

BALANCING COPYRIGHT PROTECTION & CREATIVE FREEDOM IN THE DIGITAL AGE: PATHWAY FOR ADAPTATION OF CREATIVE WORKS ON DIGITAL PLATFORMS IN NIGERIA

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ABSTRACT

This work begins by giving a briefing of the concept of “intellectual property”; from which the concept of “copyright” itself is drawn, then the dynamics of protecting these copyrights are brought to light, the modes of breaching copyright are then portrayed; from which the infringement by adaptation is brought to light, the work goes further to (through an in -depth exploration of copyright principles, case laws and policy debates globally), examine what constitutes adaptation of works, the tension between protecting creator’s exclusive right and promoting creative freedom in the digital space and instances where it could constitute copyright infringement, the work also shoots briefly at examining what creative freedom ordinarily ought to look like before finally seeking to find a truce by peddling both sides with a proper balance.

KEYWORDS: Adaptation, Copyright, Creative Freedom, Intellectual Property.

INTRODUCTION

The rapid evolution of digital platforms has created a complex struggle between copyright and creative freedom in recent times. Primarily, copyright laws are established to grant creators exclusive rights to their creative works, including the sole right to adaptation. On another end, the development of digital platforms has brought about creativity since adaptation, remixing. and transformation of creative works has been made very simple and culturally pervasive.

The concept of balancing copyright protection and creative freedom in the digital age is a complex and highly debated issue across all platforms and in immeasurable spheres (especially with the emergence of social media platforms like TikTok, Instagram, X, and YouTube) which have sprung questions like “what is the sensitivity limit for creative works to enjoy legal backing?”, “what is the limit to creative freedom?”, “What extent of derivation does a creative work retain in respect of copyrights?”, “At what point is there a clash between creative freedom of one and the copyright of another?”, “Where do digital platforms need to intervene to protect copyrights?”, and “When is a creative allowed to digitally intrude on the copyright protection of another work?”.

This work therefore attempts to find a middle ground between protecting the rights of creators. and allowing for the free flow of creative information and ideas with an especial focus on the way forward for the adaptation of created works on the aforementioned digital (social media) platforms.

INTELLECTUAL PROPERTY

It is of greater advantage that the broader question “**what is Intellectual Property?**” is first answered. To this, **WIPO** is of the position that “*Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce*”.¹

On another hand, **David Bainbridge** (a world-acclaimed emeritus professor on Intellectual Property Law), refers to it as “*that area of law which concerns legal rights associated with creative effort or commercial reputation and goodwill*”.²

In the simplest of forms, Intellectual property law is the area of Law that deals with the protection of any work created by the mind or special artistic nature, talent or skill of a person. Examples are Song making, Poem writing and designs amongst others. From another lens, it is simply anything created by an individual (with the aid of their mind, creative skills or talent) which may be in form of a book, an invention, a song, a unique design etc, that such individual can legally own.

In the same vein, Intellectual property laws are the laws that grants the creators of these songs, designs, books among others, the exclusive ownership and control over that particular creation. It can be likened to possessing a physical property like a

¹ : WIPO, ‘What is Intellectual Property?’ <<https://www.wipo.int/about-ip/en/>> accessed January 21, 2024.

² : David I. Bainbridge, Intellectual Property (8th Ed. Pearson 2010).

car; the owner of a car can control who drives, cleans, enters and rents the car. In this case, they are creative works and ideas which the law restricts their duplication or profiting to the authorization of the owner.

COMPONENTS OF INTELLECTUAL PROPERTY

Simpliciter, and according to **Paul Marrett**, “...the term is used to include copyright... industrial property rights such as patent, trademark and industrial design...”.³ In Nigeria as well, with the main legislations being the **Trade Mark Act, Cap T13, LFN, 2004**, **Patent and Designs Act, Cap P2, LFN, 2004**, and the **Copyright Act, 2023**, the major components of Intellectual Property which also form the major rights include Trademark, Patent, Industrial Design, and Copyright⁴

COPYRIGHT

The term ‘copyright’ in its literal sense means the right to make copies of a work⁵, but in a more defined analysis, it is an exclusive right granted to the creator of an original literary, artistic, musical or any other form of eligible creative work ; giving them the power to control the adaptation and reproduction of such work. Copyright also extends to the activities of the copyright industries such as publishers, film makers and others involved in the production of books, films, sound recordings and broadcasts⁶. Copyright in Nigeria is regulated by the Nigerian Copyright Commission, which is also the agency responsible for protection of intellectual property rights of Nigerians in general.

TRADEMARK

Trademark is another component of Intellectual Property used in relation to goods and services. Simply put, trademark is a distinctive sign, name or symbol placed or used in relations to one trader’s good or services to distinguish them from similar goods or services supplied by other traders . In essence, they provide a link in the mind of public between the proprietor of the mark and the product which the mark is applied . In section 42 of the Nigerian Trade Mark Act Cap 436 LFN 1990, it was defined as a mark adopted in relation to any goods to distinguish it in the course of trade. One of the most popular trademarks in the world is the “Nike” sign (in alternate for the swoosh sign itself)that serves as a perfect example of a word that is a trade mark.

