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MODULE 1

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Unit 2 – Copyright

Unit 3 – Nature of Copyright

Unit 4 – Subsistence of Copyright

Unit 5 – Ownership Rights and their exploitation

Unit 6 – International Conventions and National Legislations on Copyright

UNIT 1

LAW OF INTELLECTUAL PROPERTY

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1.0 INTRODUCTION

The object of Intellectual Property is to protect a work that has only an abstract existence and therefore cannot be perceived by the senses, unlike a building or a car. However, like material goods, intellectual creations may be subject to a proprietary right.

The Principal object of intellectual property is to ensure consumers a variety of products at the lowest possible price. Intellectual Property law ensures private property rights enabling individual and business outfits to appropriate to themselves the value of the information they produce and encourage them to produce more.

There are two main concepts of intellectual property. These include the moral and economic right of a work. However it is important to note that Copyright is the main aspect of an intellectual property that is the right to protect the work of an author in any circumstance from invasion.

2.0 OBJECTIVE

The main objective of this unit is to discuss the basic concept of Intellectual Property as a form of protection for authors and at the end of the unit to be able to define and dwell into the history of the concept and also to understand the rights available to the owner of an intellectual property and the nature of intellectual property as a chose in action.

3.0 MAIN BODY

3.1 Intellectual Property Law

Intellectual property law is an area of law which concerns legal rights associated with creative effort or commercial reputation and goodwill. The

law deters others from copying or taking unfair advantage of the work or reputation of another and provides remedies where this arises.

Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; words, phrases, symbols, and designs.

According to Paul Marett, the term intellectual property has come into vogue relatively recently. To describe property rights in most of the various intangible products of the human intellect, sometimes the term is used to include Copyright, the law of confidence and others are classified as industrial property rights such as Patent, Trademark and industrial design.

David Bainbridge defines intellectual property as that area of law which concerns legal rights associated with creative effort or commercial reputation and goodwill.

Intellectual property law deals with the protection of inventions. It is also a means of safeguarding the fruits of their creativity and maintaining their incentives to invest in innovation.

Intellectual property can be passed on to someone like other kinds of property by gift, sale or bequest, and it could be temporary or permanent in nature. However, it is a right that is limited in nature. There are different periods for all the forms of the intellectual and industrial property.

3.2 Emergence of Intellectual Property

Although many of the legal principles governing intellectual property evolved in the course of the over centuries, it was not until the 19th century that the term *intellectual property* began to be used, and not until the late 20th century that it became a commonplace in the United States.

The modern usage of the term *intellectual property* goes back at least as far as 1888 with the founding in Bern of the Swiss Federal Office for Intellectual Property (the *Bureau fédéral de la propriété intellectuelle*).

When the administrative secretariats established by the Paris Convention (1883) and the Berne Convention (1886) merged in 1893, they also located in Berne, and adopted the term intellectual property in their new combined title.

The United International Bureau for the Protection of Intellectual Property, subsequently relocated to Geneva in 1960, and was succeeded in 1967 with the establishment of the World Intellectual Property Organization (WIPO) by treaty as an agency of the United Nations.

3.3 Rights of an Intellectual Property owner

1. Moral right

This is a right that grants the author paternity of the intellectual creation and protects the personal and reputational value of a work, as opposed to its purely monetary value.

Moral right is especially important under intellectual property law since the author has the right to decide whether he wants to disclose the work to the public. He can set the conditions of its commercial exploitation and defend its integrity. As the author is deemed to have the moral right to control its creation, moral right relates to the connection between an author and his creation.

2. Economic right

This relates to a creation's commercial value and grants the author a monopoly to exclusively exploit his creation for a certain period. This fosters industrial and commercial relations as well as creativity.

Under this monopoly, right holders can prevent third parties from using, manufacturing and selling the creation without authorization. If rights are infringed the author can take legal action against unlawful use of his literary, artistic or industrial creations.

3.4 The principal features of intellectual property rights

1. Property Rights

Copyright as a property law was initially conceived of as a "chose in action", that is an intangible property, as opposed to tangible property. In the case of tangible property the property rights are bundled with the ownership of the property, and property rights are transferred once the property is sold.

However, in contrast, copyright law detaches the exclusive rights granted under property law to the copyright owner from ownership of the good which is regarded as a reproduction. Hence the purchaser of a book buys ownership of the book as a good, but not the underlying copyright in the book's content.

The question of whether copyright is property right dates back to the Battle of the Booksellers. In 1773 Lord Gardenston commented in *Hinton v. Donaldson* that *"the ordinary subjects of property are well known, and easily conceived...But property, when applied to ideas, or literary and intellectual compositions, is perfectly new and surprising..."*

Courts, when strengthening copyright, have characterized it as a type of property. Companies have strongly emphasised copyright as property, with leaders in the music and movie industries seeking to "protect private property from being pirated" and making forceful assertions that copyright is absolute property right.

According to Graham Dutfield and Suthersanen, copyright is now a "class of intangible business assets", mostly owned by companies who function as

"investor, employer, distributor and marketer". While copyright was conceived as personal property awarded to creators, creators now rarely own the rights in their works, because most of these copyrights have been sold off by their inventors.

2. Territorial nature

Intellectual property rights are territorial in nature. By this, it is meant that they arise as a result of national legislation which authorizes an official grant by a national intellectual property office.

Territorial nature means that intellectual property right is only effective in the territory of the state granting that right. As an example, an intellectual property right granted Nigeria only has effect within the territory of Nigeria. It does not give the power any rights outside Nigeria and can only be infringed by conduct which occurs within the territory of Nigeria.

3. Monopolistic nature

It is the idea of being monopolistic in nature that is the right to exclude others from his work. However, whether monopolies are good or bad in nature is beyond the discussion in this work.

Present day intellectual property legislation contains many built-in safeguard to ensure that a balance is struck between the rights of the intellectual property owner and free competition, and some of the safeguard requires the owner to pay renewal fees regularly (in the case of trademark, patent and registered design) while others require a regular use of the intellectual property right by the owner.

Finally, in the case of all registered intellectual property rights, statute provides for the right to be declared invalid in certain instances, so unlike

real property and tangible personal property, intellectual property rights are always vulnerable to challenge by third party.

Nature of Intellectual Property

Intellectual property is a kind of right that can be dealt with just like any other right. It is a right that can be assigned, mortgaged or licensed. It is a property in legal sense. It can be owned and dealt with. Statutorily it is a property right.

However most form of intellectual property is by chose in action right that is enforced only by legal action as opposed to possessory rights.

In *Torkington v. Magge* (1902) 2 KB 427, Channell J, described a chose in action as a legal expression used to describe all personal rights which can only be enforced by action and not by taking physical possession.

4.0 CONCLUSION

It is important to note that the general law of intellectual property is a global concept. Intellectual property rights play an important role in the economic life of any nation, especially in this age of technological development. It is indeed meant to protect the right of inventors, writers and also those of artist and the public generally.

5.0 SUMMARY

This unit has defined intellectual property through authors like Paul Marette and David Bainbridge. Also, a brief history of the concept of intellectual property has been offered.

Also, description of the rights of the intellectual property owner and the features of intellectual property of the owner, as well as the nature of the concept of intellectual property been

discuss.

6.0 TUTOR MARKED ASSIGNMENT

1. Briefly offer a scholastic definition of the concept of intellectual property.
2. Set out the principal characteristics of all intellectual property rights.

REFERENCES/FURTHER READING

David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).

William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).

Paul Marett, Intellectual Property Law, London: Sweet & Maxwell (1996).

Helen Norman, Intellectual Property University of London Press (2005).

Unit 2

COPYRIGHT

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- 1.0 Introduction
- 2.0 Objective
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 - 3.2 History and Evolution of Copyright
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1.0 INTRODUCTION

Copyright does not stand in isolation. It is a curious segment of the law. Its essence is to protect intellectual property of someone from being reproduced and sold by unauthorised persons, so that the author of the work can enjoy the fruit of its labour.

Copyright does not protect ideas until such have been encapsulated in some tangible medium, but merely protects the expression of an idea.

However, the unfair taking of the results of the application of human intellect may infringe more than any one single right.

Copyright therefore provides a very useful and effective way of exploiting a work economically. It also provides a mechanism for allocation of risks and income from the sale of the work.

2.0 OBJECTIVE

The law of copyright is therefore for the protection of intellectual property. It is pertinent to note that definitions will be offered to the concept and a brief history of the subject matter will be dealt with.

3.0 MAIN BODY

3.1 Definitions of Copyright

Copyright is a set of exclusive rights granted by the law of a jurisdiction to the author or creator of an original work, including the right to copy, distribute and adapt the work.

Okoye defines Copyright as the right which the law gives an author or other originator of an intellectual production whereby he is invested with the sole and exclusive privileges of reproducing and selling copies of his work.

However, the Black's law Dictionary, sixth edition, defines copyright as the right of literary property as recognised and sanctioned by positive law. An intangible incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

It has also been defined by Ekpo M.F., Director General Nigerian Copyright Commission (May 1997) as "a right in law conferred on authors and owners of creative works be they literary, scientific or artistic in nature, to control the doing of certain acts in relation to those works. This means that the work is protected against unauthorised use. The rationale for this

protection is that the law regards the work as property, which, like other properties entitles the owner to the exclusive right of usage”.

In Sokefun’s view, the law of intellectual property gives the exclusive right to make copies, license and otherwise exploit a musical or artistic work, whether printed, audio, video and so on. This right protects the work for the lifetime of the author(s) and a period of 50 years after his death.

In Nigeria the Copyright Act, CAP. 68, Laws of the Federation 2004 does not give a clear definition of copyright.

It however recognises it as a right to stop or debar others from doing something and to restrain others from printing or interfering with others’ work.

One can safely infer that there lies a fundamental principle in the different definitions given above. That is , that copyright serves to control the copying of the intellectual materials existing in the field of literature and the arts, protecting the writer or artist against unauthorised copying of his materials.

Copyright protection applies for a specific period of time, after which the work is said to enter the public domain. It is restricted in its lifespan, it is of limited duration but generally, copyright in a literary work endures until the end of the period of 70years but for some work it could be 50years or effectively 25 years. This temporal generosity can be justified on the basis that copyright law does not lock away the ideas underlying a work.

Initially copyright only applied to published books, but over time copyright was extended to other uses, such as translations and derivative works. It now covers a wide range of works, including maps, dramatic works, paintings, photographs, sound recordings, motion pictures, and computer programs.

3.2 Brief History and Evolution

Intellectual production constitutes a specie of property founded in natural law and recognised by the common law. Copyright law has a relatively long history and its roots can be traced back to the period before the advent of printing technology, which permitted the printing of multiple copies quickly at relatively little expenses.

However, the origin of copyright law in most European countries lies in efforts by the church and governments to regulate and control the output of printers. Before the invention of the printing press, writing, once created, could only be physically multiplied by the highly laborious and error-prone process of manual copying by scribes.

The first record of a copyright case was *Finnian v. Columbla* (AD 567). Apparently, St. Columbia surreptitiously made a copy of a Psalter in the possession of his teacher Finnian.

But before the 15th century, most books were written by hand. Books were expensive and few people owned them. If a person was able, they were free to copy any book they pleased. There were no copyright protections. By mid-century, the printing press, invented by Johann Guttenberg made books more accessible to the public. It also made unauthorized copying more widespread.

In 1662 England began requiring that books be registered and licensed. The main reason for this was to control writing that could be hostile to the Church of Government. Books suspected of such hostility were seized.

In 1710, the author's rights were first recognized when the British Parliament established, passed a law that established the principles of authors' ownership of copyright, and prevented a monopoly of booksellers who were able to make fortunes printing books without compensating the

authors. It also defined public domain to ensure that a person could use a book as he pleased after they purchased it.

However, the scope of copyright law was expanded to cover more and more forms of literary and creative works. And it includes photographs, negatives, and films.

Later copyright laws becoming international, several international treaties were signed; in 1886 the Berne Copyright Convention was formulated with purpose of promoting greater uniformity in copyright law giving copyright owners full protection in all contracting state. Then it was revised in 1908, then the universal copyright convention was first promulgated in 1952.

Nigeria as a nation is not left out of the history of copyright with the promulgation of the copyright Act in 1970 and then the 1988 Copyright Decree now Copyright Act, CAP. 68, Laws of the Federation 1990 which talked generally about the regulation of copyright law in Nigeria and also to the Copyright Amendment Act of 1992, both now enshrined in the Laws of the Federation of Nigeria 2004.

4.0 CONCLUSION

The concept of copyright is the main issue concerned with intellectual property law; it is important to note that the concept aims to protect the specified work of others from invasion. It does not in any way protect ideas but rather protects the expression of ideas.

5.0 SUMMARY

Definitions have been offered to the term copyright by various scholars. This includes the definition of copyright under the copyright Act. A brief history of the concept was offered from the period of pre-printing technology to the era of the Berne Convention of 1886 up to the period of the copyright Act of 1970.

6.0 TUTOR MARKED ASSIGNMENT

1. Identify the principal international conventions which affected the Copyrights Act, 1990.
2. Define the concept of copyright.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, (2007) Intellectual Property (Sixth Edition) Pearson Education Limited.
- Yemi Osinbajo and Kedinga Fogam, (1991) Nigerian Media Law, Lagos: Gravitas Publishment.
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Unit 3

NATURE OF COPYRIGHT

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1.0 INTRODUCTION

The nature of copyright traditionally strikes a delicate balance between the interests of authors and other right holders in the control and exploitation of their works on the one hand, and society's competing interest in the free flow of information and the dissemination of knowledge, on the other hand.

It is kind of legal commonplace that the originality of the work of a copyright will be ascertained and also that they are certain work that are eligible for copyright. Not all works are eligible to protection by copyright therefore, the originality of a work must be ascertained before it can enjoy copyright protection.

It is pertinent to note that the exclusive right of authors to exploit their works or to authorize others to do so is a basic element of copyright. Where recognized, this right is also important for the beneficiaries of related rights. The exclusive nature of a right means that only its owner and nobody else is in a position to decide whether he or she will authorize the performance of any of the acts covered by the right.

2.0 OBJECTIVE

The main purpose of this unit is to discuss the nature of copyright, the categories of work that are eligible for copyright, the requirement for originality of a work and also the requirement of the work being in a permanent form. The originality of the concept of copyright which is the main idea of protection of copyright will be discussed as well as the role of the Copyright Act.

3.0 MAIN BODY

3.1 Nature of Copyright

Copyright has its nature which is peculiar to every aspect of its origin. It is pertinent to that this is peculiar to each work.

Literally, copyright is the right to prepare and distribute copies of an intellectual production. The essential aspect of this branch of law is the recognition of the fact that writers and authors should enjoy the ownership in their creation, its purpose is to protect from exploitation by other people the fruit of a person's work, labour or skill.

It is an age-long principle of copyright law that there is no protection of ideas per se unless they are embodied in permanent form. *Donoghue v. Allied Newspaper* (1938) Ch. 106 at 109, it was held that copyright exists to protect works and not ideas. The use of the word idea/expression was in Article 2 of the Berne Convention.

The court in *Green v. Broadcasting Corp of New Zealand* (1989) 2 All ER 1056, differentiated between idea and work. In this case, the claimant tried to stop the defendant from copying the format for a television programme, 'opportunistic Knocks'. The Privy Council accepted the defendant's argument that all they had taken was the idea. There was no work, such as a dramatic work to be copied, and they had not copied any particular broadcast, as they had created their own television programmes.

Even though one cannot have copyright in ideas or information, nevertheless, any attempted publication of another's idea or information, in breach of faith or confidence will be restrained by the court at the instance of the originator of the ideas. *Elanco v. Mandops* (1980) RPC 213.

It is in respect of this that the Copyright Act in sections 5, 6, 7, and 8 gives the owner of a work the exclusive right to control (subject to the exceptions specified in the Second Schedule to this Act) in Nigeria, the reproduction, broadcasting, publication, performance adaptation or communication in any material form, the whole or substantial part of the work either in its original form or any other form derived from the original.

3.2 Work Eligible for Copyright

Ordinarily, what is being rewarded is the mental decision to create the work coupled with the toil or labour to bring it to fruition. The basic notion of protected works of copyright is that it is confined to the expression of an idea, principles, systems, methods and so on, fixed in any tangible medium of expression or in any material form.

1. Literary work

The Copyrights Act of 2004 in its section 39 defines literary works to include (a) novels, stories and poetic works; (b) plays, stage directions, film

scenarios and broadcasting scripts; (c) choreographic works; (d) computer programmes; (e) text-books, treatise, histories, biographies, essays and articles; (f) encyclopedias, dictionaries, directories and anthologies; (g) letters, reports, and memoranda; (h) lectures, addresses and sermons; (i) law reports, excluding decision of courts; (j) written tables or complaints.

