

ANALYZING THE CHALLENGES TO DIVERSIFICATION OF THE ECONOMY THROUGH PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN THE ENTERTAINMENT INDUSTRY IN NIGERIA

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ABSTRACT: *The Nigerian economy is a monolithic economy dependent mainly on oil. The price of oil has depreciated in recent times and most developed economies have already set timelines to divert to renewable energy sources due to environmental concerns that result from the destructive effect of fossil fuel. These developments have affected adversely Nigeria's economic development. Therefore, there is a need for Nigeria to diversify her economy to engender economic development especially through knowledge-based systems. The entertainment industry could bring this needed economic development if the potentials are fully harnessed through strong intellectual property laws and policies. This paper analysed the role of law in the protection of the entertainment industry from piracy and explained how the industry can contribute to the diversification drive of the Nigerian economy. Using doctrinal approach, the paper found that the Copyright Act, which is the extant law on the protection of copyright in Nigeria is flawed in many areas especially the lack of provisions to address copyright infringement on the internet. It recommended among other things that the Copyright Act be urgently amended to address obvious lacunas in the protection of copyrighted works in the entertainment industry in Nigeria.*

KEYWORDS: *Intellectual Property Rights; Entertainment Industry; Nigerian Economy; Diversification*

JEL Code: *K11, K2*

1. INTRODUCTION

The economy of Nigeria is mainly dependent on oil for its sustenance. The global economic challenges, militancy in the Niger Delta region, international oil politics and the production and refining of shale oil by the United States of America have all played out to impact negatively on the economic fortunes of Nigeria. The economic recession

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that the world witnessed a decade ago limited the capacity of countries that imported Nigeria's oil from importing the oil in the quantity they previously imported. Militancy in the Niger Delta in recent times drastically reduced the quantity of oil that Nigeria produce per day. This reduced the revenue base of the country arising from the sale of oil.

In addition, as a member of OPEC, Nigeria has suffered from the quota system operated by the organization, as it is often required to limit its production output in a bid to control global market prices; this tends to reduce Nigeria's revenue from oil export. The production of shale oil by the United States, the largest importer of Nigeria's oil on the other hand, has resulted in lower demand of Nigeria's oil. The combined effect of these factors has tremendously influenced negatively the Nigerian economy. Indeed, recent advances in energy technology have made it possible for some countries to set deadlines to phase out the use of fossil fuel in favour of green energy.¹ (Abdulahi, 2017) When these deadlines are achieved, countries that depend on crude oil to finance their national budgets (including Nigeria) would most certainly lose out in the New World Order. Their economies will crumble in the face of new realities. It is this realization that drives a new resolve to find other means of sustaining the Nigerian economy, especially through a knowledge-based system. Thus, the development and exploitation of the entertainment industry remains a viable alternative to achieving a knowledge-based economy. This article analyses this possibility in the face of diverse challenges.

Over the years, the Nigerian economy has benefited enormously from copyrighted works and related rights. In 1998 for instance, copyright-based industries contributed about ₦1.2 trillion to the Nigerian gross domestic income (Ajirere, 2008) and this revenue continued to rise over the years. Still, Nigeria lost huge revenues from this industry due to abuse of copyright, especially following new technologies that tend to exploit weaknesses in the already obsolete legal regime. This article intends to analyse the continued relevance of the extant legal regime for the protection of intellectual property rights in Nigeria, especially in the entertainment industry. It will identify the areas that require urgent legal intervention to reduce copyright abuses and recommend amendment to existing laws.

2. DEFINITION OF TERMS

2.1 Copyright

Copyright is defined as 'the right to copy' specifically, a property right in an original work of authorship which is fixed in any medium of expression giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work. (Garner, 2009) (Okany, 2000) (Jangkam, 2011) Copyright is an incorporeal intellectual property right vested for the benefit of the owner. (Asein, 1990) (Sodipo, 2010) (Uloko, 2010) WIPO defined copyright as the exclusive right given to an author to disclose a work as his own and to reproduce, distribute and disseminate it to the public and to permit others to deal with the work in specified ways.² We understand copyright to

¹ Germany, France and India to phase out hydrocarbon engine between 2030-2040.

² WIPO, *WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights* (Geneva: WIPO, 1980).

mean the bundle of rights granted by law to the author of a work, which allows him to deal with his work in certain ways while excluding others from dealing with the work in those ways without his authorization.

2.2 Economic Development

Economic development is the development of economic wealth of a country for the well-being of its citizens. From a policy perspective, it can be defined as efforts that seek to improve the economic well-being and quality of life for a community by creating or retaining jobs and supporting or growing incomes and the tax base.

2.3 Entertainment Industries

Entertainment industries for the purposes of this article include industries that make use of novels, plays, drama, songs, lyrics, sound recordings, films and music, advertising and broadcast.

2.4 Intellectual Property

This includes rights relating to: literary, artistic and scientific works; performances of performing artistes, phonogram and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trademarks, service marks, commercial names and designations; protection against unfair competition; all other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields.³ (Ozioko & Nwogu, 2010)

Intellectual Property is the aggregate of rights and duties, which relates to the control and regulation of the rights of peoples over the product of their intellect, (Nwabueze & Shikill, 2009) such as ideas, inventions, poems, designs, micro and computers. (Philips & Firth, 1990) Intellectual property is the property, which a person has in his intellectual creation in the area of industrial, scientific, literary or artistic fields. Intellectual property rights protect creators and other producers of intellectual goods and services by granting them certain time-limited rights to control what they have created. (Kur, 2015) These rights are essentially negative aimed at stopping unauthorized persons from doing certain things. (Cornish, Llewellyn, & Aplin, 2003)

2.5 Knowledge-based Economy

Knowledge-based economy describes the new economic environment in which the generation and management of knowledge play a predominant role in the creation of wealth.⁴ (Keith, 2002) It is about the most effective use and exploitation of all types of knowledge in all manner of economic activity. One of the key components of a knowledge economy includes a greater reliance on intellectual capabilities than on physical inputs or natural resources. A nation's well-being increasingly hinges on its ability to convert knowledge and information into tangible economic asset.