INDUSTRIAL DESIGN

The word Industrial design is used interchangeably for ‘Design Rights’. In a legal sense, it constitutes the ornamental aspect of an article⁷. Industrial design law is focused primarily, on protecting how the products look and appear resulting from features such as lines, colors of the products or the visual design of its objects. As defined in **Section 12** of Patent and Designs Act⁸, it is *‘any combination of lines or color or both and any three-dimensional form, whether or not associated with colors, is an industrial design if it is intended by the creator to be used as a model or pattern to be multiplied by an industrial process and is not intended solely to obtain a technical result’*. New designs help promote diverse products and are of economic value to such industries. It is important to mention that an industrial design is registrable if it is new, and it is not contrary to public order or morality⁹.

PATENT

A patent is granted under the law to protect an invention that is new or essentially better in some way than what was made before, or for a better way of making it¹⁰. It is an intellectual property right usually granted by the government of a state to an inventor that grants such inventor an exclusive right to the invention for as much as 20 years, in exchange for disclosing the details of a new innovation to the society for its ultimate benefit. The subject matter of patent rights includes products that are useful for diverse purpose including health, communication, transport etc. The effect of this protection is to prevent others from certain commercial acts of exploitation of the invention. However, an invention is patentable if it is new, results

³ : Paul Marrett, Intellectual Property Law (Sweet & Maxwell Ltd, 1996).

⁴ : Udo Udoma& Bello Osagie, ‘Intellectual Property Law, Nigeria’ <<https://www.a4id.org/wp-content/uploads/2016/12/Intellectual-Property-Law-Nigeria.pdf>> (Advocates for International Development, December, 2016) accessed November 25, 2024.

⁵: Adejoke O. Oyewunmi, *Nigerian Law of Intellectual Property*(University of Lagos Press and Bookshop Limited, 2015).

⁶: See Section 1(1) of the Copyright Act, for categories of works eligible for protection.

⁷: WIPO, ‘Industrial Designs; What is an industrial design?’ <<https://www.wipo.int/en/web/designs>> accessed November 27, 2024.

⁸: Cap 344 LFN 1990 (now LFN 2004)

⁹: Section 13.

¹⁰: F.O Babafemi, Intellectual Property, *The law of practice of copyrights, trademarks, patents and industrial designs in Nigeria*(Justinian Books Limited, 2006).

from incentive activity, and is capable of industrial application; or if it constitutes an improvement upon a patented invention¹¹.

RIGHTS UNDER COPYRIGHT

According to the World Intellectual Property Organization (WIPO), *Copyright (or author's right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings*¹².

Copyright may also be defined as the area of intellectual property that deals with protecting artistic creations; as may be derived from the wordings of the court in the celebrated case of **Finnian v. Columbia**^{13,14}: “*to every cow belongs her calf; to every book, its copy*”; to explain the rule of copyright as the (proprietary) right of an intellectual being to own the usage of its intellectually-produced work to the exclusion of unauthorized persons.

Historically, the origin of copyright can be traced to the early European printing controls, evolving with the England's Statute of Anne 1710 (which is often referred to as the first official copyright law aimed to give authors right to control and profit from their pieces).¹⁵ This was then followed by multiple treaties and agreements like the Article 27(2) of the UDHR which spells that ‘everyone has the right to protect the moral and material interest of any scientific, literary or artistic production they create’, and the Berne Convention for the Protection of Literary and Artistic Works, 1886.

The ability of man to “multiply”¹⁶ (in its interpretation to mean man's ability to “reproduce”) has flung it wings through man's innate ability to be creative (and recreate) through artistic, musical, literary, cinematographic, sound recording and broadcast works; which have now been primarily protected by Copyright laws. The rights protected are now further divided into two; **moral** rights; which protects the reputation and the integrity of the author, and **economic** rights which gives the author the right to earn profit by direct or indirect exploitation of a work¹⁷.

ECONOMIC RIGHTS UNDER COPYRIGHT

The economic right aims at securing the financial or pecuniary interests of the author by conferment of an exclusive right to exploit the work commercially. These rights usually differ from laws of the different states, but they generally include;

1. The right of Reproduction

The term ‘Reproduction’ means the making of one or more copies of a work while ‘copy’ means a reproduction in a written form, in the form of a recording or cinematograph film, or in any other material¹⁸. In **Okilo v. Dick Francis & Anor**¹⁹, the defendant's act of duplicating Okilo's tape without consent from him was held to fall within the reproduction right conferred on the plaintiff. Hence, reproduction comprises of printing, photocopying or any form of duplication of an original copyrightable work. This also includes the production or reproduction of translated version of the work as held in **Bryne v. Statist**²⁰.

2. Performance in Public

The public delivery of literary works such as lectures, speeches or sermons, public recitation or acting are all ways that which a literary work may be performed in public. In determining what the “public” is, the court will take account of relevant circumstances like the characters of the audience, the place of the performance and most importantly, if the economic right of the author have been exploited. In **Harms [Inc.] v. Martans Club**²¹, Operators of a club named ‘Embassy Club’ performed the music of the plaintiff in their club, before a hundred and fifty capacity. The court held that the performance was in public against the economic rights of the plaintiff and the decision was upheld at appeal.

