

ICLG

The International Comparative Legal Guide to:

Copyright 2017

3rd Edition

A practical cross-border insight into copyright law

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General Chapter:

1	**Implications of Brexit for English Copyright Law** – Will Smith & Phil Sherrell, Bird & Bird LLP		1

Country Question and Answer Chapters:

2	**Angola**	J Pereira da Cruz: Maria João Nunes & Nuno Cruz	6
3	**Australia**	MinterEllison: John Fairbairn & Emily Hawcroft	11
4	**Canada**	Bereskin & Parr LLP: Jill Jarvis-Tonus	17
5	**China**	East & Concord Partners: Charles (Chao) Feng	24
6	**France**	Weisselberg Avocat: Elise Weisselberg	30
7	**Germany**	HOYNG ROKH MONEGIER: Thomas H. Schmitz & Mathis Breuer	35
8	**Greece**	KG Law Firm: Irene Kyriakides & Panagiota (Julie) Vasileiadou	40
9	**Japan**	Atsumi & Sakai: Chie Kasahara & Reina Kanemura	46
10	**Liechtenstein**	Schwärzler Attorneys at Law: Dr. Alexander Amann	52
11	**Malaysia**	Tay & Partners: Lin Li Lee & Kah Yee Chong	57
12	**Mexico**	Dumont Bergman Bider & Co., S.C.: Laura Collada & Jonathan Rangel	65
13	**Mozambique**	J Pereira da Cruz: Maria João Nunes & Nuno Cruz	71
14	**Nigeria**	S. P. A. Ajibade & Co.: John C. Onyido & Yetunde Okojie	77
15	**Philippines**	SyCip Salazar Hernandez & Gatmaitan: Vida M. Panganiban-Alindogan & Enrique T. Manuel	83
16	**Portugal**	Pereira da Cruz e Associados, R.L.: João Sardinha & Nuno Cruz	91
17	**Russia**	Tilling Peters LLC: Elena Buranova & Ekaterina Tilling	97
18	**Senegal**	LPS L@w: Léon Patrice Sarr & Ndèye Khady Youm	104
19	**Switzerland**	Meisser & Partners AG: Dr. *iur.* Marco Bundi & Benedikt Schmidt	109
20	**Taiwan**	Deep & Far Attorneys-at-Law: Yu-Li Tsai & Lu-Fa Tsai	114
21	**Turkey**	Güzeldere & Balkan Law Firm: Altuğ Güzeldere & Didem Ataün	120
22	**Ukraine**	Gorodissky & Partners (Ukraine): Nina Moshynska & Oleg Zhukhevych	129
23	**UAE**	Hamdan AlShamsi Lawyers & Legal Consultants: Dr. Ghandy Abuhawash	135
24	**United Kingdom**	Bird & Bird LLP: Rebecca O'Kelly-Gillard & Phil Sherrell	140
25	**United States**	Sheppard Mullin Richter & Hampton LLP: Edwin Komen & Theodore C. Max	146

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Nigeria

John C. Onyido



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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

1. For copyright to subsist in a work, the work must be a literary, musical or artistic work, a cinematograph film, sound recording or broadcast (inclusive of adaptations of any of these creative expressions) as defined under the Nigerian Copyright Act Cap. C28 of the Laws of the Federation of Nigeria 2004.
2. Sufficient effort must have been expended in making the work to give it an original character.
3. The work must be in a fixed or definite medium of expression, now known or later to be developed from, which can be perceived, reproduced or communicated either directly or with the aid of a device.
4. The work must have been first published in Nigeria.
5. In the case of a sound recording, it must have been first made in Nigeria.
6. The author is a citizen of or domiciled in Nigeria or a body corporate incorporated in Nigeria.
7. The work is first published in a country which is a party to a convention or international treaty to which Nigeria is a signatory; *or* the work is first published by the United Nations or any of its specialised agencies, the Organisation of African Unity (i.e. the African Union) or the Economic Community of West African States (ECOWAS), and in each of these instances, one of the authors of the work is a citizen or domiciled in such treaty country or international arrangement/organisation, or is a body corporate set up under such international copyright arrangement or international organisation.

