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COPYRIGHT IN THE DIGITAL AGE: PROSPECTS AND CHALLENGES

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To:



**STAFF & STUDENTS OF THE
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“Copyright in the Digital Age: Prospects and Challenges”

-John C. Onyido, Esq.¹

A. **Introduction:** In mid-2007, I was privileged to be part of the legal team that represented the RIAA in its fight against LIMEWIRE for peer-to-peer online piracy of numerous sound recordings belonging to various artistes utilizing LimeWire’s decentralized network servers, its file-sharing software and distribution platform.² The action included claims for vicarious and contributory infringement, inducing copyright infringement, unfair competition and common law copyright infringement claims for pre-1972 sound recordings. At the heart of RIAAs claims was the fact that LimeWire had the ability to control the activities of its customers and its failure to do so disclosed complicity in the offending conduct. Prior to LimeWire, companies like Napster,³ Aimster⁴ and Grokster⁵ had occupied similar strategic positions.

And very much like those P2P networks, LimeWire developed a software program based on the Gnutella protocol that enables online transfer of files between numerous servers and user computers. Potentially, these files could be anything from regular data and personal information to music, movies and other video recordings. The problem, however, was that the files that could be transferred and were more often electronically transferred were copyrighted works distributed without license from the music labels, the record companies or their representatives who rely on the sale of these works to remain in business.⁶ LimeWire placed reliance on the Sony-Betamax decision⁷ of the US Supreme Court on the validity of a staple item of commerce with primary salutary impact on the relevant industry.

The high-speed rate and ease with which these copyrighted files can be uploaded or downloaded over the internet has increased exponentially over the years that the facts and figures of the Sony-Betamax case paled in comparison.⁸ Some have argued that failure to restrict such behavior may

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² Arista Records, LLC & Ors. v. Lime Group LLC & 3 Ors., 06 CV 5936, U.S.D.C. Southern District, NY 2006.

³ A& M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

⁴ In re: Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

⁵ MGM Studios Inc., v. Grokster, Ltd., 545 US 913 (2005).

⁶ As at 1st January 2008, LimeWire held approximately 37.19% of the P2P market share.

⁷ Sony Corp. of America v. Universal City Studios, 464 U.S. 417 [1984].

⁸ At the relevant period, the RIAA website referred to data analysis conducted by the Institute for Policy Innovation that global music piracy caused about \$12.5 billion economic losses annually, with job losses placed at 71, 060 and loss of workers earnings at \$2.7 billion. Unlike in Sony-Betamax in which time-

result in widespread use that may render other forms of music distribution like CD's, DVDs and cassettes obsolete. Indeed, the advantages of cashing in on the enormous revenue generation which online music distribution has engendered has since become apparent to the music industry who are now variously experimenting with other legitimate P2P companies regarding the use of this medium as an effective marketing tool. LimeWire operated a decentralized architectural network and did not own or control a central server for file profiling and distribution as Napster did. It merely provided its software to the public by introducing them to a free basic version that was upgradeable to a more sophisticated ad-free version with faster download capability for a negligible fee. It did not monitor the conduct of members of the public who utilized its software and had not encouraged them in any way to download or upload copyrighted music files among themselves.⁹

This brief introduction is intended as a segue to the ubiquity, complexity and challenges of the digital era and the impact of new technologies on the development of the law, i.e., Copyright law.

B. Defining the Issues: Developments in the sciences and technological knowledge have occasioned disruptions in how humans conduct their affairs and carry on business relations with each other and across geographical locations. These developments have also compelled permanent and irreversible changes to the legal landscape and the trajectory of legislative enactments and judicial decisions.¹⁰ The introduction of the printing press in the 16th century and the industrial revolution it engendered, marked the significant growth and recognition of copyrights in Europe, the UK and globally.¹¹ The introduction of player-pianos of the 1800s; radio transmitters in the 1920s; cable television in the 1960s; photocopying in the 1970s; home video cassette recorders in the 1980s and digital transmissions and downloads of the internet era triggered major turning points in the growth of copyright law. Such periodic occurrences introduced significant conceptual issues not anticipated and provided for under the legal regimes then in force.¹²

shifting was viewed by the court as a beneficial use of the VCR technology, the LimeWire protocol was being used mainly for illicit copying and sharing of copyrighted material.