Section 3 of the Copyright, Designs and Patents Act 1988 also defines the word literary work as well. The courts have long since been prepared to take a very wide view of what constitutes a literary work. See *University of London Press Ltd v. University Tutorial Press Ltd* (1916) 2 Ch. 601 at 608.

Section 5(1) (a) of the Copyright Act grants the owner of a literary work in Nigeria the exclusive right to control the doing of any of the following acts; (i) reproduce the work in public; (ii) publish the work; (iii) perform the work in public; (iv) produce, reproduce, perform or publish any translation of the work; (v) make any cinematograph film or a record in respect of the work; (vi) distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement; (vii) broadcast or communicate the work to the public by a loud speaker or any other similar device; (viii) make an adaptation of the work; (ix) do in relation to a translation or an adaptation of the work.

Musical Work

A musical work is defined as any musical composition irrespective of musical quality and includes work composed for musical accompaniment. The Copyright Act does not necessarily; require writing or other graphic presentation, so the above definition would have to be fixed in a definite medium of expression.

A song will have two copyrights: one in the music and one in the words of the song, the latter being a literary work. The work must be reduced in

writing or otherwise, the Copyright, Designs and Patents Act 1988, the UK version of the Act gives no guidance as to what a musical work is.

Making a new performing edition of an incomplete old work of music out of copyright may itself be worthy of copyright protection even if few or no new notes are added. In *Hyperion Records Ltd v. Dr. Lionel Sawkins* (2005) RPC 808, Dr. Sawkins wrote new performing edition of some of Lalande's baroque musical compositions. He added a figured bass (numbered guidance to musicians, giving them some flexibility in playing the piece of music). He also corrected notes that he considered wrong or unsatisfactory. It was held by Mummery LJ that he has created a new work.

The Copyright Act, 1990 also grants the owner of a musical work the same exclusive right as that of the owner of a literary work.

3. Artistic Work

The artistic work category is a diverse one and includes several different types of works. The Act defines an artistic work to include any of the following work (s) similar thereto: *a)* paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; *(b)* maps, plans and diagrams; *(c)* works of sculpture; *(d)* photographs not comprised in a cinematographic film; *(e)* works of architecture in the form of buildings models; and *(f)* works of artistic craftsmanship and also (subject to section 1 (3) of this Act) pictorial woven tissues and articles of applied handicraft and industrial art;

While section 4 (1) of the Copyright, Designs and Patent Act 1988 (UK) defines artistic work as (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality; (b) a work of architecture being a building or a model for a building or (c) a work or artistic craftsmanship.

Relatively, simple things such as football club badges are works of artistic copyright. *Football Association Premier League Ltd v. Panini UK ltd* (2004)

1 WLR 1147 This principle also applies to crests applied to porcelain articles and patterns applied to tableware.

It appears that for works falling into the last category of artistic works, that is, works of artistic craftsmanship, some qualitative characteristics are required. Works of artistic craftsmanship give rise to the greatest difficulty amongst artistic works.

In *George Hensher Ltd v. Restawhile Upholstery (Lancs.) Ltd* (1976) AC 64, a prototype made for a suite of furniture described a 'boat-shaped'. The House of Lords held that the prototype was not a work of artistic craftsmanship and that for something to fall into this category it must, in addition to being the result of craftsmanship, have some artistic quality.

4. Cinematographic Film

Cinematograph film is defined in the Act to include the first fixation of a sequence of visual images capable of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film.

The owner of cinematograph work has the exclusive right, to do or authorise the doing of any of the following acts, that is- (i) make a copy of the film, (ii) cause the film, in so far as it consists of visual images to be seen in public and, in so far as it consists of sounds, to be heard in public, (iii) make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track, (iv) distribute to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.

5. Sound Recording

Sound recording means the fixation of a sequence of sound capable of being perceived orally and of being reproduced but does not include a sound track associated with a cinematograph film.

The owner of a sound recording shall have exclusive right to control in Nigeria- (a) the direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognisably derived from the original; (b) the distribution to the public for commercial purposes of copies of the work by way of rental, lease, hire, loan or similar arrangement.

6. Broadcasts

The Act defines broadcast to mean sound or television broadcast by wireless telegraphy or wire or both, or by satellite or cable programmes and includes re-broadcast;

Section 7 of the Copyright Act, 2004 states that Copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is- (a) the recording and the re-broadcast of the whole or a substantial part of the broadcast;

(b) 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 recognisably derived from the original; and

(c) The distribution to the public for the commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement.

(2) The copyright in a television broadcast shall include the right to control the taking of still photographs from the broadcast.

3.3 The requirement of Originality

Originality is a fundamental principle of a copyright. In fact it is regarded as the basis of the protection given by the law of copyright to particular forms of expression.

In section 1 (2) (a) of the Copyright Act that for copyright to subsist in a literary, musical or artistic work, sufficient effort must have been expended to make the work possess an original character.

In copyright law originality does not have its ordinary dictionary meaning and the court have interpreted the concept in the light that the work does not have to be unique or particularly meritorious. Originality is more concerned with the manner in which the work was created and that the work in question originated from the author. In *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964) 1 WLR 273 at 291, Pearce said that the word Original requires only that the work should not be copied but should originate from the author.

However, in *Plateau Publishing v. Adophy* (1986) 4 NWLR Pt. 34 Pg. 205 at 233, Karibi-Whyte JSC (as he then) said that it is not a defence in an action for copyright that the article published in the opinion of the defendant is an original work.

The work concerned must be original in the sense that it must not be a verbatim reproduction of a prior work, but not in the sense that it must itself be a product of original or inventive thinking. (*University of London Press Ltd v. University Tutorial Press Ltd* (1916) 2 Ch. 601 at 608).

Simply producing a copy of an existing work, no matter how much skill and labour went into its making, could not give rise to a new original work of copyright. Thus originality for the purpose of copyright law is not originality of ideas or thought but originality in the execution of the particular form required to express such ideas or thought.

Originality does not mean that the work must be necessarily novel or new. That is the author does not have to be the first person to say something in order to be able to have to be the first copyright protection of it.

Other works eligible for copyright include architectural work, folklore, titles and nom de plume, letter to the editor and headnotes.

3.4 The requirement of permanent form

Protection arises automatically once the work is complete, by which is meant that there is something which can be copied. The Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961 requires the affixation (date of publication and author's name) of a copyright notice to the work.

1. The work must be recorded

The Act requires that the work must be fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device. Section 1 (2) (b) Copyright Act, 1990.

In *Hadley v. Kemp* (1999) EMLR 589, it was held that the defendant had completed the writing of the song in his head and that they were put into a permanent form when the group made the first 'demo' tape of the song in the recording studio.

4.0 CONCLUSION

It is however essential to note that the nature of copyright is a peculiar part of intellectual property. Copyright simply, put is the exclusive right given under the law to the owner of copyright. However, originality of a work is the copyright with which an author enjoys in any work that is what he enjoys as the originator of a certain literary or artistic work.

5.0 SUMMARY

The unit discussed the nature of copyright as the concept behind intellectual property and also an intangible property right that can be assigned. It discussed the originality of a work as germane to copyright itself. For a work to be eligible for copyright protection it must be in permanent form.

6.0 TUTOR MARKED ASSIGNMENT

1. Explain the criteria for originality in a copyright law and the need for permanent form.
2. In a tabular form define all the works that are eligible for copyright under the Copyrights Act, 1990.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, (2007) Intellectual Property (Sixth Edition) Pearson Education Limited.
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Unit 4

SUBSISTENCE OF COPYRIGHT

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1.0 INTRODUCTION

Ownership as a concept that is peculiar to copyright is paramount in the law of intellectual property. As copyright is a property rights, the owner of the copyright possesses economic right while the author of a work possesses the moral right of the work, They both could be the same persons or different people. Generally, copyright in a work belongs to its author. That is the person who originates the language employed in the work and so is the owner of the copyright.

OBJECTIVE

The purpose of this unit is to deal with the concept of ownership and the concept of authorship, since authors are mostly the owners of any works. Ownership is indeed the bedrock of copyright in any organized or civilized society. This goes along with the right of copyright owners and also the duration of the copyright work.

3.0 MAIN BODY

3.1 Ownership of Copyrights

Ownership flows from authorship. The person who makes the work is normally the first owner of the copyright in the work, provided he has not created the work in the course of his employment, in which case his employer will normally be the first owner of the copyright.

The Copyright Act 2004 s 9 (1) states the basic rule that the author of a work is the first owner of the copyright. This will apply in so many good number of cases if the work is created solely by the author not employed under a contract of employment and even to employed persons if the work has not been created in the course of their employment.

In *Oladipo Yemitan v. The Daily Times (Nig) Ltd & Anor.* (1980) F.H.C.R 186 at 190, Belgore, J said that “it must be stated that the legal position is that copyright belongs to the author, who is the one that actually expended the work, labour, knowledge and skill.”

Copyright protects original forms of expression and not ideas or fact. This was well expatiated in the case of *Donoghue v. Allied Newspapers Ltd* (1937) 3 All E.R 503. There are number of exceptions to this basic rule that are in Sec.9(3). For instance, where a literary, artistic or musical work is made by the author in the course of his employment the said employer shall, in the

absence of any agreement to the contrary, be the first owner of copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical,; or to the reproduction of the work for the purpose of its being so published. In all other respects, the author shall be the first owner of the copyright in the work.

In *Noah v. Shuba*, (1991) FSR 14, it was held that the copyright created by an employee in the course of his employment could still belong to the employee on the basis of a term implied on the ground of past practice. If the employee's name appears on the work or copies of the work, there is a presumption that the work was not made in the course of employment.

In an original literary, dramatic, musical or artistic work made by an officer or employee of certain international organizations, or published by the organization and which does not otherwise qualify for copyright by reference to the author or country of first publication, the organization is deemed to be the first owner of the copyright in the work.

Finally the ownership of the copyright in an anonymous works can present problems as may be no author available or willing to give evidence as to the ownership.

3.2 Authorship

The author of a work is the person who creates it. The author of music is the composer of the work. It is essential to note that the author does not have to be the person who carries out the physical act of creating the work such as putting pencil on paper.

In *Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd* (1995) FSR 818, it was held that an amanuensis taking down dictation is not the author of the resulting work.

Copyright protects only the expression of an idea, so there may be occasions when the originator of the information that forms the basis of the work in question will not be considered the author of the work. In *Springfield v. Thame*, the claimant, a journalist supplied newspapers with information in the form of an article. The editor of the Daily Mail, from that information, composed a paragraph which appeared in the newspaper. It was held that the claimant was not the author of the paragraph as printed in the newspaper.

A corporate entity can be the author of a work, as long as the body is incorporated under the law.

3.3 Duration of Copyright

Copyright does not continue indefinitely. The law provides for a period of time during which the right of the copyright owner exists. The period or duration of copyright begins from the moment when the work has been created, or, under some national laws, when it has been expressed in a tangible form. It continues, in general, until sometime after the death of the author. The purpose of this provision in the law is to enable the author's successors to benefit economically from exploitation of the work after the author's death.

In countries party to the *Berne Convention*, and in many other countries, the duration of copyright provided for by national law is as a general rule the life of the author plus not less than 50 years after his death. The *Berne Convention* also establishes periods of protection for works such as anonymous, posthumous and cinematographic works, where it is not possible to base duration on the life of an individual author.

There is a trend in a number of countries toward lengthening the duration of copyright. The European Union, the United States of America and several

others have extended the term of copyright to 70 years after the death of the author.

Nigeria as a signatory to Berne Convention adopted the 50years in section 24 of the Act

The rules for determining the duration of copyright depends on the nature of the work in question, but as a rule of thumb, copyright lasts for the life of the author plus 70years for literary, dramatic, musical and artistic work, at least 50 years for sound recording, 50years for broadcast and 25years for typographic arrangement for published editions

4.0 CONCLUSION

Ownership and authorship are in relation to copyright, two distinct concepts each of which attracts its own peculiar rights. It is also very important to note that the author of a work might not necessarily be the owner of the work. If the author is doing it in the cause of an employment then the owner is the owner of the work but not the author of the work.

5.0 SUMMARY

In this unit, we have been able to have been able to distinguish between ownership and authorship of a work. It could be a right vested in one person or in two distinct persons one where one right is economic while the other is moral. It is however important for owners of copyright to protect it. The duration of any copyright work affords the family of the author or owner the opportunity to enjoy the work after his demise.

6.0 TUTOR MARKED ASSIGNMENT

1. The Ownership of a work flows from authorship. Explain this in line with the words of Belgore J in *Oladipo Yemitan v. Daily Time* (Supra)..

2. Copyright lasts for the life of the author plus 70years for literary, dramatic, musical and artistic work. Briefly explain this context and its rationale.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, (2007) Intellectual Property (Sixth Edition) Pearson Education Limited.
- Yemi Osinbajo and Kedinga Fogam, (1991) Nigerian Media Law, Lagos: Gravitas Publishment.
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- T.O.Elias (Ed.) (1969) Nigerian Press Law, University of Lagos and Evan Brothers Ltd.
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Unit 5

OWNERSHIP RIGHTS AND THEIR EXPLOITATION

CONTENT

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Body
 - 3.1 Ownership Right and their exploitation
 - 3.2 Joint Ownership
 - 3.3 Dealing with Copyright
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The owner of the copyright in a work may decide to exploit the work by the use of one or more contractual methods. He may however grant a license to allow another person to carry out certain acts in relation to the work, such as making copies. This notwithstanding, he still retains the ownership of the work. He could also transfer the ownership of the work to another by relinquishing the economic right in the work.

It is also important to note that for consortium agreements, the legal implications of "joint ownership" are significant. Joint ownership in a work

arises often and how their rights are dealt with is always a cause for concern for copyright practitioners.

2.0 OBJECTIVE

The essence of this unit is to explain the ownership of rights and how they can be exploited. It will also discuss the issue of joint owners as well as the rights available to each owner. From this unit, learners should be able to understand what it means for a work to be licensed to another and also the assignment of a copyright work.

3.0 MAIN BODY

3.1 Ownership rights and their exploitation

Copyright provides a very useful and effective way of exploiting a work economically. It provides a mechanism for the allocation of risks and income derived from the sale of the work. The owner of the copyright in a work may decide to exploit the work by the use of one or more contractual methods.

Copyright is a property right and as such the owner of that right can deal with it. He can transfer the right to another, or he can grant license to others, permitting them to do some or all of the acts restricted by copyright in relation to the work. It should however be noted that the exploitation of rights of ownership in a work must take accounts of all its rights by way of assignment, licenses or waiver.

3.2 Joint Ownership

The term joint ownership refers, in general, to a situation in which two or more persons share interests in property rights. Such rights include all types of rights in moveable and immovable property. In intellectual property law, all types of protected subject matter can be owned jointly.

The general requirement for joint ownership to subsist is that a work has been created by at least two persons. The term creation refers to a contribution displaying at least a level of originality in the sense of an "own personal creation". Mere laborious efforts do not suffice. The second requirement for true joint Ownership to subsist is that each contribution becomes an inseparable element of the work, that is, the result of such contribution cannot be commercially exploited in its own right.

Typically, joint ownership is created where an Intellectual Property right comes into existence by the efforts of two or more persons, such as a collaborative invention or joint creation. A work of Joint Ownership will, by operation of the law, create an undivided share for each joint owner. In this case, the interest in the intellectual property will be shared equally.

In general, it refers to a right in undivided shares. Each joint owner is permitted to assign his share to a third party. However, any dealing in the right as a whole is subject to consent of all joint owners. This new party will then replace the former joint owner with respect to the interest.

- Any dealing in the work is subject to consent.
- In the case of the demise of one party his interest will pass to the others.
- In the case of the insolvency of one joint owner, his interest can be transferred to creditors.

3.3 Dealing with Copyright

Copyright is a property right and as such the owner of that right can deal with it. There are two ways of dealing with such rights. The first is by licensing while the other is by assignment of the work.

The ultimate owner of a copyright is not entirely free to do as he wishes with the work that is subject matter of copyright. Nevertheless, in most cases

respecting the author's moral rights will not be a hindrance to the economic exploitation of copyright.

Licensing

A licence arises when the copyright owner gives permission to another person to do an act which would constitute an infringement of that copyright if done without that permission. A licence merely makes legal what otherwise would have been illegal. It may be contractual and therefore easily enforceable in a court of law.

A licence may be exclusive. An exclusive licence is usually in writing signed by or on behalf of the copyright owner authorising the licensee, to the exclusion of all other persons including the owner, to exercise a right that would otherwise be exercisable exclusively by the copyright owner. See *Adenuga v. Ilesanmi Press* (1991) 5 NWLR Pt. 189 Pg. 82 at 98.