³ WIPO Intellectual Property Convention, 1968, Article 2;

⁴ J.J. Kur, *Op. cit.*, p.55;

3. NATURE OF COPYRIGHT PROTECTION IN THE ENTERTAINMENT INDUSTRY

There are myriads of copyrighted works relevant in the entertainment industry in Nigeria, which require protection from piracy. These include literary and musical works, artistic works, cinematograph films, sound recording, broadcast programmes, expression of folklore and neighbouring rights. In respect of literary and musical works, the Copyright Act⁵ grants certain rights exclusively to authors: to reproduce; publish; perform; translation; record; make cinematograph film; distribute to the public; broadcast or communicate to the public; and make adaptation of the work in any other way whatsoever.

Regarding artistic works, which may be found in private and public museums for entertainment purposes, (including drawings, paintings, lithographs, woodcuts, and works of sculpture), the Copyright Act grants the author the exclusive right to reproduce, publish, include in cinematograph film and make any other adaptation of the work.⁶ This right extends to the whole or substantial part of the work in its original form or in any form recognizably derived from the original.⁷

For cinematograph films, the Act protects the owners or investors (including the producers) from infringement particularly, piracy which appears to be endemic in the entertainment industry. It prohibits the doing of any of the following acts without the license or authorization of the copyright owner: making a copy of the film; causing the film to be seen or heard in public; making any record of the sound track associated with the film; and distributing copies of the work for commercial purposes.⁸ The prohibited acts extend to the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original.⁹

The Copyrights Act also protects sound recordings placed on media such as DVD, VCD and audio recordings on the internet. Copyright in sound recording is infringed where any person without the license or authorization of the copyright owner, does or authorizes the doing of any of the following acts in relation to sound recording: direct or indirect reproduction, broadcasting or communication to the public; distribution to the public for commercial purposes.¹⁰

Closely related to the protection of cinematograph films and sound recordings is the protection of audiovisual broadcast programmes. Broadcast may be made by television or radio stations, or even on the internet and the law protects the content of such broadcast against infringement. Direct infringement of broadcast would occur where any person, without the license or authorization of the copyright owner, does any of the following: recording and rebroadcasting of the whole or a substantial part of the broadcast; communication of the broadcast to the public; distribution to the public for commercial purposes;¹¹ and taking of still photograph from the broadcast.¹² The Act in

⁵ Copyright Act, Cap C 28 Laws of the Federation of Nigeria, 2010, section 6(1)(a).

⁶ *Ibid*, section 6(1)(b).

⁷ *Ibid*, section 6(2).

⁸ *Ibid*, section 6(1)(c).

⁹ *Ibid*, section 6(2).

¹⁰ *Ibid*, section 7(1)(a) and (b).

¹¹ *Ibid*, section, 8(1) a – c.

section 8(1)(b) prohibits the communication to the public of the whole or a substantial part of a television broadcast either in its original form or in any form recognizably derived from the original.

Neighbouring rights are rights conferred by law on works of performers, including live performances and recorded performances of singers, actors, musicians and dancers. The Copyright Act protects these works against infringement particularly piracy. The Copyright Act did not define a performer, however, section 2 of the Rome Convention¹³ defines 'performers' to mean 'actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. The Copyright Act gives the performer the exclusive right to control, in relation to his performance, the following acts: performance; recording; broadcasting live; reproducing in any material form; and adaptation of the performance. By section 26(2) of the Act, 'performance' include: dramatic performance (dance and mime); musical performance; and reading or recitation of literary act or any similar presentation which is or so far as it is, a live performance given by one or more individuals.

The Act also protects expression of folklore, which includes live performances and recordings of traditional cultural expressions like folklore, folk poetry, folkdance, arts, music and fashion. Section 31(5) of the Act defines folklore as "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, by imitation or by other means". Thus, expression of folklore is not attributed to any individual but rather a group-based protection of intellectual property, which is an embodiment of the expression of the identity of the community including their customs, traditions and way of life. Expressions of folklore are protected against the following: reproduction; communication to the public by performance, broadcasting, distribution by cable or other means; and adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context.¹⁴ The Act rests on the Nigerian Copyright Commission the right to authorize the doing of the acts specified in section 31(1).¹⁵

4. THE IMPACT OF THE ENTERTAINMENT INDUSTRY ON ECONOMIC DEVELOPMENT IN NIGERIA

The entertainment industry always depends on copyright and related rights protection to thrive. Thus, an effective copyright system is a baseline for any government to engender economic growth and development. Sustained protection and harnessing of copyright resources certainly leads to diversification of the economic base of a nation through a knowledge-based system. Under this kind of economic base, the generation and exploitation of knowledge play a predominant part in wealth creation.

¹² *Ibid*, section 8(2). The above rights are subject to exceptions provided for in Second Schedule to the Act.

¹³ Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961.

¹⁴ Copyright Act, *Op. cit.*, section 31(1).

¹⁵ *Ibid*, section 31(4).

Today, the wealth and economy of different nations relies on the ability to turn information and technology into tangible economic asset;¹⁶ hence, the protection of intellectual property systems plays a key part in this dynamics.¹⁷ The ‘knowledge based economy’ is actually a by-product of the 21st century new economic environment propelled by the generation and management of knowledge in the key sectors of the economy compared to the traditional factors of production.¹⁸ Therefore, the new conduit of capitalism is control of information, knowledge and technology. (Ocheme, 2010) This clearly explains the renewed vigor to protect information and knowledge systems in different countries beyond the traditional copyright legal regimes.

