

Originality in Copyright and the Debate on Protection of Traditional Knowledge: A View on Nigerian Law

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1. Introduction

Copyright is perhaps the most popular and familiar branch of intellectual property law which is used for the protection of literary, artistic, and dramatic achievements. Eligibility to copyright protection rests mainly on the requirement of originality which arguably is the main force in the creative process of all arts. Ironically, this same condition has greatly undermined the influence of copyright in so far as protection of traditional knowledge is concerned. For instance, it is generally believed that copyright cannot protect traditional knowledge because the latter lacks originality. Surprisingly, materials or products derived from traditional knowledge have overtime received copyright protection through their collection or compilation into books or other media of fixation. It is for this reason that some have heavily criticized the originality requirement as ineffectual or a mere subterfuge, since it fails to stand against copyright protection of mere collection of information or ideas which were originally generated by persons other than the collectors.

The truth is that the technical connotation of “originality” is not consistent with ordinary thinking whereby creativity or innovation is an integral part of an original work. This calls the fairness of the copyright system into question. The point been made is that where a principle

designed to protect an item fails to achieve its target, it should, at least, not become a tool of oppression against such item. It thus becomes imperative that such a key principle should be re-examined to safeguard the integrity of our copyright law. It is precisely that task that has been undertaken in this paper where the nature of copyright and traditional knowledge is considered to highlight the factors of inconsistency between the two systems. It further examines how the technical manipulation of originality has while seeking to achieve copyright objectives ended up promoting predatory activities against traditional knowledge which should ordinarily be its candidate for protection. The paper therefore argues that the system could be strengthened to at least offer negative protection of traditional knowledge where the element of innovation or creativity is read into its test of originality. The next section examines the general notion of protection of intangible materials and its relevance to traditional knowledge.

2. The General Notion of Protection of Intangible Property

Traditional knowledge is a form of intangible asset in that it lacks physical substance and shares the general characteristics of knowledge which, as Jefferson noted, is an iconic non-

rivalrous public good – “he who receives an idea from me as he who lights a taper at mine, receives light without darkening me” This feature of an intangible asset necessitated the intervention by law to create statutory property from the intangible sources as a form of protection, and it is precisely that intervention that is otherwise known as the intellectual property protection.

Protection by intellectual property could take two different dimensions: either positive or negative (defensive) protection. Positive protection involves acquisition of property rights either through IPRs or other rights provided by a legal mechanism created to protect developments of arts and science. For example, a special legal provision vesting in the right-holder the right to grant or withhold consent to access and use a protected subject or to claim entitlement for use of such subject qualifies as positive protection. A common example of positive protection can be found in the various intellectual property devices such copyright, patent and trademark which are based on established standard of protection. There is also a special kind of intellectual property protection commonly referred to as *sui generis* protection. This can either take the form of property regime, liability regime or a combined system containing the elements of both. A property regime vests exclusive rights in the owner, and fundamental aspects of the rights are the rights to authorise, refuse, and set conditions of access to the target property, while, a liability regime allows a third party to make use of the protected subject without fulfilling any entry requirements subject to liability to pay compensation after use.

On the other hand, defensive protections (also known as negative *sui generis protections*) are legal devices designed to prevent wrongful appropriation or unauthorised exploitation of protected subject regardless of whether such consists of undisclosed information or publicly available knowledge. In the strict sense, this form of protection has a negative connotation and does not confer any entitlement but this is not always the case. In practice, the boundary between positive and defensive forms of

protection is fluid and the same legal tools can be applied to achieve the different objectives.

The copyright system, being property-based, tends largely towards the positive protection regime and therefore insists that its subjects must fulfil established standard, including requirement of originality for copyright, which, as shown in the next section, is obviously hard for a local initiative as traditional knowledge to fulfil.

3. Nature of Traditional Knowledge

The term “traditional knowledge” refers to knowledge, possessed by local or indigenous people, in one or more societies and in one form or another, including art, dance and music, medicines and folk remedies, folk culture, biodiversity, knowledge and protection of plant varieties, handicrafts, designs and literature.

