



THE COPYRIGHT BILL

Analysis and comparison with other jurisdictions



LAGOS | ABUJA



BACKGROUND

Advances in the technologies for creating and distributing content and the disruption to traditional content industries such as publishing, music, film, photography, and television is playing a critical role in shaping copyright laws across the globe. Nigeria is no different as the technological conversion of traditional contents into digital formats and the distribution of same instantaneously at little or no cost through novel channels is fast eroding the exclusive rights conferred on content creators by the Copyright Act. The access to contents through various sources such as peer-to-peer sharing¹, cybberlocker² or linking websites³ all outside of the authorized distribution channels is making it difficult for the content creators to enforce their rights in the digital space.

The impact of these technological advancements on copyright especially as it relates to content storage and sharing, has led to the amendment of Copyright laws globally and Nigeria is no exception with the legislature recently passing the Copyright Bill.⁴

Below are the highlights of the Bill as it relates to online copyright infringement.

RIGHT TO DISTRIBUTE THE CONTENT ONLINE

Section 6 of the Copyright Bill confers on content creators the exclusive right to make their contents available to the public by wire, wireless or online means in such a way that members of the public are able to access the contents from a place and at a time individually chosen by them. This provision is similar to **section 16 of the Copyright, Patents and Designs Act of the United Kingdom 1988 (as amended)** which provides that a content creator

has the exclusive right to communicate their work to the public. “**Communication**” is defined in **section 20 of the Act** as: “**the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.**”

CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES

Copyright owners have the right to use technological protection measures to protect their copyright content from unauthorised access or use. A technological measure effectively protects contents if the measure, in the ordinary course of its operation, prevents or restricts acts which are not authorised by the content creator or permitted by law.⁵ Protection against circumvention of technological protection measures is therefore likely to be significant for copyright owners in the media industry in the fight against large-scale copying and dissemination. **Section 26 of the Copyright Bill** provides that no person shall knowingly circumvent a technological protection measure that effectively protects contents from unauthorized use or access. It is a criminal offence for under **section 28 of the Bill** to circumvent a technological measure by avoiding, bypassing, removing, deactivating, decrypting or otherwise impairing the technological measure. No person shall manufacture, import, sell, offer to the public, provide, or otherwise traffic in any technology, product, service, or device that:

- a. is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects contents; or
- b. has only limited commercially significant purpose or use other than to

¹ This is the transmission of digital files, usually large, from one computer to another using internet. An internet user allows files stored on their computer to be available for copying by other users. Peer-to-Peer Sharing is simply the distribution of digital media such as software, videos, music, and images through an informal network in order to upload and download files

² This is a third-party online service that provides file-storing and file-sharing services for various types of media files and data such as music, videos, films, photos etc. Cyberlockers makes these

contents available to the public as contents stored in this type of platform can be accessed globally over the internet

³ A linking website collates thousands of links that take the user to another website where contents are stores.

⁴ Guardian Nigeria ‘Copyright Bill to strengthen creative sector, enhance competitiveness’ 10 April 2022 <https://guardian.ng/art/copyright-bill-to-strengthen-creative-sector-enhance-competitiveness/>

⁵ Section 26(3)(b) of the Copyright Bill

circumvent protection afforded by a technological measure that effectively protects contents.

In the European Union, **Article 6(1) of the Information Society Directive** requires Member States to provide adequate legal protection against the intentional circumvention of any effective technological measures, designed to prevent or restrict acts of copying not authorised by the copyright holders. Article 6(2) of the Information Society Directive also requires Member States to provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale, possession for commercial purposes of circumvention devices and/or software or the provision of services which are promoted, advertised or marketed for the purposes of circumvention of technological protection measures.

TAKEDOWN NOTICE

Takedown notices are notices issued by content creators to service providers (such as internet service providers, network operators and website hosts) that are hosting contents that infringes the copyright of the content creators. The Copyright Act makes no provision mandating service providers to take down contents that violate copyright of content creators. However, **section 29 of the Bill** makes a robust provision for taking down infringing materials by service providers. The owner of content whose copyright has been infringed, may issue notice of such infringement to the relevant service provider requesting the service provider to take down or disable access to any infringing content or link to such content, hosted on its systems or networks. The take down notice must be in writing and shall include:

- a. identification of the content alleged to have been infringed;
- b. identification of the material that is claimed to be infringing and that is to be removed, and information reasonably

sufficient to permit the service provider to locate the material;

- c. the contact of the content creator;
- d. a declaration on oath that the use of the content in the manner complained of is not authorised by the content creator or the law; and
- e. a statement that the information in the takedown notice is accurate.

Upon being served with a takedown notice, a service provider is required to promptly notify the subscriber responsible for the infringing material, and the subscriber is required, within 48 hours, to provide any information justifying the continued keeping of the content complained about. The service provider shall take down or disable access to the infringing content or links to such content hosted on its systems or networks if the subscriber fails to provide the required information. Where a subscriber has provided the required information, or the service provider is otherwise convinced that the complaint of the owner of content is without merit, the service provider shall promptly inform the owner of content of its decision not to take down the content. Any person not satisfied with the decision of the service provider may refer the matter to the Nigerian Copyright Commission for determination.

A service provider who fails to comply with a takedown notice shall be liable for such failure as a breach of statutory duty; and for infringement of the copyright in the content which is the subject matter of the notice to the



same extent as the person responsible for placing of such content on the system or network. It is also a criminal offence for a service provider to fail to comply with a takedown notice.

In the United States of America, the United States Digital Millennium Copyright Act provides a mechanism for protecting copyright in content distributed on the internet as the copyright holder can request the removal of content or restrict access to it if there is a suspicion of violation of legal rights. The mechanism is essentially similar to what is contained in the Copyright Bill. In the UK, the service providers are required to act quickly to remove offending contents as soon as they “have actual knowledge” that copyright has been infringed.