   Nigeria is currently a signatory to the Berne Convention (1886), the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement 1994), the WIPO Copyright Treaty (1996), the Universal Copyright Convention (1952), the Brussels Convention on the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974), the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication (1971) and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).
8. Based on reciprocity, where the relevant Minister is satisfied that the treaty member extends similar protection to works protected under the Nigerian Copyright Act.

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

Copyright protection also extends to neighbouring rights like performer's rights and expressions of folklore. A performance may be musical or dramatic and would ordinarily include literary recitations and pantomimes. An expression of folklore is a "… group-oriented and tradition based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally…". Examples of these include riddles, dances, plays, poetry, and indigenous art forms and expressions.

On the other hand, artistic works intended by the author to be used as a model or pattern to be multiplied by industrial process are ineligible for copyright protection. As in most common law jurisdictions, copyright protection in Nigeria does not extend to ideas, facts, processes, laws of nature and mathematical formulas.

1.3 Is there a system for registration of copyright and if so what is the effect of registration?

There is no system or requirement for the registration of copyright in Nigeria. A work, once created, becomes automatically copyrightable if the requirements identified above have been met. However, the Nigerian Copyright Commission (NCC) has introduced an online database for the owners of copyrighted works and individuals/entities who have acquired rights to these works to register them online with the Commission. Although registration is not mandatory under the law, it provides a convenient tool for proving ownership, date of creation and other ancillary information relating to the copyrighted material.

1.4 What is the duration of copyright protection? Does this vary depending on the type of work?

The duration of copyright protection depends on the type of work involved.

For literary, musical or artistic works other than photographs, the copyright subsists from the date of creation and expires 70 years after the end of the year in which the author dies.

In the case of cinematograph films and photographs, copyright expires 50 years after the end of the year in which the recording was

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first made, whilst in the case of broadcasts, copyright expires 50 years after the end of the year in which the broadcast first took place.

1.5 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

There is an overlap between copyright, design rights and other intellectual property rights in Nigeria. Designs, which are protected by design rights, are also copyrightable works protectable under copyright law. Although there is no specific reference to database rights under the current Nigerian Copyright Act, these are presumably protectable as literary works (or as compilations) in the same manner as computer software programs. Computer programs are entitled to protection both under Copyright law as literary works and under patent law, where they involve an inventive step, are novel and capable of industrial application. Also certain designs and logos may be protectable under both copyright law and trademark law.

1.6 Are there any restrictions on the protection for copyright works which are made by an industrial process?

Copyright works of an artistic nature made by industrial process cannot be protected insofar as they are intended by the author, at the time they were created, to be used as a model or pattern to be multiplied by an industrial process.

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

The first owner of the copyright in a protected work is the author, or in the case of a joint authorship, any or all of the authors.

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

Where a work is commissioned, ownership shall belong in the first instance to the author, unless otherwise stipulated in writing under an applicable contract.

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

Where a work is created by an employee, in the course of the employment, copyright shall belong in the first instance to the employee, unless otherwise stipulated in writing, i.e., in a contract of employment. However, where a literary, artistic or musical work is made by an author in the course of employment by the proprietor of a newspaper, magazine or other periodical, and the work is made for the purpose of accomplishing these objectives, copyright would initially vest in the proprietor unless the contrary is stipulated by agreement.

In the case of sound recordings and cinematograph films, the author is under an obligation to conclude contractual arrangements with third parties whose works may form part of the subject work prior to its creation.

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

The concept of joint ownership exists under Nigerian copyright law, and a work is said to be jointly owned where the owners share a joint interest in the whole or any part of the copyright, or if they have a proprietary interest in the various works forming part of a composite production; in other words, a production consisting of two or more works.

In the case of a joint ownership of a work, reference to the death of the author shall be taken to refer to the author who died last. All assignments and licences granted over the protected work are deemed to be granted by the co-owner and fees payable as a result of the grant are equally divisible between such co-owners subject to the terms and conditions of any existing contract between them.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

For an assignment/transfer of copyright ownership to be valid, it must be in writing and must apply only to acts which the owner of the copyright has exclusive rights to control. Copyright is transmissible in Nigeria by operation of law or by testamentary disposition as any movable property. Any testamentary disposition of original copyrighted material shall be presumed (in the absence of evidence to the contrary) to include the copyright or prospective copyright in the work which may vest in the decedent/deceased.

3.2 Are there any formalities required for a copyright licence?

All exclusive licences of copyrighted material must be in writing to be valid, whereas non-exclusive licences may be written or oral, or may be inferred from the conduct of the parties.

