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The Expediency in Amending the Nigerian Copyright Act

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Abstract
The current Copyright Act provides for categories of works that can be protected and also makes provision for the use of protected works in ways that would not affect the right of the work owner. Accessing works of copyright is a public right that should not be affected by one's disability. This research highlights that in providing the exceptions to copyright infringement, the Copyright Act does not adequately provide for ways copyright works can be used by persons with disability especially the blind, visually impaired and otherwise print disabled persons in the society, without infringing the legitimate right of a copyright owner. In the course of this research, reliance was placed on statutory provisions, international treaties, textbooks and internet publications and it was discovered that the current Nigerian Copyright Act has its inadequacies with respect to the free accessibility of disabled persons to Copyright Works. The Marrakesh Treaty to Facilitate Access to published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled 2013 recognizes and provides for disabled persons to freely access copyright works without infringing the right of a work owner. Despite the goals and objectives of this treaty, it would be useless in Nigeria if it does not follow the due process as provided by the constitution for its domestication. The Draft Copyright Bill of 2015 implemented the provisions of this treaty and is currently going through the requisite process before it can be enacted as law. Amendment of the Nigerian Copyright Act to accommodate the rights of Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled cannot be trivialized in view of universally recognized human right standards set to avoid discrimination.

Keywords
Nigerian Copyright Bill, Marrakesh Treaty, Blind, Print disabled persons, Copyright Infringement

1. Introduction
It is recognized that Intellectual property rights being a product of one's intellectual activity ought to be protected by Law. A good administration of Copyright Law recognizes that a result of an intellectual activity wherein, time, energy and resources have been invested in should be given adequate protection. This protection enables the right owner to recoup the moral and economic benefits of the investment.

Copyright is defined by World Intellectual Property Organisation (WIPO)[1] as a "legal term used to describe the rights that creators have over their literary and artistic works" The Nigerian

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[1] *Copyright: What is copyright?* https://www.wipo.int/copyright/en/ Accessed on 6th December 2021 at 11.11pm

Copyright Act[2] however provides for categories of works that should be protected by copyright. It states that generally, Copyright gives the right owner the exclusive right to do or control the doing of acts in relation to the work such as, reproducing the work, publishing, making copies or distributing the work to the general public. Copyright can also be defined[3] as:

> *"a proprietary right, which confers exclusive right to authorize or prohibit a wide range of activities relating to qualified subject matter. These activities include: the performance, translation, adaptation, publication, and other forms of use or exploitation of the protected work. In this way, the law is able to provide legal recourse for the creator of a work against those who copy or otherwise appropriate the work without lawful authority".*

It is not in dispute that copyright should be protected, but is this protection at the detriment of the public who ought to benefit from the product of the intellectual activity, and should therefore be given access to copyright works.

The aim of Copyright Law has always been to promote the progress of knowledge. A good administration of copyright should try to create a balance between the rights of the copyright owner and the interest of the public. Public interest is access of the public to literary, artistic, musical, cinematograph works, sound recording and broadcasts.

It is inaccurate to assume that protection of intellectual property, especially copyright should be inconsistent with the rights of the public. The relationship between the copyright owner and the interest of the public / society is so interwoven that one cannot do without the other[4]. If there were no people to access and benefit from works of copyright, the authors will not be motivated to create more works. Copyright systems recognize the right a creator has over his developed work, and at the same time try to make adequate provision for the public to utilize the work without infringing the right of the creator/ work owner.

The Constitution[5] provides that no citizen of Nigeria shall be subject to any disability or deprivation merely, by reason of the circumstances of his birth. There are however many ways by which the strict application or compliance with the provisions of the current Copyright Act could restrict or limit the way people with disabilities such as the blind, the visually impaired or otherwise print disabled persons can make use of protected works.

In the society we live in, having access to knowledge and various sources of information is vital for personal growth and development. It is a matter of right that everyone has the right to express and form a well-informed opinion about a particular subject after proper research. The

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[2] The Copyright Act Cap C28, Laws of the Federation, 2004. Section 1 of the Act provides for the six categories of works that should be protected to include Literary, Musical, Artistic, Cinematograph Works, Sound Recording and Broadcasts.

[3] A. O Oyewunmi, *Nigerian Law of Intellectual Property*, First Edition, Lagos,(University of Lagos Press and Bookshop Ltd, 2015) P 22

[4] N. C. Ezedum, "Public Interest in the Administration of Copyright Law in Nigeria" LLM Thesis, Enugu State University of Science and Technology, ESUT. Page 25

[5] Section 42(2) of the 1999 Constitution Of The Federal Republic of Nigeria

same is the case when it comes to visually impaired or blind persons.[6] This right should not be restricted or changed due to someone's defect or disability.