¹¹: Section 1(1) Patents and Designs Act Cap 344

¹²: WIPO, “Copyright: What is copyright?” <<https://www.wipo.int/copyright/en/>> accessed October 3, 2023.

¹³: 567 A.D.

¹⁴: ‘To Every Cow its Calf, to Every Book its Copy’.

¹⁵: R. Deazley, M. Kretschmer, & L. Bently, ‘Privilege and Property: Essays on the History of Copyright’ (Cambridge, 2010) https://eprints.bournemouth.ac.uk/16089/1/_History_of_Copyright_History.pdf accessed November 25, 2024.

¹⁶: as put forth in the bible in Genesis 1:28.

¹⁷: Afolabi Elebiju & Gabriel Omoniyi, ‘Incidents: Moral Rights in Nigerian Intellectual Property Regulatory Framework’ (Ielawlegal.com, September 2021) <https://ielawlegal.com/add111pdfs/AE_GO-Incidences_Moral_Rights_in_Nigerian_Intellectual_Property_Regulatory_Framework.pdf> accessed January 21, 2024.

¹⁸: Definition of reproduction by Lord Reid in Ladbroke v. Hill (1964) 1 ALL ER 465

¹⁹: (2003-2007) 5 I.P.L.R. 243

²⁰: (1914) 1 KB 622.

²¹: (1927) 1 Ch 526.

The other form of economic right of the author of a copyrighted work includes; the right of making adaptation of the work, communication of the work to the public, receive a percentage if the work is resold, distribute the work to public, making of any cinematograph in respect of the work etc.

MORAL RIGHT UNDER COPYRIGHT

The law also protects the integrity of intellectual creations as an extension of the author's personality and these protections are termed moral rights. Unlike economic rights, the 'sacredness' of moral rights is that it cannot be transferred for temporary usage [but may be passed to creator's heir]. In view of this, the Copyright Act has provided that moral rights are exclusive to the author and are inalienable. The two major forms of moral rights recognized under the act are:

1. The right to paternity

This is also regarded as 'authorship' right. It means when a work of an author is reproduced, published, communicated or exhibited to the public, the person responsible for doing so must make sure the author's name appears on or in relation to the work, whenever reasonable.²² Hence, false credit of authorship to other persons other than the author is a moral affront and a clear legal wrong. This was exemplified in the case of **Maurice Ukaoha v. Broad-Based Mortgage Finance Limited and Anor**²³.

2. The right to integrity

This right primarily prohibits any modification, alteration or mutilation of the author's work that may potentially damage the honor or protection of such work. This can be seen in the Delhi High court case of India, **Amar Nath Sehgal v. Union of India**²⁴.

Beyond the two moral rights of integrity and paternity, other countries such as the United Kingdom recognizes two additional rights which includes; Right to object to false attribution and right to privacy²⁵

COPYRIGHT PROTECTION

In the Nigerian *Corpus juris*, the protection of this right (copyright) can be said to be rooted in **section 44** of the **1999 Constitution of the Federal Republic of Nigeria**²⁶ (by virtue of **section 30(1)** of the Act), and subsequently; the **Copyright Act (2022)**.

In line with the international automated protection, *ipso facto* **section 4** of the Act; an artist who creates any of the works above is automatically protected by copyright law without any formality (as may be derived from the wordings of the court in **Registered Trustees of Association of Hotel Proprietors of Edo state v. Copyright Society of Nigeria Ltd & Ors**²⁷). Examples of copyright works on digital platforms would then include (but not limited to) 1²⁸: written contents on LinkedIn, computer programs/codes, and lyrics of songs/spoken words; 2²⁹: songs, beats of songs, and original TikTok musical sounds; 3³⁰: NFTs, digital designs, memes, and digital drawings; 4³¹: YouTube Shorts, TikToks, animations, TEDx videos, and discovery videos; 5³²: Instagram sounds, songs³³, spoken words, and snapchat sounds; and 6³⁴: podcasts and vlogs.

Nonetheless, **section 2(1)** of the (Nigerian) **Copyright Act (2022)**³⁵ provides certain works which enjoy copyright protection including literary works, musical works, artistic works, audiovisual works, sound recordings, and broadcasts.

²²: WIPO, 'Understanding Copyright and Related Rights' <<https://www.wipo.int/publications/en/details.jsp?id=4081>> accessed November 27, 2024.

²³: (1997-2003) 4 I.P.L.R. 48.

²⁴: 2005 PTC (30) 253

²⁵: Section 85 and 85 of UK Copyright, Designs and Patents Act, 1988 (CDPA).

²⁶: which provides for the right of Nigerians to own moveable property.

²⁷: (2020) LPELR-43198 (CA).

²⁸: Being literary works by virtue of section 108(1) of the Act.

²⁹: Being musical works by virtue of section 108(1) of the Act.

³⁰: Being artistic works by virtue of section 108(1) of the Act.

³¹: Being audiovisual works by virtue of section 108(1) of the Act.