The effect of the knowledge-based systems produced by the entertainment industry on the economy is huge, as it takes a large share of the Gross Domestic Product (GDP) of different countries.¹⁹ (WIPO, 1998) The industry leverages on copyright and related rights protection and their enforcement to stimulate investment and employment and ultimately generate income and grow the economy. (Ouma, 2012) The economic theory or justification for granting of copyright protection is to promote creativity by rewarding authors while ensuring that users have access to their works. Copyright law thus, exists to provide marketable right for creators and distributors of copyright works, which in turn create an incentive for production and dissemination of new works.²⁰ In this way, protection of investment through copyright law provides a major economic incentive and benefit²¹ to the author, industry, commerce and society as a whole.²²

Indeed, there seems to be a correlation between strong intellectual property protection through modernized copyright legislation and enforcement with the increasing rate of technology transfer and consequent technology development in developing countries. (Maskus, 1998) Strong intellectual property protection certainly attracts foreign direct investment. (Alikhan, 2002) According to Maskus, evidence exists to show that stronger and more certain intellectual property right systems (IPRS) increase economic growth and foster beneficial technical changes, which improve development prospects if structured in a manner that promotes effective and dynamic competition. (Maskus, Intellectual Property Rights and Economic Development, 2000) An earlier broader study by Ginarte and Park²³ also concluded that strong intellectual property right protection leads to economic development. The authors studied a number of developed and developing countries over a period of time and noted that the strength of patent rights depended on real Gross Domestic Product (GDP) per capita share of Research and Development (R&D). This suggested that increased protection of patent is related to demand for protection because countries with higher R&D intensities and human capital

¹⁶ J.J. Kur, *Op. cit.*, p.56.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ J.J. Kur, *Op. cit.*, p. 23

²⁰ *Ibid.*

²¹ The first recorded legislative instrument in this area indicated that protection of the product was considered necessary for the disseminating industries. See the Venetian Privilege of 1469 quoted in J.A.L. Sterling, *World Copyright Law*, 3rd ed. (London: Sweet & Maxwell, 2008), p. 72.

²² *Ibid.*

²³ J.C. Ginarte & W.G. Park, “Determinant of Patent Rights: A Cross National Study” *Res. Pol’y* 26 (1997), 283, 285-286, W.G. Park, “International Patent Protection: 1960-2005” *Research Policy*, 37(4) (2005) pp.761-766. The later extended the study to 2005 and arrived at the same result as the earlier study.

inputs have 'higher index' and thus requires more protection. The study showed that the developed countries have 'higher index' and thus stronger Intellectual Property Rights System (IPRS) protection as opposed to developing countries that do not have strong IPRS protection.

Primo Braga *et. al* on the other hand, considered the importance of intellectual property rights to economic growth and development. They found that the significance of intellectual property right (IPR) in economic activities depends on the amount of resources devoted to creating intellectual assets and the amount of protected knowledge and information used in production and consumption. (Primo Braga, Sepulveda, & Fink) This means that because of strong IPRS, developed countries apply more resources to research and development and thus, yield more intellectual asset than developing countries, which have weak IPRS.²⁴ Weak IPRS protection damages the economy and causes loss of revenue to both copyright owners in the entertainment industry and the government. It also causes loss of employment and investment due to pervasive copyright infringement. For instance, the Motion Picture Association of America (MPAA) reports that online piracy costs the US economy \$258 billion yearly and is responsible for the loss of 375,000 American jobs.²⁵ (Beer, 2016)

In Nigeria, available statistics indicate that the entertainment industry account for a significant contribution to the economic development of the country. Nigeria has a vibrant and growing entertainment industry. The Nigerian film industry alone is estimated at \$250 million.²⁶ The advertising industry in Nigeria is also an important component of the revenue raised by broadcasting organizations especially the commercial radio and television stations. In 2008, the totality of copyright-based industries operating in Nigeria contributed about ₦1.2 trillion to Nigerian Gross Domestic income.²⁷ (Faga & Ole, 2010) Recently, the Director-General of the Nigerian Copyright Commission (NCC) declared that the creative industry in Nigeria generated a cumulative annual output of \$2 billion, which accounts for 1.42 percent of the country's Gross Domestic Product (GDP). (Lopes, 2015) The industries include film, music, performing arts, advertising and TV broadcasts amongst others.

The main category of protected works in the entertainment industry in Nigeria within the above genre include the reproduction and distribution of 'hard copies' of sound records, films and other electronic formats and communication in the form of radio-

²⁴ Handke, on his part concluded that there is some evidence for a net positive effect of IP in some economies. However, results suggest that countries have divergent interests regarding IP protection depending on their relative state of development and in particular on their domestic industries' ability to conduct innovation. Thus the most developed and innovative economies may favour stronger international copyright protection while developing economies that seek to catch-up and grow through imitation (rather than through foreign direct investment and licensing) may not for the time being. See C. Handke, "Effects of Copyright: The Empirical Evidence so Far", Report of National Academies of the Science, Rotterdam, (2011), pp.13-14. Available at: https://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_063399.pdf (Accessed 10 November, 2018).

²⁵ S.E. Siwek, "The True Cost of Copyright Industry Piracy to the US Economy" Institute for Policy Innovation, Policy Report No. 186 available at: https://www.ipi.org/docLib/20120515_CopyrightPiracy.pdf (accessed 8 December 2017). See also E. Kain, "Does Piracy Cause Economic Harm? How to Think about Economic Frontiers" (2012) available at: <https://www.forbes.com/sites/erikkain/2012/01/15/does-piracy-cause-economic-harm-how-to-think-about-economic-frontiers/> (accessed 10 January, 2018).

²⁶ M Ouma, *Op. cit.* p. 70.

