Interface of Copyright Litigation and Conflict of Laws: A Reflection on the Nigerian Copyright Act.

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Abstract

The paper has interrogated the applicable choice of legal regime in copyright litigation. It considered the situs of intangible property in conflict of laws particularly as it affects copyright infringement in the digital era. The paper has interrogated whether it is possible to rely on conflict of law's physical concepts such as lex loci contractus or lex fori or lex loci delicti in dealing with intangible goods such as copyright or shall there be formulated new rules of conflict for intellectual property concerns. The paper proceeded to adapt Professor Ginsburg's hierarchical model suggestion with a slight modification with the introduction of the lex proprietas theory. The paper also considered, possible internal conflict situations that may arise in adjudicating copyright infringements litigation in Nigeria and, the jurisdictional problems of ownership of copyright in a work (which is an incorporeal right),as against ownership of the work perse (which is ownership in the object of corporeal substance) and the corresponding conflicts imminent in the provisions of section 46 of the Copyright Act and Section 251(1) of the Constitution of Federal Republic of Nigeria[1], as well as Section 254(c)of the National Industrial Court Act as amended by the Third Alteration Act,2010 relating to disputes of Copyright Ownership made by authors' in the course of employment' and 'contracts of service or apprenticeship of simple contracts involving copyright items. The paper ended up with recommendations for amendment of the sections.

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Introduction

This paper interrogates, and in modest terms undertakes an essay on treatment of international and national choice of law problems that do arise in copyright litigation referencing the Copyright Act[2] of Nigeria. The paper extend the discourse beyond the traditional practice in conflict of laws litigations where, the choice of law rules have commanded little or no attention in intellectual property circles because intellectual property laws enforcement are traditionally limited in their territorial grants. The paper argues that, while it is incontestable that principles of choice of law for intellectual property infringements were settled during the analogue age which was characterised by the physical world, the same cannot be said today as the world moves into the digital era where the nature of the internet and its operation and *modus oparandi* has rendered geographical and political boundaries irrelevant. A person with access to a computer and the internet might engineer an infringing act or criminal act anywhere in the world. The question of which state's or country laws controls an internet relations is still developing and not well settled. In articulating these issues, the paper is anchored on the fact that, due to the fluid and intangible character in copyright proprietary divisible[3] nature, conflict related problems will continue to stare in the face of copyright which remains basically "territorial" while factors as the internet and digital technological communication have pushed acts of exploitation and infringement of copyrighted works across territorial borders thereby making intellectual property violations remain a global concern. The aim of this paper is to look into issues of jurisdiction as it relates to internet infringements. In considering the

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2 Cap C28 Laws of the Federation of Nigeria,2004

3 Divisibility in its bundle of rights; divisibility in its duration of right; divisibility of rights in geographical location.(see generally S.11(2) CRA which provide that "an assignment or testamentary disposition of copyright may be limited so as to apply to only *some of the acts which the owner of the copyright has exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area*" (emphasis added)

foregoing, the paper look into issues of which court will have jurisdiction to make decisions as to copyright jurisdiction on the internet? Which domestic law will govern the multiple acts of internet based exploitations and infringements? What are the legal huddles in integrating private international law with intellectual property law? Is it still possible to continue to rely on conflict of law's physical property concepts such as *lex loci contractus*[4] and *lex fori*[5] in dealing with intangible property dimensions or shall there be formulated new rules for Intellectual property concern? What are the legal solutions to generated internal conflicts relating to subject matter jurisdiction of copyright litigations? These and several other related issues are considered.

Nature of Copyright as Intangible Property

Copyright is the legal right granted to an author, composer, play writer or publisher for exclusive publication, production, sales or distribution of a literary, musical, artistic, dramatic or electronically produced work.[6] The Black's Law Dictionary defines it as 'a property right in an original work of authorship(such as a literary, musical, artistic, photographic or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distributes, perform and display the work.[7]

Copyright is an intangible and incorporeal kind of property which confers on the author a right to control the reproduction of his intellectual creation, conferring on him the authority to control his creation after disclosing thereby preventing others from reproducing his personal expressions without his consent.[8] The exclusive nature of copyright seeks to prevent unauthorised copying or reproduction

4 Such as questions bordering on copyright contracts simpliciter.
5 Questions bordering on procedural law, remedies and jurisdiction.
6 Webster's New College Dictionary 249
7 Olanike AV, "Strategic Action Agaist Piracy (STRAP) Revolutionising The Nigerian Copyright Sector" p30
8 Ekpere JA, "Nigerian Copyright Law and National Development: Philosophical and Economic paradigm foor the next Millennium" in Asein JO, A Decade of Copyright Law in Nigeria

of physical materials in the said field of literature, artistry, music, cinematography, broadcasting, sounding and folklore.[9] Property here does not connote physical, fixed or tangible property but rather connotes some kind of intangible property usually expressed in a given form of expression now known or later to be developed.

Copyright therefore is a property. Like Shares , real property and other assets, copyright transfers and transactions in the form of licences, assignments, testamentary bequeaths, charges and other security is of some antiquity for the living and the dead.[10] Copyright is incorporeal property. Incorporeal rights are rights that can't be seen or touched, but are still enforceable by law. Generally, incorporeal rights have to do with intangible property and unlike real property that can be physically quantified, intangible property is conceptual in nature. However, the rights associated with intangible property are just as valid as the rights associated with real property. Incorporeal rights are also known as intangible rights, and incorporeal property is also known as intangible property.

Jurisprudentially, there are two kinds of incorporeal rights, namely, *jura in re aliena* or encumbrances and *jura in re propria.* Jura in re aliena refers to incorporeal rights over corporeal things. The Incidences of such include but are not limited to leases, easements, right of ways, mortgages and servitudes. In this sense, one can have incorporeal or intangible rights over a corporeal and tangible property, such as in the right to quiet enjoyment of a property that is conferred with a valid agreement.