Payment of royalty is highly suggestive of a license, then in an exclusive license, a licensee might sue after joining the owner of the work in case of legal battle or by leave of court, because it is only the owner that has right to sue.

Assignment

Assignment of copyright can be thought of as a disposal of the copyright by way of sale or hire. Copyright could also pass through a testamentary disposition or through operation of law. By virtue of section 10 (2) of the Copyright Act, an assignment must be in writing signed by or on behalf of the assignor.

An assignment need not be total, it could be partial. It could relate to specific areas, for a limited period, future works or even an existing work in which copyright does not yet subsist.

In *Savory (EW) Ltd v. The World of Golf Ltd* (1914) 2. Ch. 244, the court held that a written receipt for card designs 'inclusive of all copyrights' was sufficient to assign copyright to the purchaser.

CONCLUSION

The right of an owner of a copyright work is very important in copyright law. Exploiting such right is in exhaustive. It could be through licensing or assignment or disposition by will. Exploiting the right of a co owner has to be with the consent of the joint owner of the work

5.0 SUMMARY

This unit has been able to discuss the right of an owner of a copyright ranging from the right to license to assignment of the copyright. The approach of the Act and several judicial decisions as well as the consent of a joint owner before such rights can be exploited by either of the owner of the work has also been discussed.

6.0 TUTOR MARKED ASSIGNMENT

1. Differentiate between an assignment and license.
2. In the concept of Joint Ownership, explain the rights available to joint owners in exploiting their rights

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, (2007) *Intellectual Property* (Sixth Edition) Pearson Education Limited.
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- Paul Marett, (1996) *Intellectual Property Law*, London: Sweet & Maxwell.
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Unit 6

International Conventions and National Legislations on Copyright

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- 3.0 Main Body
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 - 3.5 The Copyright, Designs and Patents Act 1988 (United Kingdom)
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- 6.0 Tutor Marked Assignment

References/Further Reading

1.0 INTRODUCTION

The concepts of globalisation and integration of regional and national economy have produced a swell effect in the various facades of world economy. Intellectual property is no exception.

It is significant to note that the creation of international and national conventions and legislation has helped the world of intellectual property to grow beyond imagination.

OBJECTIVE

The purpose of this unit is to enable learners to identify different international and national conventions and legislations respectively that are available for the protection of the right of intellectual property. After this unit, learners should be able to discuss the various conventions available in this direction.

3.0 MAIN OBJECT

3.1 National and International Conventions on Intellectual Property

Copyright law owes much to international conventions since these have often been the channel for the creation or revision of domestic legislation.

The main objective of the World Intellectual Property Organisation (WIPO), a UN Agency based in Geneva is to help establish effective protection for intellectual property rights and the production of international consensus on the standardisation of national laws. It also administers a number of conventions dealing with intellectual property.

3.1 World Intellectual Property Organisation (WIPO)

WIPO, as an agency of the UN for the protection of rights has numerous conventions aside the Paris Convention; dealing with registrable rights. The organisation also administers a number of conventions dealing with rights which are not registrable like copyright.

The Berne Convention for the Protection of Literary and Artistic Work, 1886 (as revised at Paris in 1971), deals with literary, dramatic, musical and artistic works and films. It is a convention whose main features are the principle of national treatment as stated in Article 5 of the convention and that copyright protection is not dependent on registration. The consequence is that copyright protection arises automatically once a work comes into existence.

The other WIPO convention dealing with copyright is the Rome Convention for the Protection of Performers, Record Makers and Broadcasting Organisations 1961 (the Neighbouring Rights Convention). This convention has similar rights with the Berne Convention. It provides for the formality of a copyright notice to be affixed to each copy of the work in the case of sound recordings.

To

Lastly on the list of WIPO for copyright are two treaties namely the WIPO Copyright treaty and the WIPO Performers and Phonograms Treaty. The objective of this treaty is to clearly spell out the rights of the copyright owner in the digital era, especially with regard to the exploitation of copyright convention and the Neighbouring Rights Convention.

The purpose of WIPO is to combat piracy and counterfeiting. Nigeria is signatory to WIPO and is indeed a good instrument for the protection of copyright and fight against piracy and counterfeiting.

3.2 Universal Copyright Convention (the UCC)

The Alternatively Universal Copyright Convention (the UCC) was designed to assist citizens of developing countries. It was initially made in Geneva in 1952 but later revised in Paris in 1971. It is administered by United Nations Educational, Scientific and Cultural Organisation (UNESCO). It has similar provisions as the Berne Convention. In addition it does require the use of a copyright notice on a work as a pre-condition to protection the (p) and the (c) symbol.

3.3 The World Trade Organisation

It is a rival force for WIPO established in 1994 at the conclusion of the renegotiation of the General Agreement on Tariffs and Trade (GATT). Then the renegotiation brought about TRIP, the purpose of the WTO is to enhance the principle of free trade between states, such that membership of the

organisation guarantee businesses established in one contracting state that they will have access to the markets of other contracting states.

1. Trade Related Aspects of Intellectual Property (TRIP)

An agreement entered into by the World Trade Organisation to protect the trade aspect of an intellectual property, some of the positive points of this agreement include the empowerment of holders of well known marks to insist on the fair and reasonable protection of their marks, the streamlining and harmonisation of the various intellectual property laws and the cooperation of state members in attempt to eliminate international trade in infringing goods.

The most significant feature of the TRIP agreement is that where a state is in breach of its requirements, another displeased state may initiate the WTO dispute settlement procedure. The enforcement mechanism means that the TRIP Agreement is a more powerful force for change than the WIPO statute.

3.4 The Copyright, Designs and Patents Act 1988 (United Kingdom)

This is the Act that regulates and protects the rights of copyright owners in the UK. It ratified the Berne Convention. It has been amended on several occasions to accommodate other EU directives dealing with copyright and other related rights.

3.5 The Copyright Act 1990 (Nigeria)

The copyright Act 2004 emanated from the 1970 Act which was a revised version of the English Copyright Act which was inherited during the pre-independence era.

The 1970 Act was to be found obsolete and inadequate in dealing with the rising incidence of piracy and other copyright abuses. Then the Copyright Law Drafting Committee worked and came out with the Copyright Decree

No. 47, 1988 which became the Copyright Act, Cap 68, Laws of Federation of Nigeria, 1990 and as amended by the Copyright (Amendment) Decree 1992. Like other statutes in Nigeria, it is now, incorporated into the Laws of the Federation of Nigeria, 2004.

The establishment of the National Copyrights Commission is to complement the efforts and the instrument in WIPO in eradicating piracy and counterfeiting.

4.0 CONCLUSION

The success of intellectual property as a right boils down to the international conventions and national legislations of some nations and the applicability of the international conventions in that directions. Most of the national legislations have been enacted or amended to comply with the obligations under international conventions.

5.0 SUMMARY

This unit has been able to discuss various international conventions that are available for the protection of international property as it relates to trade in that direction. It also discussed national legislations in the protection of copyrights.

6.0 TUTOR MARKED ASSIGNMENT

1. What are the main differences between WIPO and WTO.
2. What is the purpose of UCC to the developing countries in relation to intellectual property?

7.0 REFERENCES/FURTHER READING

Helen Norman, Intellectual Property University of London Press (2005).
Copyright Act, CAP. 68, Laws of the Federation 1990.
World Trade Organisation, 1994.

World Intellectual Property Organisation, 1886.

The Copyright, Designs and Patents Act 1988.

MODULE 2

Unit 1 – Copyright Infringement

Unit 2 – Defences to Copyright Infringement

Unit 3 – Moral Rights in Copyright

Unit 4 – Remedies for Copyright Infringement

UNIT 1

COPYRIGHT INFRINGEMENT

CONTENTS

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 - 3.2 The nature of copyright infringement
 - 3.3 Primary Infringement
 - 3.4 Secondary Infringement
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INTRODUCTION

Generally copyright infringement is the unauthorised use of the work of an author. It could also mean the unauthorized or prohibited use of works under copyright, infringing the copyright holder's exclusive rights, such as

the right to reproduce or perform the copyrighted work, or to make derivative works.

A copyright owner is given exclusive rights to deal with his work. The Act gives the owner rights and restricts the unlicensed use of the work. It is pertinent to note that the copyright owner should prevent others from committing what are called 'restricted acts'.

2.0 OBJECTIVE

The main purpose of this unit is to establish the fact that copyright infringement is real and for learners of this work to be able to specifically explain what is meant by the term and the nature of copyright infringement and the acts prohibited as primary and secondary infringement of copyrights.

The idea behind copyright infringement is that it enables the copyright owner to protect its work from unlicensed users of the work.

3.0 MAIN BODY

3.1 Definitions of Copyright Infringement

Section 16(2) of the CPDA, 1988 provides that 'Copyright in a work is infringed by a person who without the license of the copyright owner does, or authorizes another to do, any of the acts restricted by the copyright.'

The person carrying out any unauthorised restricted act is infringing copyright, even if he did not intend to do so. Ignorance of the existence of copyright in a work is no defence for such an infringement'.

Section 14 of the Copyright Act, 1990 states that Copyright is infringed by any person who without the licence or authorisation of the owner of the copyright-

(a) does, or causes any other person to do an act, the doing of which is controlled by copyright;

(b) imports into Nigeria, otherwise than for his private or domestic use, any article in respect of which copyright is infringed under paragraph (a) of this subsection;

(c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection;

(d) distributes by way of trade, offer for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed under paragraph (a) of this subsection;

(e) makes or has in his possession, plates, master tapes, machines, equipments or contrivances used for the purpose of making infringed copies of the work;

(f) permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement on the copyright in the work, unless the person permitting the place to be used is not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright;

(g) performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business or as supporting facility to a trade or business, any work in which copyright subsists.

For copyright infringement to take place, the owner of a copyrighted work will need to establish that either of the following acts are done in relation to a substantial part of the work without his or her consent or authorisation being provided (a) copy the work, (b) issue copies to the public (c) Rent or lend it, (d) perform or show it in public, (e) communicate it to the public.

Infringement refers to breach of copyright. There is so called primary infringement and secondary infringement. The primary infringer is liable

regardless of the state of knowledge. The secondary infringer is only liable if he knew or had reason to know that he was dealing with an infringing copy.

3.2 Nature of copyright Infringement

The quintessence of copyright infringement is that it involves taking a work belonging to another. Copyright infringement as a statutory tort, is an interference with property rights, while liability for any of the restricted acts is strict.

Conversely, Copyright infringement does require the defendant to have taken something of the claimant's work. The claimant must show a causal link between the infringement and the source work. Note that copyright infringement may be either direct or indirect.

1. The requirement of objective similarity and derivation

In the nature of copyright infringement the requirement of objective similarity and derivation is an important aspect of copyright infringement.

Objective similarity requires the court to compare the source of the work with the alleged infringement. *Francis Day & Hunter v. Bron* (1963) Ch. 587.

It is also very important to note that derivation is another way of saying that the defendant must have taken the claimant's work either directly or indirectly. In *Warwick Films v. Eisinger* (1969) 1 Ch. 508, the defendant's film about the trials of Oscar Wilde was based not on the claimant's book but on the actual court transcript.

2. Substantial taking

This is determined not by reference to how much of the work has been taken but the essence of the work that has been reproduced. In *Hawkes & Sons v. Paramount Films Services* (1934) Ch. 593, a 30 second extract of

the famous 'Colonel Bogey' included in a news film was held to have amounted to substantial taking.

3. Authorising Infringement of copyright

Copyright is infringed by a person who authorizes another person to perform the infringing act. See *ABKCO Music & Records Inc v. Music Collection International Ltd* (1995) RPC 657.

The authorization is a tort only if the act authorized is restricted by copyright, so an employer will be held responsible for acts of infringement committed by employees.

It is important to note that copyright infringement could either be primary that is, restricted act or secondary infringement, which we shall discuss further in this unit.

3.3 Primary Infringement or Restricted Acts of Copyrights

Copyright may be infringed vicariously, where a person without the permission of the copyright owner, a person authorizes another to do a restricted act. One of the salient restricted acts of copyright is copying, while others are issuing copies to the public, performance in public, communicating to the public and adaptation of the said work.

1. Copying

Copying may involve an exact reproduction or taking only part of the work, or creating a work which appears to be similar. Copying does not have to be direct. It could also be an indirect act. In *Bernstein v. Sydney Murray* (1981) RPC 303, the defendant infringed the copyright in a fashion sketch by copying a garment based on the sketch.

Section 18 of the Copyrights Act, 1990 and Section 17 of the CPDA, 1988 thoroughly deals with the concept of copying.

Copying has a technical meaning which varies, depending on the nature of the work in question. Copying could come in different forms like an accumulation of insubstantial taking, copying and alteration, and it could also be a non-literal copying.

It is noteworthy that it is not necessary for the defendant to realise that there was copying, as the court can find that copying was subconscious because the claimant's work had been seen or heard by the defendant. *EMI Music Publishing v. Papathanassiou* (1993) EMLR 306.

2. Issuing copies to the public

Issuing copies of a work to the public is a restricted act that applies to all categories of work. It has been defined in section 18 (1) CPDA, 1988 as the issue to the public of copies of work.

Section 14(1)(d) defines it as distributing "by way of trade, offer for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed under paragraph (a) of this subsection;"

It is important to note that a copyright owner can take action against anyone who issues a copy of his work to the public for the first time without his consent.

However, authorized copies may be infringed where copies have been made by a printer on behalf of the copyright owner, but an employee of the printer has stolen and sold some of them.

3. Performance in public

Public performance and all other artistic work displayed in public infringe copyright unless done with the permission of the copyright owner. The performance of a work in public is an act restricted by the copyright in

literary, dramatic and musical work. Section 19(2) CPDA and section 14 (1) (c).

It is pertinent to note that the significant aspect is that the performance must be in public. In *Duck v. Bates* (1884) 13 QBD 843, the defendant performed a dramatic piece in a room in an hospital for the entertainment of nurses, attendants and other hospital workers without the consent of the copyright owner and no admission was made. Approximately 170 persons attended the performance. It was held that the room where the drama was presented was not a public place and that consequently the defendant was not liable to the copyright owner in damages.

By this token for a performance not to be deemed to be in public place must be to an audience of a domestic nature.

4. Communication to the public

Under section 20 (1) CPDA communication to the public is a restricted act as it relates to

a literary, musical, dramatic or artistic work

a sound recording or film, or

a broadcast

Placing a work on a website or facilitating its downloading from a website will infringe if the work can be and has been downloaded by any member of the public, no matter where the computer on which the website is hosted is physically located. In *Shetland Times Ltd v. Dr. Jonathan Wills* (1997)

FSR 604, the court held that inclusion of extracts from the claimant's newspaper on a website amounted to broadcasting work.

5. Adaptation

The word adaptation has some very special meaning under the act depending on the nature of the work concerned and should not be taken in its usual sense, it does not have the same as modifying a work.

Adaptation can also be described as including translating, converting and arranging the work. See *Anacon Corp Ltd v. Environmental Research Technology Ltd* (1994) FSR 659.

3.4 Secondary Infringement of copyrights

Secondary infringement concerns dealing with or facilitating the manufacture of infringing copies, i.e. copies which have been made without the copyright owner's permission. It could also mean the 'dealing' with infringing copies, providing the premises or apparatus for the performance or making an article for the purpose of making infringing copies.

The purpose of secondary infringement of copyright is aimed at those who deal commercially with infringing copies of copyright work. Liability is not confined to retailers only. In *Pensher Security Door Co Ltd v. Sunderland City Council* (2000) RPC 249 (CA), a local authority which had installed security doors in a block of flats was found liable under section 23(a) CPDA, as the doors infringed the claimants design.

For a secondary infringement the person responsible must have knowledge or reason to believe that the copies are infringing copies or whatever. In *Columbia Picture Industries v. Robinson* (1987) 1 Ch 38, it was held that the knowledge required extended to the situation where a defendant deliberately refrained from inquiry and shut his eyes to the obvious.

The Copyright, Designs and Patents Act 1988 ("CDPA") proscribes 8 separate acts of secondary infringement:

- importing infringing copies
- possessing or dealing with such copies
- providing means for making such copies

transmitting a copyright work over a telecommunications system

permitting premises to be used for an infringing performance
providing apparatus for such infringement
permitting such apparatus to be brought onto premises, and
supplying a sound recording or film for an infringing performance.

Also the Act, 1990 deals with the secondary infringement in section 14 of the Act.

It is important to note that the principal forms of secondary infringement are set out in section 22 and 23 of the CPDA, 1988.

