

ANALYSIS OF LEGAL PLATFORMS FOR EFFECTIVE COPYRIGHT HERITAGE SYSTEM IN NIGERIA

Inebu Christiana Agbo - Ejeh*

Peter Ocheme**

Abstract

Under the Nigerian legal system, copyright law provides for a peculiar proprietary right that secures the owners' rights for many years after the owner's demise. The commission or omission of copyright infringement by an individual or corporation could result in the court awarding damages to the owner. Copyright infringement has recently increased due to the extensive use of Information and Communication Technology (ICT). The courts have become more active than ever in granting remedies to copyright owners when their works are copied without proper permission and acknowledgement. This paper argues that, despite the Nigerian Copyright Act providing numerous remedies for copyright owners, various escape clauses exist, resulting in the owner's rights not being enforced as intended. The research method employed in this paper focuses on black-letter law and its application by the courts, providing a descriptive and detailed analysis of legal rules in primary sources. Notwithstanding the efficacy of remedies against copyright infringement, there is a need to observe and enforce the rules.

* PhD, Senior Lecturer at Nile University of Nigeria, obtained her PhD (UCT), LLM (Warwick), LLB (Jos), BL (Nigeria). Her research focuses on international economic law solutions to enhance economic development and integration for developing countries.

** Professor of Law, School of Law, American University of Nigeria, Yola, Nigeria. Formerly with the Ahmadu Bello University, the Nigerian Law School and the Benue State University.

Keywords: copyright infringement, Remedies, law, Nigeria, Damages, Common Law, Injunction

1.0 INTRODUCTION

Various legal issues related to Intellectual Property (IP) might interest technically inclined stakeholders, such as lawyers.¹ For rights owners, mainly laypeople, the key factors are the number and effectiveness of remedies, as well as restrictions on exercising rights in legal situations.² The realisation that, under Nigerian law, copyright functions as a distinct proprietary system that endures for many years after the owner's death.³ This underscores the significance of the analysis in this paper. In practice, numerous actions or omissions by individuals and companies can lead to copyright infringement in both domestic and cross-border transactions.⁴

Recently, the use of Information and Communication Technologies (ICT) has significantly amplified these actions.⁵ The thematic analysis of legal remedies, exceptions, and exemptions to copyright rights in

¹ Wendy J Gordon, 'Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship' (1990) 57 (3) UCLR, 1009-1049.

² Copyright Act (Cap C28, Laws of the Federation of Nigeria 2004) s 19.

³ *ibid* [16 and 2].

⁴ Femi Olubanwo, Olumide Osundolire, Chinasa Uwanna et al, 'Review of the 2020 Judgment in Fhc/Abj/Cs/680/2008: Tv Xtra Production Limited & Anor V National Universities Commission & Zain Nigeria' available at www.mondq.com accessed 21 February 2022; Baker v Seldon, 101 U.S. 99 (1879); Bleistein v Donaldon Lithography C, 188 U.S. 239 (1903); Aifuw Edosomwan, 'Protecting Intellectual Property Rights in Nigeria: A Review of the Activities of the Nigerian Copyright Commission' (2022) Word Patent Information 71; Neol N Udeoji, 'Remedies and Enforcement of Copyright Infringement in Nigeria African Journal of Law and Human Rights' (2022) 6, 2.

⁵ Robin Mansell and Edward Steinmueller, 'Copyright Infringement Online: The Case of the Digital Economy Act Judicial Review in the United Kingdom (2013) 15 New Media & Society 1312-1328, 1313.

Nigeria differs from other areas of the intellectual property system. It is grounded in English Common Law, Nigerian statutory law, and indigenous judicial precedents regarding the procedures for addressing such infringements. This paper examines the civil framework that courts employ to deliver remedies to litigants within Nigeria's copyright system.⁶ Unlike other industrial properties, Copyright involves derivative intangible rights that accrue upon the creation of a visible work. Unlike other IP forms, it does not require registration for protection and serves as an inheritance alongside proprietary rights over the physical work.

The principles of assumption, acquisition, and disposition of proprietary rights are grounded in various legal foundations, as the following analysis shows. While these remedies aim to eliminate monopolistic tendencies and ensure their comprehensive application, the law also sets out specific exceptions in certain situations. This paper examines the delineation of these exceptions governing the use of copyrighted works.

The remaining sections of the paper are organised into four parts following the introduction. Part 2 discusses the remedies available to copyright owners in cases of infringement; Part 3 outlines the procedures for inspecting and seizing infringing materials; Part 4 concludes the paper.