The second kind of incorporeal right is *jura in re propria*, which refers to the ownership of intangible property such as in copyright, patents, trademarks and other IP related rights which in this regard confers a full ownership of property which is incorporeal or intangible, and does not have a physical presence.

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9 Agbede IO,"Intangible Property Rights in Conflict of Laws" In Aremu JA, Contemporary Issues in International Law & Diplomacy (2008) 220

10 Sodipo Bankole, Copyright Law Principles, Practice & Procedure 2nd edn p 113

In general, incorporeal rights give the owner a set of legally enforceable rights, either over tangible property or over the ownership of intangible property. For example, an author who holds incorporeal rights over the copyright of his or her work has the legal right to control when and how that work can be reproduced. However, the author does not have the tangible rights over the finished book; the reader who buys that book also buys the tangible or corporeal rights over the physical book as a piece of personal property that can be bought, sold, or destroyed at the owner's discretion. In this way, incorporeal rights are different from the corporeal rights over the property carrying those incorporeal rights.

The incorporeal nature of copyright is a distinctive divisible floating right that crystallise and clutch on to and protect a work that satisfies some condition enabling the author either directly himself or through his licencees, assigns, successors in title or heirs to restrain third parties from dealing with the work by the exercise of the distinctively divisible rights either for the whole work or for a substantial part of the work that could be recognised to have been derived from the original work.[11] Copyright therefore is a bundle of distinctively divisible rights ...divisibility on the basis of the whole of the rights or some of bundle of rights the right holder is vested with; divisibility on the basis of the whole or part of the term the right will subsist; or divisibility on the basis of geographical part, that is, the state, region or part of the world.[12]

The juridical and jurisprudence of incorporeal and intangible property in Nigeria whether in copyright, patents or trademarks has continued to expand with Comparative indices to the applicability of principles of *Lis Pendes* to intangibles *res* where the courts have developed the doctrine to cover intangibles as held in **Umoh v Tita**[13] where Sanusi JCA held that "the maxim is aimed at preserving the subject matter of litigation and it applies to both tangible and

11 Sodipo Bankole (n19)
12 Ibid and Section 11(2) CRA
13 (1999) 12 NWLR pt 631 at 127

intangible res**"** in the same case, Opene JCA said, "the principle or doctrine of lis pendens is derived from the latin maxim *lis pendent lite nihil innveteur* which means nothing should change during the pendency of an action and this doctrine or maxim is aimed at preserving the subject matter of litigation and is applicable to both tangible res and intangible res." *Similarly, in Olori Motors & Co v UBN plc*[14] the Supreme Court held that, "the doctrine of lis pendis prevents the effective transfer of rights in any property (emphasis mine) in which is subject of an action pending in court during the pendency in court of an action."

The foregoing list of cases undoubtedly is indeed revolutionary and dynamic in nature. This is because, based on precedence of the long list of cases such as in **Barclays Bank v Ashiru,**[15] and **Ikeanyi v ACB**[16]**t**he doctrine of lis pendes was limited to real property and the doctrine has no application to personal property such as in copyrights and patents etcetera. The simple interpretation of these decisions is to say in unequivocal terms that, the doctrine of lis pendes is applicable to intangibles res and as such to intellectual properties[17](sic). The foregoing conclusion is hard to rebut. Incorporeal goods can equally be subject of conflict of laws in all ramifications of property.

Problem of Conflict in Intangible Property in Copyright

Conflict of laws is that part of law which comes into operation whenever the court is faced with a claim that contains a foreign element. It is only when the foreign element is present that the conflict of laws situation will arise.[18] The conflict of laws has three main objectives, first, to prescribe the conditions under which

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14 (2006) MJSC at 55
15 (1978) NSCC at 355
16 (1991)7 NWLR pt 205 626
17 Adebayo Akinropo O, "The applicability of Lis Pendes to intangible Res" in Ojo & Oke and Onamade, Cross- Cctting Issues in Nigerian Law (2007) Showers IMC Press) 107
18 AA Ijohor "Recognition and Enforcement of Foreign Judgements in Nigeria" pp2-3

the court is competent to entertain such a claim. Secondly, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained. Thirdly, to specify the circumstances in which a foreign judgement can be recognised as decisive of the question in dispute and the right vested in judgement can be enforced.[19]

Contravening the above summary of the scope of conflict of laws, it can be rightly observed that conflict of laws occurs at two levels, namely, the first one is international conflict of laws situation, and this is where the law of one country is competing with the law of another country to govern an issue before the court, while the second one is the internal conflict of law, here the clash is between two or more different laws within a country.[20] Drawing from the going proposition, there is hardly any type of property rights that deserves international protection than those of authors and by extension copyright on literary, musical, artistic, cinematograph films, sounds recording and broadcast works of (a) an individual who is a citizen of Nigeria or is domiciled in Nigeria [21](b) any person whose work is first published in Nigeria[22](and this includes a foreigner or non Nigerian) (c) the work is first published in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party; by the United Nations or any of its specialised agencies; by the Organisation of African Unity; or by the Economic Community of West African States[23]. The problem is further captured by Agbede where he argued that, the possibility of unauthorised use of their works transcend national boundaries and has indeed assumed a global dimension with the advent of modern technology (radio, television, and internet connectivity). It is understandable therefore that the Nigerian current enactment on this

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19 D Prosser Ïnterstate Publication"as quoted in AA Ijohor (n4) p3

20 Kera Farida Aisha "The Role of a Judge in Conflict of Laws" (2015) Vol 29-35 ABULJ

21 Section 2(1) CRA Cap C28 LFN 2004

22 Section 2(3) and 3(1) Ibid

23 Section 5(1)(a)and (b) ibid

issue makes provision, like many other national laws, for the protection of foreign –protected rights on a reciprocal basis on the threefold principle of equal treatment, union priority, and common rules.[24]