2. The Challenges experienced by the Disabled.

Works of copyright are fixed in generally accepted format. Literary works are typed and printed, artistic works are also fixed in formats that the majority of the public would be able to appreciate them. This is just natural, because an author who has the right to reproduce his work would want to fix it in a convenient format that would be easy to sell and get economic benefit from. It would not normally cross the mind of a regular copyright owner to also consider that there are people who would not appreciate copyright works in its generally accepted format.

The visually impaired and the blind would naturally by reason of their physical limitation not be able to access copyright works in their original and generally acceptable mode , but would need to convert a literary work into a format that would enable them use it. For instance converting the text of a book into a format that is compatible with screen reading software, and in this process a copy of the work is made. This copying of the entire work would be against the Copyright Act[7] which provides that in the case of a literary or musical work that it is the copyright owner who can reproduce, or authorize the reproduction of a work in any material form. The copying of a copyright work by the visually impaired and the blind could amount to an infringement of the provisions of the Copyright Act.[8]

Therein lies the dilemma of the physically challenged who has the fundamental human right not to be subjected to any deprivation or disability by reason of their physical condition and the need to have access to copyright works without being held culpable of infringing the rights of the copyright owner.

3. The Disability Exception

The interest of the public generally has always been contemplated in the history of copyright and that is why copyright systems strive to create a balance. This need has always been recognized all through the history of copyright and was given special mention during the negotiation leading up to the Berne Convention hence the provisions in the text allowing members to limit the rights of authors in certain circumstances. This balance is achieved by introducing various exceptions or limitations to the rights granted under the copyright law[9].

However, there is dire need to specifically include disability exceptions in the Copyright Act. In essence, when a physically challenged or disabled person is unable to enjoy a copyright work the same way a person without such impairment, then the disability exception would apply. These exceptions should allow persons with physical challenges such as the blind or visually impaired, to make a copy of a work for personal use and equally authorize institutions that cater for them put these copyright works in formats that would be easily accessible to these people.

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[6] A. Yadav, *Developments in International regime and Indian Copyright Law, https://blog.ipleaders.in accessed on 7/12/2021 at 12.12pm.*

[7] Section 5(1)(a) of the Copyright Act, Cap C28, Laws of the Federation, 2004

[88] Section 14(Supra)

[9] J.O Asein, *Nigerian Copyright Law & Practice*, 2nd Edition (Books and Gavel Ltd 2012) page 246

It is acknowledged that the Second Schedule of the Copyright Act provides exceptions to the rights conferred in respect of a work by Section 6 of the Act, however providing specific disability exceptions enables a disabled person create an adapted version of the work and enables the institutions that cater from them create such version for their use so they can enjoy it to the same degree as someone without the disability.

This inclusion can be achieved first of all by the Act defining who a blind person ,visually impaired person or otherwise print disabled person is and then secondly making specific provisions that enables copyright works be put in formats for their use.

It is unfair and amounts to discrimination for copyright works to be put in formats that enables only a part of the public without physical disability to benefit thereof without considering the blind and visually impaired persons proper who make up a good percentage of the society in Nigeria. It is not under contention that right owners must be rewarded for their work but the public which include people with disability must be allowed to appreciate that creativity on equal terms with the rest of the public. Copyright law protects the expression of ideas, but the fact remains that there is a part of the public who are disabled, these include the blind and visually impaired people who would normally not be able to appreciate a work in its regularly accepted format. These people comprise a good percentage of the public and their ability to access and utilize copyright works ought to be put into consideration.

The opportunities afforded people with disability should not be restricted but rather in the quest for fairness and equality of every citizen, these disabilities should be considered when the interest of the public is discussed under copyright.

Copyright protection advances the public interest and a good public policy must consider the role of intellectual property as a tool for economic emancipation, a catalyst for cultural diversity, and a powerful protector of individual dignity and fundamental human rights[10]

Policy makers are encouraged to bear in mind the special needs of the blind and visually impaired when making copyright policies in Nigeria.

When discussing the public in general, particular interest for consideration is the percentage of the public that comprises of people with various disabilities. These people in all fairness would want to benefit from various works which enjoy copyright protection. The visually impaired live in our society, attend same higher institution with the general public but how accessible are copyrightable works to them? Right owners do not own their ideas but expression of those ideas, when owners fail to express their ideas in an accessible format, can these rights be forfeited or can the laws regulating copyright mandate them to put these works in an accessible format?