4.0 CONCLUSION

The concept of copyright infringement is well established in the primary infringement which is also known as the restricted acts. Secondary infringers can also be liable for copyright infringement. It is imperative to note that not only the retailer could be liable for secondary infringement but also the end users of the product, once he is aware of the infringement which is the crucial point of secondary infringement.

5.0 SUMMARY

This unit has been able to define copyright infringement using the provisions of the Copyright Act of 1990 and the UK version of it in CPDA, 1988. The nature of copyright infringement has also been dismissed

The types of copyright infringement, that is primary and secondary infringement of copyright, their purpose, liability and circumstances of liability have also been discussed

6.0 TUTOR MARKED ASSIGNMENT

1. Explain and apply the statutory provisions relating to primary and secondary infringement of copyright.
2. Explain the nature of copyright infringement

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
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- Copyright Act, CAP. 68, Laws of the Federation 1990.
- The Copyright, Designs and Patents Act 1988.

Unit 2

DEFENCES TO COPYRIGHT INFRINGEMENT

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 - 3.1 The statutory defence
 - 3.2 Non Statutory defence
 - 3.3 The Permitted Act
- 4.0 Conclusion
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1.0 INTRODUCTION

The alleged infringer of a copyright can raise a whole lot of issues in defence of the alleged claim of infringement of copyright.

For instance, he could raise the defence like the work taken is an idea and not an expression of the said author or that the work taken is also not protected by any section of the Copyright Act. An infringer could also claim that he has a license, or that copyright does not subsist in the said work, or the act complained of was not done in relation to a substantial part of the work.

2.0 OBJECTIVE

The main aim of this unit to give learners a thorough understanding of the defences available to those sued for copyright infringement and to be able to offer an understandable idea of the available defences both statutory, non statutory and also the permitted act under copyright which will not amount to infringement, or which could be excused for the sake of public interest or study research.

3.0 MAIN BODY

3.1 The Statutory Defence

Generally, statutory defences of copyright infringement are issues set out by the act for the protection of individuals, community and the benefit of the public in general.

It is however, pertinent to note the various provisions of the act in this stare and also to prevent copyright owners from infringing on the fundamental human rights of citizenry. In this unit some of the statutory defences and the permitted acts will be discussed.

1. The general defence of fair dealing

The thought of fair dealing covers research, that is non commercial research. Where it's mainly private research, criticism, review and reporting current events then the use of some copyright work is allowed. In this case, such use is referred to as fair use in the United States, and it mostly contains the requirement of due acknowledgement from the copyright owner.

The concept of fair dealing provisions allows the copying or use of the work which will otherwise be an infringement and in most circumstances the amount of the original work used is important before an infringement can occur.

In *Independent Television Publications Ltd v Time Out Ltd* (1984) FSR 64, Whitford J, held inter alia that the whole purpose of the fair dealing provisions is to permit, in appropriate circumstances, the taking of a substantial part of a copyright work.

It is essential to note that where an author wishes to criticise the work of an eminent Professor, then much of the work will be extracted. This will be regarded as fair dealing. In *Hubbard v. Vosper* (1972) 2 QB 84 at 94, Lord Denning in his characteristic candour that “..... to take long extract and attach short comments may be unfair while to take short extracts and add long comments may be fair enough.”

The permitted act of fair dealing for research or private study is available in literary, dramatic, musical or artistic work. For fair dealing for research or private study, the factors to determine whether it is fair may be the nature of the research or study and the funds available to the researcher or student.

Fair dealing could be for the purpose of making temporary copies, non-commercial research, private study, discussing criticisms, review and reporting current events.

Lastly, for the defence on any copyright infringement to succeed, then it is not enough for the defendant to show that his conduct falls within the circumstances of the four sections outlined in CPDA, 1988. He must show that use of the copyright was fair, and within the content of sections 28A, 29, 30 and 31.

In looking at the fairness of any work, the following will be considered:

- a. The amount of the original work which is taken - *Fraser Woodward Ltd v. BBC* (2005) FSR 762.
- b. The purpose of the use of the work - *Hubbard v. Vosper* (Supra).

- c. The necessity of the use of the work – Associated Newspaper v. Newsgroup Newspapers (1986) RPC 515.
- d. The status of the said work – Beloff v. Pressdrom Ltd (1973) 1 All ER 241.

2. Public Interest

Public interest can in some cases, provide a defence for copyright infringement. Naturally, a person will not without the authority of the copyright owner, publish something which embarrasses the copyright owner or some other persons.

In *Lion Laboratories Ltd v. Evas* (1984) 2 All ER 417, the defendant, a newspaper editor published some information about the reliability of the lion into 3000. A device used in checking the level of intoxication by alcohol in motorist.

The defence of public interest applied to both the confidence and the copyright issues because it was in the public interest that the information be published.

The defence is to justify the defendant's actions in the light of information which ought to be made known in the interest of society.

3.2 The Non –Statutory defence

The non-statutory defences are defences to copyright infringement which are naturally not covered by the Copyrights Act 1990 and the CPDA, 1988. They are defences that are based on case laws. This will be treated below.

1. Acquiescence and Delay

The equitable defence of acquiescence may be pleaded where the claimant has made a misrepresentation that the copyright owner had been aware of

the activities that could infringe his copyright and yet did nothing about it for a long time.

In this instance a license might be implied where the copyright owner he knew fully well of what would otherwise be infringing activities and did nothing about which led the infringer to believe that he has the implied consent of the copyright owner.

The normal time limit for bringing proceedings for tort is under the Limitations Act 1980, six (6) years from the time the cause of action arose. Any delay might also affect the availability of equitable remedies like injunction.

In *Cluett Peabody & Co. Inc v. Mc Intyre Hog March & Co. Ltd* (1958) RPC 355, it was held that 30 years delay prevented a claim for injunctive relief in respect of an infringement of a trade mark.

It is usually not easy to lay down hard and fast rules about this and the exercise of the discretion to grant an injunction will be influenced by the facts of each case in question and conduct of parties to the action.

It is pertinent to note that a considerable delay may not deprive the claimant of an injunction. See *Experience Hendrix LLC v. PPX Enterprises Ltd* (2003) FSR 853.

2. Estoppel

The behaviour of the copyright owner may give a good ground for estoppel to be raised against him. If the defendant has incurred expenditure or some other detriment with the knowledge of the claimant and without objection from him, then estoppel could arise.

In *Confetti Records v. Warner Music UK Ltd* (2003) EWHC 1274 (Ch), there was a purported agreement expressed as being subject to contract. The claimant sent a memo of the deal, a copy of a cleared track of music and an

invoice. This was held to be a representation that a license had been granted in respect of the track, and then the claimant was therefore stopped.

A copyright owner may not take action because the level of infringement is not really worth the trouble and expenses of going to court. But if the defendant's use of the work suddenly takes on wholly unexpected proportions, the owner may be entitled to enforce his right as to the future unless the newly found success of the work is the result of the defendant's work and expenditure carried on with the knowledge of the owner and without his complaint. See *Hodgens v. Beckingham* (2003) EMLR 376.

3. Implied License

The defence of implied license is often pleaded but rarely succeeds. The court will imply permission, so far there is an existing agreement between the parties and it is still effective.

In *Banier v. News Group Newspapers* (1997) FSR 812, the defendant published a photograph of the claimant which had previously been published in another newspaper. No license was implied as the parties were not in a contractual relationship.

4. Non – Derogation From Grant

The exercise of an intellectual property right could unduly interfere with the subsequent use of an article in which such right subsists. With copyright there must be some ultimate control of the owner's right where these could be unfairly used.

In *British Leyland Motor Corp Ltd v. Armstrong Patents Co. Ltd* (1986) 2 WLR 400, the House of Lords, while accepting that there had been a technical infringement of the copyright subsisting in the claimant's

drawings refused to enforce that copyright on the basis of non-derogation from grant. That is once an article has been sold by the rights owner, he can no longer use those rights to interfere with the purchaser's right to a free market in spare parts.

It could be argued that the principle of non-derogation from grant is inconsistent with copyright law, except in the context of a license agreement, where a term in the agreement contradicts or is inconsistent with the general rights granted by the license.

3.3 The Permitted Act

Generally, the permitted act excuses activities which, although technically infringing the copyright in a work, does not unduly interfere with the copyright owner's commercial exploitation of the work.

The permitted acts are, therefore on the whole relatively restricted in their effect on commercial exploitation.

1. Education

Copying in the course of instruction or in preparation for instruction of a literary, dramatic or artistic work is permitted as long as the copying is done by the person giving or receiving the instruction, for example the teacher or the pupil and the copying is not by a reprographic process.

Reprographic copying is permitted only in limited circumstances and some of the permitted acts can be done only for or in educational establishments. This type of copying has a wider meaning than simply making photocopies of a work, S178 CPDA, 1988.

However, section 32 CPDA, 1988 deals with things done either for the purpose of instruction or for examination purposes. In some circumstances, where it is permitted to make copies of copyright work, if those copies are subsequently dealt with, they are treated as infringing copies. 'Dealt with'

generally means sold or let for hire, or offered or exposed for sale or hire or communicated to the public.

Examinations are privileged in that anything may be done for the purposes of the examination by way of setting questions, communicating questions to candidates or answering the questions without infringing copyright.

Performance of literary, dramatic and music works are permitted provided the audience is made up of teachers and pupils at the educational establishment and other persons directly connected with the activities of the establishment.

2. Libraries and Archives

Libraries and archives, that is those prescribed by the statutory instrument, may also provide that, in some cases, a librarian or archivists may make a copy only if the person requesting the copy satisfies the librarian or archivists that he requires the copy only for non-commercial research or private study and makes such declaration in the prescribed form.

Under section 38 CPDA, and section 14 (2) (a) of the Copyrights Act, 1990, a librarian may make and supply a copy of an article in a periodical to a person requiring the copy for the purpose of research or private study. Lending of copies of a work by a prescribed library or archive, not being a public library and which is not conducted for profit, is permitted without infringing copyright.

3. Public Administration

Copyright is not infringed by certain things done in connection with what might loosely be described as in the course of public administration. And this includes parliamentary and judicial proceedings, Royal Commissions and statutory inquiries and materials open to public inspection, on a

statutory register or contained in a public record. Section 14 (2) (b) copyrights Act 1990.

The copying of documents for a court trial does not infringe copyright. Copyright is also not infringed by doing anything for the purpose of reporting parliamentary and judicial proceedings or the proceedings of Royal commissions or statutory inquiries that are held in public.

4.0 CONCLUSION

It is however important to note that the work of an author could be copied without his consent or a given license for that purpose. This could, however be done through the statutory defence provided by the Acts or the non-statutory which is mostly devoid of case laws and also the permitted acts which is more like an extension of the statutory defence of the copyright infringement.

Once these defences are done for non-commercial purposes and private study, then the copier could be relieved of the infringement claim.

5.0 SUMMARY

In this unit we have discussed the statutory defences of copyright infringement ranging from the defence of fair dealing to the concept of public interest. Also, non-statutory defences which are mainly invention of case laws and it ranged from acquiescence and delay, to the doctrine of estoppels to implied license and to the non-derogation from grant have been discovered.

6.0 TUTOR MARKED ASSIGNMENT

1. The non-statutory defences of copyright infringement are an inventions of case law. Discuss and explain with the aid of decided authorities.

2. For the defence of fair dealing in copyright infringement to succeed, the defendant must show that the use of the copyright was fair. Discuss.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Helen Norman, Intellectual Property University of London Press (2005).
- The Copyright, Designs and Patents Act 1988.
- Copyright Act, CAP. 68, Laws of the Federation 1990.

UNIT 3

MORAL RIGHTS IN COPYRIGHT

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Body
 - 3.1 The Paternity Right
 - 3.2 The Right of Integrity
 - 3.3 Other Moral Rights
- 4.0 Conclusion
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1.0 INTRODUCTION

The Berne Copyright Convention of 1928 added the word 'Moral' to copyright matters and brought about two out of the four established moral rights of an author. The CPDA gave life to the said rights for survival by giving recognition and legal effect to such rights given to the creator of a work in which copyright subsists.

An author's moral right can be protected indirectly because the act complained of might also involve a normal infringement of copyright. In moral rights only, the copyright owner could bring a legal action for

infringement and an author who did not own the copyright in his work cannot bring an action except the treatment of the work was defamatory.

2.0 OBJECTIVE

The principle that this unit is out to discuss pertains to the moral rights of a copyright owner in a work, and the rights available to the copyright owner as against the author and those provided by the Berne Convention.

3.0 MAIN BODY

3.1 The Paternity Right

The right to be identified as the author of a literary, dramatic, musical or artistic work or as the director of a film, does not apply to other types of works such as sound recordings and broadcast or works in which copyright does not subsist. The work must be a copyright work. S77 (1) CPDA.

The right might be asserted at any time even subsequent to the transfer of the economic rights in the work. The right to be identified as the author or director does not apply to every act that can be performed in relation to the work, for example, the right does not apply when a dramatic work is performed privately, for instance, to a group of friends or for non-commercial publication.

The right also applies to these acts in respect of adaptations, that is the author has the right to be identified as the author of the work from which the adaptation was made. For example, Chinua Achebe writes a story in English and another person later translates the story into Chinese and publishes copies of the Chinese translation commercially, then provided that Wole has asserted his right to be identified as author, copies of the Chinese version must contain a clear and reasonably prominent notice to the effect that the story has been translated from the original English version written by Wole Soyinka.

The method of identification of the author of a work should be conspicuous and reasonably prominent. In the case of the commercial publication of the work or the issue to the public, then the author or director should be identified on each copy or to bring his identity to the notice of a person acquiring a copy. Section 11 (1) (a) of the Copyright Act, 1990.

In *Hyperion Records Ltd v. Dr. Lionel Sawkins* (2005) RPC 808, the composer of performing editions of old musical works required that a copyright notice should be used in the following format: (c) copyright 2002 by Lionel Sawkins.

3.2 The Right of Integrity

The author of literary, dramatic, musical or artistic work and the director of a film has an 'integrity right', a right to object to derogatory treatment of the authors or director's work.

The owner can only object to the distortion, modification or mutilation of the work if such treatment is prejudicial to the honour or reputation of the author. See *Confetti Records v. Warner Music UK Ltd* (2003) EWHC 1274.

The right is described in section 80 (1) CPDA and also section 11 (1) (b) of the copyright Act 1990 as the right belonging to the authorship or director not to have work subjected to derogatory treatment. For the right to apply, the work must be a copyright work. This means a work in which copyright subsists. If the treatment does injure the honour or reputation of the author or director, it is possible that it may give rise to a claim in defamation in addition to an action for infringement of the moral right.

An important aspect of the integrity rights is the question of what amounts to a derogatory treatment of a work certainly reducing the aesthetic content or damaging the literary style of the work by altering it. In other words,

reducing the merit or quality of the work would probably fulfil the requirement.

It is not enough if the author is simply aggrieved at the treatment of his work. See *Pasterfield v. Denham* (1999) FSR 168.

3.3 Other Moral Rights

The first of it is a false attribution of a work. A person could be angered if a work of poor quality or a work containing scandalous or outrageous comment were falsely attributed to him.

It is not so easy to know whether the false attribution right is a moral right because it does not concern any work created by the person to whom the right accrues but CPDA places the right amongst the other moral rights.

The persons quoting extracts from the works of others must be careful to use verbatim extracts only and check carefully for typographical errors, if the word 'not' is omitted from a quoted passage and the author's name is acknowledged, it would seem that the whole passage has been falsely attributed.

In *Noah v. Shuba* (1991) FSR 14, it was held that two short sentences by themselves could not be a work for copyright purposes.

However, the false attribution right applies to the same category of works as to the other moral rights.

3.4 Duration and Transmission on Death of Moral Rights

The duration and transmission on death of moral rights except false attribution rights, endure as long as copyright subsists in the work in question. Note that where moral rights are likely to be in issue, the span the life of the author plus 70 years and this can be seen as fairly generous, while the right to object to false attribution as author spans 20 years after their death.

4.0 CONCLUSION

The moral right of an author or director is part and parcel of a work as long as copyright subsists in the work. However, moral rights remain personal to the author of any work and cannot be assigned but can pass on death or bankruptcy.

5.0 SUMMARY

This unit has discussed the moral rights available to an author or a director of a work. The moral right of an author subsists as long as his copyright does.

The rights of an author are from paternity as well as the right of integrity of his work or person as associated with the work. This also affects his moral rights especially the false attribution and transmission on death of moral rights.

6.0 TUTOR MARKED ASSIGNMENT

1. Critically analyse the rights of paternity and integrity in moral rights.
2. Explain the duration and transmission on death of moral right rights.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
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- The Copyright, Designs and Patents Act 1988.
- Copyright Act, CAP. 68, Laws of the Federation 1990.

