrights. On the part of the judiciary, legal principles embedded in case laws need to be developed or settled to determine the legality of the transaction in question. Further, many such pertinent questions related to copyrights in cyberspace have to be clearly settled on a global scale. For want of internationally accepted principles relating to copyrights in cyberspace divergent national standards are bound to emerge.

<sup>45</sup> Although advocates have suggested that this problem could be addressed through the use of *transfer-and-delete* technology, the digital first sale doctrine has so far not been enacted into law.

<sup>46</sup> Andrés Guadamuz, "Copyright in Cyberspace: Building fences on the internet" (September 2004), available at: [https://www.researchgate.net/publication/228171199\\_Copyright\\_in\\_Cyberspace\\_Building\\_Fences\\_on\\_the\\_Internet](https://www.researchgate.net/publication/228171199_Copyright_in_Cyberspace_Building_Fences_on_the_Internet).

<sup>47</sup> *United States v LaMacchia* 871 F. Supp. 535 (D. Mass. 1994), available at: <https://law.justia.com/cases/federal/district-courts/F/Supp/871/535/1685837/>.

<sup>48</sup> J.M. Feder, "Copyright Office, Congress and International Issues", in *Advanced Seminar on Copyright Law 1998*, at 373, 495 (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-4035, 1998).