3.3 Are there any laws which limit the licence terms parties may agree (other than as addressed in questions 3.4 to 3.6)?

There are no provisions in the current Copyright Act and any subsidiary legislation which directly limit the terms that parties may agree upon in a licensing arrangement. Whatever arrangements that parties make would, however, be subject to public policy presumptions against illegal contracts and other related laws regulating the transfer of technology, compliance with standards, local content provisions and relevant monetary policy guidelines on transfer of foreign exchange in line with the payment clause contained in such licence agreements.

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

Under the Nigerian Copyright Act and the Copyright (Collective Management Organizations) Regulations of 2007 (2007 Regulations), all collecting societies licensed by the Commission may manage all performance and mechanical rights relating to the musical works/compositions and sound recordings of their member artists. Presently, the Copyright Society of Nigeria (COSON) is the sole collecting society licensed by the Commission to manage

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the rights of artists to copyrighted material in musical works and sound recordings. COSON is charged with the responsibility of negotiating licensing arrangements with users on favourable terms, as well as the collection and distribution of royalties on behalf of its members.

3.5 Where there are collective licensing bodies, how are they regulated?

Collective licensing bodies, like COSON listed above, are bodies formed to manage any one or more of the exclusive rights of copyright owners and to license and collect royalties from users of copyrighted works within their repertoire for the benefit of its members. They are regulated by the Nigerian Copyright Commission (NCC) in accordance with the Copyright Act and the 2007 Regulations.

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

Licence terms offered by a collective licensing body can be challenged when:

1. The licence is in respect of a work which it is not authorised to administer.
2. The licence discriminates against members of the same user class either as to the terms of such licence or on differential tariff rates, without reasonable justification.
3. Imposing a condition which requires a member to designate the society as the sole collecting agent of royalties due on the member's copyrighted work.
4. Where the terms are onerous or unconscionable and the licensee has been compelled by undue pressure/influence to accede to them.

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

A rights holder can restrict or regulate the use of his work in relation to:

1. Public performances and/or display of the work.
2. Making adaptations or derivative works.
3. Publication, copying and reproduction of the work.
4. Lending, renting and issuing copies to the public, and all other distributions to the public for commercial gain.
5. Producing, reproducing, performing or publishing translations of the work.
6. Making a cinematograph film or recording of the work.
7. Broadcasting or communicating the work to the public.

4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

Yes, there are ancillary rights related to copyright and they include moral rights, performers' rights and the protection of expressions of folklore.

Moral rights under Nigerian law protect the right of the author to be identified as the creator of the work, and are designed to shield authors from derogatory actions, including the distortion, mutilation or modification of their work, where these actions would be prejudicial to the author's honour and reputation. Although these rights may be waived, they are perpetual, inalienable and imprescriptible under Nigerian law.

Performers' rights address the right of the author to public performance, recording, and live broadcasts, as well as the reproduction of the protected work in any material form or the creation of adaptations of the performance. They can be waived and are assignable.

Copyright protection in expressions of folklore covers the right of a group, community or individual to restrict, through the Copyright Commission, the reproduction, communication to the public by performance, broadcasting, distribution, adaptation, and/or translations of protected material, either for commercial purposes or outside their traditional context, by unauthorised persons.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

Nigeria operates a national exhaustion principle. Consequently, and upon the first sale of a protected work in which copyright subsists, a copyright owner is unable to restrain subsequent dealings in such work which have been put on the Nigerian market and sold with the copyright owner's consent.

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

Yes, there is a statutory enforcement Agency known as the Nigerian Copyright Commission (NCC), which can be instigated by rightsholders to sue infringers/pirates in the form of criminal prosecutions as an alternative to civil action at the Federal High Court. The criminal provisions in the Copyright Act are enforced by copyright inspectors with police powers, who are appointed by the Commission. The Copyright Act allows both criminal and civil actions to be pursued simultaneously in respect of the same act of infringement. The power of the Commission to institute and maintain a criminal charge against an alleged offender separate from and despite the conclusion of the civil lawsuit was recently confirmed by the trial court in Suit No. FHC/ABJ/CR/379/15: *Nigerian Copyright Commission v. MTN Nigeria Communications Ltd.*

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

Other than the copyright owner, an assignee or exclusive licensee can bring an action for infringement of a copyrighted work. However, the law provides that where both the assignee/exclusive licensee enjoy concurrent claims to the protected material alongside the copyright owner, then unless the leave of the court is first obtained, the lawsuit may not proceed without the copyright owner being joined either as co-plaintiff or co-defendant to the action.

