

Subject Matter of Copyright Protection

by

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This article is a concise and comprehensive representation of the subject matter of copyright and subsistence of copyright in a ‘work’. What is obtainable in Nigeria and Ghana is herein illustrated.

1. Introduction

Copyright may be described as a set of exclusive rights in relation to cultural creations.¹ When we talk about copyright, an average individual averts his / her mind to cultural works such as literature, newspapers, drawings and photographs, artworks, films, plays and of course music. These are cultural creations and copyright protection has expanded in scope over the years to include non-aesthetic creations such as computer programs, databases and compilations. The subject matter of copyright remains an area subject to expansion as far as innovation is concerned. This writer suggests that Copyright is also the most infringed form of intellectual property in our societies. This may be as a result of its presence and value in social lives such as is seen in the entertainment industries, education, or even for pleasure.

In developing economies, the abuse of copyright in entertainment industries, photography and literature cannot be over-emphasised. The emergence of the digital world and indiscriminate use of the internet has made protection a gruesome task.

Copyright just as every property right is territorial, however, its significance and application is of an extra-territorial nature. This has led to a shift to international harmonisation of rules for the recognition, protection and enforcement of copyright through the adoption of treaties and conventions such as:

- Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement);
- Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention);
- WIPO Beijing Treaty on Audiovisual Performances 2012 (Beijing Treaty);
- International Convention for the Protection of Performers,

¹ Tanya Aplin and Jennifer Davis, ‘Intellectual Property Law: Text, Cases and Materials’ (2nd Edition, Oxford University Press 2013) p 47

- Producers of Phonograms and Broadcasting Organisations 1961 (Rome Convention);
- WIPO² Copyright Treaty 1996 (WCT) and so on.

2. Nature and Subsistence of Copyright

Copyright began life as a registered right granted to registered printing press publications until the beginning of the 20th century when it became recognised as an unregistered right.³ This means that protection arises automatically to a qualified work (not every work is subject to copyright protection as we shall consider shortly), without the need to satisfy any formalities such as registration or deposit with the Registrar-General.⁴ This nature of copyright makes it a lot easier to acquire and maintain copyright protection in a creation as compared to what is obtainable with Trademarks, Patents, Industrial Designs and so on. What this implies is that in the event of infringement and possible litigation, the burden of proof lies on the right holder

² WIPO means World Intellectual Property Law Organisation

³ For further reading S. Van Gompel, *Formalities in Copyright Law: An Analysis of their history, rationales and possible future* (The Netherlands: Kluwer, 2011)

⁴ Tanya Aplin and Jennifer Davis, 'Intellectual Property Law: Text, Cases and Materials' (2nd Edition, Oxford University Press 2013) p 62; this principle of 'no formality' was introduced at the Berlin 1908 Revision Conference.

to prove the existence of his/her copyright in a given creation by establishing the existence of the requirements of copyright protection. For copyright then to subsist the work must qualify as a work subject matter of copyright protection. Qualification is usually a question of originality and fixation.⁵

The TRIPS Agreement⁶ and WCT⁷ state that copyright protection extends to the expression of an idea not the idea. This principle forms the inherent nature of protection of copyright commonly referred to as the *idea/expression dichotomy* and has been incorporated in a number of national laws such as is found in Section 1(2) and 31 of the Copyright Act, CAP C20 LFN 2004 in Nigeria and Section 1(2) and 17 of the Copyright Act of the Republic of Ghana 2005 (Act 690). It is for the idea/expression dichotomy principle that copyright has been referred to as a rather weak intellectual property right.⁸ A prominent argument for the rationale behind this principle is the attempt to prevent monopolies by way of copyright. To illustrate this, it is possible for two individuals to independently create a concept to portray slavery in the exact manner. A

⁵ *University of London Press v University Tutorial Press* [1916] 2 Ch 601, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 291