³²: Being sound recordings by virtue of section 108(1) of the Act.

³³: Okparaeké V. Egbonu 7 W.A.C.A. 53; Din V. African Newspapers Ltd (1990) 3 N.W.L.R. (Pt.137) 392 @ 408.

³⁴: Being broadcasts by virtue of section 108(1) of the Act.

³⁵: hereinafter referred to as "the Act".

Moreso, there are two conditions (spelled out in **section 2(2)** of the Act) that a work must fulfil to gain copyright protection including that the work must be fixed in a definite medium of expression and that the work must be an outcome of sufficient effort to make the work possess original character³⁶ as put forth in **Nokia West Africa Nig. Ltd v. Williams Orioha**³⁷.

FIXATION

For any work to be eligible for copyright (be it literal, musical, dramatic or artistic work), it has to be fixed in any definite form³⁸. This essential requirement emphasizes expressing ideas in a recognizable form and underlines the means of determining originality³⁹. This goes to mean that copyright does not protect 'ideas' but the expression of ideas in a particular form. In other words, Copyright will only grant protection for literary or artistic works submerged into a medium from which it can be perceived as a fact by (at least one of) the senses.

By fixation, it is contemplated that the work is expressed in some permanent form and not a transient or evanescent medium that will soon disappear from sight or memory⁴⁰. Such medium must be such that can be produced, perceived or communicated either directly or through the aid of a device. In simple terms, the medium must be clear and capable of being recognized by human senses or mechanical or electronic device. The reduction of ideas to material forms also increases the probability that a work may continue to be accessible beyond the death of the author.⁴¹

Examples of sufficient fixation includes writing something on a piece of paper or typing something into a computer and then saving that information. Fixation does not include something which is simply spoken, unless it was either previously written down or the process is being recorded [the process fixes the content in a tangible form]. Also, fixation does not have to be perceptible by a person, it just has to be capable of being perceived with the help of a machine or device.⁴²

MODES OF BREACHING COPYRIGHT

The right of the copyright owner will be deemed to have been infringed upon by any person who without the consent of the author have produced, appropriated or use such work. The Copyright Act identifies in details actions that constitutes infringement of works in Nigeria, which summarily includes any person without license or authorization of the author;

1. Reproduction or making copies of the work;
2. Public performance of the work or its substantial part;
3. Sale, distribution, public exhibition;
4. Importation for public or commercial use;
5. Publication without license;
6. Public distribution to public;
7. Making derivative, adaptation or conversion of the work; and/or
8. Translation of the work.

BURDEN & STANDARD OF PROOF

For a plaintiff to establish that defendant has breached his copyright. He has to prove that;

1. He or she possess valid copyright that has met the requirement under the Copyright Act or any other copyright law in force.
2. Establish that the reserved for him or her has been encroached on.
3. Establish that the defendant has made unlawful use of the works protected under copyright law without permission for such usage
4. Defendant's unauthorized use of copyright is clearly not justifiable under the law.

³⁶ : Becky Izioma Dike, 'Copyright Infringement In Nigeria; Tobore v Mo Abudu- A Case Study' (LinkedIn, 03 March, 2021) <<https://www.linkedin.com/pulse/intellectual-property-rights-copyright-infringement-v-becky-izioma/>> accessed October 3, 2023.

³⁷ : (2016) LPELR-40189(CA).

³⁸: Section 1(2)(b) of the copyright act.

³⁹: John O Asein, *Nigerian Copyright Law and Practice*(2nd Edition 2012) 82-83.

⁴⁰: Jennifer Heaven Mike&Greg Uloko, *Modern Approach to Intellectual Property Laws in Nigeria*(2nd edition 2022).

⁴¹: Chudi Nwabachili, *Intellectual Property Law and Practice in Nigeria*(Malthouse Press Limited, 2017).

⁴²: Dr. Tabrez Ahmad, *Significance of Fixation in Copyright Law*(2011).

Typically, proof of copyright infringement is established true direct or circumstantial evidence when a plaintiff demonstrates that the defendant had access to the original work and substantial similarity between both works⁴³. The test and proof of substantial taking also consider the similarity between words, appearances, style, language, designs or even errors to the copyrighted work. Also, two authors may rely on the same sources or even discuss the same subject matter, this was emphasized in **Franklin Mint Corp v. National Wildlife Art Exchange Inc**⁴⁴. The court in this case noted that since copyright does not cover thematic concepts, the fact that the same subject matter may be present in two or more paintings does not constitute breach in any way.

In other circumstances, prove must show that there is actually a connection between the copyrighted work, and the work that has been alleged to infringe on the original work⁴⁵. This can be carried out by showing striking resemblances between the two works or establishing that they possess similar aesthetic appeal. The plaintiff can argue his or her work precedes that of the defendant through the publication date (although this method is not so substantial), but must also prove clearly that the defendant had access to his or her work.