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5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

Although there is no explicit reference under Nigerian law to substantiate the validity of claims brought against secondary infringers of copyrighted material, it is surmised that such an action is recognisable on a broad interpretation of the Copyright Act and at common law. Such a claim is justifiable where the secondary infringer aids, abets, connives with and actively facilitates the procurement or infringement of a copyrighted work. The generally accepted prongs of secondary liability for copyright infringement would cover 'vicarious liability', where the secondary infringer exercises sufficient control over the premises or implements of infringement and obtains direct financial benefits from the primary infringer's activity, *and* 'contributory liability', where the secondary infringer induces, causes or materially contributes to the offending conduct or otherwise facilitates infringement by end-users.

Liability for secondary infringement would arise where one, without the license or authority of the copyright owner:

1. Does or causes any person to do an act, the doing of which is controlled by copyright without the copyright owners' permission.
2. Imports, or causes to be imported, into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy under the Act.
3. Permits a place of public entertainment or of business to be used for a performance in the public of a work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of copyright.
4. Performs or causes the performance, for business or trade purposes or as a supporting facility, of any work protected by copyright.

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

Yes, there are defences to a claim for copyright infringement, and they are only available where:

1. In the case of criminal liability, it can be proved to the satisfaction of the court that the alleged infringer had no knowledge and no reason to believe that any such copy was an infringing copy of affected work or that the implements, equipment or other contrivances such as plates, master tapes, reproduction machines, etc., were used for the purpose of making infringing copies of such work.
2. In all other instances, the defence of fair dealing is available to the defendant, where the alleged infringing activity was for educational purposes, research or review, private use, news commentary and other critical reviews like caricatures, parodies or satires, or incidental inclusions of artistic works in a film or broadcast. Other exceptions include use of works under the direction or control of the government, public libraries, scientific and research institutions in the public interest and for non-commercial objectives; and use of copyright protected works in legal proceedings and under a compulsory licence issued by the Commission for the translation and/or reproduction of certain specified works under the Copyright Act.

5.5 Are interim or permanent injunctions available?

Yes, interim and permanent injunctions are available in an action for copyright infringement. Interim injunctions may be issued *ex parte* on a *quia timet* basis or in the form of an interlocutory restraining order after taking arguments from the plaintiff and the defendant. In rare cases, Anton Piller injunctions can be obtained where the copyright owner argues to the satisfaction of the court that the alleged infringer is likely to remove and/or destroy evidence of the infringing activity, unless restrained by an order of court as a matter of extreme urgency. Furthermore, where there is evidence that infringing materials together with the implements and contrivances for making them are in an identified location, the court may issue an order *ex parte* for the inspection and or seizure of such materials for safekeeping, pending the determination of the lawsuit.

Permanent injunctions are issued at the end of a full trial (or settlement, depending on the terms) when the trial court accepts the copyright owner's claims as established by credible evidence.

5.6 On what basis are damages or an account of profits calculated?

A claim for general damages avails a successful plaintiff to a copyright infringement claim as a matter of the court's discretion. Conversely, a claim for specific damages must be specifically pleaded and strictly proved with the aid of substantiating evidence. Furthermore, the court may award additional damages, usually in the nature of punitive, exemplary or aggravated damages, based on the flagrancy of the infringement, any benefit shown to have accrued to the defendant by reason of the infringement, effective relief not being otherwise available to the plaintiff, and any other material consideration.

An account of profits may be ordered where, although the infringer admits liability, there is evidence indicating that at the time of such infringing activity the infringer was not aware and had no reasonable basis for suspecting that the affected works were protected by copyright. In such unique cases, an award of damages would be inappropriate.

5.7 What are the typical costs of infringement proceedings and how long do they take?

The cost of infringement proceedings depends on the attorney fees, filing fees, damages awarded and other incidental expenses.

There is no stated duration for infringement proceedings, but in the absence of a bureaucratic bottleneck, it could last for a minimum of three years where there is a full trial.