What role does copyright law play to ensure that ideas are expressed in a way that can be perceived, manipulated, or comprehended by people with disabilities because the truth is that the public also includes people with various disabilities which include blindness, print disability and visual impairment. Copyright laws attempt to balance the rights of authors against the rights of end users, which is the public. In the case of the end users who have print disability there is an

[10] N. Turkewitz , Intellectual Property Watch: *Copyright And The Public Interest: Not Necessarily Competing Forces* ,www.ip-watch.org accessed on 6th December 2021 at 3.30pm

added responsibility to ensure that there is no discrimination against them. Does the Copyright Act which regulates Copyright in Nigeria even recognize the visually impaired, because if the act recognizes them, there ought to be well provided in the Act the definition of people with print disability or virtual impairment.

4. **Standards for Accessible Formats.**

There ought to be a statutory provision that permits reproduction and communication of literary or dramatic works in accessible formats for the use of disabled persons. This means a copy of the work in an alternative manner or form which gives a beneficiary access to the work, including, to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively for the beneficiary person and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.[11]

There are five globally recognized formats for use by the visually disabled. These include: sound recordings, braille versions, large print versions, photographic versions, and electronic versions.

It is advised that for these exceptions to apply, the copyright work must have been acquired in a lawful way by the disabled person or authorized bodies or the institutions that provide or cater for them. Lawful in this regard means download of an authorized copy of the eBook or purchase of the hardcopy from an authorized source that does not amount to piracy.

An authorized body is defined as an educational establishment or a body that is not conducted for profit. Accessible copies made by authorized bodies must come with a statement that the copy has been in accordance with this particular exception and where practical, sufficient acknowledgement of the author of the work[12]

There are international treaties which are aimed at facilitating access of copyright works for visually disabled, visually impaired or print disabled persons. The Marrakesh Treaty to Facilitate Access to published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled 2013 is one of such treaties and it was adopted at the conference by the World Intellectual Property Organisation ,(WIPO) along with the support of the US delegation in Morocco, on 27th June 2013. Though Nigeria is a signatory to this treaty, the treaty can only take effect when it is domesticated.[13]

The Marrakesh Treaty is dedicated to the promotion of 'user rights'.

> *"Essentially, it has a clear humanitarian and social development and its main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired and other wise print disabled (VIPs). It requires Contracting Parties to introduce a standard set of limitations and exceptions to*

[11] Article 2 Marakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, 2013. This treaty was adopted by the Diplomatic Conference to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled on June 27 2013.

[12] L. Diver and B. Schafer Exceptions For Disability- Copyright User www.copyrightuser.org accessed on 6 November 2021 at 2.08 pm

[13] As provided by Section 12 of the 1999 Constitution Of The Federal Republic of Nigeria

> *copyright rules in order to permit reproduction, distribution and making available of published works in formats designed to be accessible to VIPs, and to permit exchange of these works across borders by organizations that serve these beneficiaries"*[14]

This treaty is a welcome relief to the blind and print disabled who would otherwise be restricted in their desire and quest for knowledge and intellectual growth. A consideration of the right of the disabled and their inclusion in the Copyright Act would in no way jeopardize the authors copyright to his work.

Furthermore,

> *The treaty clarifies that beneficiary persons are those affected by a range of disabilities that interfere with the effective reading of printed material. The broad definition includes persons who are blind, visually impaired or print disabled or persons with a physical disability that prevents them from holding and manipulating a book*[15]

This treaty however allows each member country to implement the provisions of the treaty in line with the three step test obligation, while considering the country's peculiar legal system with respect to fair use. The current Copyright Act recognizes fair use as fair dealing.

Over the years there has been disparity in defining what fair use or fair dealing is. There was no clear cut definition rather the courts came up with factors to assist it in considering whether the use of a work is fair and can be used as a defence in a case of copyright infringement. This proffered some help but did not solve the problem and confusion because there was no standard definition rather, it was handled on a case by case basis. The international community needed to set a standard to assist its member states and this informed the basis for an internationally recognized and accepted test known as the Three-Step Test.