⁶ Article 9(2) of TRIPS Agreement 1994

⁷ Article 2 of WIPO Copyright Treaty 1996

⁸ Paul Torremans, 'Intellectual Property Law' (7th Edition, Oxford University Press 2013) p 372

rather popular illustration is that two photographers can take a picture of the same scene with different choice of lens or perspective and arrive at the same result. The result of the expression is an independent creative effort of both photographers and both will have the copyright protection of their individual pictures although similar. The owner of an intellectual property has the exclusive right to do, or license to others to do, certain acts in relation to the work and may sue for infringement and obtain remedies such as injunctions and damages.⁹ The idea/expression rule of subsistence is one very difficult to prove as there exists in many cases, a gray area between the two concepts and have been subject to judge-made law.

3. Originality

Whatever the form a work takes it must be *original*. One may want to assume that a work must be *new* for it to be original. However, in Copyright Law, the word ‘originality’ does not have its ordinary meaning and have been interpreted quite loosely in the past.¹⁰ This concept of originality is flexible and considered on a case by case analysis. As already established, the ideas in the work do not need to be new but the form of its expression, be it

literary or artistic, must be an original creation of the author, in the sense that it must not have been copied from an existing source.¹¹ To illustrate, a collection of existing literary and artistic works may qualify as original. It is selection and arrangement of these existing works that is given the ‘intellectual creation’ attribute.¹² *One may wonder why this is so* but it appears the idea is to encourage the use of existing works in the society to create the non-existent. Furthermore, Copyright subsists independent of the quality or value accruing or attached to the work, or the use to which a work may be put. Therefore, a work will be protected whether or not it is considered, according to taste, a good or bad work. Different jurisdictions have either through legislation or case law adopted varying tests in the determination of *originality*. Some of these tests include labour skill and judgement¹³, minimal level of creativity¹⁴, skill and judgement¹⁵, imprint of author’s personality,

¹¹ *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273 at 291

¹² Article 2(5) of the Berne Convention for the protection of literary and artistic works, 1886

¹³ House of Lords decision in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273 at 291

¹⁴ United States Supreme Court decision in *Feist Publications v Rural Telephones* [1991] 111 S Ct 1282

¹⁵ Canadian Supreme Court decision in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 236 DLR (4th) 395; [2004] 1 S.C.R. 339

⁹ David Bainbridge and Claire Howell, Intellectual Property Law (1st Edition, Pearson Education Limited 2009) p 2

¹⁰ Ibid p 71

intellectual contribution¹⁶, personal or author's intellectual creation.¹⁷ Whatever the term adopted by a jurisdiction, 'originality' is imputed on a case by case basis on a consideration of the facts of the case presented before the courts. In *Offrey v Chief S.O. Ola*,¹⁸ the court held that a work would only be deemed to be protected if the product is a result of some substantial or real expenditure of mental or physical energies of the producer.

In determining subsistence of copyright, a line has to be drawn separating works that are subject matter of copyright from those that are not. One of the principles adopted by the courts in drawing this distinction is *de minimis non curat lex*.¹⁹ That is to say that the work is insufficiently significant to be accorded Copyright protection.

Therefore the title of a book or the name of a song or phrases such as slogans used for adverts will be considered insufficient *prima facie*.²⁰ It is said that to every general rule there is an exception, as such there are certain situations in which Copyright will be granted to a phrase if it is used in some

¹⁶ French Supreme Court Ruling in *Pachot Decision* [1986] 129 RIDA 130

¹⁷ Tanya Aplin and Jennifer Davis, 'Intellectual Property Law: Text, Cases and Materials' (2nd Edition, Oxford University Press 2013) p 94

¹⁸ (Unreported) Suit No HOS/23/68 delivered June 27 1969; see also *I.C.I.C (Directory Publishers) v Ekko Delta Ltd* [1977] F.H.C.L.R 346

¹⁹ *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1981] 3 All ER 241

²⁰ *Sinanide v La Maison Kosmeo* [1928] 139 LT 365.

extensive manner or presented in such a way it seems possible that copyright may subsist as established in *News Group Newspapers Ltd v Mirror Group Newspapers*.²¹

4. Subject Matter of Copyright Protection

Section 1 of Copyright Act, CAP C20 LFN 2004 provides for the Subject Matter of copyright to include every work or production in the literary, musical, artistic, cinematographic, sound recordings domain and broadcasts, whatever the mode or form of expression. Section 1(2) of Act 690 is of the same effect.