UNIT 4

REMEDIES FOR COPYRIGHT INFRINGEMENT

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1.0 INTRODUCTION

The CPDA as a legislation for the regulation of copyright provides an ample range of remedies for copyright infringement. This statute is largely declaratory of prior case laws on this subject matter.

The remedies available to a copyright owner in this regard are mostly civil in nature and they are mostly post trial remedies like damages, injunction account of profits and delivery up. It is also important to note that there are pre-trial remedies like the interim injunctions, search and seizure and freezing orders and discovery.

2.0 OBJECTIVE

The objective of this unit is to discuss the remedies available to a copyright owner when his copyright has been infringed. At the end of this work

learners should be able to discuss the pre-trial and the post trial remedies available to the copyright owner.

3.0 MAIN BODY

3.1 Pre-Trial Remedies

Naturally, if a copyright owner believes that his rights are being infringed upon and there is a real danger that the person involved will dispose of the evidence before the trial, then the copyright owner can apply to the court for an order. The order in this regard come in different dimensions like a search order (Anton Piller Order) to an interim injunction, as well as a freezing order. This are discussed in seriatim in this unit

a. Anton Piller Order (Search and seizure)

An Anton Piller order is an order which will enable the claimant, accompanied by his solicitors and law enforcement agents and court bailiff, to enter the premises where the offending materials and articles are kept and remove them, or have copies made, so they can be produced at the trial.

It is an order, which is obtained without notice to the other party, so as to remove evidence which ought to otherwise be destroyed. The order originated in Lord Denning's judgement in the case of *Anton Piller KG v. Manufacturing Processes Ltd* (1976) 1 Ch. 55.

The object of a search order in this context is the preservation of evidence. In this instance, the claimant has to give an undertaking as to damages in case he is wrong and the defendant suffers damages as a result of the granting and execution of the order.

The purpose of the order is to fulfil a legitimate purpose, that is, protecting the claimant's copyright. See *Columbia Pictures v. Robinson* (1987) 1 Ch. 38.

It is imperative to note that search orders have been abused in their exercise in the past. For this reason, they are granted sparingly and with strict compliance with guidelines set down in *Universal Thermosensors Ltd v. Hibben* (1992) 3 All ER 257.

b. Interim Injunctions or Interlocutory

It is a court order directing that certain acts do or do not take place or should continue, pending the final determination of the parties rights by the court. The idea behind is to preserve the status quo in order to prevent irreparable harm.

The principles which govern the grant of interim injunction are stated in *Kotoye v. CBN* (1989) 1 NWLR Pt 98 Pg. 419 and also the in the words of Laddie J, in *Series 5 Software Ltd v. Philip Clarke* (1996) FSR 273, where it laid down the conditions to be fulfilled before the grant of the order

Note that an interim injunction will not be granted if the claimant's claim is frivolous or vexations. see *Entec Pollution Control Ltd v. Abacus Mouldings* (1992) FSR 332.

c. Mareva Injunction or Freezing Order

It is an order obtained without notice, that is, without the defendant being notified, it is designed to prevent the defendant from moving assets out of the jurisdiction or dissipating them or concealing them so as to deprive the claimant of any monetary compensation in the event of success at the trial. It is an *exparte* order.

It is an order that emanated from the case of *Mareva Compania Naviera SA v. International Bulk Carriers SA* (1980) 1 All ER 213.

The safeguard for this order is that the defendant must be left with enough money to live on and to carry on his day to day business. It should be noted that the order can affect third parties like banks.

3.2 Civil Remedies or Post-Trial Remedies

The successful claimant in a copyright infringement action has a range of remedies available. The civil remedies available for infringement of copyright are damages, injunctions and accounts. These are stated in S96(2) CPDA and also section 15 (1) of the Copyright Acts LFN 1990 being available in respect of a copyright infringement as they are available in respect of any other proprietary right.

a. Damages

Damages for the infringement of intellectual property are tortuous in nature. The copyright owner will usually ask the court for damages which can be expected to be calculated, as with other torts, on the basis of putting the claimant in the position he would have been had the tort not been committed that is to compensate him for the actual loss suffered in so far as it is not too remote.

In *Sutherland Publishing Co Ltd v. Caxton Publishing Co. Ltd* (1936) 1 All ER 177, Lord Wright, said that the normal measure of damages for copyright infringement is the amount by which the value of the copyright as a chose in action has depreciated.

The principles governing the award of damages for intellectual property rights are set out in the case of *General Tire v. Firestone* (1976) RPC 197.

In copyright infringement, the court may award additional damages to reflect the flagrancy of the infringement section 15 (4) (b) of the Copyright Act, 1990.

Damages might be assessed as the amount of royalties the copyright owner would have secured had the infringer obtained and paid for a license to perform whatever the infringing act was.

Another way of calculating the quantum of damages, depending on the circumstances, might be based the profit of the copyright owner has derived from sales lost as a result of the infringement.

b. Injunction (Final)

A final injunction is discretionary in nature and will not be awarded where it is unlikely that the defendant will repeat any act of infringement. Section 15(1) of the Copyrights Act, 1990.

See *Coflexip SA v. Stolt offshore MS Ltd* (2994) EWCA CIV 213.

c. Accounts of Profits

Equity provides an alternative to damages in the order for an account of profits, the infringer may have made a profit from his actions which exceeds in value what would be the normal award of damages.

The purpose of the remedy is to prevent unjust enrichment of the defendant. See *Potton Ltd v. Yorkclose Ltd* (1990) FSR 11.

The quantum of an account is the profit, that is the gain, made by the defendant attributable to the infringement and not the wholesale or retail value of the offending material. Unlike ordinary damages accounts are available regardless of the defendant's knowledge as to whether copyright subsisted in the work.

A claimant cannot have both damages and an account of profit, but must elect between them. However, they do not have to do so until after the conclusion of the trial. See *Island Records v. Tring* (1995) FSR 560.

d. Additional Damages

This is a form of punitive damages. The award of the damages may be fitting if the defendant has acted scandalously or deceitfully or if the ordinary damages or an account of profits is not appropriate.

The court has discretion to award additional damages. Additional damages are rarely awarded. In *Cala Homes (South) Ltd v. Alfred McA Alpine Homes (East) Ltd* (1995) FSR 818, Laddie J, said that additional damages were quite distinct from ordinary damages together with an account of profits. Section 15 (3) of the Copyrights Act, 1990.

It is imperative to take note that deliberately concealing the infringing work or disguising the origin of the work, for example by removing copyright notices or the name of the copyright owner or otherwise modifying the work, may suggest that additional damages might be appropriate. See *Cantor Fitzgerald International v. Tradition (UK) Ltd* (2000) RPC 95.

e. Delivery Up

A court may order that infringing copies, or articles designed or adapted for making copies of the copyright owners work are delivered up to him or such other person as the court may direct.

Delivery up is available where a person has an infringing copy of the work in his possession or custody. The time limit for the application for delivery up corresponds with limitation of actions which is six years from the time the infringing copy or article was made. For the order to subsist, there must be a real situation of urgency before the order can be made. Note that the order once made may mean that the infringing copies be forfeited to the copyright owner or destroyed or otherwise dealt with as the court thinks fit. In this instance, but the court shall consider whether other available remedies would be adequate to compensate the copyright owner and protect his interest.

4.0 CONCLUSION

In conclusion the successful claimant has wide option of remedies to choose in case of an infringement of his copyright.

The remedies available for copyright infringement are only compensatory in nature and cannot in its entirety remove the pain caused by the infringement.

5.0 SUMMARY

The remedies available to a copyright owner are pre-trial and post –trial in nature and they range from anton piller order, to mareva injunction and also interim injunction. Learners of this unit are enjoined to read the case of *Kotoye v. CBN* for further understanding of the conditions for the grant of the interim injunction.

Post trial remedies start from the award of damages to the issue of final injunction and also the accounts of profits as well as additional damages. It also include account of profits and also to the issue of delivery up that is if the infringed material has not been delivered up. The essence of this last remedy is to discontinue infringement.

6.0 TUTOR MARKED ASSIGNMENT

1. Explain interim remedies that may be available to a copyright owner before an infringement action comes to trial.
2. Analyse the concept of additional damages and accounts of profits in the *Cala Homes* case.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, *Intellectual Property* (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (Sixth Edition) London: Sweet & Maxwell (2007).
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MODULE 3

Unit 1 – The Law of Breach of Confidence

Unit 2 – The Law of Copyright and Confidential Information

Unit 3 – Confidential Quality

Unit 4 - Defence and Remedies for breach of confidence

UNIT 1

THE LAW OF BREACH OF CONFIDENCE

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1.0 INTRODUCTION

This is an area of law concerned with secrets of all kinds. It is a judge-made law and therefore a case law invention. A vast majority of persons owe an obligation of confidence to others.

The law of confidence covers business transactions and negotiations and an obligation of confidence will be implied in many situations where there is no express mention of confidentiality.

It is important to note that by the coming of the Human Rights Act of 1998, so much confidence that was missing in the breach of confidence law in relations to right to privacy evolved.

2.0 OBJECTIVE

The objective of this unit is to discuss the law of breach of confidence as a law based on case laws, to the development of the area of law. It is also meant to discuss confidential information, its definition and its

It is important to note that the human right law has done a lot in keeping the private life of even celebrity private from the media. This is an area which the laws hitherto generally could not protect.

3.0 MAIN BODY

3.1 The law of Breach of Confidence

Breach of confidence lies in the domain of equity and is entirely based on case laws. In *Kitechnology BV v. Unicor GmbH Plastmaschinen* (1995) FSR 765, it was held that claims for breach of confidence did not arise in tort, they were certainly non-contractual but were part of the equitable jurisdiction of the court.

This is an area of law with no legislative backdrop except for some isolated statutory stamp like the section 171 (1) of the CPDA and section 1 of the Official Secrets Act 1989.

Generally, the law of breach of confidence gives protection to things not released to the public or part of the public domain. It also protects ideas, inventions and its details.

3.2 Development of Breach of Confidence

It is an area of law that developed in the middle of the nineteenth century, but went dormant until the late 1940's when it was realised that this was an extremely useful area of law.

One of the earliest case law that helped in the development of this area of law was *Prince Albert v. Strange* (1849) 1 Mac & G 25. Here the Queen and Prince Albert made etchings for their own amusement, intended only for their private entertainment, but they sometimes had prints made to give to friends. The defendant had made unauthorised copies which he had intended to put on public display. An injunction was granted to restrain him.

It is imperative to know that many breach of confidence claims arise when the parties have previously been in a contractual relationship. In *Morison v. Moat* (1851) 9 Hare 241, the son of Mr. Thomas Moat was restrained by the son of Morison who originally devised the recipe from making use of secret recipe for a medicine, after the partnership had been dissolved. The court granted the injunction in that regard.

However, the first major case that laid the foundation for modern law of breach of confidence was *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1963) 2 All ER 413. The learned trial judge in this case emphasised the fact that there need be nothing special about confidential information and that others may be able to derive the information for them but will need to invest some efforts to obtain that information.

There are certain conditions that must be met before protection of confidential information can be enjoyed. In *Coco v. AN Clark (Engineers) Ltd* (1969) RPC 41, Megarry J, further developed the action of breach of

confidence and laid down a good working formula for the application of this area of law.

The learned judge laid down that the doctrine of confidence required three elements and they are as follows:

1. The information must be of a confidential nature
2. The information must have been imparted in circumstances importing an obligation of confidence.
3. There must be an authorised use of that information to the detriment of the party communicating it.

3.3 Confidential Information

The law relating to confidential information is scrappy in nature. Confidential information is information which must not be divulged without permission.

It is information that can cover a wide range of material and can often have great value. Example of such is a trade secret like for instance, coca cola recipe.

Trade Secrets, is another name for confidential information in some jurisdictions. It could be a formula, practice, process, design, instrument, pattern or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers. However, there are three main factors that are subject to differing interpretations. Firstly, it has to be information that is not generally known to the public must it confer some economic benefits on its holders, and lastly it must be the subject of reasonable efforts to maintain secrecy.

Generally, confidential information is written down. It can also be information which is not recorded in material form. It is imperative to note that there is no single Act of Parliament defining confidential information or

probably governing how to protect it or setting out rights and obligations in respect of it. However, the general rule is that a person who has received information in confidence cannot take undue and unfair advantage of it.

Confidential information must be confidential in nature and it must have the necessary quality of confidence namely that it must not be something which is public property and public knowledge and someone must have added some thought and effort to existing public domain materials to create something that deserves protection.

Confidential information can be protected for as long as it retains its confidential nature which could be indefinite but it can lose its truly confidential character by becoming out of date and ceasing to have a commercial value.

Types of Information

The action for breach of confidence provides the only legal mechanism to protect ideas and information as such. Importantly other categories of intellectual property rights require ideas and information to be embodied in a tangible form.

The information protected by the action for breach of confidence was enunciated in the case of *R v. Department of Health, ex parte Source Informatics Ltd* (2001) FSR 74, where Simon Brown LJ accepted the proposition that there are four main classes of information traditionally regarded as confidential.

1. Commercial Information or Trade Secrets: it is information which is related to business, commercial or industrial or enterprise. The value of such information should not be taken for granted. See *Coco v. AN Clark (Engineers) Ltd* (1969) RPC 41.
2. Personal Confidence: it is important to note that secrets of a personal nature are also protected, even if relating to sexual conduct of a lurid

nature. This was exemplified in *Stephens v. Avery* (1988) 1 Ch. 457, where the basis of the case was the killing of Mrs. Telling by her husband. The details of a sexual relationship between Mrs. Stephens, the claimant and Mrs Telling were disclosed in confidence to a friend. Mrs. Avery, the defendant who had published the information in a newspaper. See also *Douglas v. Hello! Ltd* (2001) FSR 732.

Note that simply marking a document with the word 'PRIVATE AND CONFIDENTIAL' will not suffice if the contents are commonplace and lie within the public domain e.g a simple, straightforward recipe for bread which contains nothing unusual.

3. Government information: is an area that concerns state secrets and other materials amount the internal working of a state. The last of it is that of artistic and literary confidence.

3.4 Breach of Confidence and Human Rights

Generally, there was no fundamental right to privacy. They was well enunciated in the case of *Kaye v. Robertson* (1991) FSR 62, where the court was unable to give redress to the claimant a well known actor when his privacy was invaded upon, because of lack of any legislation in that direction.

When the right to privacy is combined with the Human Right Act of 1998, then this may be the means to create a right of privacy. Occasionally, invasions of privacy may have been dealt with under the law of breach of confidence but did not provide a comprehensive and seamless law of privacy. Article 8(1) of the Human Rights Convention states that "everyone has the right to respect for his private and family life, his home and his correspondence."

In *Hannover v. Germany* (2005) 40 EHRRI, photographs were taken by the press of Princess Caroline of Monaco in public places. It was held by the

European Court of Human Rights that her right of privacy had been breached, because the photographs did not relate to her duties, obligations or suchlike as a Princess.

Also in *Naomi Campbell v. Mirror Group Newspaper Ltd* (2004) 2 WLR 1232, the court held that it was a breach of confidence to publish story and photographs of her where she was receiving treatment for Narcotics.

4.0 CONCLUSION

The law of breach of confidence cannot be overemphasised especially as it relates to commercial information. The Human Rights Act of 1998 attempts to protect the right to privacy of the individual with a view to complementing the various municipal statutes.

5.0 SUMMARY

The law of breach of confidence has been discussed in this unit, with emphasis on the law of confidence as purely a law of equity and not contractual in nature. Also the historical development, to the modern age of the law has also been discussed vis a vis confidential information which can also be referred to as trade secrets in some jurisdiction. The types of confidential information was also discussed with the law in relation to the right to privacy as laid down in the Human Rights Act of 1998.

6.0 TUTOR MARKED ASSIGNMENT

1. Discuss the commercial information of the confidential information.
2. With reference to *Hannover v. Germany* (2005) 40 EHRR1, discuss the rights of privacy as against the breach of confidence.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, *Intellectual Property* (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (Sixth Edition) London: Sweet & Maxwell (2007).

- Helen Norman, Intellectual Property University of London Press (2005).
- The Copyright, Designs and Patents Act 1

UNIT 2

THE LAW OF COPYRIGHT AND CONFIDENTIAL INFORMATION

CONTENTS

- 1.0** Introduction
- 2.0 Objective
- 3.0 Main Body
 - 3.1 The Copyright Law
 - 3.2 Confidential obligation
 - 3.3 Confidential Information as Property
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The law of copyright is one of the ingredients of intellectual property in protecting ideas and inventions. In this respect, it protects ideas and also the people who invent the ideas.