The three-step test which was first enacted in 1967 revision of the Berne Convention provides that "it shall be a matter of legislation in the countries of the Union to permit the reproduction of such works(a) in certain **special cases**, provided that (b) such reproduction **does not conflict with the a normal exploitation** of the work and (c) does not **unreasonably prejudice the legitimate interests of the author"**. It is my opinion that the blind and disabled person fall within "special". I sincerely believe that allowing reproduction of copyright works in formats that would enable them use copyright works will not conflict with the normal exploitation of such work and would not unreasonable prejudice the interest of the author but would be for the overall interest and benefit of the these disabled people who are also part of the public.

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[14] D. Oriakhogba, '*As We Celebrate Nigeria's Ratification of the WCT, WPPT, The Beijing Treat AND Marrakesh Treaty'* https://infojustice.org/archives accessed on 7th November 2021 at 12.30pm.,
Also contained in the *Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) (2013) www.wipo.int/treaties/en/ip/ accessed on 7th November 2021 at 12.54pm.*

[15] *Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) (2013)(Supra)*

Over the years there have been discuss on the three-step test but I believe its intent has not changed. The intent of the three step-test is to provide factors to be used when considering fair use with respect to public use of copyright works.

Nowadays, the three-step test appears not only in the Berne Convention (Article ((2) but also in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Article 13), the WIPO Copyright Treaty (WCT) (Article 10) and the WIPO Performances and Phonograms Treaty (WPPT) (Article 16)[16].

5. The Copyright Reform.

There became a need to upgrade the Nigerian Copyright Act to meet up with the constant development of Copyright in the world and to cover the loopholes in the current Copyright Act with respect to the right of the general public and in particular, the disabled persons to access copyright works.

> "*Given the political and cultural framework of a particular society and the economic resources at its disposal, the public interest is the aggregate of the fundamental goals that the society seeks to achieve for all of its members-not for a majority of its members or for any large and powerful group, but for all the people within the society. Considered separately, a society's goals are often in conflict with one another, and in that case there must be balancing. The art of government consists of achieving a harmonious rather than a destructive balance among the conflicting goals"*[17]

It can therefore be concluded that copyright is in the interest of every member of the public and not for the exclusive use of only a privileged part.

The Nigerian Copyright Commission constituted a committee to draft a new Copyright Bill and thereafter the draft Bill was published on 30th October 2015. Although the Bill is essentially derived from the current Copyright Act 1988, there are a handful of noticeable differences.[18]

Under the introductory notes of the bill, it was mentioned that:

> *"The key objective of the reform was to reposition Nigeria's creative industries for greater growth, strengthen their capacity to compete more effectively in the global marketplace, and also enable Nigeria to fully satisfy its obligations under the various International Copyright Instruments, which it has either ratified or indicated interest to ratify"*[19]

The Bill introduces factors to be considered in determining whether the use made of a work in any particular case is fair dealing:

i. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.

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[16]T. Schonwetter, "The Three-step test within the copyright system" http://pcf4.dec.uwi.edu accessed on 7th November 2021 at 1.05 pm

[17] G. Davies *Copyright and the Public Interest*, Second Edition, (London, Sweet & Maxwell) 2002 page 353

[18]O. Mayowa" A Brief Review of the Nigerian Draft Copyright Bill 2015" www.spaajibade.com accessed on 7th November 2021 at 2.40 pm

[19]Introductory Notes to Draft Copyright Bill 2015

ii. The nature of the work

iii. The amount and substantiality of the portion used in relation to the work as a whole

iv. The effect of the use upon the potential market for or value of the work; and

v. If the use does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the owner of copyright etc[20]

Section 22 of the Copyright Draft Bill also provides for special exceptions for the Blind, Visually Impaired or Otherwise Print Disabled Persons to use Copyrighted works. This provision permits, without authorization of the author or owner of copyright, for an accessible format copy of a work to be made for the benefit of the Blind, the visually impaired and the otherwise print disabled persons. The act permits this format to be made for their benefit provided the person that undertakes to make the copy has lawful access to the work, the format does not include changes other than those needed to put the work in that format, such format is for the benefit of the Blind, Visually Impaired or Otherwise Print Disabled Persons. The permission is for non-profit basis but solely in the interest of these Disabled persons.

The Act went further to describe accessible format to mean a copy of the work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.[21]

The Act further described who a beneficiary person is to include one who is blind, has visual or reading disability and one who is unable due to physical ability to hold or manipulate a book, focus or move his eyes in a normally acceptable way of reading.[22]

These provisions of the Draft Copyright Bill takes into cognizance the right of the Blind, Visually Impaired or Otherwise Print Disabled Persons to access works and gives specific provisions for them unlike the current Copyright Act. This is a major step in the right direction in taking into consideration the interest of the Blind, Visually Impaired or Other print Disabled Persons, which is in line with the Marrakesh Treaty and other Internationally accepted Copyright Instruments.