2.0 CIVIL PLATFORMS FOR REMEDYING COPYRIGHT INFRINGEMENTS:

The maxim “*Ubi jus ibi remedium*” is one of the many principles of law exhibiting the very foundations on which the legal science rests. The principle states that when someone's rights are violated or destroyed,

⁶Peter Ocheme, *The Law and Practice of Copyright in Nigeria*: (Zaria, Ahmadu Bello University Press Ltd, 2000). 2.

the law provides a remedy or compensation for the harm.⁷ Lord Chief Justice Holt clearly established this in *Ashby v White*.⁸ Highly valued, this principle led to the development of the legal action known as “action on the case,” which has been essential to the growth of tort law. It confirms that if a law recognises a right, there must be an appropriate remedy for its breach. The right to seek such a remedy is a fundamental legal principle universally accepted across legal systems.

It is a principle derived from common law that grants a right or prohibits injury. Today, it is a principle enshrined in the Nigerian Copyright Act.⁹ According to this maxim of law, whenever the Common Law¹⁰ and the statute¹¹ giving a right or prohibition against injury also provide a remedy, i.e., *lex semper dabit remedium*. This section examines the civil framework through which the court grants remedies or relief to a litigant who has been wronged or is at risk of being wronged. A civil remedy is provided by law to a party through a court process if they suffer injury as a result of negligence. Similarly, an infringement of an owner’s copyright constitutes an injury, thus entitling the owner to damages, an injunction, or an accounting for profits, among other remedies the court may decide to award in the circumstances. It may be clearer to note that the word “remedy” can sometimes be used interchangeably with “action” on.¹²

In civil liabilities, the term “remedy” has a broader meaning than “action”. An action is a specific legal process used to enforce a remedy or pursue a claim in court. Conversely, a remedy is a right that arises upon the successful completion of an action. In this paper, both

⁷ Jonathan Law, Oxford Dictionary of Law (Oxford Quick Reference, 10 edn).

⁸ (1703)14 St Tr 695, 92 ER 126.

⁹ Copy Right Act (n2) s 17(1).

¹⁰ R. v. Lancaster Guardians (1899) 2 QB 632.

¹¹ Copyright Act (n2) s 17 and 18.

¹² The Copyright Act specifically uses the word “Action” in s 5.

“Action” and “Remedy” form the foundation for realising Nigeria’s copyright heritage, ideally aligned with developments elsewhere. Before examining each remedy, it is helpful to consider fundamental issues important to copyright advocates, such as the question of “class representation” on either the plaintiff’s or defendant’s side. Although court rules generally address representative actions, it’s relevant to mention this here because it affects copyright infringement cases and remedies, given their complexities. In the collective administration system of the copyright industry, collecting societies, comprising individual copyright owners, safeguard the interests of their members across all areas.

This includes the right to sue for copyright infringement committed by any, some, or all of its members. The court may issue relief that benefits all members. This action is crucial because record and book pirates target various types of *repertoire* and infringe on many authors’ copyrights, often by selling infringing copies at different times or simultaneously, or reproducing them without authorisation. Usually, pirates do not limit themselves to a single record or book. As a result, infringements that occur at various times or locations make it expensive and difficult for rights-holders to take legal action against each infringer individually.

The English case of *Emi Records v. Riley*¹³ Dillon J. commented on this issue, stating: ‘... it seems to me that it is appropriate that damages should be recoverable by the plaintiffs in the representative capacity in which they are entitled to sue for an injunction....’¹⁴ In subsequent cases¹⁵, the English courts have adopted this decision and established a procedure whereby a named plaintiff can issue a Writ both on its own

¹³(1981) FSR 503.

¹⁴ *ibid*, [505-506].

¹⁵ E.M.I. Records Ltd. V Kuhadhail & Ors (1983) FSR 36.

behalf and on behalf of other members of the larger group, commonly known as collecting societies.¹⁶ Alternatively, there is the issue of suing only a named defendant while representing all other parties involved in selling or distributing the copyrighted work. The key question is whether there is sufficient shared legal interest among these defendants to justify granting remedies against them. This was seemingly resolved positively in Kudhail's case mentioned earlier. However, it remains uncertain how Nigerian courts will address these issues. After identifying these procedural challenges, it is essential to explore the options available to the owner or holder of a copyright work, or to their equitable interests, under Nigerian law.