General rules and application of Conflict of Laws

Matters of conflict of laws are hinged purely on the choice of applicable law with a view to ascertaining the lex causae (the applicable law). Once a matter has been classified, then the next step is to select the appropriate law. In selecting the appropriate law, certain conflict rules have being formulated namely: Rule One: Succession to immovable or landed property will be governed by the law of the situs *(lex Situs)* being the law where the property is situated. The connecting factors for selecting the applicable law is the personal law namely, the *lex domicile* (which is the place of domicile).Rule Two: Validity of marriage is governed by the law of the place of celebration while capacity to marry is governed by the law of the parties(domicile of the contracting person). Rule Three: In contract of sale of goods, the parties may agree upon a chosen however, in the absence of such a choice, the application is *lex loci contractus* it being the law of the place where a contract is made or has the greatest attachment or *lex loci solutionis* being the law of the place where a contract is to be performed. Rule Four: In monetary debts, the law of the country in whose currency a debt is expressed (lex monetae) is the applicable rule of conflict. Rule Five: Questions bordering on procedural law, remedies and jurisdiction are governed by the *lex fori* which meaning and purpose the court stated in ***Ramon v Jinadu***[25] that, 'there is no doubt that in conflict of laws, matters of procedure are those for the forum and are governed by the lex fori. But procedure in this respect, remedies for process, damages, limitation of action, evidence, priorities, setoff and counter-claims and costs'. Rule Six: In determining the substantive law governing

[24] I O Agbede(n8)
[25] (1986)5 NWLR(Pt39) 100 as culled from Bankole Sodipo (n) 315

the infringement issues, courts in general apply the torts conflict of laws principle of *lex loci delicti* which means 'place of the wrong'. Under this principle, the court applies the law of the country in which the infringement occurred. Poser? What then will be the applicable conflict of laws in intellectual property being an intangible property right that is territorially-based? Is it still possible to continue to rely on conflict of law's physical concepts such as *lex loci contractus*[26] and *lex fori*[27] *or lex loci delicti* in dealing with intangible goods or shall there be formulated new rules for Intellectual property concern. To appreciate the immediate and remote concerns on these issues, the conflict scenario in intangible property laws is graphically captured by learned Agbede[28] thus;

> Transborder disputes in respect of intangible property rights may arise from infringement of rights over a registered trademark, design, patent, or a grant of copyright or by way of a transfer or transmission of these rights. Such disputes will normally call to question issues of jurisdiction of courts; the ascertainment of the applicable law, and the enforcement of the ultimate judgements. Claims in respect of intangible property are generally territorial. Consequently, cases in this respect were few and far between not only in Nigeria but also in common law jurisdictions. However, with the modern trend of globalisation, the situation has taken a different dimension. The future poses increasing challenges.

The foregoing analysis of the learned professor is apt and accurate. The question one would ask is, how would conflict of law

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26 Such as questions bordering on copyright contracts simpliciter.

27 Questions bordering on procedural law, remedies and jurisdiction.

28 Agbede IO Intangible Property Rights in the Conflict of Law in Aremu JA, Contemporary Issues in International Law & Diplomacy(being Essays in honour of Amb MT Mbu) Lagos: Total Communications Ventures 220

answer to such a dilemma of intellectual property scenario? If intellectual property is territorially limited, then it means that the '*situs*' of such claim is the territory in which the incorporeal right is registered but that being the case, it then means that, a foreign author or owner of a patent or copyright or trademark proprietor registered abroad will not have the right to sue in a Nigerian court because same being viewed as a right in rem and common law will not permit. However, if a claim from such registration arises in personam, the conflict of law rules in tort action will apply in line with the case of *Benson v Ashiru*[29] where the principle demands that, a defendant will will be liable for a tort committed abroad if and only if two conditions are satisfied namely:

(a) The wrong is of such a character that it would have actionable if committed in Nigeria and (b) that the act must not have been justifiable by law of the place where it was done.

The above discourse has made Agbede to argue succinctly that, under intellectual property rights, an infringement of a registered trademark, design, patent, or a grant of copyright is a claim in tort and consequently, the choice of law rule is the so called 'double liability' rule enunciated in *Benson v Ashiru* and proceeds to argue that, a right that is not protected under Nigerian law will not satisfy the first condition except as it may be altered by an international treaty or agreement or there is a reciprocal agreement to that effect. He hold the view further that, equally without protection will be an infringement abroad if the right is not equally protected in such a foreign country in the absence of a reciprocal arrangement to the contrary...[30]

Copyright interface with Conflict of Laws.

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29 (1967) NMLR 363

30 Agbede I O (n15)

Conflict of laws otherwise called 'private international law and intellectual property have a long history of neglected or even avoided relationship'. According to Boschiero,[31] the reasons for the avoidance is more historical in that, as far as the late nineteenth century, the vast majority of intellectual property disputes were domestic in nature: ownership or infringement issues hadn't the potential of reaching the whole world, concerning parties established within a single national territory and rights conferred by the law of that territory and infringements that mostly took place there.[32] The implication of the foregoing scenario is that, cross-border or transnational IP disputes, involving foreign elements were rare and resolved by the courts through the standard principles embodied into the multinational treaties establishing an international protection system for intellectual property, namely the Principle of territoriality as reinforced by the principle of national treatment and independence of national rights. The territorial principle also known as territoriality principle itself being a principle of Public International law under which a sovereign state is given legal authority to exercise jurisdiction in a case, due location of the crime . The principle also bars states from exercising jurisdiction beyond its borders, though with some possible exceptions[33] including the principle of nationality, passive personality principle, the protective principle and possibly the universal jurisdiction in extreme cases of rights violations. The implication and application of the territoriality thus developed on the limitation that the scope of IPR is limited to the