BREACH OF COPYRIGHT: BREACH BY ADAPTATION

The Learned **Georgewill JCA**. in the case of **MTN Nig. Communications Ltd. v. Musical Copyright Society of Nig. Ltd**⁴⁶ expatiated **section 9** of the Act on how copyright protection covers these works; in that an owner of a work *shall have the exclusive right to control the doing (in Nigeria) of any of the following acts, that is: i. Reproduce the work in any material form; ii. Publish a work; iii. Perform in public; iv. Produce, re-produce, perform or publish any translation of the work; v. Make any cinematograph film or a record in respect of the work; vi. Distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement; vii. Broadcast or communicate the work to the public by a loudspeaker or any similar device; viii. Make adaptation of the work; ix. Do in relation to any translation or an adaptation of the work, any of the acts specified in relation to the work in sub paragraphs (I) to (vii) of this paragraph.* See also **Adenuga v. Illesanmi Press and Sons Ltd**⁴⁷, and **West African Book Publishers Ltd v. Access Bank plc & Anor**⁴⁸.

Unfortunately, copyrighted works are constantly and unabatedly being infringed upon by individuals and even the media⁴⁹ either intentionally or inadvertently, and one of the most rampant forms of abrogating copyright in today's digital world would span from adaptation, and other forms of derivation of works (which is an exclusive right *per quod* **section 10(1)**).

Section 108(1) of the Act defines adaptation as the *modification of a pre-existing work from one type of work to another or altering a work within the same type to make it suitable for different conditions of exploitation and may also involve altering the composition of the work*. Adaptation is a work which is essentially the same as the original work although there may be a change in the format.⁵⁰

Section 21(3)(a) of the **Copyright, Designs and Patent Act (1988)** states that adaptation (a) *in relation to a literary work, other than a computer program or a database, or in relation to a dramatic work, (i) means a translation of the work, (ii) a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is converted into a dramatic work, and (ii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical.*

In this case, a translation is generally a derivation of an original work e.g when you convert the language in a novel from English to French, or the lyrics of a song German to English, or the scripts of a movie Portuguese to Italian etc.⁵¹ Such translation would constitute an infringement of the existing copyright in the previous work; by way of adaptation except there is authorization from the owner of the work. Moreover, in **Apple Computer, Inc. v. Mackintosh Computers Ltd.**;

⁴³: Ibid (43).

⁴⁴: 575 F.2d 62 (US Court of Appeals, 3rd Cir, 1978)

⁴⁵: Plateau Publishing and Anor v. Adophy (1968) 4 NWLR (Pt. 34) 205 pg 615-616.

⁴⁶: (2017) LPELR-50121(CA) (Pp 55 - 56 Paras B - A).

⁴⁷: (1991) 5 NWLR (pt 189) 82.

⁴⁸: (2019) LPELR-50513 (CA).

⁴⁹: Olusegun Abe, 'The Peril of Copyright Infringement and the Nigerian Media' (FRC Articles, 10 June, 2020)

<<https://www.funmirobertsandco.com/2020/06/10/peril-of-copyright-infringement/>> accessed October 3, 2023.

⁵⁰: Pournami, 'What Is 'Adaptation' Under Copyright Law?' (iPleaders, October 17, 2016)

<<https://blog.iplayers.in/adaptation-copyright-law/>> accessed January 21, 2024.

⁵¹: Prudence Etkin 'Don't Get Lost in Translation: Copyright Protection in Translated Works' (lexology, September 17, 2021) <<https://www.lexology.com/library/detail.aspx?g=743f4863-90e3-4636-97fd-8ba5814d263b>> accessed January 21, 2024.

Apple Computer, Inc. v. 115778 Canada Inc.⁵², the Court made clear that the translator's ability to exploit their rights in the translation is still subject to the rights of the author and copyright owner in the underlying work.

Adaptation could also occur in the form of converting a work from dramatic work to non-dramatic or vice versa as held in **Nova Productions Limited v. Bell Fruit Games Limited**⁵³. This could be in form of converting a novel or a piece of writing to a movie or converting a movie to written works; as is with the popular teen movie collection - "After" (inclusive of "After", "After we met", "After we collided", "After we Fell", and "After Ever Happy").

In its multidimensionality, adaptation may occur by parodying (mimicking), it could be in form of sampling, by remix⁵⁴, "sped-up" version of songs, a cover of a work⁵⁵, or conversion from one genre/surface/meaning/form to another⁵⁶. See **Music Ltd v. Sunday Pictorial Newspapers (1920) Ltd**⁵⁷ and **Tv Xtra Production Limited & Anor v. National Universities Commission & Zain Nigeria**⁵⁸. A Nigerian example of sampling would be the song "Let Nas Down" by J. Cole (2013) which sampled Fela Kuti's song "Gentleman" (1973).

In essence, adaptation takes place when: a song is being remodeled to a faster version or a beat is being twitched, or a music video is being transformed to an animated version, or the audio of a video is being replaced with another audio (e.g. replacement with funny sounds), or the background of a design or color of a design is changed.

It of great weight to note that posting something on the internet is the equivalent of publishing the work. Therefore, posting an article without permission from the owner of the copyright in the article is infringement.⁵⁹

EXCEPTIONS TO THE BREACH OF COPYRIGHT BY ADAPTATION

The question of when adaptation is permissible is very crucial and important, specifically in Copyright law. Generally, adaptation is usually permissible if they qualify as 'fair use' or transformative works. The concept of 'fair use' has been largely adopted and acknowledged in the United State, massively influencing global operations of IP.