The following are subject to copyright protection pursuant to the Laws mentioned above:

i. Literary Works

On the face of it, this category comprises of novels, short stories, poems and any other writing irrespective of the content²², length, purpose,²³ and form²⁴. Section 51 (Interpretation Section) of the Copyright Act, 2004 provide that "literary work" includes, irrespective of

²¹ [1986] the Times, 27th July 1988.

²² Fictional or realistic stories are all subject to copyright

²³ Such as propaganda, education, amusement, advertisement and so on

²⁴ Printed, handwritten, published or unpublished as long as same is expressed in a tangible form

literary quality, any of the following works or works similar thereto:

- a) Novels, stories and poetical works;
- b) Plays, stage directions, film scenarios and broadcasting scripts;
- c) Chorographic works;
- d) Computer programmes;
- e) Textbooks, treaties, histories, biographies, essays and articles;
- f) Encyclopaedias, dictionaries, directories, and anthologies;
- g) Letters, reports and memoranda;
- h) Lectures, addresses and sermons;
- i) Law reports excluding decisions of courts;
- j) Written tables or compilations.

From the aforementioned, it is clear that a literary work need not be interpreted strictly to mean works of literature, items such as written tables (such as railway timetables, company balance sheets, actuarial tables and mileage charts) and compilations are literary works. The second requirement for protection as stipulated by Section 1 and 1(2) of CAP 28 and Act 690

respectively is the reduction of such work in a tangible form.²⁵

ii. Musical Works:

A musical work is one consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.²⁶ Musical works include songs, choruses, operas, operettas, musicals whether serious or light whether for one instrument (solos), a few instruments (sonatas) or many (orchestras). Section 51 of the Copyright Act, 2004 and Section 76 of Act 690 provide that “Musical work” means any musical composition, irrespective of musical quality and includes work composed for musical accompaniment. A musical work when produced accrues to itself two copyright protections;

- The ‘musical’ which is a protection of the singer’s choice and combination of musical notes and;
- The lyrics of the song which takes the form of a literary work.

These may be protection afforded to one or various right-holders. Where the author of the lyrics of a song is the

²⁵ Tangibility/ Tangible form simply means to fix a work in some material form. The Law requires that literary, dramatic and musical works must be recorded in writing or put down in other material medium for copyright to subsist.

²⁶ David I. Bainbridge, ‘Intellectual Property’ (8th Edition, Pearson Education 2010) p 50

composer of the harmony by which it is sung, then he/she is a single right-holder. Where there is an author of the lyrics different from the composer, the copyright in the lyrics as a literary work belongs to the author except where there exists a contract between parties stipulating otherwise. Sometimes, making an arrangement of an existing piece of music may attract its own copyright in addition to, and running alongside, the copyright subsisting in the prior work as long as it is done with the consent of the owner of copyright in the already existing work. Also, based on case law, making a new performing edition of an incomplete old work of music in the public domain²⁷ may itself be worthy of copyright protection even if few or no new notes are added.²⁸

iii. Artistic Work

The Copyright Act, 2004 and Act 690 under Section 51 and 76 respectively describe “Artistic Work” as including, irrespective of artistic quality, any of the following works or works similar thereto-

- a) Paintings, drawings, etchings, lithographs, woodcuts, engraving and prints;
- b) Maps, plans and diagrams;
- c) Works of sculpture;
- d) Photographs not comprised in a cinematograph film²⁹;
- e) Works of architecture in the form of buildings models; and
- f) Works of artistic craftsmanship, pictorial woven tissues and articles of applied handicraft and industrial Art.