Generally, copyright is capable of helping to resist invasion of privacy. In this unit copyright law will be revisited especially its relationship with confidential information.

It is also imperative that there a lot of confidential obligations that must be fulfilled in intellectual property especially with copyright by individuals from one party to another. In copyright law, ideas generally cannot be protected

but the law relating to confidential information can generally do this to the favour of the inventor.

2.0 OBJECTIVE

This unit is determined to explain the main differences and similarities between copyright law and confidential information. It will also discuss how confidential information can protect ideas and copyright.

3.0 MAIN BODY

3.1 The Copyright Law and Confidential Information

Copyright law is a bundle of exclusive rights that permit the owner of copyright to prevent others from reproducing their copyright work. The proceeding under copyright must be brought by those with title to the copyright.

Confidential information is information which should be kept confidential because of its nature, which is identified as confidential. It is also information which must not be divulged without permission.

It is imperative to note the commonality between an unauthorised disclosure and copyright infringement. This may be found where the disclosure contains the acted copyright work in its material or recorded form. The protection granted the law of confidential information is broader than that of copyright. It is the very information that is protected, and not simply the form it takes.

However, the reproduction of summaries, precis and opinions in respect of a copyright work may constitute an unauthorised disclosure of confidential information simply by communicating the contents to a third party, where the duty of confidence exists.

Generally, the rule surrounding confidential information is that a person who has received information in confidence cannot take unfair advantage of it.

Copyright law is well protected by legislation while confidential information is mainly based on the results of cases considered by the courts over many years. It has therefore developed by reference to a wide range of different circumstances.

The United Kingdom the law of confidential information is currently undergoing radical change in this direction.

3.2 Confidential Obligation

In the law of confidence, there must be an obligation which arises from the circumstances in which the information was imparted. It is a relationship that can arise by express agreement or prior notice or may be implied by law. Note that it is not necessary to show that there was a contractual relationship, although evidently this may help the claimant's case considerably.

The relationship of confidential obligation imposes an equitable duty of good faith. Generally, there are two tests to the issue of confidential obligation. It is subjective and objective in nature. In *Schering Chemicals v. Falkman* (1982) 1 QB 1. It was decided under *alibi* that it is a question whether the confider believed that the circumstances imposed secrecy.

The objective test was well enunciated in *Stephens v. Avery* (1988) Ch. 449, where one friend disclosed to another that he was in a lesbian relationship. It was held that the friend should have realised from the circumstances of the disclosure that the information was confidential and not to be disclosed least of all to a tabloid newspaper.

The weight of authority is now overwhelming in favour of objective tests. Note generally that confidential obligation has three main areas which will be dealt with in the next unit.

3.3 Confidential Information as Property

It is important to note that there have been differing views on the nature of confidential information, namely whether it is a property or an asset that is capable of being assigned.

Generally, it is accepted that knowledge or confidential information itself is not property. See *Moorgate Tobacco Co. Ltd v. Phillip Morris Ltd* (No 2) (1984) 156 CLR 414.

Relatively, confidential information is protected by equity as an obligation of conscience, arising from the appropriate circumstances in which the information has communicated or contained and not on the basis of rights in property.

In Australia, confidential information is not property in any normal sense, but equity will restrain its transmission to another if in breach of some confidential relationship. On this view, confidential information in itself is not property capable of being assigned or the subject of a charge.

Notwithstanding how confidential information itself is characterised, there is support for the possibility of assigning the right to enforce an obligation to keep information confidential. In *Mid-city Skin Cancer & Laser Centre v. Zahedi - Anarak* (2006) NSWSC 844 at 196-238, Justice Campbell held that a skin cancer clinic had the right to sue a doctor who used the records obtained from a patient in another practice.

Similarly, in *TS & B Rental Systems Pty Ltd v. 3fold Resources Pty Ltd* (No 3) (2007) FCA 151, where Justice Finkelstein agreed that confidential information was not property capable of being assigned. He went further to

accept that a purchaser of confidential information could take action for breach of confidence in such information.

In addition to all these a purchaser who acquires confidential information may be able to prevent a disclosure of the information by enforcing a right in equity. In achieving this and assisting actions for breach of confidence, agreements that created those obligations of confidence (confidentiality agreements or employee agreement) should be also assigned to the purchase under the relevant agreement.

4.0 CONCLUSION

Copyright law and confidential information are naturally interwoven and the protection offered by the law of confidential information is often the only or main form of protection especially for commercial sensitive materials and information as in trade secrets.

A person who has received information in confidence cannot take unfair advantage of it.

5.0 SUMMARY

Confidential information and copyright have been enunciated and explained in this unit. Confidential information have been defined along with copyright law. It has been shown that confidential obligation is an instrument of law of breach of confidence, will be discussed extensively in the next unit.

6.0 TUTOR MARKED ASSIGNMENT

1. Briefly explain the relationship between confidential information and copyright law.

2. Explain the concept of confidential information whether it is a property capable of being assigned with the concept of *TS & B Rental Systems Pty Ltd v. 3fold Resources Pty Ltd* (No3).

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, *Intellectual Property* (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (Sixth Edition) London: Sweet & Maxwell (2007).
- Helen Norman, *Intellectual Property* University of London Press (2005).
- Paul Marett, *Intellectual Property Law*: London: Sweet & Maxwell (1996).
- The Copyright, Designs and Patents Act 1988.

UNIT 3

CONFIDENTIAL QUALITY

CONTENTS

- 1.0 Introduction
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 - 3.1 Employer/Employee Relationship
 - 3.2 Unauthorised use
 - 3.3 Trade Secrets
 - 3.4 Official Secrets
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

Usually for an action in breach of confidence to succeed, there must be an obligation of confidence which arises from circumstance in which the said information was imparted.

The duty of secrecy can arise in a number of ways. It may arise from a contract between two or more parties which could be express or implied in nature.

The court can infer that there is a duty of confidence from the relationship of the parties' for example an employment relationship, professional

adviser/client. That the relationship must however be of the type which imposes an equitable duty of good faith.

2.0 OBJECTIVE

It is imperative to note that this unit will discuss extensively the obligation of confidence between employer/employees and that of ex-employee and also that of involuntary third party.

The unauthorised use of confidential information will also be discussed and how detrimental it could be when information is divulged without authorised permission to do so.

The idea behind the concept of trade secrets is a unique one which cannot be overemphasised and that the concept enjoys a long secrecy than patenting the idea.

The official secret of government establishment is not to be divulged once it is not in public domain as they may be detrimental to any reasonable government. This is guided by the official secrets Act of various jurisdictions, Nigeria inclusive.

3.0 MAIN BODY

3.1 Employer/Employee Relationship

1. Employee

Normally, where the relationship between the supplier and recipient of information is that of employer and employee, then there is a separate policy to be looked into.

An employee owes the employer a duty of fidelity, that is, to further the interests of the employer's business. The duty varies depending on the seniority and skill of the employee.

The duty of fidelity embraces the protection of trade and commercial secrets, including both information which is given to the employee and that which he generates in the course of his work. See *Faccenda Chicken v. Fowler* (1986) 1 All ER 617 at 625.

Conversely, during the continuance of employment there is certainly an obligation to keep rival research staff from access to technical secrets. See *Printers & Finishers v. Holloway* (No 2) (1964) 3 All ER 73.

The employee has an obligation not to extract information with a view to taking it away on departure for example by copying it out or deliberately memorising it. In *Lancashire Fires Ltd v SA Lyons & Co. Ltd*, Lord Bingham MR said at (674) that “we do not accept that it is incumbent on an employer to point out to his employee the precise limits of that which he seeks to protect as confidential, particularly where, as here, what is new is an integral part of a process”.

2. Ex-employees

These set of people has caused so many problems through the use or disclosure of confidential information by them. The question whether a former employee owes an obligation of secrecy to the employer depends on the status, knowledge and skills of the said ex-employee.

Normally, there are three main categories of information which must be kept distinct, namely trade secrets which are automatically protected during and after the contract of employment. See *Northern Office Microcomputer Pty Ltd v. Rosenstein* 91982) FSR 124; the second which is commercially sensitive is automatically protected during the contract of employment because of the employees general duty of fidelity, but will require an express clause to protect it after termination of employment. In *Faccenda Chicken Ltd v. Fowler* (Supra), this was about the alleged

wrongful use by the defendant ex-employee of his employer's sales information.

The third category of information is not protectable, so that the employee in this circumstance is free to make use of his/her skills in subsequent employment.

3. Employer

It is important to note that the obligation of confidence is diverse, that is, as an employee has a duty so the employer as well. An employer will hold information concerning the employee, such as marital status, salary and career details. These set of information should not be divulged to others without the employee's permission except in circumstances where disclosure is permitted by express provision.

In *Prout v. British Gas Plc* (1992) FSR 478, the claimant while employed by the defendant submitted an idea for a new design of bracket for warning lamps placed around excavations. The bracket was supposed to be vandal proof on the basis of its suggestions scheme, but later the defendant said that it had no interest and agreed to allow the claimant to pursue a patent application on his own behalf. It was held that the employer was in breach of confidence by its subsequent use of the lamps.

4. Third Party Recipient

Usually, a third party who comes by the information without knowing it to be confidential, or in circumstances where an obligation of confidence cannot be imposed, is free to use the information or to disclose it as he deems fit especially if it entered the public domain.

One of the fundamental weaknesses of the law of breach of confidence is that innocent third parties are largely unaffected by this area of law. In some instances, where information has been obtained by unlawful means,

the courts have focussed on the conduct of the third party acquiring the information and the main issue raised here is whether the party acted illegally or not.

In addition, a discussion of third party recipient is not complete without consideration of the position of a person who obtains the information. In *Malone v. Commissioner of Police* (1979) 2 All ER 620, Megarry V.C, expressed the opinion that an eavesdropper would not owe a duty of confidence.

Conversely, in *Francome v. Mirror Group Newspaper* (1984) 2 All ER 408, the court held that there was a serious issue to be tried on the basis of breach of confidence concerning information obtained by way of an illegal telephone tap.

3.2 Unauthorised Use

Apparently for the action of breach of confidence to succeed, then the element of unauthorised use must also be proved. That is that the defendant went beyond the purpose of the original disclosures. The use or disclosure complained of must be related to the nature of the obligation of confidence and must have been used to the detriment of the party communicating it.

Unauthorised use is the last of the three ingredients for a successful claim of breach of confidence. Liability for unauthorised use may be joint but it is all joint tortfeasors that may be liable.

In *Dremmond Murray v. Yorkshire Fund Managers Ltd*, (1998) FSR 372, a team of six persons put together a package of information relating to the purchase of a company. The information was communicated to a third party by the team and the third party started the use of the information with the blessing of the team bar one. The claimant objected and commenced

proceedings to restrain the third party from using the information. It was held that the last ingredient of unauthorised use was absent therefore the action could not succeed.

Where the information is a mixture of public and private materials then the recipient must be especially careful to use only that which is public. See *Seager v. Copydex (No 1)* (1967) RPC 349.

3.3 Trade Secrets

Trade secrets as the name connotes is the commercial aspect of confidential information. Normally, trade secrets is a formula, practice, process, design, instrument, pattern or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers.

It can also be referred to as confidential information associated with industrial and commercial activity. In *Herbert Morris Ltd v. Saxelby* (1916) 1 AC 688, Lord Atkinson, spoke of trade secrets thus”.... trade secrets, (are) such as prices and costs or any secret process or things of a nature which the man (the defendant) was not entitled to reveal. In the words of Lord Parker in that same case, trade secrets are information that are far too detailed to be carried away in the head.

In *Lansing Linde Ltd v. Kerr*, Staughton LJ, spoke in terms of information that would be liable to cause real harm if it was disclosed to a competitor, provided it was used in a trade or business and provided the owner had either limited the dissemination of the information or at least not encouraged or permitted widespread publication.

It should be noted that it would not be realistic to limit trade secrets to invention that are potentially patentable.

Fortification of trade secrets can, in principle, extend indefinitely and therefore may provide an advantage over patent protection, which lasts only for a specific period of time. Coca-Cola, for example, has no patent for its formula and has been very effective in protecting it for many years than the twenty years protection that a patent would have provided. The intricacy is that there is no protection once information protected as trade secret is uncovered by others through reverse engineering.

This issue came up in *Cantor Fitzgerald International v. Tradition (UK) Ltd* (2000) RPC 93, where it was held that a technique used for testing computer software which was readily derivable by a skilled man from public sources is not a trade secret.

3.4 The Official Secrets

It is a process where the government seeks to protect confidential information. Generally, the government does not have the same personal interest as an individual in preventing information from being used or released.

The confidentiality of government's information, particularly where it touches on the security of the nation, is backed up by forceful criminal sanction.

In general, with the trend to more open government in recent years, there has been a relaxed attitude to Official Secrets Act.

The most celebrated issue under this head is the *Spycatcher*, a book written by a retired security agent who has signed an undertaking not to divulge official information received during service, but however did through the book and was sued. The success recorded in the case was minimal because the book was already in the public domain at the material time.

4.0 CONCLUSION

The last two sets of ingredients of breach of confidence were discussed in this unit. The employer/employee relationship in law of confidence has also been extensively discussed

The unauthorised use of information is an essential aspect of breach of confidence. This was also discussed along with the rationale behind the concept of trade secrets which is not definite like the patent right.

5.0 SUMMARY

In summing up the whole unit, we would make mention of topics briefly discussed in the unit. This include the concept of confidential obligation, that is the employer/employee, ex-employee and third party recipient.

Also the perception of trade secrets which is germane to commercial confidential information and official secrets and the Acts regulating it have also been discussed.

6.0 TUTOR MARKED ASSIGNMENT

1. Explain with the aid of decided case, the role of an ex-employee in keeping company secrets, after his exit from that establishment.
2. Briefly explain with decided authorities and legislation the purpose of the official secrets.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Helen Norman, Intellectual Property University of London Press (2005).

- Paul Marett, Intellectual Property Law: London: Sweet & Maxwell (1996).

UNIT 4

DEFENCE AND REMEDIES FOR BREACH OF CONFIDENCE

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Body
 - 3.1 Defence of public interest
 - 3.2 Injunctions and other equitable remedies
 - 3.3 Damages and other monetary reliefs
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

Generally, there are defences available for breach of confidential information which could succeed in court. They include the defence of public interest and public knowledge which are akin to each other.

Once information is known to the public or revealed for public interest, then it is no longer confidential. It is also imperative to note that once information that is confidential is made public and the plaintiff sued and then succeeds in this instance there are certain reliefs that are available to him in that regard. These include injunction and other equitable remedies as well as damages and pecuniary reliefs.

2.0 OBJECTIVE

The purpose of this unit is to discuss the defences for breach of confidence and remedies available once it is established that a breach has occurred.

From this unit, learners should be able to explain the defences available in a breach of confidence, the defence of public interest and also the remedies available, that is injunction and damages.

3.0 MAIN BODY

3.1 Defence

Defences are generally available in a breach of an action. The law governing breach of confidence is not an exception by this general rule. The defence available in breach of confidence will be discussed. This is referred to as the defence of public knowledge and public interest.

Public Knowledge and public interest

A defence of public interest is available in an action for breach of confidence. The court will not respect an obligation of confidence, if it is in the public interest that the information be made known to the public.

Public interest is relevant where it concerns the administration of justice, for example, the law of confidence cannot be used as a means of suppressing information concerning criminal conduct. In *Hellewell v. Chief Constable of Derbyshire* (1995) 1 WLR 804, the court held that the use by the police of prominently displayed posters identifying a criminal suspect was in the public interest.

In *Hyde Park Residence Ltd v. Yrlland* (2000) 3 WLR 215, the court publication in a newspaper of stolen video stills rebutting the claim that Princess Diana was decided about to marry Dodo Al Fayed was not in the public interest. It might have been of public interest if the information have

had been supplied without copying the photographs which were protected by copyright owned by the claimant.

It is however important to note that public interest must now be viewed within the context of the Human Rights Act 1988. Of particular interest in the Act are Articles 8 and 10 of the convention, the former providing a right to privacy while the latter provides a right to freedom of expression. Both rights are subject to potential interference and derogation.

Where the issue is in the interest of national security, public safety and for the protection of the right of others, then the Human Rights Act cannot be applied strictly. In *R v. Ashworth Special Hospital Authority, The Times*, 26 June 2001, the authority monitored telephone calls made by high risk patients having violent or dangerous predilection. The monitoring was random and involved about 10% of calls but excluded privileged calls like calls made to patients' legal advisers. It was held that this was not a breach of the right to privacy in Article 8(1) and fell within Article 8(2) which allows interference with the right in accordance with the law.