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31 Nerina Boschiero, Intellectual Property in the light of the European Conflict of Laws http.www.intellectual property and conflict of laws(visited 20/8/2018)

32 Nerina Boschiero (n5)

33 For instance, the S.S. Lotus case was a key court ruling on the territoriality principle. In 1926, a French vessel collided with a Turkish vessel, causing the death of several Turkish nationals. The Permanent Court of International Justice ruled that Turkey had jurisdiction to try the French naval lieutenant for criminal negligence, even though the incident happened beyond Turkey's boundaries. This case extended the territoriality principle to cover cases that happen outside a state's boundaries, but have a substantial effect on the state's interests or involve its citizens.

territory for which they have being granted. This is even so even if "parallel "rights relating to the identical intangible objects may exist in various countries, they are "independent" of one another (principle of independence)

Conversely, the narratives have changed in the contemporary world. The old order in which infringement of copyrighted works took place successively, one country at a time, by means of tangible copies of work and not simultaneously by means of "intangibles" is gone. Creative works cross borders. Copyright is not necessarily exploited at the national level; it is, in fact, exploited at a global level. Video cassettes and compact discs(CDs) containing materials protected by copyright are marketed in an increasing number of countries; Patents in CD technology were exploited whenever a CD – pressing plant was built,...the Coca Cola trademark is found on cans and bottles all over the world.[34] With reference to copyright matters, copyrighted works can be disseminated and infringed on the internet at an alarming and explosive speed and quality..... Conflict of laws will arise on important issues in litigation and transactions. In cross border cases, claimants often shop for forums. The reason is obvious; forum law normally includes the court's jurisdictional, procedural and conflict laws.

The waves of digitalisation, global trading patterns and indeed forces of globalisation has destroyed the bricks and walls of physical territorial limitation thereby increased conflicts involving trans-border elements in the contemporary world thereby forcing the two areas of intellectual property and private international laws that are historically characterised by little or no interaction to confront each other and crave for the need to harmonise. Questions of jurisdiction and choice of law have become increasingly important in the field of intellectual property law since markets have become increasingly "global," while copyright laws remain basically "territorial" hence there is no international copyright nor

[34] Paul Torremans, Intellectual Property Law 5th edn (Oxford University Press)27

supranational copyright system, rather, there are splinter copyright laws in each country such as Nigeria's Copyright Act Cap C28 Laws of the Federation of Nigeria (LFN) 2004.

The existing legal framework for deciding jurisdiction and choice of law rules for copyright law is derived from two sources namely, (a) Copyright rules(domestic laws and international instruments on copyright); and (b) Private International Law rules (rules on jurisdiction and choice of law provided in domestic laws and international instruments).[35] In buttressing further on this issue, Xalabarder,[36] has argued that, there is no "international" copyright law, just numerous domestic laws applied within the boundaries of their respective domestic territories. International efforts developed in the 19th century at bilateral, regional, and worldwide levels to ensure the protection of copyrighted works outside the boundaries of nations. The most important was the Berne Convention for the Protection of Literary and Artistic Works of 1886.[37] Intellectual Property Rights have always been regarded as territorial and the international conventions were built upon that concept.

Relying on the postulations of Xalabarder further, private international law addresses problems that arise from the territorial nature of legal systems, in particular, problems of attributing jurisdiction to national courts, and of determining applicable domestic law. No international convention has been adopted globally in the areas of jurisdiction, choice of law and the enforcement of foreign judgements. Some "regional" Conventions[38] attempted have covered issues of jurisdiction and enforcement in civil matters but within Europe alone (not applicable to Africa nor Nigeria) while other Conventions[39] provide for choice of law rules on contract. At best, these rules provide additional general rules on jurisdiction and

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35 Raquel Xalabarder, "Copyright: Choice of Law and Jurisdiction in the Digital Age" (2002)vol 8 issue 1 Annual Survey of International & Comparative Law 80

36 Raquel Xalabarder,(n9)

37 Herein called the Berne Convention

38 Brussels and Lugano Conventions

39 Rome Convention

choice of law rules for torts however, there are no rules expressly for jurisdiction and choice of law for copyright infringement cases and even then these instruments are not sufficient to ensure uniform solutions for the international protection of copyrighted works. [40]

Choice of Law Dilemma under the Berne Convention and Trade Related aspects of Intellectual Property Rights (TRIPS)

The Berne Convention is the precursor of today's copyright protection initiated in 1886. The Berne convention is angled on certain provisions that seemingly raises the choice of law issues under Private International law notably in its Article 5.1(National Treatment) and 5.2 (Choice of Law).

Article 5.1 provides to the effect that, in addition to the minimal protection that must be granted within any member state to any foreign works, the Berne Convention relies on the principle of "national treatment". This principle is a principle of non-discrimination which enforces that, authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

Indeed, the International Convention in the field of intellectual property forming the public international law namely, the Paris Convention for the Protection of Industrial Property Right, 1883 (the Paris Convention), the Berne Convention for the Protection of Literary and Artistic work, 1886 (the Berne Convention), and Trade Related Aspects of Intellectual Property Rights, 1995 (the TRIPS) agreement are built around two pillars, national treatment, fortified by the most favoured nation treatment and minimum substantive standards of protection. The "National treatment" clause is construed to imply a duty of non discrimination. However, this duty of non discrimination is very doubtful and less relevant to an