²⁷ T. Ajerere, *Op. cit.*

phonic or electronic transmission.²⁸ Although the entertainment industry in Nigeria contributes to the level of economic development in the country, its potential is yet to be achieved.²⁹ It would certainly contribute more if the IPRS is reformed to provide for stronger legislations and institutions that meet international standards. A stronger IPRS would undoubtedly attract the needed foreign direct investment and licensing contracts that will enhance the economic fortunes of Nigeria.³⁰

The film industry in Nigeria for instance, has a wide viewership that spans the entire Africa and even Europe and the Americas. Foreign investors in the industry are therefore sure to recoup their investment if the proper environment is nurtured by the enactment of stringent legislations and the willingness to enforce them. In this way, a responsive IPRS plays a major role in encouraging investors, as their returns on investment are guaranteed and the economy is better off for it. The current figure of one million people employed in the entertainment industry in Nigeria³¹ certainly pales in the face of statistics, which puts the figure at the high level of between two and three million when the right atmosphere is created. (Sahara Reporters, 2014)

5. CHALLENGES TO PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN THE ENTERTAINMENT INDUSTRY IN NIGERIA

5.1 Piracy

Piracy is one of the greatest challenges to the protection of intellectual property rights and enforcement in the entertainment industry in Nigeria. It involves the production of unauthorized copies of protected materials and the act of dealing with them by way of sale or any other way inconsistent with the interest of the right owner.³² Infringement may occur by the act of making the copy, having in possession plates for making unauthorized copies, distribution or importation of pirated copies and sale of the copies.³³ It is rife for instance in Nigeria to find copies of local or even foreign films sold for as low as 25 cents (100 naira) as against the cost price of between \$1.30 to \$5 (₦500 – ₦1,500). This situation applies with the same verve in respect to music CDs and music videos produced in Nigeria.

The Nigerian Copyright Act however, makes provision to curb such practices. In section 21(1), the Act empowers the Copyrights Commission to prescribe any design, label, mark, impression or any other anti-piracy device for use on, in, or in connection with any work in which copyright subsists. It creates an offence for anybody who sells,

²⁸ J.A.L Sterling, *Op. cit.*, p. 26.

²⁹ Vanguard Newspaper, "Film Industry can Generate N10b Annually, Movie Producer Tells Buhari," *Vanguard Newspaper*, August 26, 2016. See also A.A. Abraham, "How Entertainment Contributes to Nigeria's GDP," April 9, 2014, available at: <https://allafrica.com/stories/201404090290.html> (accessed 23 November, 2018).

³⁰ S. Alikhan, *Op. cit.*, p. 502.

³¹ A.A. Abraham, *Op. cit.*, S Alikhan, *ibid*, p. 496.

³² "Boot legging" is related to Piracy and it means the illegal recording and sale of records derived from live performances. Counterfeiting is the use of distinctive label, mark, to goods without the authorization of the rights owners and which makes people believe they are purchasing the goods produced or issued by the right owners.

³³ JAL Sterling, *Op. cit.*, p. 1421.

rents, hires, or offers for sale any work in contravention of section 21(1) of the Act.³⁴ Section 21(3)(a)(b) of the Act creates an offence for anybody who imports into Nigeria or has in his possession without the consent of the Commission any anti-piracy device or any machine, instrument or contrivance, intended for use in the production of the anti-piracy device. Finally, the Act makes it an offence for anybody who has in possession, or reproduces or counterfeits any anti-piracy device without the permission of the Commission.³⁵

In order to address the issue of piracy, the Commission has made a number of regulations aimed at keeping the menace in check.³⁶ Yet, these legislative measures have not succeeded in eliminating piracy in Nigeria, which remains a major challenge in the protection and enforcement of the rights of copyright owners in the entertainment industry. The advent of the internet has compounded this challenge. Online infringement of protected materials is rampant and almost unabated. Digital threat to copyright has assumed incalculable proportions especially, with the advent of peer-to-peer (P2P) software downloadable free of charge.

The software enables the replication of copyrighted works with ease and thereafter, made available to the world through the file-sharing network. (Prasad & Agarwala, 2008) This technology makes it easy to pirate both sound recordings and audio-visual recordings (films) online which deprive the copyright owners of legitimate income they would make thus, discouraging creativity. The impact on the economy is immediate and monumental, as it erodes the revenue base of the country through taxable transactions. This is apart from the ripple effects such practice has on the employment chain in both the entertainment industry and companies that produce the CDs and films. A good example of the disastrous effect of online piracy on the global entertainment industry is the plummeting figure of global music sales from \$40 billion annually in 1995 and 1996 respectively, (Danaher & Smith, 2014) to just below \$15 billion in 2003, a decline of 62% in less than a decade.³⁷ Indeed, writing on the effect of piracy on the entertainment industry, Danaher and Smith³⁸ found a significant correlation between piracy and declining revenues in the entertainment industry. They concluded that online file sharing was the cause of the collapse of record industry sales from 1998 to 2003.³⁹

³⁴ *Ibid*, section 21(2).

³⁵ *Ibid*, section 21(4).

³⁶ The Regulations made include the following: Copyright (Video Rental) Regulations, 1999, Government Notice No.144 Gazette No.63 vol. 86 of 10th September, 1979. Copyright (Security Devices) Regulations 1999, with commencement date of 7th September 1999, Government Notice 145, Gazette No.63, vol. 86 of 10th September, 1999. Copyright (Optical Disc Plates) Regulations, 2006, with commencement date of 15th December 2006. Copyright (Collective Management Organizations) Regulations, 2007 with commencement date of 28th September, 2007.

³⁷ S. Carlisle, "Copyright Piracy and the Entertainment Industries: Is the Effect Massive or Negligible?" (2014), available at: <http://copyright.nova.edu/copyright-piracy-entertainment-industries/> (Accessed 5 Jan 2019). The film "The Expendable 3" was leaked on line three weeks ahead of its scheduled release and was downloaded 2.1 million times which threatened a big percentage of the projected profit for the film. See S. Carlisle *ibid*.

³⁸ Danaher, Smith *et al*, *Op. cit.*, pp. 18 – 19.