⁹ In May 2010, the US District Court for the Southern District of New York found that LimeWire engaged in "pervasive online infringement", allowed and encouraged online users to engage in music piracy using the LimeWire P2P protocol. By targeting former Napster users, who were known copyright infringers, it actively promoted its software's infringing capabilities.

¹⁰ George Thuronyi, "Copyright Law and New Technologies: A Long and Complex Relationship", available at: <https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/>, accessed 28th May 2019.

¹¹ Ibid

¹² See *White-Smith Music Publishing Co. v. Apollo Co.*, 209 US 1 (1908), holding that manufacturers of music rolls for player-pianos were not liable to make royalty payments to composers as these did not form part of sheet-music but were in fact machine readable works ineligible for copyright protection. The 1909 amendment to the Copyright Act introduced statutory protection for mechanical reproductions of protected compositions whether made by machines or humans.

Whilst our daily lives are enhanced and rendered considerably more manageable through the introduction of new relational platforms and mediums of expression, they raise thorny questions of copyright exploitation and unauthorized appropriation. Some of the challenges extend to the range of exclusive rights available to copyright authors and rights-holders, use of technological tools for copyright protection, the possible impact on collective management and administration of copyrighted works arising from modern technological tools, and determining the scope of secondary liability in the new digital space are just a few.¹³ The relative ease of reproduction, distribution, transmission or retransmission and storage of copyrighted works with the use of new technologies pose additional challenges for copyright laws and administration to contend.¹⁴ With the advent of new forms of dissemination of protected materials, rights-holders have found it near impossible to regulate and control the unauthorized distribution of their works. Under the interactive functionality of the current digital dispensation, the ability of users and third parties to manipulate protected works online and on digital platforms blurs the conceptual lines between the author and users of copyrighted works as well as the authorial integrity of these works.¹⁵

C. **Multi-layered Jurisdictional Approaches:** The regulation of copyright law is generally a question of national laws and each country stipulates the boundaries of what is copyrightable, their nature, applicable rights and term of protection. Traditionally, most copyright laws provide for the protection of literary and artistic works, sound recordings and musical compositions, broadcasts and neighboring/performance rights. These traditional categories of eligible works appear ill-suited to the exigencies of the digital age.¹⁶ The mere digitization of a piece of copyrighted material may implicate two or more categories of works simultaneously or even necessitate the creation of new and more fluid categories of a *sui generis* nature deserving of discrete legal protection.¹⁷ The limitations of national legislations have given rise to an international regime of laws to address transboundary copyright issues starting firstly with the Berne Convention on Literary and Artistic Works of 1886,¹⁸ the Universal Copyright Convention established in 1952,¹⁹ the Geneva Phonograms Convention²⁰ and the Rome Convention.²¹ In 1996, the WTO Treaty introduced the TRIPS Agreement²² which stipulated certain minimum standards of protection for copyrighted works premised on the framework of the Berne

¹³ Marybeth Peters, "The Challenge of Copyright in the Digital Age", available at: <file:///C:/Users/JOHNON~1/AppData/Local/Temp/Dialnet-TheChallengeOfCopyrightInTheDigitalAge-3710016.pdf>, accessed 28th May 2019.

¹⁴ Ibid

¹⁵ Marshall A. Leaffer, Protecting Authors' Rights in a Digital Age, (1995) University of Toledo Law Review Vol 27, available at: <http://www.repository.law.indiana.edu/facpub/611>, accessed 24th May 2019.

¹⁶ Ibid at p. 4.

¹⁷ Ibid at pp.6-8.

¹⁸ 828 UNTS 221, S. Treaty Doc. No. 99-27.

¹⁹ 25 UST 1341, T.I.A.S. No. 7868 (1952).

²⁰ Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, October 29th, 1971.

²¹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 26th October 1961. 496 UNTS 43.

²² Trade Related Aspects of Intellectual Property Rights, Annex 1C of the WTO Agreement 1995.

Convention as part of the international trade in goods and services. Most of these international instruments did not directly address the special role of digital technologies and their ramifications for copyright ownership and enforcement.