Thus, as will be seen later, several traditional knowledge products are in the nature of works protected by copyright. The term “traditional” used in describing this knowledge does not imply that this knowledge is old or unscientific in nature, but that it is “tradition-based.” It is “traditional” because it is created in a manner that reflects the traditions of the communities, therefore not relating to the nature of the knowledge itself, but to the way in which that knowledge is created, preserved and disseminated.

Traditional knowledge is collective in nature and is often considered the property of an entire community, and not belonging to any single individual within the community. It is transmitted through specific cultural and traditional information exchange mechanisms, for example, it is maintained and transmitted orally through elders or specialists (breeders, healers, etc.), and often to only a select few people within a community.

It is precisely some of these features of traditional knowledge that have been found to work against its copyright protection. As will be seen in the next section of this paper, the features of traditional knowledge seem incompatible or sharply contrast with the

principles and framework of copyright protection.

4. Nature of Copyright

Copyright is one of the legal devices designed to protect intangible materials. It protects a list of works including literary, artistic and musical works. However, the Nigerian Copyright Act also contains provisions for live performance of such intangible materials when they are not qualified as works.

Generally, the author is the first owner of copyright in a work unless it was made pursuant to a contract or under the author's employment, in which case the owner is the person who contracted the author or his employer as the case may be. However, parties are entitled to choose the terms of their own agreement concerning ownership or such transfer of copyright. A copyright owner has exclusive right to do such things including the reproduction of the work in any material form; communication to the public; the performance, showing or playing to the public; the distribution of copies to the public by sale or other transfer of ownership and commercial rental to the public. The right of the copyright owner is infringed when someone exercises any of the rights reserved for the copyright owner.

Copyright is conferred for a definite period. In literary, musical or artistic work other than photographs, it lasts until seventy (70) years after the end of the year in which the author dies. In Nigeria, the Copyright Act is the statute that provides for the protection of copyright and related rights. The potentials of copyright to protect and at the same time exploit traditional knowledge are discussed in relation to the issue of originality in the sections that follow.

4.1 The Relevance of Originality to Copyright

As noted earlier, copyright law provides for the protection of works of art which include literary, artistic and dramatic works, musical works, sound recordings, cinematography and broadcasting. Rights in copyright are automatic as they come into existence upon the creation of a work without any requirement for formal registration. The eligibility of literary, artistic,

musical and dramatic works to copyright protection is anchored on twin requirements that the production must be original and must have been fixed in a definite medium of expression. Under the Nigerian Copyright Act, for instance, a work is required to have an original character but no definition is provided for the term original. What then is originality?

4.2 Concept of Originality

Literally, originality is defined as "the ability to think independently and creatively" or "the quality of being novel or unusual", which suggests a connection between originality and the concept of "creativity". The terms "creativity" and "unusualness" are both abstract for a legal definition and subjective for determining the scope of copyright protection. Thus, the courts have had, over the years, to grapple with the task of providing an objective definition for the term "originality".

4.3 Judicial Approaches to Originality

Two main judicial approaches have evolved globally in the conception and application of the doctrine of "originality" in copyright context, namely the British-American model, and the civil law approach. However, the approach of the European Court of Justice as well as the understanding of the concept in copyright diplomatic circles also deserves to be mentioned. The conception of originality in British-American copyright jurisprudence derives basically from the Utilitarian theory of incentivising productions to add to the store of information, enrich cultural life and the fabric of the society. For instance, article 1(8) 8 of the US Constitution justifies the protection of copyright on promotion of useful arts. Hence, originality is conceived more by reference to the skill, efforts and labour of the creator than his personal ingenuity. The same philosophy underlies the United Kingdom's copyright policy as could be seen in the long title to Copyright Act 1709-10: An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned. The approach was otherwise expressed in the celebrated dictum of J. Peterson in the *University of London Press Case*² that:

“The word original does not in this connection mean that the work must be the expression of *original or inventive thought*. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought. The originality which is required relates to the expression of thought. But the act doesn't require that the expression must be in an original or novel form, but that the work must not be copied from another work that it must *originate* from the author.”