2.1 Damages

This is a pecuniary compensation or indemnity recoverable in the courts by any person who has suffered loss, detriment or injury. It may be to the person, property or rights, through the unlawful Act, omission or negligence of another.¹⁷ Damages are typically awarded as final remedies in a successful infringement action. This monetary compensation is payable by the infringer to the rights holder for the financial loss caused by the act of infringement. Under the Act.¹⁸ The courts, in awarding damages, are required to restore the plaintiff (as far as practicable) to the position they would have been in had the infringement not occurred. The Act, therefore, provides for damages that may be either compensatory or punitive.¹⁹ On the one hand, it could serve as a measure to compensate for actual loss or as a punishment for outrageous conduct to deter future transgressions. In doing so, the Act

¹⁶ Paul Goldstein, *International Copyright: Principle, Law, and Practice* (Oxford University Press, 2001) 228-29.

¹⁷ Henry Campbell Black, *Black's Law Dictionary* (5th edn St. Paul, Minn, West Publishing Co, 1979).

¹⁸ Copyright Act (n 2) s 15(4).

¹⁹ *Hussy v Palmer* (1972) WLR 1286, 1290.

requires an objective assessment based on two tests as provided under the Act.²⁰

The compensatory damages for copyright infringement can easily be worked out by the plaintiff adducing evidence to show his diminished rate of sales, as well as his loss of profit and earnings as a result of the Act. This is only possible when the plaintiff's claim is founded on his economic rights. In an action based on moral rights, the damages would be at large. It was so held in a Nigerian case²¹ that damages are at large in an action for copyright infringement, and it is not necessary to prove actual or specific damage. The Nigerian decision is derived from *Exchange Telegraph Co Ltd. v Gregory Ltd*,²² which followed an earlier decision in *Fenning Film Service Ltd v Wolverhampton, Walsall and District Cinema Ltd*.²³ The *ratio decidendi* in the cases is that damages are at large and are not limited by any scale or provision of the law. Equally, some learned authors²⁴ argued that Damages compensate the plaintiff for losses caused by the breach. While infringement gives the plaintiff a right to damages, the plaintiff must present evidence to help the court assess the damages. Even if damage is estimated and paid as a lump sum, proof is needed sum.²⁵

However, other reported cases show the application of a different formula in assessing such damages in copyright. In *Sutherland Publishing Co. Ltd v Caton Publishing Co. Ltd*,²⁶ the depreciation caused by the infringement to the values of the copyright as a chose in action was used as the

²⁰ Copyright Act (n 2) s 15(4) (a) and (b).

²¹ *Plateau Publishing Company Ltd v. Adolph*, (1986) 4 NWLR, 34, 205 [225].

²² (1986) 1 QB 147.

²³ (1914) 3 QB 1171.

²⁴ JAL Sterling and MCL Carpenter, *Copyright Law in the United Kingdom and the Rights of Performers, Authors and Composers in Europe*, (Sweet & Maxwell, 1986).

²⁵ *ibid*, 325.

²⁶ (1936) Ch 323 [336].

yardstick of damage and the measure of damages awarded. In *Pike v Nicholas*,²⁷ the yardstick used was the plaintiff's profit from the sale of the infringing materials if he had sold them directly. A different approach was again used in deciding the case of *Redwood Music Ltd. v Chappell & Co. Ltd*,²⁸ where the computation of damages was based on what would have been paid as royalty if, instead of acting illegally, the defendant had acted legally. On the whole, the learned Judge position in the case of *Beloff v Pressdram Ltd*²⁹ was that the process is far from the action of computation or 'scientific' precision but a 'matter of impression'.³⁰

One is puzzled whether the above English decisions guided Tofowomo J. in the subsequent Nigerian case, in which he awarded N5,000.00 damages to the Plaintiffs, wherein, at trial, evidence showed that 3,200 infringing copies of records were alleged to be involved. It was further admitted in evidence that the royalty payable was at the rate of 14% on every 5,000 copies sold. Thus 14% of ₦18,400.00, being the cost of the 3,200 infringing copies, mathematically arrived at ₦2,576. In addition to the above compensatory damages, the Act has a statutory provision for what in Common Law may be called "punitive damages", where it made it clear that when a copyright infringement is proven or admitted. The court believes adequate relief cannot be obtained otherwise; it can grant additional damages it deems appropriate in the circumstances.³¹

It is, however, observed that although the above statutory provision exists, there is still not much room for punitive damages in respect of copyright infringement in Nigeria. Instead, the Act allows for an account to be rendered of proven benefits that may have accrued to the wrongdoer.