[40] Raquel Xalabarder,(n9) 80

indigenous inventor or creator. The duty only requires the application of the same substantive law to foreigners and to the national, thus playing to the gallery the applicable law as defined in application of the national conflict of law rules. An application and interpretation of the national treatment clause encapsulated in the international conventions[41] as demanding the application of the law of the country of origin. Opinion by academics and commentators is varied as to whether this principle is a complete choice of law rule since it does not solve the question of what applicable law will apply when protection is sought for a country from a non-forum country. Other writers argue that the Article implore the application of the *country of origin rule.* Writers such as Nimmer maintained that, national treatment is a choice of law provision and that it should govern all elements of infringement action, regardless of the nationality of the author, the country of origin of the copyrighted work or the place of first publication.[42] While Nimmer was undoubtedly a leading authority on copyright, his interpretation was unconvincing in that it had the possibility of creating multiple ownership laws and a change of ownership every time the work crosses a country's borders. Thus, some commentators and courts have rejected his interpretation. Instead, they consider national treatment as a non-discrimination device, restricting a country's ability to enact laws that treat domestic authors more favourably than foreign authors. Other scholars on the contrary hold the view that the courts are to apply the law of the country of protection *(lex loci protectionis)*[43]. The foregoing proposition is further supported by WIPO[44] which explains the import of the Article 5.2 that;

> The rights that are claimed by virtue of the convention i.e. the convention minima…in this

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41 Article 5.1 BERNE Convention; Article 2 of Paris Convention; Article 3.1 of the TRIPS

42 Nimmer"Melville as quoted in Yu Peter, "Conflict of Laws Issues in International Copyright cases

43 Boschinro (n18) p.17

44 WIPO Guide to the Berne Convention

> respect article 5.2 concerns itself only with two areas; (1) the extent of protection, and (2) the means of redress". The guide indicate that in those two areas "the law of the country where protection is claimed" shall govern exclusively unless the parties have agreed that another law should apply by the way of a forum selection clause[45].

This authoritative explanation strongly supports the initial proposition that there exist a total resembling of conflict principles found in all the international instruments of substantive public international law in intellectual property, which do not purposefully address the private international law question on which law to apply to intellectual property right infringements. The foregoing are of importance to copyright protection in all its ramifications. The issues relate to instances of infringement that occur in countries where there exist no bilateral agreement in such regard. The issue also extend to matters as to what remedy the intellectual property protecting these forms of knowledge can offer. The conflict of law question in this instance is clear in that, in all such cases of misappropriation, reproduction, mutilation, publication, without the appropriate authorisation, the plaintiff can only sue where the infringement has occurred and this is regulated by the *lex loci commissi delicti*, the *lex loci protectionis* is claimed and the law of the forum.

In yet another sophisticated doctrinal construction, Elger[46] postulated that, it is impossible for any choice of law rule to exist in view of the divergence of national laws view regulating the same judicial relationship which same is underlined by principles of territoriality in expressing private international law principle. He argued that, in view of the way each legal order grants these rights, there could be no such thing as an "international copyright", even under international copyrights law, neither a truly international

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45 Ibid

46 Elger op.cit p. 1112

trademark nor an international patent. Comparatively, there exist also provisions of "National Treatment" under Human Rights with different amplifications and scope of protection. Under international and regional instruments on Human Rights, this principle is known as the Principle of Non-discrimination. Non-discrimination in Intellectual Property shows a number of differences as compared to non-discrimination under human rights. The differences lead to the question of how the two sets of non-discrimination rules relate to each other and which rule of non-discrimination protects better authors and owners of copyrighted works.

Under non-discrimination principle of human rights, an extensive definition of non-discrimination includes non-discrimination such as to race, colour, religion, national or social origin and the like. In addition provisions relating to the equality before the law are made in most of the Treaties on human rights. For example, non-discrimination clauses exist in virtually all International and Regional Treaties (except the European Social Charter) such as under the Universal Declaration on Human Rights 1948[47], (UDHR) Article 2.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[48]. The International Covenant on Civil and Political Rights (ICCPR)[49], The European Convention for the Protection of Human Rights and Fundamental Freedoms[50], the American Convention on Human Rights[51], The African Charter on Human and Peoples Rights[52]. Equality before the law has been laid down as a human right in Article 7 of the UDHR; Articles 14.1 and 26 of the ICCPR; Article 24 of the American Convention on Human Rights, Article 2 of the American Declaration of the Rights and Duties of Man and Article 3 of the African Charter on Human and Peoples' Rights. The foregoing

47 Article 2
48 Article 2.2 ICESCR
49 Article 2.1 ICCPR
50 Article 14
51 Article 2.2
52 Article 2 Banjul Chapter

provisions on non-discrimination apply to the rights recognized in the respective treaties and declarations.

Deduced from the foregoing and using the beneficial rules of interpretation, while folklore and indigenous forms of knowledge of intellectual property rights are not explicitly mentioned in these treaties and declarations (except the African Charter on Human and Peoples' Rights), they may be covered by provisions on the human rights of people and by extension of the same reasoning, even those instances or hurdles of these forms of knowledge of the African people that are discriminated or capable of being discriminated upon under the Intellectual Property Convention on grounds of lack of reciprocity or long accepted provisions of national laws of member states regarding the status of foreign right holders or right of communities holders in the area of intellectual property may no longer be applied to the extent to which this would amount to discrimination.

On the second pillar upon which the Public International law of Intellectual Property is built being the Minimum Substantive Standard of protection, the reasons are clear and simple. The operation of national treatment without the Minimum Standard of Substantive protection would imply an inadequate level of protection afforded by a member country to its own right holders. In this direction, the TRIPS has provided for the most favoured nation principle[53] which obliges the treatment to be meted out to nationals to members. This principle of "most favoured nation" implies that any advantage, favour, privilege or immunity with regards to the protection of intellectual property shall immediately and unconditionally be accorded to nationals of all other members. However, MFN principle does not oblige a state to recognize another state's standard and thus the principle appears less weighty. It thereby follows that the requirement of the application of the same substantive law to foreigners and to the nationals based on National

[53] Article 3 and 4 of TRIPS

Treatment and Most Favoured Nation Clause principle relates to the law of the protecting country as the applicable law and this equally has a choice of law rule incidental to trans border protection of indigenous forms of knowledge and folklore beyond the protecting African State or Country.