The social and economic considerations of the British-American model has a great influence on its conception of “originality” in the context of skill, labour and judgement expended in the production of a work. The basic principle of common law jurisdictions is that anything which has involved labour is worth protecting, and the amount of labour involved needs not be great. Perhaps, the dictum of Megarry J in *British Northrop Ltd. V. Texteam Blackburn Ltd* in relation to drawings will offer a useful illustration in this regard. He said:

It may indeed be that something may be drawn which cannot fairly be called ... a drawing of any kind: a single straight line drawn with the aid of a ruler would not seem to me a very promising subject for copyright. But apart from cases of such barren and naked simplicity as that, I should be slow to exclude drawings from copyright on the mere score of simplicity.

The threshold of originality for copyright protection is that low. Thus, in *Waterlow Directories Ltd v Reed Information services Ltd*, both the plaintiff and the defendant in this case published legal directories containing the names and addresses of solicitors and barrister. In 1990, the defendant decided to update its directory. It did by comparing it with the plaintiff's, highlighting those names which appeared in the plaintiff's directory but not the defendant's. It also decided to include, as did the plaintiff's, a section listing solicitors and barristers in public authorities and industry. For the purpose of updating the defendant's directory, the names and addresses not appearing in the defendant's directory were loaded onto a word processor, so

that the relevant solicitors and barristers could be written to, inviting them to appear in the defendant's directory.

Aldous, J. however held that it was clear that a person could not copy entries from the plaintiff's directory and use them to compile its own directory. The defendant did not deny that the plaintiff had copyright in its directory, but denied infringement. The judge, however, had little difficulty in deciding that what was taken was a substantial part. The quality of what is taken is usually more important than the quantity, but in the present case the parts reproduced were important in that they enabled the defendant to carry out a comprehensive mailing.

The above approach has consistently enjoyed the favour of common law courts as far as conception of originality is concerned. Other illustrative examples include *Schroeder v. William Morrow & Co*; *Adventures in Good eating v Best Places to Eat*; and *Engineering Dynamics Inc. V Structured Software Inc.*

In *Schroeder v. William Morrow & Co*, the defendant had copied 27 out of 63 pages of the plaintiff's catalogue of gardening suppliers. It was held that this constituted an infringement of copyright. Similarly, in *Adventures in Good Eating v Best Places to Eat*, it was held that the defendant had infringed the copyright in the plaintiff's restaurant guide by copying entries from it. In *Engineering Dynamics Inc. V Structured Software Inc.* it was held that a compilation of facts for a user interface was copyrightable. Finally, a guide to state tariffs charged on operating pay telephone companies, and in *Info. Servs. Inc. V Maclean Hunter Market Reports* a red book listing of used car values based on the professional judgement and expertise of the author.

While it is correct to state that the foregoing represents the dominant common law approach, it is by no means the only judicial interpretation of originality. The threshold has been raised in a number of cases especially in the US. For instance, some federal courts in the United States included the element of creativity in the

definition of originality and this approach received the approval of the Supreme Court in *Feist Publications Inc. V Rural Telephone Services*. In that case, Justice O'Connor stated that in order for a work to be considered 'original' it must not only be an independent creation, it must also show "a modicum of creativity".

4.4 The Civil Law Approach

The test of originality in France can be safely used to exemplify the civil law copyright tradition. In that jurisdiction, the author's right is founded on the link between the author and the work emanating from his mind. This is a subjective approach based on a Hegelian philosophy of requiring that the work expresses or reflects the author's personality. The classic French theory is that an original work 'bears the mark of the personality of its author and confers on the created object a specific aspect' This is probably founded on the notion that an individual's personality caused the work to come into existence. In his explanation of the personality theory as applies to artists, authors and inventors of original and derivative works, Justin Hughes notes that such a work "comes into the world already an embodiment or reflection of some particular individual". Thus, Delacroix called paintings "a bridge linking the painter's mind with that of the viewer," Solzhenitsyn said that literature "transmits incontrovertible condensed experience," and Thomas Jefferson called inventions "the fugitive fermentation of an individual brain".