²⁷ (1969) 5 Ch 251.

²⁸ (1982) FSR. 109 [131].

²⁹ (1973) RPC 765.

³⁰ *ibid* [797] (James LJ).

³¹ Copyright (n 2) s 15(4).

In fact, a converse provision also exists, to the effect that if at the time the infringement was committed, the defendant was not aware and had no reasonable grounds to suspect that copyright existed in the work to which his action relates, the court will deny the plaintiff's right to damages.³² It is argued that this legislative immunity is undesirable. Copyright by its nature would exist and crystallise in work upon its creation without regard to anyone's knowledge, and certainly not for the defendant to know. The law ought to presume the defendant's knowledge; otherwise, his ignorance of this law could be offered and accepted as an excuse.

2.2 Remedy of Injunction

An injunction is a prohibitive equitable remedy issued or granted by a court. It is usually a suit by a complainant against a defendant. An injunction is a court order requiring a person to do or cease doing a specific action.³³ Under Common Law,³⁴ an injunction operates *in personam*, usually requiring the person(s) to whom it is directed to do or refrain from doing a particular thing. The statutory remedy of an injunction under the Nigerian Copyright Act provides that:... ‘in any action for an infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights.’³⁵ The Act has classified copyright as of equal importance and thus deserving equal protection as real property under Nigerian law by the above provision. This is a very potent and equitable remedy available to a copyright owner in Nigeria. The injunction may be granted *ex parte* or on notice; it may be interlocutory or final.

³² *ibid* s 15(3).

³³ Black (n17) 705.

³⁴ American Cyanamid Ltd. V. Ethicon & Co. Ltd. (1975) 1 All ER 504.

³⁵ Copyright (n 2) 15(1).

Be that as it may, the general principles governing the grant of injunctions concerning other property rights, having not been restricted, would undoubtedly apply to copyright. Such principles were enunciated in *Obeya Memorial Specialist Hospital & Ors. v AG of the Federation*³⁶ and *Kotoye v Central Bank of Nigeria*³⁷. Essentially, as gathered from these cases, an interlocutory injunction will be granted if: first, there is a serious issue to try, secondly, damages will not be adequate compensation for the injury done to the plaintiff (if the application is presently refused but he succeeds at the end of the day); thirdly the balance of convenience is in the plaintiff's favour; and finally there is no conduct on the part of the plaintiff that will make it inequitable for the court to grant the application.

As a remedy for an infringement in copyright, an interlocutory injunction obtainable by *ex parte* application is frequently resorted to to minimise the injury arising from the defendant's action. In that instance, the court will presume that the plaintiff is interested in maintaining the *status quo*, or at least, that no further infringement is committed. The nature of an interlocutory injunction is such that it is issued at any time during the pendency of the main suit for short-term prevention of irreparable injury.

In keeping with the modern trend of legislative drafting techniques, the Nigerian Copyright Act has made the species of injunction obtainable in copyright *pari passu* with such injunctions obtainable in other proprietary rights.³⁸ Even so, an interlocutory injunction is one which is limited in duration to some specified period, or at the very widest, to the time of concluding the action on its merits. In the category of interlocutory injunctions, there are two distinct types; the first is generally referred to as a "preliminary injunction" and includes such injunctions granted after the respondent has been given notice or opportunity to participate in the

³⁶ (1987) 3 NWLR, 60 [325].

³⁷ (1989) 1 NWLR 98, 419 [441].

³⁸ As may be construed from the last sentence of the Copyright Act (n 2) s15(1).

hearing. The second, generally referred to as a “temporary restraining order”, differs from the preliminary injunction in that it is issued *ex parte*. This second type offers better relief to most copyright owners, who often find themselves in situations where they suffer irreparable injury and cannot afford to wait for time or give notice to the defendant for a hearing.