In a further assertion in proof of the foregoing discourse, the Paris Convention, for instance, determines the personal scope of application of the 'National Treatment' and Minimum Substantive Standard application on the basis of nationality and beneficiaries of the protection by virtue of the Convention are limited to; (i) nationals (ii) nationals of any member country of the known[54] and (iii) nationals of countries outside the union provided that they are domiciled or have a real and effective establishment in the territory of one of the countries of the union[55], with respect to Berne Convention, the National Treatment beneficiaries are (i) nationals of one of the countries (ii) Non nationals whose work are first published in one of those countries or nationals who have their habitual residence in such a country[56].On a whole, the fundamental question as to "which law applies" in infringement proceedings largely remains unanswered by Private International Law or choice of law option and the intellectual property "Public International" Laws (Conventions) have equally failed to provide any guidelines on the issue of choice of law on intellectual property rights infringements.

These uncertainties, together with the inadequacy of the International Intellectual Property System in protecting adequately the copyright system outside the scope and territory of the granting state showcase the need to develop a comparative and coherent Public Private International Law for intellectual property. The framework must include a well agreed policy and institutional framework that recognizes the diverse international, domestic law making and enforcement mechanisms in which state and community

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54 Article 2.1 (a) and (b) of the Convention
55 Article 3 Ibid
56 Article 3 and 4 Berne Convention 1886

actors generate new rules, norms and enforcement strategies.

Conflict and choice of law elements in Copyright Act Cap of Nigeria.

There exist a plethora of provisions of the Nigerian Act that have conflict of laws connotation and implication and as Sodipo[57] has pointed out, situations may exist where laws conflict due to the applicability of foreign laws arising from questions relating to the copyright ability of works, ownership in the works, transfer of copyright in the works, jurisdictions, remedies and the like. The Act has provided for eligible works to mean, literary works, musical works, artistic works, cinematograph films, sound recording and broadcast.[58] This is more so applicable to copyright than in all other IP related subjects because of the possibility of unauthorised use of works that transcend national boundaries and has assumed a global dimension with the advent of modern technology such as the computer, internet and other virtual world of digital networks and platforms. This scenario makes persons exploiting and consuming copyrighted products to be reasonably connected to justify the application of a specific national copyright law. In this regard, the *situs* of the claim would only be the country where the right is protected and this will ultimately create a conflict of law implication for the section where the right is protected.

Section 2(1) of the Act is another curious provision. It provide that, "Copyright shall be conferred by this section on every wok eligible for copyright of which the author or in the case of a work of joint authorship, any of the author is...a qualified person, that is to say (i) an individual who is a citizen of, or *domiciled*[59] in Nigeria"(emphasis mine). The qualification of domicile is argued to mean the permanent abode or home of a party as held in *Sodipo v*

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57 Bankole Sodipo (n19)

58 Section 1(1)

59 Domicile of origin? Domicile of Choice? Domicile of Matrimony? It is however interesting to note that, the said clause is suggested in the proposed Copyright Bill to reflect Habitual Residence

Sodipo[60] as well as *Koku v Koku*[61]that it means a place at which he intend to return and remain even though he may currently be residing elsewhere. A person who is not a citizen of Nigeria may have copyright conferred on his eligible work by this section if he is domiciled in Nigeria but not if he is merely resident in Nigeria. This is irrespective of where the work was published or made.[62] The foregoing section 2(1) is further supported by Section 3(1) which provides that, "copyright shall be conferred by this section on every work... (a) Being a literary, musical or artistic work or cinematograph film, is first published in Nigeria; or (b) being a sound recording, is made in Nigeria ..."

The provisions of Section 4(A)[63] of the Act provide that; "Copyright shall be conferred by this section on every work if-

(a) On this date of its first publication atleast one of the authors is-(i) a citizen of or domiciled in, or (ii) a body corporate established by or under the laws of a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party; (b) the work is first published-(i) in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party...."

The fore going provision relate to qualifying factor which, unlike the other two requirements, applies to all categories of works. The required connection contemplated by the Act may be by virtue of the status of the author, the place of first publication of the work or by reference to international agreements ...are all deemed to have the requisite nexus.[64]The third basis which is quintessential purpose to conflict of laws and copyright is qualification by reference to international treaties and agreements. This provisions are in fulfilment of Nigeria's obligation under various international

60 (1990) NBRN 98
61 (1999)8 NWLR pt 616 at 672
62 Bankole Sodipo (n19)
63 Otherwise referred as section 41
64 Adejoke Oyewunmi, Nigerian Law of Intellectual Property p44

agreements namely, Berne, Universal Copyright Convention (UCC), Trade Related Aspects of Intellectual Property Rights (Trips), United Nations, African Union (AU) etcetera. The section is relevant to the issue of reciprocal extension of protection by virtue of international agreement to which Nigeria is a party and the minister is satisfied that the country in question provides for protection of copyright in works which are protected under Nigerian copyright law, the minister may, by Order in the federal Gazette extend the application of the Nigerian copyright Act in respect of all or all of the categories of work eligible for copyright protection.

The issues of protection of foreign works came up for consideration in the Nigerian case of *Microsoft Corporation v Franike Associate Ltd*[65] where the court held although *per incuriam* that the said foreign copyright in Nigeria was not subject to reciprocal protection in Nigeria. Other cases include *Societe Bic S.A. v Charzin Industries Ltd & Others*.[66] These cases have to do with Copyright (Reciprocal Extension) Order which provides reciprocal extension of copyright protection to individuals who are citizens of or domiciled in member countries. These and other provisions of the Act lend support to the conflict of laws application because in conflict of conflict of laws, once at any time a foreign element is involved, the court would have to determine which legal system to apply. Thus in any conflict action, the following questions are determined by the forum court (a) The question on jurisdiction and cause of action. (b) The classification of subject matter of the suit. (c) Selection of the applicable law. (d) Application of the applicable law.