³⁹ *Ibid*. See also K. Strauss, "TV and Film Piracy: Threatening an Industry?" (2013) available at: www.forbes.com/sites/Karsten/strauss/2013/03/06/tv-and-film-piracy-threatening-an-industry-re4a83555eoe (accessed 5 January 2017), where the author argued that even though piracy cannot be denied, the rise of streaming video content hubs like Netflix and Amazon has certainly recaptured some users that may have

In Nigeria, it is estimated that piracy has affected all sectors of the copyright industry, but the worst hit is the entertainment industry, which has lost billions of Naira. (Abraham & Oguntola, 2016) Eight out of ten works in the entertainment industry find their way to pirated markets, a situation that not only weighs negatively on the industry but also on the Nigerian economy.⁴⁰ The prevalence of piracy in Nigeria is estimated at 82%, 83%, 82% and 83% for 2008, 2009, 2011 and 2012 respectively. (Bamwo&Ighadolo, 2015) In 2014, Nollywood (the Nigerian equivalent of US Hollywood) lost 82 billion naira to piracy.⁴¹ Indeed, there is no doubt that a modern and well-managed intellectual property system would catalyze economic growth and development in Nigeria. With a huge population of over 150 million people, the country is likely to generate more revenue in the exploitation of its intellectual property if the right atmosphere exists. (Waziri, 2011)

Piracy hampers growth and creativity as artists and investors are reluctant to put forward their works for fear of incurring losses and enriching pirates. Artists would rather depend on money made from live shows than produce albums that will not benefit them economically. Furthermore, piracy results in loss of foreign direct investment to the country and this discourages both local and foreign investors. Most genuine producers and manufacturers will avoid setting up facilities in the country due to uncertainty resulting from piracy.

5.2 Ineffective Legal Regime

Lack of appropriate legislation is one of the major challenges to the protection of intellectual property rights in the entertainment industry in Nigeria. The principal legislation on the subject is the Copyright Act. However, the Act is obsolete and in dire need for revision to address new developments in copyrights, especially the challenges thrown up by the emergence of internet technology and the huge impact it has had on copyright protection. Most international copyright instruments⁴² which Nigeria is signatory have not been domesticated to take full legislative effect in the country. The current situation makes it difficult for right owners in the entertainment industry to enforce their rights particularly in this digital era.

Furthermore, Nigeria is not a signatory to some international treaties that are relevant to the entertainment industry.⁴³ This situation impacts negatively on right owners to protect their works especially as such are available on digital media. Most of the

resorted to piracy (in the US). But this cannot be true for Nigeria where most people do not have access to the internet and will have recourse to pirated hard copies of films.

⁴⁰ *Ibid.* See also A. Fielding-Smith, "Piracy and Illegal Downloads Hit Nigeria's Film and Music Industries", *Financial Times*, May 4, 2014, available at: <https://www.ft.com/content/e9cdd214-bb16-11e3-948c-00144feabdc0> (accessed 5 January, 2019). Producers in the film and music industries are now turning to online distribution of Nigerian Cinema and music. Mr. Jason Njoku spends about \$3m - \$4m annually licensing films to his IROKOTv online video streaming site.

⁴¹ *Ibid.*

⁴² Nigeria is a signatory to Berne Convention on the Protection of Literary and Artistic works 1886, Universal Copyright Convention 1952, The Rome Convention, 1961, World Intellectual Property Organisation, World Trade Organisation Treaty (WTO) and by extension Trade Related Aspects of Intellectual Property Rights (TRIPS) 1994.

⁴³ Nigeria is yet to domesticate the WIPO Copyright Treaty of 1996, WIPO Performances and Phonograms Treaty, 1996, and yet to adhere to the Phonograms Convention of 1971, and Satellite Convention of 1974.

penalties imposed by the Copyright Act in form of prison terms and fines are currently inadequate especially in view of the endemic nature of infringement in the entertainment industry in Nigeria. The process of re-enacting international treaties (domestication) is a major hindrance to benefiting from these treaties as it takes a lot of time in the National Assembly to enact the required legislation. (Nwabachili, 2015)

5.3 Weak Enforcement Mechanism

The observance and enforcement of law determines its success and efficacy in achieving the intended aim. In this way, the efficacy of the Copyright laws applicable in the entertainment industry depends largely on their enforcement. The primary institution or agencies charged with the administration of the Copyright Act and its enforcement is the Nigerian Copyright Commission (NCC).⁴⁴ The Commission has myriads of challenges that limit or hinder intellectual property rights protection in the entertainment industry in Nigeria.

First, it lacks the requisite personnel knowledgeable and trained to address the issue of internet infringement of copyright in the entertainment industry, this being the foremost means of infringement. Second, the Commission suffers from infrastructure deficit especially in the Information and Communication Technology (ICT) area to enable them cope with the challenges of the digital era. Government has failed to integrate intellectual property, including copyright into economic development agenda of government, which has resulted in downplaying the role of the creative industry in economic development of the country.⁴⁵

The Commission also lacks adequate information and intelligence to support enforcement of copyright abuse in the entertainment industry. It has to rely heavily for instance, on the Police to arrest and arraign culprits in court even in the face huge personnel deficit in the Police, leaving the commission helpless and frustrated. Coupled with this, the Commission is grossly underfunded to perform its functions, especially those of educating the populace and creating awareness on ways to protect intellectual property.⁴⁶ Even the task of forging sub-regional, regional and international partnership to fight piracy across national boundaries is emasculated by the lack of funds and infrastructure.⁴⁷

The Nigerian Police is another agency of the government charged with enforcement of copyright laws in Nigeria. By virtue of the Police Act,⁴⁸ the Police is conferred with power to investigate and prosecute offences created by any law, including the Copyright Act, which provides for copyright offences and their punishment.⁴⁹ However, in practice, the Police has a sordid record of prosecuting offenders for copyright infringement in spite of the clear evidence of widespread piracy of copyrighted works in the country.

⁴⁴ Hereafter referred as "The Commission".

⁴⁵ Nigerian Copyright Commission, "Second Quarter Report" (2006), available at: www.copyright.gov.ng/index.php/reports-services/item/347-making-creativitywork-for-you-second-quarter-report (accessed 15 November, 2016).

⁴⁶ *Ibid.*

⁴⁷ Nigerian Copyright Commission, "Making Creativity Work for You", (2016) First Quarter Report, available at: www.copyright.gov.ng/index.php/reports/items/338-making-creativity-work-for-you-2016-First-Quarter-Report (accessed 15 November 2016).

⁴⁸ Cap P2 Laws of the Federation of Nigeria, 2010, section 2.