BLOCKING ACCESS

Section 36 of the Copyright Bill confers on the Nigerian Copyright Commission the powers to either, directly or with the assistance of any other person, block or disable access to any content, link or website hosted on a system or network, which it reasonably believes to infringe copyright. This provision fails to provide for the factors which the Nigerian Copyright Commission must consider before arriving at the decision whether content hosted on a website infringes a copyright. This creates room for arbitrariness in the application of the provision. In comparison to the position in the UK, it is the High Court that has the powers to grant injunctions mandating an internet service provider to block access to an infringing content hosted on a website. **Section 97A of the Copyright, Patents and Designs Act of the United Kingdom 1988 (as amended)** provides that the High Court shall have power to grant an injunction against a service provider, where that service provider has “**actual knowledge of another person using their service to infringe copyright.**” In determining whether a service provider has actual knowledge for the purpose of this section, “**a court shall take into account**

all matters which appear to it in the particular circumstances to be relevant” and, amongst other things, shall have regard to whether a service provider has received a notice from the content creator stating the details of the infringement in question.

In **Twentieth Century Fox, v British Telecommunications Plc**,⁶ the Applicants applied for an injunction against British Telecommunications pursuant to section 97A of the Copyright, Designs and Patents Act 1988. In essence, the application was intended to block or at least impede access by British Telecommunications’ subscribers to a website hosting infringing films. The court held that a website will be blocked if:

- a. users and/or operators of the Target Websites infringe copyright;
- b. users and/or operators use the services of the internet service provider to infringe copyright;
- c. the internet service provider has actual knowledge of that fact.

The court further held that it was sufficient to establish that a service provider has knowledge of one or more persons using its service to infringe copyright, and that it was not necessary to prove ‘**actual knowledge of a specific infringement of a specific work by a specific individual**’ and that the knowledge requirement can be satisfied by sufficiently detailed notice with a ‘reasonable opportunity to investigate the position’.

SUSPENSION OF ACCOUNT OF REPEAT INFRINGERS

Section 31 of the Copyright Bill requires a service provider, upon receiving notification from the content creator that a particular account has been engaged in repeated infringements of their content, to: (a) promptly send a warning to the defaulting subscriber

⁶ [2012] 1 All ER 806

informing that subscriber that if the service provider receives another complaint of infringement, the account of the subscriber will be suspended; and (b) after a second notification relating to the same account, if no challenge is raised, the service provider is required to promptly suspend the account for a period of at least one month.

A subscriber who has received a warning may challenge the complaint of infringement on grounds of mistake or misidentification within 10 days from the date of the warning, furnishing the factual basis of his belief that his account has been misidentified or that the use of the content was not an infringement. The challenge is to be resolved within 10 days by the service provider and any person not satisfied with the decision of the service provider may refer the challenge to the Nigerian Copyright Commission for determination. A service provider acting in good faith in suspending the account of a subscriber is exempted from liability to any person for any claim based solely on that suspension.

In the United States, **section 512A of the Digital Millennium Copyright Act** provides that an internet service provider has an obligation to adopt and reasonably implement policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.

SAFE HARBOUR

Safe harbour is a legal principle that limits the liabilities of internet service providers whose customers use their networks or servers to distribute other people's copyright-protected content without permission. The Copyright Bill in **sections 33 and 34** protects service providers from liability arising from the infringing acts of the service providers' users. A service provider shall not be liable for monetary relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider:

- a. does not have actual knowledge that the material on the system or network is infringing; or in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to the material;
- b. does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- c. complies with the procedure for suspension of accounts of repeat infringers.

Section 37(1) of the Bill clarifies that the limitations to liability in favour of internet service providers shall apply only to:

- a. the neutral, automatic and passive activities of a service provider; and
- b. service providers who do not take an active role, intervene or participate in the making available of content.

The above provisions are similar to section 512 of the United States' **Digital Millennium Copyright Act** which provides that an online service provider shall not be liable for monetary relief if (a) the transmission of the infringing material is "initiated by or at the direction of a person other than the service provider"; (b) "the transmission, routing, provision of connections or storage is carried out through an automatic technical process without selection of the material by the service provider," and (c) "the material is transmitted through the system or network without modification of its content." Additionally, "a service provider shall not be liable for monetary relief ... for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or

for the service provider,” provided that the service provider “does not have actual knowledge that the material ... is infringing” and “is not aware of facts or circumstances from which infringing activity is apparent.”

Articles 12 and 14 of the 2000 EU E-Commerce Directive are also similar to the provisions of the Bill above. Article 12 provides that EU member states must ensure that an online service provider is not liable for content distributed over its networks provided that the online service provider “does not initiate the transmission; does not select the receiver of the transmission; and does not select or modify the information contained in the transmission.” Article 14 provides that EU member states must ensure that an online service provider is not liable for content stored on its servers as long as “the provider does not have actual knowledge of any illegal activity or information and ... is not aware of facts or circumstances from which the illegal activity or information is apparent.”

CONCLUSION AND RECOMMENDATIONS

The Copyright Bill is indeed an innovative piece of legislation that recognizes the inadequacies of the Copyright Act of 1988 in terms of the challenges posed in the enforcement of copyrights by technological advancements. The Bill, if enacted into law, will effectively tackle the incessant digital piracy that has eroded the exclusive right of content creators.

CONTACTS



ROTIMI AKAPO

rotimi.akapo@advocaat-law.com



LAZARUS KALU

lazarus.kalu@advocaat-law.com



MARY OKE

mary.oke@advocaat-law.com