Copyright Contracts and Employments and Jurisdiction of the Federal High Court.

In Nigeria, the Federal High Court has exclusive jurisdiction over all civil and criminal causes and disputes arising from the

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65 (2011) LPELR 8987(CA)

66 (1990-1997)3 IPLR 335.

copyright Act[67] and despite the exclusive jurisdiction of the Federal High Court (FHC), State High Courts (SHC), have continued and would in some situation continue to entertain actions on contractual obligations that have effect on contracts for copyright (as against contracts of copyright) and by extension, the National Industrial Court(NIC) would in appropriate cases be called upon to determine copyright contract of service or contract for service for purposes of determining questions of ownership of copyright made by the author 'in the course of his employment ...under a contract of service or apprenticeship...'[68] For clarity of purpose, section 251(1) of the constitution provides thus, "...the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters... any federal enactment relating to copyright, patent, designs, trademark and passing off, industrial designs and merchandise marks, business names, commercial and industrial monopolies and trusts, standards of goods and commodities and industrial standards"[69] Under the CRA, section 46 provides "The Federal High Court shall have exclusive jurisdiction for the trial of offences or disputes under the this Act".

The fore going discourse is not mere rhetoric because there exist cases where the Federal High Court declined jurisdiction in a number of copyright disputes where the claim was for breach of copyright and other rights granted by the Act on the ground that they involved breach of contract simplicita.[70] This is so because of the peculiar nature of copyright being incorporeal and divisible in nature. In copyright, every work subject matter of copyright has two proprietary interests, ownership of copyright in a work in which copyright subsists and the ownership of the work per se. This analogy will suggest that the purchaser of a book acquires ownership of the book per se by virtue of his purchase but he is not the

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67 Sections 251 of the 1999 Constitution (as amended); 46 CRA Cap C28 LFN 2004

68 Section 10 (3) CRA 2004

69 Section 251(1)(f) CFRN 1999 (as amended)

70 Azion ResourcesLtd v Deputy Governor, Lagos State FHC/IKJ/CS/204/12 see also Rediscover Nigeria Ltd v Skye Bank Plc FHC/L/CS/640/09

copyright holder[71] to enable him sue in the Federal High Court for theft of the book as an intellectual property because it is nonexistent. Equally true is the fact that, the owner of copyright in a painting may not be the owner of the painting[72]. Copyright law makes ownership and authorship distinctive in all works of copyright namely, literary, musical, artistic, cinematograph film and sound recording.

In the same vein, Sodipo, has submitted that, the test to determine whether the Federal High Court has jurisdiction is whether the claim raises issues such as the ownership of copyright, whether a party has exercised a right that is the exclusive preserve of the author of a work subject matter of copyright, whether an act was properly licenced and the like, and issues of contracts that can only be adjudicated on by a court that has jurisdiction to interpret the copyright Act, that is , the Federal High Court.[73] He argued further that, the Federal High Court has jurisdiction over contracts or other disputes arising from copyright Act including alleged breach of fundamental rights and observed that, the case of *Olufemi Aladetuyi v Daramola Taiwo*[74] where the court of Appeal affirmed a state High Court's decision that the defendant's right was breached when he was arrested for allegedly selling infringing copies of a book was wrong. The present writers hold a contrary opinion and hold on the view that, purposeful interpretation of section 251(1)(f) CFRN 1999 would not suggest that where the reliefs sought are not affecting the validity of any executive or administrative action or decision of a federal Agency or of the copyright holder or licensee or exclusive assignee, there can be no hindrance to commencing an action in the State High Court based on the circumstances of each and every given facts. This reasoning is supported by the apex court in *Adetayo v Ademola*[75] where the court held that, the FHC has exclusive original jurisdiction to the exclusion of all other courts in Nigeria, in any

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71 Kolade Oshinowo v John Holt Group Ltd & ors FHC/L/60/86 delivered in 1991
72 Muri Adejimi v 3C Promotions and Consultancy Services Ltd & ors FHC/L/26/89
73 Bankole Sodipo (n)206
74 (2013) LPELR--20283
75 (2010)15 NWLR Pt 1215 at 169

civil action or proceedings in which federal Government or its agencies is a party. Additionally, it is the holding of this paper that, Section 46 CRA which confers exclusive jurisdiction for the trial of offences or disputes under the this Act is in itself is contradictory of the opening words of section 251(1) CFRN which provides that "Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion..." the said provision is a law of the National Assembly that has only conferred an additional jurisdiction and itself cannot override the constitution and thus inconsistent in that regard. The foregoing arguments hold *mutatis mutandis* to disputes that may arise in ownership of works in authors who are employed and perform work either in a contract of service or contract for service and works made in the course of employment[76] same being conferred with an exclusive jurisdiction on the National Industrial Court being a labour, employment ...industrial relations and a matter arising from work place thereto.[77] This internal law characterisation question such as these requires definite legislative intervention in the affected sections to bring out certainty in the judicial application of cases that comes before the courts.

Recent Choice of Law Proposals

With the advent of the internet and increased globalisation, conflict related problems will continue to stare in the face of copyright which remain basically "territorial" The questions therefore are, which country and court will have jurisdiction to make decisions as to copyright jurisdiction on the internet? Which domestic law will govern the multiple acts of internet based exploitations and infringements? What are the legal huddles in integrating private international law with intellectual property law? Is

[76] See generally Sections 10(1)(2)(3)(4) CRA

[77] See Section 254C of the NIC Act as amended by the Third Alteration Act,2010

it still possible to continue to rely on conflict of law's physical concepts such as *lex loci contractus*[78] and *lex fori*[79] in dealing with intangible goods or shall there be formulated new rules for Intellectual property concern including new choice of law rules? Recent choice of law proposals include:

(a) Professors David Johnson and David Post's cyberlaw approach, under which territorial copyright laws will be replaced by customary law that aims to balance the interests of rights holders and users.[80]

(b) Professor Paul Geller's proposal of applying the law of the country that affords the greatest protection among all countries having access to network disseminating the infringing materials.[81]

(c) Professor Jane Ginsburg's approach, under which U.S. law will apply whenever the work is infringed in the United States or when the infringer is an American national, resides in the United States or has an effective business establishment in the country[82].