⁴⁹ Copyright Act, *Op. cit.*, sections 20(1)(a – c) and 20(2)(a – d).

This is probably because the police suffers from the same shortcomings as the NCC, which include inadequate financing, enlightenment and lack of personnel.

Finally, the Nigerian Customs Service is also charged with enforcement of copyright. Pursuant to section 15(5), the Copyright Act of 1970 expressly incorporated the Custom and Excise (Copyright) Regulations of 1973.⁵⁰ Although, the regulation was omitted in the 2004 and 2010 edition of the Laws of the Federation, it is argued that by the provisions of paragraph 3(3) of the Fifth Schedule to the Copyright Act 2010, the 1973 regulations are saved by implication as a subsidiary legislation made under the 1970 Act. (Asein S. , 2012) The regulations give a copyright owner the power to issue a prohibition notice to the customs declaring that he is the owner of copyright in the work and requests the Nigerian Customs Service, during the period specified in the notice to treat as prohibited goods, copies of the work to which section 44 applies. The notice of prohibition applies to any printed copyrighted work that is produced outside Nigeria, which if it had been produced in Nigeria, would be an infringement of copyright. This provision of the law is rarely used, as copyright infringement is rampant through the borders and seaports of Nigeria.

5.4 The Emergence of Internet Technology

The internet is one of the most important revolutionary technologies in the 20th century. The invention of the internet has impacted every facet of human life and revolutionized the way people live. Because of the ease of communicating through the internet to a wider audience, this medium has emerged as the preferred choice of dissemination of research results and communication. It has brought about a wide range of new models for the enjoyment of copyrighted works with some enjoying widespread consumer acceptance. One development is the ability of individual authors, musicians, videographers and other artists to publish directly to a global audience, regardless of their intention – whether they are seeking to make money or have their creations seen or heard.⁵¹

However, the internet also poses a serious legal challenge to the world's legal systems. Thus, copyrighted works previously confined to national boundaries may find their way onto the internet where they are accessible globally bypassing the legal covering and protection given by domestic legislations. This challenge constitutes impediment to intellectual property rights protection and development in the entertainment industry in Nigeria. Piracy poses a great challenge to copyright works on the internet. (Hughes, 2006) The rampant infringement over the internet takes place through technologies like peer-to-peer networks⁵² and cyber lockers,⁵³ which have a

⁵⁰ This is now pursuant to section 44 of the Copyright Act.

⁵¹ US Department of Commerce, "Copyright Policy, Creativity, and Innovation in the Digital Economy" (Internet Policy Task Force, 2013) available at: <https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> (accessed 21 October, 2018).

⁵² Peer-to-Peer (P2P) technology allows individual consumers to exchange digital files of music, videos and games. The most widely used current P2P file-sharing protocol is Bit Torrent. See Federal Trade Commission, "Peer to Peer File sharing: A Guide for Business" available at <https://www.ftc.gov/system/files/documents/plain-language/bus46-peer-peer-file-sharing-guide-business.pdf> (accessed 10 January, 2019). An anti-piracy firm had "detected 5.4 billion instances of pirated content online" in 2009 and 14 billion in 2012. See C. S. Stewart, "As Pirates Run Rampant, TV Studios Dial up Pursuit", *Wall Street Journal*, March 4, 2013 cited in the Department of Commerce Internet Policy Task Force, *Op. cit.*, 38.

range of legitimate but also have become major sources of illegal contents.⁵⁴ (Bridy, 2011) Often, because of the transnational nature of these infringements, enforcement becomes a problem due to jurisdictional, procedural and logistical difficulties.

Infringement on the internet can be both hard to detect and global. The internet allows individuals to access and disseminate content from private locations without public attribution. Hence, individuals can copy and distribute works that are near perfect copies to the original making it difficult to trace acts of infringement to their sources. This can pose a significant threat to legitimate markets for those works in view of the sheer number of potential defendants due to the vastness of the internet.⁵⁵

5.5 Illiteracy

This is a major challenge to intellectual property protection and development in Nigeria. So many copyright owners particularly in the music industry are illiterate and as a result are not even aware that they have any right in their intellectual creations. Although this was more prevalent in the past, still the situation is appalling in the music industry where upcoming artists are exploited especially by the media due their ignorance. Musicians plying their trade in vernacular or native language are particularly affected, as many of them who have died did not understand that the intellectual property in their creations could be passed on by testamentary disposition. Some of these works become orphan works⁵⁶ because even those entitled to inherit them are not aware of their rights in those intellectual creations.

Thus, illiteracy has largely led to a situation of inadequate protection and enforcement of intellectual property rights in Nigeria. This is not only limited to the copyright owners, but also extends to the Nigerian public who are not aware of the connection between protection of the right of copyright owners in the entertainment industry and economic growth and development. Most Nigerians do not even know that it is illegal to appropriate a person's work in which copyright subsists without the copyright owner's authorization or that copyright infringement is a criminal offence that can lead to imprisonment upon conviction.

Another challenge in this area is the public perception about infringement of copyright online. People do not realize or are not aware that unauthorized file-sharing and downloading of works in which copyright subsist online is an infringement. They

⁵³ Cyberlockers, such as Hotfile and Mediafire allows users to both store and share large files, often operating as cloud-based services. Users can post the URLs for the files that they have uploaded onto blogs or 'link farms' that aggregate such links, which can be found using a search engine; US Department of Commerce, *Op. cit.*, p.38; R. Parloff, "Mega Upload and the Twilight of Copyright", (2012) *Fortune*, available at: <https://fortune.com/2012/07/11/megaupload-and-the-twilight-of-copyright/> (accessed 10 January, 2019).