The WIPO Internet treaties²³ introduced with effect from 2002 have attempted to extend the provisions of the Berne Convention and the TRIPS Agreement to these new technologies by allowing rights-holders to protect their rights through encryption technologies best suited to the needs of the Digital Age. These treaties introduced minimum requirements for the protection of copyright owners by member states of WIPO from unauthorized access and use of their works on the internet and other digital platforms by recognizing their rights to control these works and to be compensated for their use.²⁴ In addition to extending the recognized protections of copyright law to these uses, the WIPO Internet treaties also introduced the anti-circumvention provisions to all digital rights management techniques and the prohibition of intentional deletion of associated electronic digital rights management information.²⁵

The United States implemented the provisions of the WIPO Internet treaties in its DMCA enacted in 1998.²⁶ In addition to criminalizing the circumvention of technical protection measures and access control technologies adopted by copyright holders, the Digital Millennium Copyright Act (DMCA) also introduced exemptions and protections from direct and indirect liability for internet intermediaries and ISPs. The Copyright (Information Society) Directive²⁷ implements the provisions of the WIPO Internet Treaties in the European Union. This Directive distinguishes between reproduction rights and the right of communication to the public, which covers transmissions and publications distributed on the internet. Transient and incidental copying forming part of a network transmission or other legal uses are exempted for the benefit of ISPs. The anti-circumvention provisions extend to the manufacture, importation, distribution, sale and rental of devices intended for such use, specifically marketed and advertised for circumvention purposes, and have limited commercial uses other than to sidestep copyright protection measures, or are primarily designed and adapted for the purpose of enabling or facilitating such evasive measures.²⁸

Very recently, the EU issued a new Directive on Copyright in the Digital Single Market²⁹ intended to ensure “... *a well-functioning marketplace for the exploitation of works and other subject matters...taking into account in particular digital and cross-border uses of protected content.*” The measure seeks to protect copyrighted material distributed online, encouraging

²³ The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, adopted December 20th 1996.

²⁴ Articles 6, 7 and 8 WCT; Articles 7- 10 of Ch. II and 11-14 of Ch. III WPPT.

²⁵ Articles 11 and 12 WCT; Articles 15, 18 and 19 Ch. IV WPPT.

²⁶ The Digital Millennium Copyright Act of 1998 amending Title 17 of the United States Code, Pub. L. 105-304.

²⁷ The EU Copyright Directive 2001/29/EC.

²⁸ Articles 2-4, 6 and 7.

²⁹ Directive on Copyright in the Digital Single Market. Directive (EU) 2019/790 of 17th April 2019.

collaboration between content creators and internet platforms and engendering a just and more equitable distribution of profits generated from such content.³⁰

- D. **The Nigerian Position:** Under the Copyright Act³¹ literary, musical or artistic works are protectable where sufficient efforts have been expended in making the work to give it an original character and such work is fixed in a definite medium of expression (now known or later to be developed) from which it may be perceived, reproduced, or communicated either directly or by means of a machine or other device.³² This definition is clearly afflicted by all the problems and challenges which the digital era has engendered as already reviewed above. Although the Act attempts to anticipate improvements in technology and scientific knowledge, the intended flexibility and broadness are hampered by the other eligibility requirements and parameters for copyright protection stipulated in the Act.³³

Several amendments and regulations have been introduced over the years to more pointedly address these shortcomings and more of such updates are still expected to occur.³⁴ Section 21³⁵ which provides for anti-piracy measures empowers the Commission to prescribe suitable marks, labels, designs or impressions or other anti-piracy devices in connection with any works over which copyright subsists. That section proscribes the offer for sale, rental or hire, importation, possession, unauthorized replication or circumvention of anti-piracy devices. This amendment was followed up in 2006 with the introduction of the Copyright (Optical Discs) Plants Regulations,³⁶ empowering the NCC to monitor and regulate the activities of optical disc manufacturing and production plants and the importation of relevant equipment into the country. In 2010, the Commission introduced the mandatory inscription of Source Identification Codes (SIDs) on all optical discs produced in Nigeria.³⁷

The new Copyright Bill contains provisions on anti-piracy measures,³⁸ circumvention of copyright technology protection measures,³⁹ liability of ISPs for online infringing material,

³⁰ Articles 15, 17, 18, 19 and 20. This Directive comes into effect on 7th June 2021.

³¹ CAP C28 Laws of the Federation of Nigeria 2004.

³² Section 1(2).

³³ See generally, Nkem Itanyi and Chinelo Ngwu, "Expanding the Frontiers of Nigerian Copyright Laws in the Age of Social Media", *The Gravitas Review of Business & Property Law*, Vol. 9 No. 1, March 2018 pp. 96-107.