(d) Professor Jane Ginsburg's hierarchical alternative model on one applicable law to defend a work against internet copyright infringements namely;

  (i) The law of the country of residence or principal place of business of:

  - The operator of the website (when the infringing content is found on a website).
  - The person or entity that initiated the communication (when the infringing content is not found on a website) so long as the law is

78 Such as questions bordering on copyright contracts simpliciter.
79 Questions bordering on procedural law, remedies and jurisdiction.
80 Peter Yu "Conflict of Laws Issues in International Copyright Cases"www.Gigalaw.com visited on 2/8/2018
81 Peter Yu (n72)
82 Peter Yu(n72)

consistent with the Berne Convention and WTO-TRIPS Agreement norms.

(ii) If the law in No1 (above) does not conform to the Berne Convention and WTO-TRIPs Agreement norms, then the law of the country the server that hosts the infringing content is located would be applied-as long as the law is consistent with Berne Convention and WTO-TRIPs Agreement norms.

(iii) In either case, if a third country is shown to have a more significant relationship with the controversy, its law should be applied-as long as the law is consistent with Berne Convention and WTO-TRIPs Agreement norms.

(iv) By default, the law of the forum-as long as it is a member of the Berne Convention or WTO.[83]

Conclusion Remarks:

The paper has attempted to argue that, the rules of conflict of laws are aimed at resolving conflicts of applicable law in any given situation for the sake of justice and orderliness in society. The paper acknowledges the fact that, territoriality still reign supreme and remains a powerful intuition since there are no separate national territories in cyberspace. That in the area of copyright protection in the contemporary world, conflict of jurisdiction and choice of law problem remains an issue yet to be resolved. It is therefore time, in our opinion, for a restatement of the rules of conflict of law in copyright specifically and intellectual property laws generally.

The paper acknowledges the fact that, among the competing theories of jurisdiction and choice of law issues, no one perfect solution exist that will provide permanent solution to solving the issue of choice of law and jurisdiction especially for copyright

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[83] See Professor Ginsburg's Report submitted to WIPO Group of Consultants on Private International Law and Copyright(Geneva, Dec.1998) www.wipo.org/eng/meetings/1998/gcpic/doc

infringement on the internet whether it be *lex loci delicti, lex loci protectionis*. In view of the forgoing, the paper lean on Professor Jane Ginsburg's alternative proposals[84] with a slight modification on her 'default law of the forum' to recommend a *lex proprietas* approach as agaist a *lex loci protectionis* as a more manageable system to apply as a default rule. The *lex proprietas* which means the law of the domicile of the proprietor [85](owner). This *lex proprietas* lend support to the vexed issue of situs of intangible property in conflict of laws especially for copyright which has no physical existence and no actual location. In conflict of laws problems, situs of property must be determined in order to confer jurisdiction over a cause of action.

Secondly, Section 2(1) Copyright Act should be amended to read '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 author is...qualified person, that is to say (i) an individual who is a citizen of, or connected or residence in Nigeria'. The said requirement will clearly erase the controversies surrounding definitions of domicile whether of origin, choice or matrimony.

Thirdly, Section 46 of the Copyright Act which provide that, "the Federal High Court shall have exclusive jurisdiction for the trial of offences or disputes under this Act" should be amended to cure the contradiction when viewed alongside with Section 251(1) of the Constitution of Federal Republic of Nigeria which provides that "Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters (F)...Any Federal

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84 See Professor Ginsburg's Report submitted to WIPO Group of Consultants on Private International Law and Copyright(Geneva, Dec.1998) www.wipo.org

85 See generally Van Engelen "jurisdiction and Applicable Law in Matters of Intellectual Property" Electronic Journal of Comparative Law,Vol 14.3 (December 2010) http://www.ejc.org visited on 20/11/2018

enactment relating to copyright, patent, designs..." and Section 254C of the Third Alteration Act which read that, " Notwithstanding the provisions of section 251,257,272 and anything contained in this section and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-(a) related to or connected with any labour, employment, trade union, industrial relations and matters arising from workplace, the conditions of service...and matters incidental thereto or connected therewith".

The three provisions are materially contradictory in that, material rights subsisting in a corporeal thing such as a physical book or contract for the supply of books may not necessarily be of any creative interest to the author of the books but may be treated merely as a contract for the supply of physical goods which the High Court may entertain under Sections 272 of the Constitution.

The foregoing conflicts are anchored on the following:

(a) The determination of copyright ownership under section 10 (2) and (3) of the copyright Act is determined by whether the copyright contract was that of service or is for service.(by inference it will amount to an employment matter for the NIC to determine)

(b) The determination of contracts of copyright and contracts for copyright is determined by whether the author was in the course of his employment or was under a contract of service or apprenticeship under section 10(2)(a) and (b) of the Copyright Act' (by inference it will amount to an employment matter for the NIC to determine);

(c) purposeful interpretation of section 251(1)(f) CFRN 1999 would not suggest that where the reliefs sought are not affecting the validity of any executive or administrative action or decision of a federal Agency or of the copyright holder or licensee or exclusive assignee, there can be no hindrance to commencing an action in the State High Court based on the circumstances of each and every given facts. This reasoning is supported by the apex court in *Adetayo v Ademola*