⁵⁴ *A & M Records Inc v. Napster Inc* (The Napster case) where the plaintiff sued the Defendant for copyright infringement in relation to the Defendant's file sharing system;

⁵⁵ See for instance, the case of *Yahoo Inc. v. La Ligue Contre le Racisme et l' Antisemitisme*, 169 F. Supp. 2d 1181 (ND Cal. 2001), 379 F.3d 1120, (9th cir., 2004) 433 F 3d 1199 (9th cir., 2006) where La Ligue obtained an order from a France Court directing the service provider Yahoo to block the access of French citizens to an auction site through which Nazi memorabilia could be obtained. The US court considered that such Order is inconsistent with the Constitution and laws of the United States for another nation to regulate free speech by a United States resident within the United States on the basis that such speech can be accessed by internet users in that nation. This case highlights jurisdictional problems that can be encountered in enforcing internet related judgments.

⁵⁶ Orphan works are works whose authors are unknown.

believe at best that it is less harmful than the unauthorized taking of the physical work in which copyright subsists.⁵⁷ The blame for this lack of awareness squarely lies on the shoulders of the NCC and the government who have the responsibility to educate the populace and chart the way to economic prosperity.

5.6 Cumbersome Litigation Process

The litigation process in Nigeria poses a major challenge to the protection, enforcement and development of copyright in the entertainment industry in Nigeria. The time it takes for a single case to move through the litigation progress in Nigeria is exceptionally long, and that constitutes a setback to copyright protection because most cases end up being abandoned due to delay and the attendant high cost occasioned by it. The NCC has listed as one of its challenges the high cost of prosecuting cases in the law court.⁵⁸ High administrative fees especially at the appellate courts contribute in copyright owners abandoning the enforcement of their rights. Many judicial officials especially judges do not have adequate knowledge of intellectual property laws to enable them give sound judgments. This shortcoming has affected negatively the development of the law in this area.

5.7 Lack of skill and Knowledgeable Personnel

The requisite skill and knowledge is essential to combat copyright infringement in the entertainment industry. The personnel and operatives of the various agencies of government with the required knowledge and skill charged with the administration and enforcement of intellectual property rights particularly in the entertainment industry is barely available. The police and NCC are ill equipped in terms of qualified manpower and infrastructure. They are supposed to study and counteract the *modus operandi* and tactics of copyright offenders especially in the entertainment industry. However, this appears not to be the case, as the infringers seem to be ahead of law enforcement agencies in their bid to protect and enforce the law.

The lack of adequate skilled and knowledgeable personnel is particularly obvious in the case of infringement on the internet. This medium has become ever more complex and challenging with different technological tools for infringement of copyright. In order to ensure adequate protection of copyrighted works online, enforcement agencies must understand these different methods and technologies infringers use, and be able to counteract their activities. Only skilled and knowledgeable personnel can achieve such task, which is unfortunately lacking among the agencies charged with the administration and enforcement of copyright in the entertainment industry in Nigeria.

⁵⁷Intellectual Property Awareness Foundation, "Australian Attitudes and Activities in Relation to Illegally Accessing Online Movies and Television Shows" (March 2012), available at: <<http://www.IPawarness.com.au/literature-retrieve.aspx?ID=120375> (accessed 12 January, 2017); T. Wingrove, A.L. Korpas *et al*, "Why Were Millions of People not Obeying the Law? Motivational Influences on Non-Compliance with the Law in the Case of Music Piracy", 17 *Psychol., Crime & L.*, (2011), p.261.

⁵⁸ Nigerian Copyright Commission; 'First Quarter Report' *Op. cit.*, Nigerian Copyright Commission, 'Second Quarter Report,' *Op. cit.*

5.8 Lack of Information and Communication Technology (ICT) Infrastructure

Nigeria is grossly deficit in Information and Communication Technology (ICT) infrastructure.⁵⁹ Internet infrastructure in the country is only available to a small percentage of the population and is very expensive. The infrastructure is therefore not adequate for the number of enforcement agency personnel who require this infrastructure to combat piracy on the internet. Consequently, right owners are not opportune to fully access the different ICT platforms they can take advantage to market their works and at the same time protect their works against infringement. This lack of ICT infrastructure is a challenge to intellectual property rights protection and development in the entertainment industry in Nigeria, which has huge potential for the Nigerian economy. (Idah, 12 November 2011)

5.9 Poverty

Poverty is a major hindrance to the protection and enforcement of copyright in the entertainment industry. Most times the owners of copyright in the industry lack the fund to enforce their rights as a result of high legal fees. Often, owners of copyright in the industry are reluctant to confront big and powerful companies like the telecommunication companies, big media houses and pirates in the industry that have transformed into organized criminal network with far reaching influence on enforcement agencies.

Again, civil actions dealing with online infringement of intellectual property may frequently cut across other foreign jurisdictions, which would require retaining legal experts in those jurisdictions. The legal fees to enable right owners pursue such enforcement is often expensive and only few can afford them. This no doubt is a major challenge to the intellectual property right protection and development in the entertainment industry in Nigeria.

5.10 Corruption

Corruption has permeated every aspect of our national life and government agencies are at the centre of it all.⁶⁰ The agencies of government charged with protection, administration and enforcement of copyright are therefore, very much involved in such

⁵⁹ Information and Communication technology refers to all the technology used to handle telecommunications, broadcast media, intelligent building management systems, audiovisual processing and transmission systems and network-based control and monitoring functions. Converging technologies that exemplify ICT include the merging of audio-visual, telephone and computer networks through a common cabling system. Internet Service Providers (ISP) commonly provide internet, phone and television services to homes and businesses through a single optical cable. The elimination of the telephone networks has provided huge economic incentives to implement this convergence, which eliminates many of the costs associated with cabling, signal distribution, user installation, servicing and maintenance costs. See Technopedia, "What is Information Communication Technology" (2017), available at: <https://www.techopedia.com/definition/24152/information-and-communications-technology-ict> (accessed 13 January 2019).