5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

Yes, there is a right of appeal from the court of first instance, and the grounds on which an appeal is brought depend on the subject matter of the suit and the *ratio decidendi* of the judgment. Ideally, an appeal is indicated when the appellant alleges that the trial court failed to weigh and evaluate the evidence adduced at trial or failed to ascribe appropriate probative value to such evidence. Other grounds of appeal may be justified if it can be argued that material evidence was improperly excluded or not considered, or if the outcome would

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have been different had such evidence been considered. An appeal may also be justified on technical grounds where questions of jurisdiction and standing to sue are alleged.

5.9 What is the period in which an action must be commenced?

Since a claim for copyright infringement is a tort claim under the common law, the applicable time frame within which to bring such claims is three years under the statute of limitations. However, copyright infringements are peculiarly of a continuing nature, and, as such, the question would invariably be of determining when the infringement abates in order to ascertain when the computation period begins to run.

The overarching consideration would be for the court to make a determination as to when the complainant first discovered the infringing activity or should have, in the exercise of reasonable diligence, discovered it. Next would be whether the complainant is entitled to damages/compensation for the entire period of infringement or for the period commencing from the date of discovery going forward. A court of law has to make a discretionary call in most cases on whether the copyright owner has unduly slept on its rights or waived them by conduct. These are issues which have not yet been examined by Nigerian courts in the field of copyright law.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Yes, there are criminal offences relating to copyright infringement. Criminal liability will attach for making, selling, importing, distributing, or hiring for the purpose of trade infringing copies of works in which copyright subsists. It also constitutes a criminal offence under the Act to make or have in one's possession any equipment or machine for the purpose of: making infringing copies of protected works; importing, making, removing, defacing or tampering with anti-piracy devices; and the circumvention of digital protection measures prescribed by the Commission for use on copyrighted materials.

6.2 What is the threshold for criminal liability and what are the potential sanctions?

As in all criminal cases, the threshold for liability is proof beyond a reasonable doubt, whether premised upon an admission, on hard or circumstantial evidence or a combination of these. Summary convictions for offences committed under the Act are also available, and the following offences have been assigned specific punishment.

1. Making or causing to be made for sale, hire or for the purpose of trade or business any infringing work, importing or causing to be imported and making, causing to be made or being in possession of any equipment for the purposes of making any infringing work is a criminal offence for which the sanction is a fine not exceeding N1,000 for every copy dealt with or to a term of imprisonment not exceeding five years, or both.
2. Selling or letting for hire, exposing or offering for sale or hire, distributing for the purpose of trade, being in possession, selling, exposing for sale, hire or distributing any work which if it had been made in Nigeria would be an infringing copy attracts a fine of N100 for every copy dealt with or a term of imprisonment not exceeding two years, or both.
3. Distributing in public by way of rental, lease, hire, loan or similar arrangement without the consent of the owners for commercial purposes, copies of a work in which copyright subsist attracts a sanction of N100 for every copy dealt with or to imprisonment for six months, or both fine and imprisonment.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

There is presently a bill before the Nigerian House of Assembly for the amendment of the Copyright Act, as well as an Intellectual Property Commission of Nigeria bill and an Industrial Property Commission of Nigeria bill.

As regards case law, there are ongoing litigations between the Copyright Society of Nigeria and MTNN with Suit No. FHC/L/CS/619/2016 on one hand, and the Copyright Society of Nigeria and Emerging Markets Telecommunications Services Limited (Etisalat) with Suit No. FHC/L/CS/756/2016 on the other hand. These cases are likely to clearly define the scope of rights and responsibilities of collecting societies, copyright owners and the users of these rights in Nigeria. There is also still pending before the Federal High Court in Abuja the case of *Nigerian Copyright Commission v. MTNN* [FHC/ABJ/CR/379/15] regarding certain copyright offences. This case will examine the powers of the Commission to pursue a criminal action against an alleged offender despite the settlement of the civil action, and the consequences of proceeding with the criminal action with or without the support of a reluctant complainant.

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

The current Copyright Act does not specifically address internet issues and other claims arising in the realm of new technologies.

However, Part VII of the proposed bill amending the Copyright Act addresses online issues like the issuance of take-down notices, suspension of the accounts of repeat offenders, the limitation of liability of service providers regarding user content and information residing on ISP network platforms as well as the denial of access to infringing material placed on these online platforms.

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