Lastly, in the area of government information, the public interest defence operates in a slightly different way. In *A.G v. Jonathan Cape Ltd* (1976) QB 752, the court refused to restrain the publication of the internal workings of the British cabinet in a politician's dairies as there was no public interest justification for keeping it secret.

3.2 Injunctions and other equitable remedies

The rationale behind remedies and the most appropriate is the quia timet injunction which will be granted to prevent general publication or other disclosure of the subject matter of the confidence.

If a claimant is successful in an action for breach of confidence, he will normally want to restrain the defendant further use of the confidential

information. However, once the information has fallen into the public domain, an injunction will not be granted because it is ineffective. Usually, the courts do not grant injunction on completed acts. See *Ladunni v Kukoyi* (1972) All NLR. In *A.G v. The Observer Ltd* (1989) AC 109, the House of Lords held that injunctions would not be granted against the Observer and the Guardian preventing them from reporting on the contents of spycatcher because publication abroad had effectively destroyed the secrecy of the book's content.

Equitable injunctions are discretionary and the decision to grant it will be influenced by factors such as innocence of the defendant. In terms of confidential information an injunction may be for either or both of two purposes. First, to restrain the continued use of the information and secondly to restrain publication of the said information. In *Ocular Sciences Ltd v. Aspect Vision Care Ltd* (1997) RPC 289 Laddie J, clearly distinguished between the two purposes and when they were appropriate.

The court will also consider a wide range of factors in deciding whether to grant a final injunction. In *Seager v. Copydex (No 1)* (1969) RPC 250, the court of Appeal refused an injunction and left the defendant to relief in damages. This was in relations to the guidelines set out in *Shelter v. City of London Electric Lighting Co.* (1895) 1 Ch 287, where the court held that courts should grant damages in substitution for an injunction where the injury to the claimant legal rights is small and capable of being estimated in money which will adequately compensate for the damages.

3.3.Damages and Other Monetary Relieves

It is imperative to note that where a breach of confidence is also a breach of contract or a general tort such as including breach of contract, then awarding damages will not be difficult in that regard. In *A.G v. Blake* (2001) AC 268, a former security services employee who had defected had

published his memoirs. His duties were held to be analogous to a fiduciary obligation, for which an account would have been the normal remedy.

However, where the liability arises only in equity, damages may be awarded in lieu of or in addition to an injunction. If damages are being given for future injuries in lieu of an injunction, as was decided in *Seager v. Copydex (No 2)*, their assessment depends upon whether the information could have been acquired by employing a competent consultant in that state.

The issue of proprietary relief may be considered in some instances. In *Cadbury Schweppes Inc. v. FBI Foods Ltd* (2000) FSR 491, the Supreme Court of Canada declared that a proprietary remedy is not appropriate. Instead the court should calculate damages on the basis of lost profits during the notional period of one year, it would have taken the defendant to reverse the engineer the claimants' secrets recipe for a drink.

4.0 CONCLUSION

The defence of public interest available for breach of confidence needs be used prudently. The courts usually infer it from the circumstances of the case. The remedies available for breach could be injunction or damages. This unit has examined the purpose of injunction and where the use is necessary and where also it could defeat the purpose.

5.0 SUMMARY

The canon of breach of confidence is a distinctive law of intellectual property which this module has explained. This unit has explained the idea of the defence to breach of confidence, that is the defence of public interest and also the remedies available to people whose confidence has been eroded upon.

6.0 TUTOR MARKED ASSIGNMENT

1. Explain with the aid of relevant authorities the defences which could be raised in an action for breach of confidence.
2. Explain the remedies available to the successful claimant in an action for breach of confidence.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
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MODULE 4

Unit 1 – Right in Performance

Unit 2 – The International Environment on Copyright Law

Unit 3 – The Exploitation of Copyright

Unit 4 – The Implication of new technology on Copyright

UNIT 1

RIGHTS IN PERFORMANCE

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2.0 Objective

3.0 Main Body

3.1 The Performer's Right

3.2 Consent

3.3 Performer's Property Right

3.4 Performer's Moral Right

3.5 Recording Rights

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References

1.0 INTRODUCTION

Live performance of dramatic and artistic work is an old tradition and a part and parcel of our daily life before the advent of new technology. It is also a relevant part of copyright law.

In a live performance, once a member of the audience makes a recording of the performance on a magnetic tape and then makes copies which he sells to the public without the singer's permission, under copyright law, there right be nothing that can be done to prevent the sale of the recording of the performance.

This happens to be a major loophole in copyright law and it is clearly enunciated by the law relating to performance. It is also an area of law that gained the status of a fully fledged intellectual property rights under the Copyright Patent and Designs Act 1988.

2.0 OBJECTIVE

The purpose of this unit is to discuss the rights associated with live performances and those available to the performer or the recording company. It is pertinent to note that there are some property and non-property rights available, particularly rental and lending rights and also the recording right available to the performer.

The provisions of the CPDA, 1988 in protecting those rights and also the rights to civil action in respect of performers and recording companies will be discussed in this unit.

3.0 MAIN BODY

3.1 Performer's Right

A well known sopranist gives a live performance of an operatic aria by Mozart, unknown to the sopranist, a member of the audience makes a

recording of the performance on a magnetic tape and then makes copies which he sells to the public without the singers' permission. The question is, what are the rights of the sopranoist.

Prior to the dawn of CPDA, 1988 the first law which provided criminal penalties in respect of the making of recording of dramatic and musical performance without consent was the Dramatic and Musical Performers' Protection Act, 1925.

This Act was then re-enacted in 1958 by the Performers' Protection Act, 1963. The provisions were extended to all the original works of copyright. That is literary, dramatic, musical and artistic works. The Performers' Protection Act 1972 increased the maximum penalties available.

These Acts appeared to give rise to criminal liability only and did not seem to give any civil remedies to performers or those with whom the performers may have had recording contracts.

Performers' rights are given to performers and persons having recording rights and their consent is required for the exploitation of the performance or the making of recordings. It is a right that is usually used to signify rights under copyright in relation to the acts of performing, showing or playing a work in which copyright subsists in public.

A performance is a live performance given by one or more individual which is dramatic performance (including dance and miming), a musical performance, a reading recitation of a literary work or a performance variety act or any similar presentation which is, or so far as it is, a live performance by one or more individuals.

It is important to note that for the rights to exist, certain criteria must be satisfied. Section 206 defines a qualifying individual as being a citizen or subject of a qualifying country.

While qualifying country means the United Kingdom and any other member state of the European Economic Community or any other country designed by order in council under section 208 that is countries enjoying reciprocal protection.

3.2 Consent

The issue of consent is an integral part of performers' right. it is however very central to the infringement of the rights. Note that there is no statutory requirement that the consent be written. Note that consent may relate to a single specific performance, a specified description of performance or performances generally.

In the absence of express consent, it seems reasonable to suppose that it may be implied and it will be so implied if necessary and reasonable to do so.

It is imperative to note that additional consent may be required if the intended uses exceed the original consent. See *Grower v. British Broadcasting Corporation* (1990) FSR 595.

3.3 Performers' Property Rights

These are sets of rights that range from reproduction rights, distribution rights, rental and lending rights and also the making available rights. If a performer transfers his rental rights, then the right will be replaced by a right to equitable remuneration in the case of the rental of a sound recording or film containing the performance.

a. Reproduction Right

It is a right that is infringed by the making of a copy of a recording of the whole or any substantial part of a qualifying performance without the consent of the performer. Making the copy can be direct or indirect.

However, making the recording in the first place will infringe his non-proprietary right. Making the copy without the performers' consent first will however infringe his property right.

b. Distribution Right

Distribution right is infringed by a person who issues to the public copies of a recording of the whole or a substantial part of a qualifying performance without performer consent. Issuing to the public means putting into circulation. It also covers a situation where the original recording is issued to the public.

c. Rental and Lending Right

The right is to authorise or prohibit rental and lending of copies of the performance to the public. It is said to be infringed by a person who without the consent of the performer rents, lends to the public copies of a recording of the whole or any substantial part of a qualifying performance.

Lending is making a copy available, on terms that it will or may be returned, otherwise than for direct or indirect economic and commercial advantage through an establishment accessible to the public.

d. Making Available Right

This is a right that covers a situation where a recording of a qualifying performance was made available electronically for access or downloading as and when a person chooses to do so. Example is where a recording performance is accessible from an internet website, where a person using the internet can either play the music or download it for use.

This right is infringed where a person, without the performers' consent, makes available to the public a recording of the whole or any substantial part of a qualifying performance by electronic transmission in such a way

that members of the public may access the recording from a place and at a time individually chosen by them.

e. Right to equitable remuneration

A performer is entitled to equitable remuneration from the owner of the copyright in a commercially published sound recording of the whole or any substantial part of a qualifying performance. The amount payable by way of equitable remuneration is to be agreed, with the possibility of the applicability to the Copyright Tribunal in the absence of agreement.

3.4 Performers' Moral Right

The WIPO Performers and Phonograms Treaty 1996 provided for moral rights for performers. The moral rights granted to performers of qualifying performance are the right to be identified as the performer and right to object to a derogatory treatment of a performance. The new moral rights for performers are contained in new sections 205C to 205N.

There are certain issues to be addressed under this head. The most important are the rights of the performer and derogatory right.

a. Right to be identified as performer

under the CPDA, Section 205C provides for the right to be identified as performer and applies to qualifying performances given in public, broadcast live, communicated to the public in the form of a sound recording or where copies of such a sound recording are issued to the public.

The identification should be in such a manner which is likely to bring the performer's identity to the notice of the person hearing or seeing the performance, communication or acquiring a copy of a sound recording as the case may be.

b. Derogatory Treatment

The performer's right to object to a derogatory performance, under s205F, is infringed in the case of a live broadcast of it or where by means of a sound recording, it is played in the public or communicated to the public with any distortion, mutilation or other modification that is prejudicial to the reputation of the performer.

c. Supplementary Provisions

Performers' moral rights will endure for the same time as the performers property right and non-proprietary rights, being 50 years from the end of the calendar year during which it was released.

There are also provisions for the transmission of the rights on the death of the performer.

3.5 Recording Rights

Recording rights are given to a person who has an exclusive recording contract with a performer, being one under which that person is entitled to the exclusion of all others, including the performer, to make recording of one or more of his performances with a view to their commercial exploitation.

The person must be a party to the contract and to whom the benefit of the contract accrues. He must also be a qualifying person.

It is important to note that a person infringes the rights of a person having recording rights by making a recording of the whole or any substantial part of the performance without the consent of the person having the recording rights or the performer.

4.0 CONCLUSION

The performer's right is part and parcel of copyright, because the advent of technology pushed the live performance of artist to a corner, but however

there are still a whole of live performances that need be protected as that of copyright. It is for this reason that the performers' rights are still relevant.

5.0 SUMMARY

The performer's right has been defined as a right that a person who performs live performances has in relation to his work. And it ranges from the performers right, to the concept of consent which is and integral part of the performers' right. That is what gives the locus standi to sue. The performer also has some rights that is rights that are regarded as property right of the performer. These are range from reproduction rights to distribution rights, just to mention a few. The moral right of a performer is the right to be identified as a performer and also the right to protect his performance from derogation and also the right to the number of years which his performance can last. This also includes the right in which a recording company has in relation to a performer.

6.0 TUTOR MARKED ASSIGNMENT

1. Explain with the aid of decided cases the concept of consent as an integral part of a performer's right.
2. Recording right is the right given to a qualifying person for the purpose of recording the performance of an artist. Discuss

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).

- Paul Marett, Intellectual Property Law: London: Sweet & Maxwell (1996)

Unit 2

The International Environment on Copyright Law

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1.0 INTRODUCTION

Generally, copyright law has influenced the international environment in so many ways. From telecommunications to commerce and manufacturing, transportation and printing, the influence of copyright law remains dominant. The impact of international environment on copyright has made the continuous existence of the likes of coca-cola, Nike athletics brands, McDonald's, Addidas continue to function.

Copyright has a reflection over our commercial existence, communication lifestyles, social standards and product information over the national, geographical and ideological boundaries that exist between us. The general

impact of the international environment on copyright has been tremendous and generally positive. It has gone from accounting issues to joint ventures, political risks new markets and repatriation just to mention a few.

It is also important to note that the idea behind copyright and conflicts of laws cannot be overemphasised. It ranges from the jurisdiction of the parties, to the forum shopping and also forum non convenien in disputes arising between the parties.

2.0 OBJECTIVE

The international environment in copyright law is an area that cannot be overemphasized. This unit will discuss the international environment in general and also its impact on copyright ranging from political to economic issues and also the conflicts of laws that arise in that area of the law from the jurisdiction to the forum shopping in that manner.

3.0 MAIN BODY

3.1 The International Environment

In copyright matters, the international environment is regarded as important. Copyright law has contributed immensely to the international environment right from when the electric telegraph was invented in 1816 when a significant amount of information could be transmitted for the first time without someone carrying it.

Today, inventions have made it possible for radio, television and satellite transmissions go everywhere in the fashion of a giant party line to which anyone with the proper equipment can connect. The worldwide use of internet has made it possible to be in touch with any part of the world with the use of the computer on the internet.

Brand images generally have flown around the world like Tinkerbelle. Now that national boundaries are more permeable to commerce, and

geographical barriers are yielding to transportation, the pent-up demand for goods and services created by the advance guard of telecommunications is building. Intellectual property protection needs to be consistent and taxation should also be equitable.

3.2 The Impact of the International Environment on Copyright

The international environment has affected copyright in so many ways, it will go from the accounting issues to joint ventures, taxes and also political and legal issues have affected copyright. This has its own effects on investment.

a. Accounting issues

The point here is that there is great variety in the accounting information available about foreign enterprise. There are so many accounting peculiarities of a given country and the issue differs from one country to another. This must be noted when entering a joint venture and licensing agreement.

Also the primary areas of difference in national accounting standards that affect the types of transaction we are discussing are those applying to depreciation, research and development expenses and accounting for goodwill.

b. Cultural Issues

In spite of the best efforts of everyone involved in a joint venture or licensing transaction, cultural and language barriers in the international arena can impede full understanding and contribute to greater risk of failure.

During a sojourn in France, Benjamin Franklin was invited to a literary society meeting. The conversation was in French. It was going a bit fast for him and was punctuated by applause. He was uncertain about joining in, but decided to join the applause. All seemed to be well until the gathering

was over, at which time his grandson told him”,. But Grandpa, you always applauded and louder than anyone else, when they praised you”.

d. Legal Protection

There is a wealth of information published about the legal protection or lack thereof of intellectual property in various countries of the world. There a lot of countries that do not adequately protect intellectual property while some do. There may however, be valid business reasons to license into or form a joint venture with an entity in such a country. Perhaps the technology is moving so fast that the pirates will not be able to catch up.

Nigeria as a nation is doing a lot in protecting copyright work but the pirates are still out waging a huge war against copyright inventions.

3.3 Copyright and Conflicts of Law

Conflict of laws, sometimes referred to as Private International law, is an area of law which has developed to resolve three particular issues that a court may be faced with in deciding a case which has a foreign element.

First, the issue whether a court in a particular country has jurisdiction to hear a case and secondly, what body of law should apply and thirdly, the recognition and enforcement of judgements of foreign courts.

Conflict of laws comes up only in cases where there is a foreign dimension to the case, such as the domicile of the parties. One thing that must be made clear from the outset is that intellectual property laws are generally territorial in nature. They subsist and can only be infringed only in their relevant territories.

There are however exceptions to the territorial limitation of some intellectual property rights. For example copyright can be infringed by authorising of the acts within the exclusive rights of the owner. In such a case a UK copyright will be infringed by carrying out one of these acts, in the UK

without the consent of the copyright owner. The person authorising the act will also be liable for infringing the UK copyright even if he was outside the UK when he gave his authorisation. See *ABKCO Music & Records Inc. v. Music Collection International Ltd* (1995) RPC 657.

Jurisdiction

The Brussels Regulation of 2000 which replaced the Brussels convention of 1968 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters is relevant in this instance. For our purpose there is only one minor difference between the Regulation and the convention and this is that the former expressly applies to torts which may occur whereas the latter does not.

There is also the Lugano Convention, 1988. This has equivalent provisions to those relevant to intellectual property rights. The bulk of our discussions will be based on Brussels Regulation, unless otherwise stated because infringement of an intellectual property right is a tort and many intellectual property rights are exploited by means of a contractual license.