However, a strict application of the classical test to such works as compilations, computer programmes and databases appears problematic as they could be rendered unprotected on ground of lack of originality. It is perhaps the recognition of such limitation that has led several French courts to develop a new test, or more precisely to elevate the classical test to a higher level of abstraction, by answering the following question: what is it that an author does to show her personality through a work?

The fairly unanimous answer given by French courts is that creative choices make the difference. In a case involving a bilingual

dictionary, the court of Appeal of Paris found that "the choices and intellectual operations required to create the [bilingual dictionary]" to allow the resulting work to satisfy certain degree of originality. In that case, the court made it clear that the mere sorting of data that was difficult to generate in alphabetical order was not original. Originality can only follow from intellectual creative (as opposed to technical or dictated by the function of format) choices. The approach is approved by the French Supreme Court by holding that labour itself was insufficient and that it is necessary to look at the choice of the method used by the author of the compilation.

4.5 The Approach of the European Court of Justice

In order to harmonise copyright protection in EU countries and set a common level of originality requirement in several aspects of copyright law, European Union set some Directives which are mainly based on the "authors' own intellectual creation" criteria. The ECJ manifested its departure from the English minimalist standard of originality when it held in *Infopaq International A/S v DanskeDagbladesForening* that the EU originality test ("author's own intellectual creation") applies beyond 'works' designated in a series of directives – namely computer programmes, photographs, and databases – so as to encompass all categories of works under the Berne Convention into the European sphere.

4.6 Originality in International Instruments

There is no explicit requirement under the international copyright instruments that a work must be original to attract protection, thus none of those instruments contains any definition of "originality". However, records of diplomatic meetings on intellectual property developments contain confirmations that originality is required for copyright protection.

For instance, in so far as the Berne Convention is concerned, the expression "work" is generally considered to be synonymous with "intellectual creation" which should contain "an original structure of ideas and impressions". Thus, the Committee of Experts of WIPO on the Convention has noted that originality was "an

integral part of the concept of work". According to the committee, intellectual creations are evidently an element of the notion of works.

Furthermore, the Berne convention provides some important hints as to what constitutes an original work in relation to collection of information. It states that "collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections".

4.7 The Role of Originality in the Protection of Traditional Knowledge

The common interpretation of originality" in common law countries including Nigeria presents as work that involves labour and skill presents some problems as far as protection of traditional knowledge is concerned. First, despite that the threshold of originality is far too low, traditional knowledge fails to meet it because it is not independently created. Second, the low threshold of originality makes traditional knowledge easily amenable to wrongful copyright exploitation, since protection would be available to every compiler of traditional knowledge-based information on ground that the person has collected, fixed and arranged same in a definite medium. This makes the nonsense of the originality requirement, while placing emphasis on the requirement for fixation. A cursory examination of the essence of the requirement for fixation further exacerbates traditional knowledge concerns in relation to copyright.

4.8 Fixation in Tangible Medium

As regards the requirement for fixation, common law recognises a dichotomy between an idea and its expression. This provides the basis for the rule that copyright protects the expression of an idea but not the idea itself. An idea is a mere abstraction and it lacks recognition under copyright law. However, when such an idea is transformed into a tangible form by its expression in a definite medium it gains copyright protection.

The rule implies that actual value in a work lies in its medium of expression. Thus, the actual value of documented traditional knowledge lies in its documentation rather than its content or substance. This rule is applied to confer commercial monopolies on compilers or authors of works containing information based on traditional knowledge. This principle has been pursued by many criticisms but the most relevant to the protection of traditional knowledge is that the protection of the form seems enmeshed with the content. The commercial value of works nowadays lay in their content or ideas and information contained in them rather than in their forms. For instance, the interests of book buyers relates largely to content and hardly to form.