Lord Denning in **Hubbard v. Vosper**⁶⁰ (a leading English copyright law case) on the defense of fair dealing, clarified and laid a legal test for determining its valid scope. He observed that;

*It is impossible to define what is fair dealing. It must be a question of degree. You must consider the number and extent of the quotation and extracts. Are they altogether too many or too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they convey the same information as the author for rival purpose, that may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. However, short extracts and long comments may be fair. Other consideration may come to mind also. After all, is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could decide this to be fair dealing.*⁶¹

Hence, the court would consider certain factors in the whole to determine if the use is fair. Such factors may include; the purpose of the dealing, the character of the dealing, alternatives to the dealing, the amount of the dealing, the nature of the work and essentially, and the effect of the dealing on the original work.

Although, Nigeria does not formally recognize the principle of 'fair use' under the copyright laws of the state, the concept is very much similar to the 'fair dealing' exception provided for in the Copyright Act. Under the Copyright Act ⁶², it is provided that there are certain instances where the rights given by various sections of the Act is not applicable due to the concept of 'fair dealing'. These instances include permitting reproduction or adaptation of a copyrighted work for the purpose of *research, education, criticism, report of events, quotations, government use and public reading*. All of these are permissible if it does not undermine the market of the original work as earlier mentioned under moral rights of copyright

⁵² : (1990) 2 S.C.R. 209.

⁵³ : (2006) EWHC 24 (Ch).

⁵⁴ : Itai Haroosh, 'How to Remix Any Song Legally and Never Get Sued' (13 October, 2021)

<<https://wealthysound.com/posts/how-to-remix-any-song-legally-and-never-get-sued>> accessed 03 October, 2023.

⁵⁵ : Guilda Rostama, 'Remix Culture and Amateur Creativity: A Copyright Dilemma' (WIPO Magazine, June 3, 2015)

<https://www.wipo.int/wipo_magazine/en/2015/03/article_0006.html> accessed October 3, 2023.

⁵⁶ : Guilda Rostama, 'Remix Culture and Amateur Creativity: A Copyright Dilemma' (WIPO Magazine, June 3, 2015)

<https://www.wipo.int/wipo_magazine/en/2015/03/article_0006.html> accessed October 3, 2023.

⁵⁷ : (1960) 2 Q.B. 60.

⁵⁸ : Fhc/Abj/Cs/680/2008.

⁵⁹ : US Legal, 'Enumerated Categories of Copyrightable Works: Translation' <<https://copyright.uslegal.com/enumerated-categories-of-copyrightable-works/translation/>> accessed January 21, 2024.

⁶⁰ : 2 Q.B. 84

⁶¹ : Ibid.

⁶² : The Copyright Act 2022

owners. In **Peter Obe v. Grapevine Communications Ltd**⁶³, the plaintiff sued for infringement and the defendant raised the defense of fair dealing. The picture in context is one of the plaintiff's photo documentaries of the Nigerian civil war which represents the historical importance and considered a matter of high public interest. The court ruled in favor of the defendant and the decision has been largely critiqued for failing to consider if the photographs fall within the bounds of fair dealing. See also **Associated Newspaper Group plc v. News Group Newspaper**⁶⁴.

In the U.S Supreme Court's case of **Campbell v. Acuff-Rose Music**⁶⁵, the court's judgement illustrates the value based on creative freedom specifically in the context of parody. In this legal dispute, 2 Live Crew's parody of Roy Orbison's 'Oh, Pretty Woman' was considered transformative enough to qualify as fair use. In the court's decision, it held that the adaptation's new and satirical message justified the usage of copyright works, supporting creative freedom as a tool for societal criticism. The court's reasoning represents how transformative works an adaptation can simultaneously draw from original works and input new and impactful commentary.

It is important to note that while adaptation and creative freedom are encouraged, they are solely permissible in context of substantial originality and inclusive insights. This is exemplified in the Harry Potter case of **Warner Bros v. RDR Books**⁶⁶, where the court ruled against the publication of a guide to the Harry Potter series. The adaptation provided a new and transformative format, the court determined it to be too derivative and does not sufficiently qualify as fair use. In a statement issued by Rowling favourably to the court verdict, he mentioned that; *'The proposed book took an enormous amount of my work and added virtually no original commentary of its own. Many books have been published which offer original insights into the world of Harry Potter. The Lexicon is not one of them'*⁶⁷. The ruling strengthens copyright law role in safeguarding a creator's control over their original work while making provision for nuanced adaptation.

CREATIVE FREEDOM

The existence of the 1999 Constitution of the Federal Republic of Nigeria ensures that creative freedom could be said to be a constitutionally-protected right since it is backed up by the right to freedom of expression laid in **section 39** and much further; **section 35** which protects the right to personal liberty (since it involves the liberty to uninterruptedly express artistic ideas).