In the practical realities of copyright infringement, it is to be expected that the mere service of notice for an interlocutory injunction on the defendant would alert him to destroy or dispose of the incriminating evidence at his disposal, thus acting to the detriment of the plaintiff. This inevitably leads us to consider the other form of injunction popularly known as “Anton Pillar Order” that now enjoys statutory flavour under the Nigerian Copyright Act. This order, when obtained, empowers the plaintiff to search the defendant’s premises, inspect and seize incriminating materials in possession of the defendant used or likely to be used in an alleged infringement of copyright. This will be considered under the heading. ‘Inspection and Seizure’ as provided under the Act.³⁹

3.0 Inspection and Seizure

This remedy was developed on the reasoning that if a complainant has to wait for the infringer to appear in court in response to a summons, the infringer will likely dispose of incriminating materials in their possession.⁴⁰ To minimise this unpleasant happening, the common law, and until recently the Act, gave an aggrieved party the right to apply for what has come to be popularly called an “Anton Pillar Order”. It is a process that derived its origin from the order of the English court in the famous case of *Anton Pillar K.G. v. Manufacturing Process Ltd & Anor.*⁴¹ In this case, the defendants, an English company and its two directors, were the United Kingdom agents of the plaintiffs, who were German

³⁹ Copyright Act s 22(1).

⁴⁰ *Davy International Ltd v Tazzyman* (1997) 3 ER 183.

⁴¹ (1976) Ch 55.

manufacturers of frequency converters for use in computers. The plaintiffs claimed that, in the course of their business, the defendants were discovered to have engaged in secret communication with other German manufacturers, disclosing confidential information about the plaintiffs' power units and details of their new converter to such third parties. This disclosure could be most damaging to the plaintiffs. In order to prevent the disposal by the defendants, before discovery in an action, of documents in their possession relating to the plaintiffs' machines or designs, the plaintiffs applied *ex parte* for an interim injunction. This was to restrain the defendants from infringing the plaintiffs' copyright and disclosing confidential information, and to obtain an order permitting entry into the defendants' premises to inspect all relevant documents and to remove them to the plaintiffs' solicitors' custody.

While relying on the plaintiffs' undertaking to issue a writ forthwith, Brightman, J., sitting at the court of the first instance, granted the interim injunction but refused to order inspection or the removal of alleged documents. The English court of appeal allowed the appeal at the plaintiffs' *ex parte* appeal, which was held in chambers, with the judgment later in open court. The appellate court held that in exceptional circumstances, where plaintiffs had a solid *prima facie case*, that actual or potential damage to them was imminent, and there was clear evidence that the defendant possessed vital materials which they might destroy or dispose of so as to defeat the ends of justice before any application inter partes could be made, the court had inherent jurisdiction to order the defendants to permit plaintiffs' representatives to enter defendants' premises to inspect and remove such material, and that in the very exceptional circumstances, the court was justified in making the order sought by the plaintiffs' *ex parte* application.

With regards to the necessity for the *ex parte* proceedings, in this case, Lord Denning M.R. posits that an *ex parte* order should be made only

where necessary, that the plaintiff should have an inspection so that justice can be done between the parties. According to him, if the defendant had foreknowledge of the search, they might have destroyed crucial evidence.⁴² At first glance, this order appears to be another form of a search warrant. This criminal nature of the order in a civil action often becomes a ground for vehement opposition or objection by the defendants, as it raises questions about an invasion of their fundamental rights to privacy and the presumption of innocence. By way of distinction and clarification, His Lordship, in his judgment, explained that no court can issue a warrant to enter a home to examine papers, such as libels or copyright. Authorities cannot simply knock and demand entry; homeowners can refuse. This was established in *Entick v. Carrington*.⁴³ The order is not a search warrant and doesn't authorise entry without permission or force. It allows inspection only with the defendant's consent, though it can pressure them, implying that refusal might lead to contempt. Though it looks like a warrant, it is not one.⁴⁴

As may be gathered from the above Common Law decision, the Anton Pillar type of injunction and Orders only made based on three grounds: first, there must be a strong *prima facie* case for the plaintiff/applicant; secondly, the damage, potential or actual, must be severe to the applicant; and thirdly, there must be clear evidence that the defendant has in his possession incriminating documents or things and that there is a possibility that he may destroy such materials before an application inter-parties can be made.

Before the enactment of the current Nigerian law, this type of order was sought under the Civil Procedure Rules of the Federal High

⁴² *ibid* [60].

⁴³ (1965) EWHC KB J 98.

⁴⁴ *ibid* [61].