Section 1(3) of the CAP 28 provides that an artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by an industrial process. This was probably intended to draw a thin line between copyright in artistic works and industrial design. Act 690 of the Republic of Ghana makes no provision for this although it includes ‘works of applied art, whether handicraft or produced on an industrial scale’ as an artistic work.

According to Jacob LJ³⁰ in describing the nature of artistic works said:

“...all the things falling
within the artistic work
category have one
thing in common in

²⁷ The public domain is generally defined as encompassing intellectual elements that are not protected by copyright or whose protection has lapsed, due to the expiration of the duration for protection; Severine Dusollier, ‘Scoping study on Copyright and Related rights and the Public Domain’ 2010 available at <https://www.wipo.int/publications/en/details.jsp?id=4143&plang=EN> accessed 21.12.2019

²⁸ *Hyperion Records Ltd v Dr Lionel Sawkins* [2005] RPC 808.

²⁹ Act 690 refers to it as an audio visual film.

³⁰ *Nova Games Ltd v Mazooma Productions Ltd* [2007] RPC 589 at para 16.

that they are all static, non-moving”.

By national laws and international conventions and treaties, there has remained the emphasis of ‘irrespective of artistic quality’ in the determination of artistic works. This is to ensure that personal taste or preference is no bar to copyright protection. It also safeguards utilitarian and functional works such as drawings for engineering equipment, photographs made for scientific or record purposes, weather charts and plans for civil engineering and building works.³¹ Just like the literary and musical works, artistic works need be original to acquire copyright protection. From the nature of such works they need not be recorded as their status or nature suggest that they are in tangible form upon existence or at creation.

iv. Dramatic Works

Part II of CAP 28 provides for *Neighbouring Rights* granted to a performer, Section 26(2) categorises Dramatic works which includes dance and mime as a form of ‘performance’. Neighbouring rights are not copyright properly so called but only derive their roots from existing copyright. They include performing, adaptation of performance, reproducing a performance in any form and broadcasting live. Act 690 of the

Republic of Ghana makes no express provision for dramatic works like CAP 28 LFN 2004. Section 76 (Interpretation section), however, provides that a ‘choreographic work’ includes forms of dance, whether or not in a dramatic form. Section 24 of Act 690 provides for the right to produce copies of sound recordings- *mechanical reproduction* rights of composers. ‘Mechanical Reproduction’ is then subsequently defined in Section 76 thus:

“Mechanical right means the right of the author to reproduce literary, dramatic or musical works in the form of sound recordings and audio-visual works produced mechanically and includes electro-acoustic and electronic procedure the rights of which are usually administered by authors, societies or other appropriate organisations”.

It appears that both jurisdictions do not recognise dramatic works as subject matter of copyright in itself nor as a form of literary or artistic work.

Dramatic works are recognised in the Berne Convention as Article 2(1) of the Berne Convention states that the expression “literary and artistic works”

³¹ David I. Bainbridge, ‘Intellectual Property’ (10th Edition, Pearson Education 2010) p 89

shall include every production in the literary, scientific and artistic domain which includes dramatic and dramatic-musical works, choreographic works and entertainments in dumb shows, cinematographic works among others. Nigeria became a party to the Convention 14th September 1993 and Ghana on 11th October 1991 as a result they are both members of the Union established by the Convention for the protection of literary and artistic works.³² Dramatic works in most developed countries are protected as rights in themselves and attract neighboring rights such as performance rights. In the United Kingdom, Section 3(1) of the Copyright, Designs and Patents Act (CDPA) 1988 describes an artistic work as including a work of dance and mime. Dramatic works under the CDPA are subject matter of copyright. The unanswered question then is- *do dramatic works require a stronger recognition in developing countries like Nigeria and Ghana?*

The nature and generally accepted definition of dramatic works suggest an overlap between dramatic works and film. One of the many questions that have arisen on dramatic works in developed countries is whether or not television formats and films fall into the

scope of dramatic works.³³ The Court of Appeal in *Norowzian v Arks Ltd*, Per Nourse LJ³⁴ held that a dramatic work is a work of action with, or without, words or music, which is capable of being performed before an audience (emphasis added). From this decision, three possibilities were identified in the relationship between a film and dramatic work. A film could be:³⁵

- a dramatic work in itself;
- a recording of a dramatic work and also a dramatic work in itself;
- a recording of something which is not a dramatic work.