The basic rule in Article 2 is that defendants should be sued in the courts in the member state which they are domiciled, whatever their nationality. Simply put, the basic rule is that defendant play at home. In spite of this, the basic rule that a defendant should be sued in his home state. Article 5 of the Brussels Regulations provides that a person domiciled in a member state may be sued in another state under the following circumstances;

- a. In relation to a contract, the court of the place of performance of the obligation.
- b. In relation to a tort, the court of the place where the harmful event occurred or may occur.

Where there is a control, for example, a license agreement in respect of intellectual property rights, the contract may include express provision for applicable law and may also include an agreement between the parties as to exclusive jurisdiction.

In *British South Africa Co. v. Companhia de Mocambique* (1893) AC 602, it was held that a claim made in respect of a breach of a foreign statutory intellectual property right would not be entertained in an English court because of the double actionability rule. The double actionability rule required that an act done in a foreign country is a tort and actionable in England only if it was a tort had it been done in England and was also actionable according to the law of the country where it was done. This rule was abolished on 1st May, 1996 by the Private International Law (Miscellaneous Provisions Act 1995).

b. Forum Shopping

Naturally, a potential litigant may have a number of options as to where to commence proceedings. It may be advantageous to bring an action in a member state which has quick and effective protective measures like interim injunctions and freezing orders and where the full trial will happen relatively quickly.

In *C-116/02 Eric Gasser GmbH v. MISAT Srl* (2003) ECR 14693, the defendant, an Italian company commenced proceedings in Italy before the claimant, an Austrian company began proceedings in Austria.

A typical example of a forum shopping could take the following scenario ensued:

1. The patent is infringed in Belgium by a Belgian company. The Dutch company can sue in Belgium on the basis of Article 2 (basic rule-

defendants play at home). This was the rule under common law before the Brussels convention.

2. The patent is infringed in Nigeria by a Libyan company. The Dutch company can sue in France on the basis of Article 2 or Spain on the basis of Article 5 (the place where the tort occurred).
3. The patent is infringed in Togo by the Botswana company and an English company, as joint tortfeasors. The Dutch company can sue in either Botswana or England by virtue of Article 2 and Article 6(1) the defendant is one of the numbers of defendants who can be sued in the courts for the place where anyone is domiciled where actions are related.

In third example the claimant has a choice. He can go forum shopping in this instance and choose the country which suits him best. Factors such as availability of interim relief, cost, time to come to trial and interpretation of the scope of infringement will strongly influence him.

c. Forum Non Conveniens

It is pertinent to note that where there is a choice of countries in whose courts a legal action may be commenced, each of which have jurisdiction the courts of one country may decline to hear the action on the basis that the courts of another country are suitable to hear the case.

A whole lot of factors would have to be considered before arriving at this. That is the applicable law, the location of the evidence and witnesses, the nationality of the would be litigants and the enforceability of judgements and awards.

The Brussels regulations make no mention of forum non conveniens and make no exceptions for it.

It should be noted that where the claimant is based in the Coted'Ivoire and the defendant based in the Angola and the contract (the place for the

performance of which is in the Angola) is subject to Coted'Ivorian, it would seem that the Brussels Regulation has no effect in the absence of a choice of jurisdiction clause.

In *Sawyer v. Atari Interactive Inc.* (2005) EWHC, Collins J, held that the claimant, a Scot had established that England was most appropriate forum to hear the case. A significant factor was that the contract was subject to English law.

4.0 CONCLUSION

The international environment generally has reflected on copyright law in virtually all areas of life and development. It has however impacted significantly, where it is possible to transfer technology, brand and so many intellectual property rights without the inventor travelling with the invention.

Copyright has impacted in many aspects of life. In the international environment, as it relates to copyright, conflicts will surely arise and the jurisdiction and applicable law will always be an issue for concern in that regard. However, intellectual property as a tort is always a cause for concern in applying international conventions for its suitable use.

5.0 SUMMARY

In this unit, the purpose of the international environment on copyright has been discussed. Also, its impact has been discussed. It is important to note that the impact is both positive and negative.

The relationship between copyright and conflict of laws has also discussed along with jurisdiction, forum shopping and forum non convenience.

6.0 TUTOR MARKED ASSIGNMENT

1. Briefly explain with decided cases the impact of the environment on copyright.
2. With decided authorities, explain the purpose of forum shopping.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Paul Marett, Intellectual Property Law: London: Sweet & Maxwell (1996).

Unit 3

The Exploitation of Copyright

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1.0 INTRODUCTION

The exploitation of intellectual property with particular focus on copyright that is licensing cannot be overemphasized. Intellectual properties are now at the very core of corporate success. However, companies are now seeking to create corporate value for investors. And all of these can be achieved by exploiting patents, trademarks and copyrights.

Without exploitation of intellectual property, profits are low, growth by companies is lacking and corporate value is lost. The main forces driving the licensing and joint venturing of intellectual property include time savings, cost controls and risk education, just to mention a few.

2.0 OBJECTIVE

This unit is set to dwell on the exploitation of intellectual property, particularly its role on copyright. It will also discuss its immense contributions to the intellectual property world as a whole. Protection of copyright from invasions cannot be ignored in intellectual property and the risks of global exploitation of intellectual property cannot be overemphasized.

The main purpose of this unit is therefore to inundate learners with information on exploitation of intellectual property particularly on copyright which is bedrock of intellectual property.

3.0 MAIN BODY

3.1 The Exploitation of Copyright

There are many of conditions that arise from international exploitation of intellectual property and they have in so many ways affected the economies of many nations. The unique effects of exploitation of intellectual property internationally can usually be affected by so many factors that will be considered in this unit to compliment those of the previous units.

a. Economic issues

This is a significant issue in exploitation of intellectual property, as it affects the growth of intellectual property. It ranges from joint ventures to taxes, transfer pricing, assets and profit just to mention a few.

This unit will discuss as they affect the exploitation of intellectual property. In joint venture agreements the issue of accounting is a prominent issue, because there are lots of accounting information available in relation to foreign enterprises.

Venturers would have to combine their proportionate share of the joint ventures assets, liabilities, income and expenses with their own financial

statement. The consideration of taxes is essential in the exploitation of intellectual property on an international scale. Citizens have, through the years become equally inventive at avoiding taxes. This should be seen in a different light from tax evasion.

Taxation may become a factor, if the selection of a manufacturing site overseas is influenced by local income taxes as a secondary consideration.

It is mostly not believed that licensors, licensees and joint venture partners come together because of the income tax structure of their home or host countries. However, it is believed that they do so because of their respective needs for the subject of intellectual property or because the transaction represents a good marriage of their respective resources.

In nearly every country, there is some form of tax withheld on dividends and royalties that are paid to foreign interests. The issues relating to taxation are likely to be more critical to joint venture alliances than to other forms of intellectual property exploitation.

Finally, the essence of pricing is that payments across states or national borders for goods, services or intellectual property rights are a tax deduction for the payer and taxable income for the payee.

b. Political Issues

Usually, the political issue in exploitation of intellectual property borders on whole lots of things in a country. It could also be construed to cover all types of risks if one assumes that a country's government is in control of all aspects of life.

A government can alter the tax structure and the monetary and banking system, impose duties and manufacturing standards, environmental regulations and nearly every element that might affect doing business there.

It is crucial that foreign companies involved in extractive or agricultural industries seem to have been more subjected to political risks. Many countries particularly less developed ones, strongly feel that their natural resources should be exploited only for national welfare.

c. Investment Risks

The term investment risk is referred to the perception of the investor of the relative risk associated with committing funds to an investment opportunity. In essence, someone who is in the position of exploiting intellectual property is an investor either on his own if he owns the intellectual property or in the role of a trustee if he is acting on behalf of shareholder or other owners, the responsibility is therefore the same.

1.2 The Risks of Exploitation

Risk is an everyday aspect of our lives. It is an area of daily endeavour's that cannot be overemphasized. Risks occurs in different forms of our daily lives, It is a fundamental factor in exploitation of intellectual property.

An investment is the act of reaching into one's pocket for cash and exchanging it for some object or right in the expectation of gain.

However, the gain in an investment may be smaller or larger than expected, or may not even come at all. Note that every investment decision, even the decision not to invest is therefore an evaluation of risk. Speculation is an element of risk and also in the eyes of the beholder.

4.0 CONCLUSION

The exploitation of intellectual property cannot be overemphasized because it is important. The exploitation of intellectual property can come in different ways, it could come in joint ventures, royalties and even in licensing.

And a lot of issues need be considered in exploitation of intellectual property, ranging from the political to economic issues of a nation that the venturers or the licensee will visit in that regard.

5.0 SUMMARY

This unit has successfully discussed the exploitation of intellectual property and the risks in exploitation of intellectual property, ranging from economic issues to investment issue and political issues.

6.0 TUTOR MARKED ASSIGNMENT

1. Critically analyses the benefits of exploitation of Intellectual property
2. The element of risks of exploitation in intellectual property cannot be overemphasized. Explain

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Paul Marett, Intellectual Property Law: London: Sweet & Maxwell (1996).
- Copyright, Patent and Design Act, 1988.

Unit 4

The Implication of new technology on Copyright

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1.0 INTRODUCTION

The impact of new technology on copyright law cannot be overemphasised. Copyright law has a history of development that can partly be explained by reference to technological change.

The CPDA 1988 was an attempt to keep abreast of developments in technology. Of particular concern is the protection of computer programs and other works stored or transmitted in digital forms.

The implication of new technology has been tremendous and technical development along these lines have been very rapid,

2.0 OBJECTIVE

The main purpose of this unit is to discuss the implication of new technology on copyright, especially the computer software, programs and the idea of scientific discoveries.

This unit is also meant to dwell into the idea behind the computer generated works and how well they can be protected.

3.0 MAIN BODY

3.1 Copyright and Computer software

Computer software is a phrase that like many phrases in the computer industry, is incapable of precise definition. It is usually taken to include computer programs, database, preparatory materials and associated documentation (in printed or electronic form) such as manuals for users of the programs and for persons who have to maintain the programs.

It can also include all manner of other works stored in digital form, interface (for example with the users or hardware or other software) programming languages and software tools to be used to develop software systems.

The vast majority of new technical developments involve computer technology, even if the developments do not appear at first sight to be connected with such technology.

There is no doubt that the new technology stretches the law which is sometimes slow to react. This can be seen strikingly in the way in which copyright has been used as the main vehicle for the protection of computer programs.

It is important that in legal protection for computer software, there are three main concerns for copyright owners. The first is copying out, that is, software in relation to games software, operating system such as windows example is word processing software.

The second and third apply particularly to software that has been specially written example software written for a business or other organisation to help it carry out its functions and operations.

It is important to note that copyright subsists in computer programs as a form of literary work by CPDA s 3 (1) (b). The same prerequisite of originality and qualification must be present as with other forms of literary works for computer programs to be the subject matter of copyright.

In *Sega Enterprises Ltd v. Richards* (1983) FSR 73, the claimant owned a computer game called 'FROGGER' which was effected by means of computer programs. The defendant produced a similar program, admitting that his was based on the claimant's program. The defendant argued that he had done much work on the program and that in any case, copyright did not subsist in computer programs under English law. Goulding J, decided inter alia that "... copyright subsists in the assembly code program of the game 'FROGGER'.

3.2 Computer Programs

There has been no precise definition of the word and courts have in several case laws been able to develop the meaning of the phrase in the light of future technological change.

In *New Datacom Ltd v. Satelite Decoding Systems* (1995) FSR 201, it was accepted that a smartcard decoder for use with scrambled satellite television broadcasts was a computer program.

Also in *NEC Corp v. Intel Corp* 645 F Supp 1485 (D Minn, 1985), it was held that even though the computer programs were permanently stored in 'read

only memory' (ROM) the programs were still capable of copyright subsistence.

a. Literary Copying of Computer Programs

Copying of a computer program can be literal where the program code itself is copied. Literal copying occurs where a person copies an existing program by disk to disk copying or by writing out or printing the program listing, perhaps to key it into another computer at a later date.

In *IBCOS Computer Ltd v. Barclays Mercantile Highland Finance Ltd* (1994) FSR 275, the second defendant, a computer programmer called Mr. Poole, wrote a suite of programs for accounts and payroll. He owned the copyright in the programs and eventually developed a MK 3 version. Then, with another person, he set up a firm, PK Computer Services, to provide software for agricultural machinery dealers. When Mr. Poole left the company, he signed a note recognising that the company owned all the rights in the software which contained the MK3 suites of programs. Mr. Poole was then engaged by the first defendant to write similar software. Both suites of programs were written in variants of the same programming languages and there was a degree of literal similarities between them. PK Computer Services transferred its assets to the claimant which learnt of Mr. Poole's activities, obtained a door step order (an order requiring the defendant to deliver up relevant materials, as opposed to a search order requiring the defendant to allow the claimant to search his premises for evidence). He was sued for infringement of the copyright in its suites of computer programs. Jacob J, held that there had been an infringement of the claimant's copyright.

b. Non Literal Copying of Computer Programs

Non literal can be elements of the program such as its structures, sequence of operations, functions interfaces and methodologies. These sets of non

literal work may have their own copyright independent of the copyright subsisting in the finished work.

Note that non literal copying is not a problem restricted to computer programs. In *Nichols v. Universal Pictures Co.* 45 F2 d 119 (2nd Gr, 1930) Judge Learned Hand recognised the importance of protecting non literal elements of copyright works saying

“....It is of course essential to any protection of literary property..... that the right cannot be limited literally to the next, else a plagiarist would escape by immaterial variations.”

In terms of permitted acts under copyright law, as a computer program is a literary work, all the provisions affecting works apply to computer programs, unless the contrary is stated.

3.3 Computer Generated Works

It is important to note that the CPDA, 1988 recognises computer generated works as a separate specie of work with different rules for authorship and duration of copyright. Works produced using a computer should not be denied the protection of copyright on the basis that the direct human contribution required to make the work is small or negligible.

Section 178 CPDA, defines a computer generated work as being a work that is generated by computer in circumstances such that there is no human author. Note also that all works generated by computer owe their creation to a human being, although the human element may be indirect.

It is important to note that the indirect human authorship had been recognised by the courts prior to 1988 Act. In *Express Newspapers Plc v. Liverpool Daily Post & Echo Plc* (1985 1 WLR 1089, the defendant claimed that grids of letters produced by computer for a newspaper competition

could not be protected by copyright because the grids had no human author. This was rejected by Whitford J, who said that the computer was no more than a tool with which the winning sequences of letter were produced using the instructions of a programmer.

3.4 Protection of Copyright Works

Generally, it has become a source of concern that works made available in digital form can be downloaded from a website or network, that is any information such as the identity of the copyright owner and what acts are authorised in respect of the work may be removed and the work then circulated or communicated to the public in that modified form.

Where a work is placed on the internet or on behalf of the copyright owner and is freely available to others for access, in the absence of any notice to the contrary. A prudent copyright owner who wants to make his work freely available on line would do well to place a prominent notice on the work as to where the work was first created and where relevant the identity of the author of the work.

3.5 Scientific Discoveries and Others

An important factor is that copyright has now moved into the technological fields and the shift of power from publishers to authors may serve as a catalyst for change in emphasis.

Once a person developed a formula or table for a work and is computer generated and a lot of skills are being put into it, then the question now is that is there a work of copyright in them?

If it is accepted that skill and judgement have been expended in the creation of the formula, then there seems to be no doubt that the formula is a work of copyright, being an original literary work.

In *Bookmakers' Afternoon Greyhound Services Ltd v. Wilf Gilbert (Staffordshire) Ltd* (1994) FSR 723, Aldous J, considered that a work of copyright subsist in the formula as an original literary work.

A table itself is a work of copyright and protected as such, provided that there is skill and judgement in its making. It is also important that similar considerations be applied to other technical discoveries such as unknown chemical reactions or a genetic sequence, provided that there is skill and judgement in their discovery or creation and they have been expressed in an appropriate manner.

In *Merrell Dow Pharmaceutical Inc. v. HN Norton & Co. Ltd* (1996) RPC 76, a patent for a chemical reaction in the human liver was held invalid.

4.0 CONCLUSION

The implication of new technology on copyright is numerous and the idea that copyright subsist in a computer program is a welcome development.

Computer generated work is capable of being owned and the idea of authorship and ownership of a computer generated work cannot be treated with levity. This type of work and programs must generally can be protected.

5.0 SUMMARY

This unit has offered some case definitions of computer software and also the subsistence of copyright in computer programs as well as the two types of computer programs of literal and non-literal work. There has been a lot of protection for works placed on internet by authors.

6.0 TUTOR MARKED ASSIGNMENT

1. With the aid of decided authorities and legislations briefly explain what a computer program is?

2. Explain with case law whether copyright can subsist in formula and tables.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Paul Marett, Intellectual Property Law: London: Sweet & Maxwell (1996).
- Copyright, Patent and Design Act, 1988.