Court,⁴⁵ and its inherent jurisdiction, by which the court may have recourse to common law. This was because the then Nigerian Copyright Decree⁴⁶ had no provisions on inspection and seizure. It was discovered that before the current Act, two important decisions of the Federal High Court illustrated the principles for and against the granting of the Anton Pillar order in Nigeria.⁴⁷ Anyaegbunam J (as he then was) said as much that the application was novel, since in his recollection, "...so far, I have not seen where such an application is reported in our law reports".⁴⁸ He traced the origin of this type of relief in Lord Denning's book,⁴⁹ where it was reported that the procedure was invented by an ingenious member of the English Chancery Bar, Mr Hugh Laddie.⁵⁰

The brief facts of the above Ferodo's case were that the plaintiffs were the sole distributors in Nigeria of Ferodo products. Certain products said to be Ferodo brake linings were sold by the defendants, who were not the plaintiffs' customers. An agent of the plaintiffs had, on a trap-trip, purchased some of the said Ferodo products from the defendants. When compared with the plaintiffs' goods, the goods were found to differ from those manufactured by the plaintiffs' parent company. By affidavit, it was further shown that the plaintiffs had certificates and renewals of trademark registrations for the Ferodo products.

The plaintiffs thereupon applied *ex parte* on the same date that the substantive action was filed for a motion to grant the type of Anton Pillar

⁴⁵ Federal High Court (Civil Procedure Rules) Decree No 23 (1999) Order XX rules 3, 4 and 5 of Order 33 Rules I and 2.

⁴⁶ Nigerian Copyright Decree No 61 (1970).

⁴⁷ Ferodo Ltd v Unibreos Stores Suit No.FHC/L/21/80 (1980).

⁴⁸ *ibid* [1].

⁴⁹ Baron Alfred Denning, *The Due Process of Law* (Oxford University Press, 2005)123.

⁵⁰ *ibid*.

Order. Mr Benthey, learned counsel for the plaintiffs, urged that because of the urgent nature of his application, that it be heard the next day, and when it was called up the next day, he further urged that on account of the confidential nature of it, the interest of justice would be better served if the motion was held in camera, Justice Anyaegbunam, (the then Chief Judge of the Court), granted all the prayers of the plaintiffs, relying majorly on the English Court of Appeal ruling in Anton Pillar's case.⁵¹

In a subsequent Nigerian case⁵², also decided before the current Copyright Act, this type of order was refused by Justice M.B. Belgore, who later rose to become Chief Judge of the Federal High Court. The case was an action for infringement of registered trademarks. The plaintiffs sought an order to restrain the defendants from selling or disposing of cassette tapes bearing the words "Sony" and for the inspection and seizure of such materials or documents relating to the alleged infringement, either directly from the defendants or from their agents. In refusing to grant these orders, Belgore, J. formulated and considered four issues below:

1. Whether the Anton Pillar Order was granted in England under the Supreme Court Order or similar Federal High Court rules, the present order is being sought under.
2. Whether the English principle applies in Nigeria, given our different constitution and laws, and whether the case facts meet the criteria for an Anton Pillar Order.
3. Whether Anton Pillar principles are affected by higher courts' decisions in England.

Justice Belgore highlights the importance of carefully considering the applicability of English rules in Nigeria, especially when Nigerian law is lacking. He notably asserts that not all principles that succeed in England

⁵¹ Ferodo case (n 47).

⁵² Unreported suit No FHC/LL/35/81 1981.

are suitable for the Nigerian environment.⁵³ He went further to add that Nigeria has to interpret laws in light of its constitution, which is more similar to the written American Constitution. The country's democracy is still in its budding stage; 'little in-road into individual liberty can be taken advantage of and abused.'⁵⁴ In the final analysis, Belgore J. refused to grant the Anton Pillar Order in the above case.⁵⁵

In an earlier case, the same Belgore J. granted the *ex parte* injunction to restrain the disposal of threatened materials but refused the total orders of inspection and seizure. Such cases, as discussed above, illustrate the uncertain state of the Nigerian application of the Anton Pillar principles before the enactment of the Copyright Act. Subsequently and emphatically, the tenets of Anton Pillar were canonised under the Copyright Act. It provides that where there is a copyright infringement and an *ex parte* application is made to the court, supported by an affidavit giving substantial reasons for believing that a premise is being used for copyright infringement, the court may grant such an application.⁵⁶

In consequence of the above statutory procedure, the Nigerian copyright owner can now inspect, seize, and preserve infringing materials without giving the defendant any opportunity to destroy or dispose of them. Moreover, such materials can be used as evidence in the substantive suit or even in criminal prosecution, since the Act contemplates both.⁵⁷ Later developments show that in almost every case of copyright infringement, the first course of action is to obtain the Anton Pillar Order. Thus, in Island Records v. Pancos, Island Records v. Pandum, and Island Records v. Lagos Shipping Agency Ltd, the Orders were granted. In contrast, in

⁵³ *ibid* [5].