It must be noted that creative freedom (or freedom of artistic creativity) is indeed the author and finisher of copyright, because it is from an unfettered creative mind that a work emanates while it is another unbound creative mind that will remix it or give the work "finesse". Moreover, according to U.S. S.C., *copyright's purpose is to promote ...free expression*.⁶⁸

At present, when one wants to create a derivative work or a creative reuse of an already protected work, very limited options exist. In order to comply with these laws, creators usually clear right associated with the use of the source material. The Berne Convention states that 'translations, adaptations, arrangement of music and other alteration of a literary work shall be protected as original works without prejudice to the copyright in the original work'⁶⁹. Even though the provisions of the article offer protections to derivative works as independent, separable artistic creations, it still requires the consent of the author of the original work where that work is not in the public domain⁷⁰.

Hence, the creative freedom is largely restricted by copyright legal provisions. It is thus imperative to both explore ways to make freedom of artistic creativity more compatible with copyright laws and access different ways to secure creative use in context of derivative works.

HOW DOES CREATIVE FREEDOM AFFECTS COPYRIGHT LAWS?

Creative freedom in every industry is central to cultural development and societal growth. By permitting creative to build upon existing works, it enables the generation of fresh ideas, innovations and inventions that reflects the values of the original work. However, the freedom must be balanced with copyright protection to protect the rights of original creators and to foster a good culture of inspiration.

In simple expression, creative freedom allows writers, artist, musicians, actors and creators of different copyrightable works to reinterpret, remake, recontextualize and reform past works giving them new meaning and trendy societal relevance.

⁶³: 40 NIPJD (FHC 1997)

⁶⁴: (1986) R.P.C 515

⁶⁵: Inc. 510 Us 569 (1994)

⁶⁶: 575 F Supp 2d 513 (SDNY 2008)

⁶⁷: John Eligon, 'Judge Rules for Rowling Against Writer Of Lexicon' (The New York Times, September 9, 2008).

⁶⁸: Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

⁶⁹: Article 2.3, Berne Convention.

⁷⁰: Paul Goldstein & P. Brent Hugenholtz, *International Copyright: Principles, Law and Practice* (Oxford University Press, 3rd Edition. 2012).

Reinterpretation is a foundational element of art and culture with historical references, showcasing how the reuse and transformation of past works have contributed to advanced cultural heritage. For example, the famous Williams Shakespeare's plays employs stories and themes from classical literature, legends and folklores. Despite this adaptation, these works are seen today as ground stone of English Literature. In the same vein, artists in modern day society use parodies and homages to reflect contemporary issues through cultural symbols.

PEDDLING COPYRIGHT PROTECTION AND ADAPTATION OF WORKS

As noted *supra*, creative freedom is the author and finisher of a copyright work and it is thereby of utmost priority that while works are protected from unfair usages, the platform for creative freedom is not snatched, and this has been assured by the Copyright Act in some ways examined below:

First, the recognition of copyright in a work does not empower the copyright owner to assert a monopoly over the idea⁷¹; as copyright protects the fixed and tangible expression of an idea but not the idea⁷². In effect, a work need not be new but be original for copyright, and that a document is protected by copyright does not mean that any other works of similar expression is automatically infringing (as with trademarks and patents⁷³). Hence, an idea may be reformed or adapted into plethora of distinct forms and not amount to copyright infringement as long as that work has had some effort expended on making it to give it an original character.

Again, the persons entitled to this protection are; by the case of **Voice Web International Limited v. Emerging Markets Telecommunication Services Ltd & Ors**⁷⁴ limited to Nigerians and foreigners whose countries have bilateral copyright agreement with Nigeria. In effect, this enables a wider range of creative freedom since works made outside the aforementioned jurisdictions are not protected.

Furthermore, **sections 20(2)**⁷⁵, **21(1)**⁷⁶, and **27(1)**⁷⁷ of the Act all provide exceptions where adaptation of works would not amount to infringement of copyright. e.g. adaptation of a work that has previously made available in Nigeria, for the purpose of retail sale with the consent or licence of the owner of the copyright.

Finally, it must also be noted that according to **section 19(1)** of the Act, copyright protection for literary, musical or artistic works lasts for only 70 years while the other works are protected for only 50 years after which a creative can even make a carbon-copy.

RECOMMENDATIONS TO FURTHER IMPROVE THE BALANCE

While different legal provisions emphasize the exclusive right of original creators, to prevent infringement, there is an essential need for flexible policies that allows for transformative and valuable adaptations. Hence, the authors' recommendations are as follows:

1. "INCREASING THE SCOPE AND UNIFORMITY OF "FAIR USAGE/FAIR DEALING"

One of the best approaches to accommodate adaptation needs in the digital age is to broaden the scope of fair use/fair dealing, to expressly support transformative works that contribute new meaning and strong social value. The transformative use doctrine that was emphasized in the case of *Campbell v Acuff-Rose Music*⁷⁸, underscoring the societal advantage of allowing works reinterpret and contextualize content with new expressions and meaning. This was stretched further to offer clarity on protection for adaptations in user generated digital context. The Copyright Act for example may be amended to accommodate a broader and detailed definition of 'fair dealing' that allows for transformative and creative adaptations of copyrightable works as protected uses.