This writer suggests that although dramatic works possess a level of protection in Nigeria and Ghana, there should be a clear distinction between chorographic works and performing rights from dramatic works. Performing rights are related rights to copyright. They are called related or neighbouring rights because they do not exist alone but bank on the existence on a prior work. A dramatic work must exist for a performing right to a dramatic work to exist. The context in which dramatic work is used in CAP 28 suggests a performance in form of a dramatic work (dance and mime) can be created

³² <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf> accessed 22.12.2019 at 7:22PM

³³ Tanya Aplin and Jennifer Davis, 'Intellectual Property Law: Text, Cases and Materials' (2nd Edition, Oxford University Press 2013) p 78

³⁴ (No 2) [2000] FSR 363

³⁵ David I. Bainbridge, 'Intellectual Property' (10th Edition Pearson Education 2018) p 87

from a literary, artistic and musical work but not on its own. Recent developments and advancement makes this approach ineffective as dramatic works such as dance and mime capable of being performed as established in *Norowzian case* are created and such creators should rather be empowered with performing rights. This should be a major consideration of the law makers and governments.

This approach should also be a consideration for the Republic of Ghana. As already established, dramatic works entail a lot more than being a mechanical right or form of chorography. In fact, it is this writer's view that chorography at best should be considered a form of dramatic work as dance or mime. This is because while a dramatic work could entail more works which cannot be categorised as chorography, chorography is highly limited to works which may be categorised as dramatic works. Our laws should be better constructed to acquire a wide range of protection to works worthy of protection.

v. Cinematographic Work

Another subject matter incorporated in Section 1 of CAP 28 as eligible for copyright is Cinematograph film. Pursuant to section 51 of CAP 28 “Cinematographic work” means a composition of movements for dancing

or any other patterned succession of gestures mostly created to accompany music. Cinematographic films, on the other hand, is also defined as including the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of the sound track associated with the cinematographic film. Act 690 does not provide for cinematographic films.

5. Derivative Works

‘Derivative work’ means a work resulting from adaptation, translation or other transformation of an original work in so far as it constitutes an independent creation.³⁶ Section 1 of Act 690 recognises derivative works as works eligible for copyright in Ghana. Although CAP 28 does not expressly provide for derivative works, it protects rights akin to rights over derivative works.³⁷ Generally speaking, sound recordings, films or broadcasts are usually referred to as derivative works because they are often (not always) based on original literary, dramatic, musical and artistic works.³⁸ A recording of a pop tune could have the record

³⁶ Section 76 Copyright Act of the Republic of Ghana 2005 (Act 690).

³⁷ Sections 7, 8 and 9 provide the nature of sound recording, broadcast and broadcast in cinematograph film respectively. Broadcasts are also eligible for copyright protection under section 1 of CAP 28.

³⁸ David I. Bainbridge, ‘Intellectual Property’ (10th Edition Pearson Education 2018) p 97

protected as a sound recording, each tune recorded will have musical copyright and literary copyright in any lyrics.³⁹ A recording of birds chirping, on the other hand, may qualify for protection as a sound recording but without underlying works of copyright. These works need to be protected to enable entrepreneurs or other investors involved in these areas to have right to a direct action in the case of infringement. It is worth noting that where derivative works are subject of underlying copyright works consent or license must be acquired from such existing right-holder. Where consent is not acquired, a derivative work is an infringement of copyright. Unlike original literary, musical, artistic, or dramatic works derivative works require a lesser standard of ‘originality’. Although it should be an independent work of the author (in the sense that it is not a copy of another derivative work), it need not be original otherwise it will fail.