⁵⁴ *ibid* [6].

⁵⁵ *ibid* [20].

⁵⁶ Copyright Act (n 2) s 22(1).

⁵⁷ Copyright Act (n 2) s 21.

*Capital Records v. Agboola*⁵⁸ and *CBS Records v. Atolagbe*⁵⁹, the applications were rejected. Given the *ex parte* nature of the application, the courts, before granting the order, would generally require the plaintiff to give substantial security and an undertaking to abide by all consequential orders attending to any abuse of court process. On the whole, it is submitted that there is a positive development arising from this legal platform for the realisation of Nigeria's copyright heritage. It is also commended as an effective tool against the indiscriminate abuse of copyright that is now prevalent in Nigeria.

3.1 The Platform of Conversion

Another potential basis for addressing copyright infringements under Nigerian law is the right of conversion, which the Act states that all infringing copies, plates, master tapes, machines, equipment, or devices used to produce infringing copies shall be deemed the property of the copyright owner, who may pursue legal action to regain possession or for conversion.⁶⁰

This statutory right, portraying the pro-authorship tendency of the Nigerian jurisprudence in copyright, is founded on an equitable presumption that the defeated defendant at trial is further adjudged as having possessed a guilty conscience of such materials for any unlawful purpose of infringing on another's copyright. Although the Act is silent as to whether or not this remedy will issue *ipso facto*, the authors of this paper viewed that it should be regarded only as a consequential remedy available to a successful plaintiff in action for either one or all the other remedies available under the law. In essence, the plaintiff should be entitled to conversion if he takes proceedings for damages, but not so if

⁵⁸ Suit No. FHC/LD/142/88.

⁵⁹ Suit NO. FHC/LD/143/88.

⁶⁰ Copyright Act s16.

limited to the right of conversion *per se*. To succeed in conversion, proceedings should justify why the vesting of the copyright owner with the infringing materials and contrivances in question, which were previously the property of the infringer, is warranted. This remedy is quite effective, as it entitles the copyright owner to claim damages, as well as the prices of all such infringing materials or contrivances.

As succinctly put by Sterling and Carpenter⁶¹, conversion takes place whereby any of the infringing copy or materials:

- i. is wrongfully taken out of the possession of the copyright owner,
- ii. is wrongfully taken, detained in defiance of the copyright owner's rights, e.g., by refusal to return the copy on demand; or
- iii. is wrongfully delivered or disposed of, e.g., by the scale of other distribution;
- iv. is destroyed (other than accidentally); or
- v. is wrongfully dealt with in any other way whereby the owner is deprived of use and possession of the copy.

More potently, the Nigerian Copyright Act goes further to state that even if the offending materials were already the property possessed by the defendant, they would be deemed to belong to the copyright owner, who, consequently, is empowered by the law to take possession of them upon his successfully pleading infringement or likely infringement of his copyright.⁶²

⁶¹ Sterling and Carpenter (n 24).

⁶² Copyright Act s 16.

It might be necessary, at this stage, to distinguish between this statutory right of the plaintiff in copyright, which entitles him to convert the materials possessed by the defendant for the reason of copyright infringement on the one hand, and the more popular doctrine of conversion as known to the law of equity on the other hand. In equity, “conversion” is an unauthorised assumption and exercise of the right of ownership over goods or personal chattels belonging to another.⁶³ By this definition, conversion *per se* is a tortious act remediable at law.

Whereas, under the Nigerian Copyright Act, conversion is a judicial order is granted to the copyright owner (as a successful plaintiff) to assume ownership and exercise control over goods belonging to another person for a reason only that such goods have or are capable of being used (by the defeated defendant) to infringe the positive prerogatives⁶⁴ granted to the owner of such copyright. This is a converse legal situation in which the statute has permitted what would otherwise have been unlawful. The Act, in a somewhat strange provision, used an emphatic phrase: “*shall be deemed*”, thus leaving no room for any other supposition as to who should belong such goods, machines, equipment, or master tapes used or capable of being used for an infringement.

In practice, however, the copyright owner, or his assignees or exclusive licensee, whose privileges are thereby infringed, cannot by themselves be expected to physically assume possession of such infringing materials without recourse first to the law court. He is required to take judicial proceedings to recover possession (if the items used were his) or for the conversion thereof (if the items were those of the wrongdoer). Finally, the Act provides that damages may be awarded in place of conversion and in addition to such other damages for infringement. However, this is granted only where the defendant destroyed the infringing materials. In

⁶³ Black (n 17).