⁷¹ : Femi Olubanwo and three others, 'Nigeria: N703 Million Damages For Copyright Infringement: An Affirmation Or Miscarriage Of Justice?' (Banwo& Ighodalo on Mondaq, August 2, 2021) <<https://www.mondaq.com/nigeria/trademark/1098178/n703-million-damages-for-copyright-infringement-an-affirmation-or-miscarriage-of-justice>> accessed October 3, 2023.

⁷² : Donoghue v. Allied Newspaper Ltd.; (1937) 3 ALL ER 503.

⁷³ : Femi Olubanwo and three others, 'Nigeria: N703 Million Damages For Copyright Infringement: An Affirmation Or Miscarriage Of Justice?' (Banwo& Ighodalo on Mondaq, August 2, 2021) <<https://www.mondaq.com/nigeria/trademark/1098178/n703-million-damages-for-copyright-infringement-an-affirmation-or-miscarriage-of-justice>> accessed October 3, 2023.

⁷⁴ : Suit No FHC/L/CS/576/2017.

⁷⁵ : for computer programs.

⁷⁶ : for literary, artistic or musical works.

⁷⁷ : for musical works.

⁷⁸ : Inc. 510 US 569 (1994)

In addition to same, the challenge of balancing copyright and creative freedom is also sponsored by jurisdictional limitations. For example, the U.S decision in *Authors Guild v Google Inc*⁷⁹ faced opposition in Europe majorly due to stricter copyright laws. Hence, harmonized copyrights and adaptation in the digital world is highly needed and also establishing fair use or dealing as a universal principle while creating a universally recognized definition of adaptation, its limitations and clear criteria to distinguish permissible adaptation and copyright infringement. By having consistent provisions on copyright and adaptation globally, these digital platforms could implement these established global standards.

2. STATUTORY LICENSING SCHEME

Also, the introduction of a *statutory licensing scheme* for digital adaptation would serve as a formal system for creators to license their works for adaptive usage on digital platforms. The scheme would typically involve a simplified process for getting permissions and also reviewed by a licensing body or a copyright authority. The system has proven successful in different context which includes music copyright, where collective management organizations like ASCAP [*American Society of Composers, Authors and Publisher*] which provides for users to license their music at a standardized rate. In the same vein, a digital adaptation license could enable a wider spread of remix culture while ensuring fair compensation.

3. PARTNERSHIP WITH PLATFORMS

In an effort to striking a balance between copyright protection and digital adaptation, lawmakers could establish clearer provisions that protect platforms from liability when they enforce reasonable copyright adherence measures. In return, these platforms would develop advanced technologies in ensuring user recognition and user education of copyright. For example, the Digital Millennium Copyright Act⁸⁰ provides for safe harbour that permits platforms to avoid liability for user uploading content if they comply with ‘notice and takedown procedures’.

CONCLUSION

The evolution of digital platforms has presented a complex challenge for copyright protection which primarily aims to grant creators exclusive rights to their works, particularly adaptation. This has put more pressure on the copyright legal frameworks to evolve to further protect copyright.

Nonetheless, according to a 2021 study by WIPO⁸¹, ‘copyright-based industries contribute more than 5 percentage of global GDP which underscores the economic impact of industries reliant on copyright. This data suggests that promoting creative freedom is advantageous to not just cultural advancement but also economic development. Summarily, while copyright law must foster the protection of creator’s copyrightable works, in the interest of national prosperity, it should also subsequently foster an environment where creativity flows, protecting both parties involved and meeting their mutual interests.

Hence, whilst the revitalization of the Nigerian Copyright Act (which opened up creative advancements) is highly-commendable⁸², to properly enhance creative freedom, the creative industry must make expedient use of Collecting Management Organizations⁸³ which usually have free membership to creatives.⁸⁴

Similarly, the Nigerian courts must by judicial activism; toe the line of their learned brothers of the U.S. Supreme Court by expanding the coast of the exception of “fair usage” in copyright infringements as was done in the landmark case of **Campbell v. Acuff-Rose**⁸⁵; as we collectively and individually rather require a balanced approach that protects the rights of creators while permitting creative adaptation in the current digital era.

⁷⁹: 804 F.3d 202

⁸⁰: DMCA 1998 US

⁸¹: World Intellectual Property Organization, World Intellectual Property Indicators 2021
<https://www.wipo.int/publication/en/details.jsp?id=4518>> accessed November 4, 2024.

⁸²: Pearl Ekong, ‘Nigeria: Intellectual Property Law In Nigeria: The Copyright Act 2022’ (Contributor from Streamsowers& Kohn, 12 June, 2023)<<https://www.mondaq.com/nigeria/copyright/1327992/intellectual-property-law-in-nigeria-the-copyright-act-2022>> accessed October 3, 2023.

⁸³: Like Musical Copyright Society of Nigeria and Performing, and Mechanical Rights Society (PMRS).

⁸⁴: MSCN, ‘Membership (Creators)’ <<https://www.mcsnnigeria.org/membership/>> accessed October 3, 2023.

⁸⁵: 510 U.S. 569 (1994).