6. Qualification

Qualification requirements of every national law must be satisfied for copyright to subsist in a work. Under CAP 28 and Act 690 of the Federal Republic of Nigeria and the Republic of Ghana, qualification is determined by the following factors:

- 1) By reference to the author by virtue of nationality or domicile and;
- 2) By reference to country of origin or first publication.

By Reference to the Author

Section 2 of the Act provides;

1. Copyright shall be conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is at the time when the work is made, a qualified person, that is to say-
 - a) An individual who is a citizen of, or is domiciled in Nigeria;⁴⁰ or
 - b) A body corporate incorporated by or under the laws of Nigeria.

By Reference to Country of Origin

Section 3 of the CAP 28 deals with qualification for copyright protection by reference to the country of origin otherwise known as country of first publication. It provides thus:

- 1) Copyright shall be conferred by this section on every work, other than a broadcast which is eligible for copyright and which-
 - a) Being a literary, artistic or musical work or a

³⁹ Ibid

⁴⁰ Section 1(2)(c) provides words to the same effect. It uses ‘ordinarily resident’ as opposed to domiciled.

- cinematograph film, is first published in Nigeria; or
- b) Being a sound recording, is made in Nigeria and which has not been the subject of copyright conferred by section 2 of this Act.

Notice that the Act excludes broadcasts from the list of qualified works by reference to country of first publication. This is as a result of the nature of broadcasts. Qualification for broadcasts is determined by reference to the country from which the broadcast is made and not the country or countries of reception. Pursuant to section 1 of CAP 28, a broadcast made in Nigeria is qualified for copyright protection. However, with the presence of international conventions, agreements or treaties, into the affairs of intellectual property protection within member states such as the Berne Convention, parties are obliged to protect works of citizens of member states who grant them similar protections in their states. Furthermore, the principle of ‘Automatic Protection’ under Article 5 (2) of the Berne Convention provides that the enjoyment and exercise of copyright must not depend on or be made conditional on any formality. This principle simply establishes that an author can claim protection in any **union country**- any country party to the Berne Convention other than the country of first publication or origin of

the work without the need to comply with any formality provided by such other countries. Irrespective of this principle, countries may require that a right-holder register their work with the copyright office, if they intend to approach national courts for copyright infringement in that country.⁴¹

Section 1(2)(c) of Act 690 provides for qualification of copyright thus:

2. Despite subsection (1), a work is not eligible for copyright unless
 - (i) Created by a citizen or a person who is ordinarily resident in the Republic;
 - (ii) First published in the Republic and in the case of a work first published outside the Republic is subsequently published in the Republic within thirty days of its publication outside the Republic or;
 - (iii) A work in respect of which the Republic has an obligation under international treaty to grant protection.

The Republic of Ghana being a member of the union under the Berne convention is also bound by the principle of automatic protection discussed above.

⁴¹ Paul L.C. Torremans, ‘The Berne Convention principles and notions of works’ WIPO, 2005 page 11.

In conclusion, after a succinct application of relevant laws and principles in the economic systems of Nigeria and Ghana as case study, it is evident that copyright protection in developing countries may not be clear cut as the law suggests. Certain subject matters of copyright do overlap in nature such as chorographic and dramatic works and some others may qualify for protection under more than one system of intellectual property protection. There appears to be evidently manifest in our laws, the adoption of certain definitions and wordings unsuitable for precision or legislative certainty. It is for this reason that a legislative review is suggested, this will enable the law makers consider the need to slightly widen the scope of copyright subject matter and protection in response to the growing creative initiatives. One way to achieve this, it is suggested, is to identify ‘dramatic works’ as independent works worthy of independent copyright protection in Nigeria, Ghana and developing nations at large. Sequel to this is the need to avoid cloning laws from developing and developed countries without considerations of the peculiar nature of the nation in which these laws are to be adopted and implemented. Legislative reform is therefore urgently needed in this area of intellectual property law to aid boost economic standards through innovations.

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