⁶⁴ Copyright Act s 11.

other words, the owner of the copyright as plaintiff has been deprived of use and possession thereof. In this instance, care must be taken to ensure that the heads of damages do not overlap. If the relief sought to be granted is “delivery up of infringing materials”, this would be answered in the theory that the copyright owner was the original owner of the infringing materials.⁶⁵

3.3. Levy on Copyright Materials

Under the Amendment Act,⁶⁶ another type of remedy has been introduced, available to a copyright owner whose rights are infringed. This is by way of a levy/charge on any materials used or capable of being used to infringe his right.⁶⁷ The levy payable in each case shall be determined by the Minister of Information and Culture and published from time to time by his order in the Federal Gazette. This implies that different levies may be imposed on various categories of materials used for copyright infringement.⁶⁸

The levy shall be paid into a fund maintained by the Nigerian Copyright Commission⁶⁹. The Commission has the authority to distribute funds to approved societies in accordance with regulations established by the Commission. This implies that the remedy is available only through the offices of the Nigerian Copyright Commission, and that each relevant copyright owner can benefit from the fund only as a member of an approved collecting society.

Given the chain of processes involved, this remedy seems quite distant from practical reality, especially as most copyright owners in Nigeria have yet to organise into collecting societies. However, it is of

⁶⁵ Copyright Act s 18(4) and (5).

⁶⁶ Nigerian Copyright Decree No. 98 of 1992.

⁶⁷ *ibid* s 32(1) (c).

⁶⁸ *Ibid* s 32 (2).

⁶⁹*ibid* s 32 (3).

theoretical significance that the law already exists ahead of practical implementation. This provision again exemplifies one element of Nigeria's pro-author stance to combat piracy at all stages. The law explicitly states that "material" for the purpose of attracting a levy under this provision includes any object, equipment, machine, contrivance, or any other device used or capable of being used to infringe copyright in a work.⁷⁰ This remedy, along with related remedies, assures the copyright owner that the law enforces his rights so he can enjoy the fruits of his labour free from infringement.

4.0 CONCLUSION

The Nigerian Copyright Act, together with supplementary regulations that the Minister or the Copyright Commission is empowered to issue from time to time, collectively provides the copyright owner with legal platforms to foster commercial emancipation and prosperity, as is commonly associated with other proprietary rights in law and equity. It is notable that in Nigeria, these civil and criminal remedies, which were popularly known to the Common Law, have been doubly sharpened and flavoured by statutory provisions, thereby making the claims to them not only along the highways of equity, but also by way of action.

The dilemma lies in how far the same law that granted freedom to the platforms has inadvertently or deliberately created loopholes that weaken the rights intended for the copyright owner in Nigeria. Nigeria's relatively new copyright system leads to the expectation that the law should be given a full opportunity to operate effectively before restricting its overreach (if any) through negative exceptions, as outlined in the Act. As the law currently stands, there is a fuzzy understanding regarding how far rights owners can effectively enforce their rights against various public

⁷⁰ *ibid* s 32 (5)

institutions, where many copyright law violations occur, especially in the reproduction of literary works.

It is observed that the drafters of the exemption clauses in the Act have uncritically adopted these exceptions from the statutes of developed jurisdictions (e.g, the American States), where there have probably been several judicial pronouncements on the meaning and scope of such exceptions concerning the rights protected under their laws and the circumstances under which exceptions apply. Perhaps, in anticipation of local disputes, our legislators would need to redefine, before codifying, exceptions to copyright to foster positive earnings from the use of creative works and encourage greater exploitation of such works in the Nigerian copyright scene. As it stands, there is little hope in Nigeria for a copyright owner who, in pursuit of their rights, would be met with one or more of the numerous exceptions contained in the current law.

Finally, despite the effectiveness of remedies against copyright infringement as discussed above (whether in civil or criminal proceedings), the most reliable way to enforce copyright (as with other proprietary rights) is through strict adherence to the rules. This begins with educating all stakeholders about the harms of copyright infringement and the benefits society gains from respecting the law. Only through such collective education can the attitudinal change among all parties involved with copyright in Nigeria foster the advantages of a legal system that safeguards and encourages creative work, such as "Nollywood," which is celebrated worldwide.