³⁴ See the proposed Copyright Bill 2015.

³⁵ Backed up by the provisions of The Copyright (Security Devices) Regulation of 7th September 1999, made pursuant to section 45(4) of the Act. See also Adejoke Oyewunmi, "Towards Sustainable Development of Nigeria's Entertainment Industry in the Digital Age: Role of Copyright Law and Administration", *NJIP* November 2011, pp. 89-94.

³⁶ Regulation No. 63 Vol. Vol. of 20th December, 2006 and the Guidelines for the (Optical Disc Plants) Regulations, initiated by the NCC as part of the Strategic Action Against Piracy (STRAP) through public enlightenment, proactive enforcement and rights administration

³⁷ Reg. 7 of the Regulations. A joint initiative of the International Federation of Phonographic Industries (IFPI) and Philips Consumer Electronics.

³⁸ Proposed Copyright Bill, Section 43.

³⁹ Section 44.

issuance of Take-Down notices,⁴⁰ empowering the Commission to block access to infringing online content, among other notable recommendations.⁴¹

- E. **Conclusion:** Under the Copyright Act, the narrow definition of broadcast and communication to the public by a loudspeaker or any other similar device does not anticipate digital transmissions which are prevalent in today's world. Similarly, the reproduction and distribution rights stipulated in the Act are also restrictive in scope. Some writers have canvassed for specific provisions that would address digital transmissions, online interactive distributions and communications to the public via cyberspace and other digital platforms in recognition and implementation of the WIPO Internet treaties.⁴²

Effective Enforcement and utilization of the relevant provisions of the Act and the Regulations highlighted in this paper is necessary to achieve the regulatory objectives of the NCC to restrict the incidence of piracy and counterfeiting in the Country. The Copyright Inspectors should be properly equipped and trained, coupled with the deployment of adequate resources for proper functioning. Appropriate border control measures and collaboration between affected agencies and parastatals would be of immense value in combating piracy of copyrighted works.⁴³ In the digital environment, however, the most effective tool of enforcement are technological tools that ensure copy protection, access control measures and digital rights management. As already remarked, the current position of our law is inadequate for addressing issues relating to digital transmissions and public performances over digital/internet platforms and the proposed amendment to the Copyright Act is intended to fill this gap.⁴⁴ There still appears to be no clear regulatory or statutory guidance for the digital transmission of ringtones on mobile devices and the extent of liability, if any, for unlawful reproduction or for public performance of these derivative works, and the liability of users, content creators and aggregators.⁴⁵

In addition to the shortcomings of extant laws, other ancillary factors that need to be addressed include: slow and lethargic legislative response, lack of domestication of international treaty obligations, poor appreciation of the unique nuances of intellectual property law and practice, need for more extensive teaching of the subject in our schools, proper training of judicial and reviewing authorities and the proper regulation of piracy through extensive enlightenment

⁴⁰ Section 47.

⁴¹ Section 48.

⁴² Oyewunmi, *supra*, pp. 95-99.

⁴³ Adewole Adedeji, "Combating Piracy Through Optical Disc Regulation in Nigeria: Prospects and Challenges", NIALS, November 2011, pp. 157-63.

⁴⁴ See the proposed Copyright Bill 2015. See also Adebambo Adewopo, "Analysis of Copyright in Digital Music: Implications for New Media Licensing for Ringtones Under the Nigerian Copyright Act", *The Gravitas Review of Business & Property Law*, Vol. 8 No. 1, March 2017, pp. 1-23.

⁴⁵ See *NCC v. Ononuju*, (FHCIL/1C/2013) on liability for the illegal download of online music utilizing a computer. But see Adewopo, *supra* at 19, arguing that any alleged performance rights in such transmissions are unknown under the Nigerian Copyright Act.

programs by rights-holders, the government and stakeholders.⁴⁶ If the country is to remain in step with advancements in new technologies, ensure that the rights of creatives and users are properly balanced, encourage the steady inflow of foreign direct investments and engender economic growth and development, we need to address these shortcomings decisively and with firm resolve.

THANK YOU FOR LISTENING!

⁴⁶ See generally, John Onyido, “You & IP Law: The System that Promotes Innovation and Creativity”, unpublished paper presented to students and members of the Faculty of Law University of Benin, 31st August, 2018.