There is need to conclude work on the on-going process of amending the Nigerian Copyright Act so as to reflect the prior mentioned treaties which Nigeria has ratified namely WIPO Copyright Treaty(WCT) of 1996, WIPO Performances and Phonograms Treaty (WPPT) of 1996, Marrakesh Treaty to Facilitate Access to Published works for Persons who are Blind , Visually Impaired or Otherwise Print Disabled of 2013(Marrakesh Treaty)and the Beijing Treaty on Audiovisual Performances of 2012(Beijing Treaty). The Draft Copyright Bill already incorporated major provisions of the treaties and its enactment into law will signal the domestication of these treaties. There are quite a lot of remarkable differences in this Bill which tries to improve the current Act, new provisions were introduced and some provisions were

[20] Section 20(1)(a) Draft Copyright Bill 2015
[21]Section 22(4) Supra
[22]Section 22(5) Supra

amended while others were expunged. The Draft Copyright Bill defines communication to the public to include "live performance or delivery, any mode of visual or acoustic presentation, making available the work or copies thereof to the public". Section 85 of the Draft Copyright Bill provides that a work will be deemed published if copies of it are made available in a manner sufficient to render the work accessible to the public. I believe this provision allows the putting of works in formats that enable the blind, the visually disabled and otherwise print disabled persons use them because this enables them have access to copyright works as part of the public.

Section 21 of the Bill also proposes special provision for archives, libraries , museums and galleries. All these new provisions are made to enable the public freely access works of copyright.

The team of experts that were engaged through the Nigerian Copyright Commission revised the Draft Copyright Bill and presented the Copyright (Repeal) Bill to the Nigerian Federal Executive Council who approved it and it was transmitted to the National Assembly[23]. It is believed that despite the various amendments the Bill might go through before it is enacted into law, the special exceptions for blind, visually impaired and print disabled persons which are in line with the Marrakesh Treaty will not be affected.

6. Conclusion and Recommendation(s)

In conclusion, complying with the Marrakesh treaty and amending the Nigerian Copyright Act will not affect an author's right to reap the benefits of his intellectual or generally his copyright to his work. It however expands the boundaries on persons who can access copyright works in line with the human rights principles stipulated in the United Nations Declaration on Human Rights (UNDHR) and the Conventions on the Rights of Persons with Disabilities (UNCRPD

These human rights principles include civil and socio-economic rights, such as the right to education and information, the right to freedom from discrimination etc. The Universal Declaration of Human Rights (UDHR) is an international document adopted by the United Nations General Assembly that enshrines the rights and freedoms of all human beings. It was accepted by the General Assembly as Resolution 217 during its third session on 10 December 1948 at the Palais de Chaillot in Paris, France.[24] It was adopted as a common standard of achievement for all peoples and all nations and the UDHR commits nations to recognize all human beings as born free and equal in dignity and rights. At that that time, of the 58 members of the United Nations and 48 voted in favour, none against, eight abstained and two did not vote.[25] The Convention on the Rights of Persons with Disabilities (UNCRPD) is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity[26] Parties to this convention are required to promote, protect and ensure the full enjoyment of human rights by

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[23] Adams & Adams, *Update On The Nigerian Copyright Bill* http://www.mondaq.com/nigeria/copyright accessed on 9th December 2021 @ 2.pm

[24] Universal Declaration of Human Rights https://en.m.wikipedia.org accessed on 7th November 2021 at 1.30pm

[25] supra

[26] Convention on the Rights of Persons with Disabilities https://www.un.org accessed on 7th November 2021 at 1.42pm

persons with disabilities and ensure that persons with disabilities enjoy full equality under the Law.

Nigeria ratified the United Nations Convention on the Rights of People with Disabilities (CRPD) in 2007[27] and the Discrimination Against Persons with Disabilities (Prohibition) Act 2018 was signed into law. This law made provision to modify buildings, structures, and automobiles to make them accessible and usable for people with disabilities.

This shows physical structures were modified to solve the physical needs and requirements of disabled person. If physical structures can be modified to accommodate disabled people what about their intellectual need and desire for knowledge. There is absolutely nothing that can prevent the Copyright Act from being modified to accommodate the quest and desire of disabled persons for knowledge and intellectual growth.

[27] Anietie Ewang, Nigeria Passes Disability Rights Law https://www.hrw.org accessed o 7th November 2021 at 2.pm

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