Recent global recognition of the commercial value of traditional knowledge has attracted researchers with a view to copyright the recording and documentation of the traditional knowledge. This development has however, drawn strong objections from some groups of traditional knowledge holders. An example of such objections was the concern expressed by the representative of the TupajAmaru of Peru at the fifth (5th) session of the Intergovernmental Committee of the World IP Organisation on the Protection of Genetic Resources, TK and Traditional Expression and Folklore. A part of the concerns reads:

To document and place TK in the public domain would signify violating the confidential character of many of the intangible, sacred and secret elements which belong to the living patrimony which was transmitted from generation to generation, and which constituted the memory of their ancestors. Placing indigenous knowledge in the public domain would accentuate the deterioration of the cultural values and elicit appropriation of their cultural values by trans-national corporations and consequently the destruction of the indigenous identity.

Traditional knowledge information can be found nowadays in such media as books, electronic databases, films, audio tape and others compiled by book writers, researchers, anthropologists,

ethno-botanists, government officials and film producers without the consent of traditional knowledge owners. This arrangement generally excludes traditional knowledge holders from the management and dissemination of the documented traditional knowledge now largely stored in archives, museums and other academic or cultural institutions. Furthermore, the arrangement has generally been construed (albeit erroneously) as consigning traditional knowledge to the public domain.

Also, it is possible to construe the requirement for fixation of traditional knowledge as providing legitimacy for the commercialisation of sacred traditional knowledge without regard to their holders' feelings and sensibilities. However, as shown by the Australian case of *Foster v. Mountford*, there is a growing judicial sensitivity to commercialization of sacred TK without the consent of the knowledge holders. In that case, it was held that the sale of a book containing sacred information about a tribe constituted a breach of confidence. The book contains information which had been disclosed to an anthropologist by some members of the tribe and was of deep cultural and religious significance to the tribe.

In the light of the problems associated with the interface between copyright principles and traditional knowledge, some have argued that copyright is not a suitable regime for the protection of traditional knowledge. As an attempt to correct the problems, the Nigerian Copyright Act of 1988 introduced a regime for the protection of folkloric expressions. But it is doubtful whether the regime is helpful in protecting traditional knowledge because its provisions have been called to question regarding the issues as to who will exercise ownership rights and the conditions for members of traditional knowledge community to use and develop their resources.

Thus, the challenges presented by the quest to provide positive copyright protection for traditional knowledge are not just very difficult, but almost impossible to resolve. However, the emerging interpretation of originality by which threshold is raised higher beyond mere expenses

of labour and skill is lurked with some opportunities for negative protection of traditional knowledge. If traditional knowledge holders are not able to obtain positive copyright by which they can refuse to grant licence to prospective compilers of their traditional knowledge, at least copyright should protect such knowledge from wrongful exploitation. By reading creativity into the meaning of originality, this goal can be achieved.

4.9 Negative Protection Through Originality

The notion of originality under the civil law system considered along the contemporary international practice, including the recent US decision in *Feist* case, is instructive regarding the volume of pretentious works which would be denied copyright protection to the benefit of actual owners of ideas behind the works. The notion of creativity seems inextricably linked to human mind, it is not a mere question of functional choice but that which comes from the author's mind. This approach is capable of recognising the emotional connection between traditional knowledge and its customary holders, while similarly helping to discourage predators from making sacred or secret traditional knowledge public.

5. Conclusion

This article began by illustrating the value of providing an effective protection for intangible items such as information, the class to which traditional knowledge belongs. In examining the nature of traditional knowledge, the paper points out some of its inherent features which constitute copyright and traditional knowledge as strange bed fellows. However, with an open approach to protection the possibility of negative protection of traditional knowledge by copyright is recognized, particularly as this does not involve a need to comply with any conditions.

The opportunity for negative copyright protection of traditional knowledge is borne out of the emerging regime of judicial interpretation and diplomatic or international conception of the term originality in relation to copyright materials. Whereas, the application of low threshold in the interpretation of originality has

rendered traditional knowledge vulnerable to wrongful exploitation for copyright goal, a high degree of originality used by civil law courts and recently some common law courts to ensure that works for copyright protection are creative production by the authors. Thus, there is a useful opportunity for the courts to “strike down” mere compilation or collection of traditional knowledge as works lacking originality and unqualified for copyright protection. In that way, traditional knowledge has been protected in the negative sense.

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