⁶⁰ According to the Nigerian Bureau of Statistics, N400 billion bribery was paid in Nigeria between April 2015 and May 2016. The prevalence of corruption in Nigeria is as follows: Police 46%, Prosecutors 33.6%, Judges and Magistrates 31.5%, Immigration 30.7%, Car Registration and Driving license Agency 28.5%, Customs 27.5%, Public Utilities 22.4%, Land registry 20.9%. See H. Boro, "Corruption: Which is Worse: N400bn Bribery or \$15bn Plus Theft" Vanguard Newspaper, 28 August, 2017, available at: <https://www.vanguardngr.com/2017/08/corruption-worse-n400bn-bribery-15bnplus-theft/> (accessed 29 August, 2017).

corruption. This includes NCC, the Police, Customs Service, and the Judiciary. These agencies often compromise in the discharge of their functions to protect and enforce infringement of copyright abuses.⁶¹ Such compromises are made in different ways through graft or other undue influences by infringers, making it difficult to combat infringement. Thus, the prevalence of corruption affects in no small measure the protection and development of intellectual property rights in the entertainment industry in Nigeria.

6. RECOMMENDATIONS

The government should have a clear policy on intellectual property particularly in the entertainment industry. The government can start by integrating intellectual property into her economic policy. This will ensure that the economy is diversified and benefit from knowledge based and intellectual capital that drives developed economies.

It is recommended that government create the enabling environment for foreign and local investment in the entertainment industry. This can be done by providing tax reliefs to investors in the industry. Tax reliefs have been a powerful tool in attracting foreign investment in the UK creative industry. (Bradley, 2017) Government should also encourage the private sector to provide financing for the entertainment industry through the banks. The government may encourage this through its monetary policy by lowering interest rates and relaxing the burdensome requirements for securing credit facilities from the banks and through securing guarantees for facilities granted to operators in the industry.

Government should provide the critical infrastructure needed in the entertainment industry to compete with the global entertainment industry. Government can invest in Information and Communication Technology (ICT) infrastructure to enhance the creation and exploitation of copyright in the entertainment industry in order to harness and reap the huge economic potentials in the industry.⁶²

It is obvious that the copyright law, which protects right owners in the entertainment industry, is weak. A comprehensive review of the copyright law is recommended to cover new challenges to copyright protection arising from new ways of exploiting copyright works through digital technologies. The areas that need to be covered by law include 'on demand services', 'anti-circumvention of technology protection measures' and 'rights to information management systems, satellite and cable broadcasting'.

We also recommend that Nigeria domesticate international treaties, which she is party, and incorporate their provisions in our Copyright Act. This is because the world

⁶¹ Transparency International defined corruption as "the misuse of public power for private benefit such as bribing of public officials, kickbacks on public procurement or embezzlement of public funds". F.A.R Adeleke & B. Lawal *et al.* "The Role of the Judiciary in Combating Corruption; Aiding and Inhibiting Factors in Nigeria" in I.A. Abdulkadir, *et al* (eds.) *Corruption and National Development*, (Ilorin: Unillorin Press, 2013) p. 293 being Proceedings of the 46th Annual Conference of NALT, 22 – 26 April, 2013 at University of Ilorin.

⁶² Nigeria has the potential to be a world power by leveraging its creative industry. There are over 800 million people on Facebook and more than 3.5bn pieces of content shared on Facebook each week and Nigeria has about 3.3 million face book users. There are 2 billion views on You Tube each day with over 150 million views of Nigerian music in the last 12 months. ICT has huge potential for the entertainment industry and Nigerian economy. Research has shown that to reach 50 million users, it took: radio 38 years, TV 13 years, internet 4 years, IPOD 3 years and Facebook 9 months. See E. Idah, *Op. cit.*, p.16.

has become a global village and the Nigerian entertainment industry will benefit from such extension of international treaties through more protection of their works especially against manipulations using global digital technologies. It is recommended that elaborate provisions should be made in the Copyright Act on satellite and cable transmissions like the United States Copyright Act, as the current Act has only skeletal and minimal provisions on the subject matter, which is not adequate to protect copyright in the digital era. We also recommend that penalties provided for criminal infringement of copyright be increased by extending the term of years and fines provided for the various offences under the Copyright Act.

The provision of the law that confers rights on the Nigerian Copyright Commission (NCC) in respect of folklores should be amended to confer such rights on the communities where the folklore originated. Such communities no doubt will have a better incentive to protect and enforce their intellectual property.

Again, the Copyright Act should be amended to provide for seizure and forfeiture of property used in connection with copyright infringement.⁶³ In respect of physical properties, the owners of the property should be made to pay damages where it is proved that they had knowledge of the use of their property for copyright infringement. In respect of copyright infringement in digital environments, the domain names and websites used to distribute pirated or counterfeit content can be blocked and blacklisted. Users of such blacklisted websites may be notified of the interference by government to prevent copyright piracy.⁶⁴

It is also recommended that the Copyright Act be amended to formally provide for a registration of authors/copyright owners' works with their contact details. This will make it easy for any potential user of the works to obtain the necessary permission to avoid infringement of the owner's right.⁶⁵

7. CONCLUSION

Copyright undoubtedly remains the most important right in the operation of the entertainment industry anywhere in the world, including Nigeria. It protects the various creative outputs in the entertainment industry by ensuring that right owners reap the benefit accruing from their creative output by granting them exclusive right to the creation for a limited period of time. The protection of these creative outputs serves as an incentive to encourage creation and dissemination of knowledge. The emergence of digital technologies and especially, the internet has however stretched the limit of copyright to a breaking point, such that the covering previously given to creative works by national legislations has suddenly lost its verve due to the transnational character with which copyrighted works are dealt with on the internet.

This new exposure of copyrighted works on the internet has affected national enforcement of infringement globally, especially in Nigeria. This is a major problem in Nigeria because of the myriad of challenges existing in the country regarding the

⁶³ United States Copyright Act, 1976, section 2323(a).

⁶⁴ National Intellectual Property Rights Co-ordination Center (2012), available at: <https://www.ice.gov/factsheets/ipr-in-our-sites> (accessed 25 August 2017).

⁶⁵ Nigerian Copyright Commission already operates an e-registration for authors even though informally. See <www.eregistration.copyright.gov.ng> Accessed 25 August 2017.

implementation of the Copyright Act vis-à-vis protection of creative outputs on the internet. This paper has discussed these challenges and it concludes that the Nigerian Copyright Act deserves to be amended to address some of the challenges identified.

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