Global Journal of Politics and Law Research
Vol.12, No.4, pp.14-28, 2024
ISSN: ISSN 2053-6321(Print),
ISSN: ISSN 2053-6593(Online)
Website: https://www.eajournals.org/
Publication of the European Centre for Research Training and Development -UK

Comparative Analysis of Copyright Regimes in Nigeria, the United States of America and France

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doi: https://doi.org/10.37745/gjplr.2013/vol12n41428 Published July 14, 2024

Citation: Elechi C.C. and Chijioke C.O. (2024) Comparative Analysis of Copyright Regimes in Nigeria, the United States of America and France, *Global Journal of Politics and Law Research*, Vol.12, No.4, pp.14-28

Abstract: *This paper deals with a comparative analysis of the copyright regimes Nigeria, the United States of America (U.S.) and France with a view to identifying impart areas from which to derive lessons. The United States is chosen because it is one of the most developed economies where the copyright industry has thoroughly developed to add to the country's GDP. It has its copyrights roots in the common law, same as Nigeria. France is chosen because, it is a country which is also advanced in copyright development-the place of birth of the first international copyright treaty, the Berne Convention. This is added to the fact that France is a Civil law country and will offer interesting areas of comparison to the common law system.*

Keywords: comparative analysis, copyright regimes, Nigeria, United States of America, France

INTRODUCTION

Scope of Copyright Protection in the U.S.

The Natural Rights approach influenced by John Locke, is that authors, inventors and other creators have natural inherent rights in the products of their intellect, and that such products are extensions of the creator's own personalities and selves has been much more influential in Civil Law countries like France and Germany, particularly with works of authorship. However, the United States has taken a pragmatic approach to the definition, application and justification of intellectual property rights. They generally have not viewed authors, inventors and other creators as possessing an inherent, natural property right in their intangible creations. In those instances, where the law grants them property rights, it does so for pragmatic reasons, to obtain an overall social benefit such as greater creative output. Thus, some of the important differences between the

U.S. Intellectual Property Laws and those of other nations (such as France and Nigeria), arise as a result of this basic difference in philosophy.[1]

This pragmatic view is reflected in the language of the American Constitution which expressly authorizes the U.S. Congress to have power to "promote the progress of Science and useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[2] This Section has been put to test in a number of cases in the U.S. For instance, in the case of ***Burrow-Giles Lithographic Co. v Sarony***,[3] the issue was who is an "author" as used in Section 8, Clause 8? In that case, the plaintiff / Respondent, a photographer, brought an action against the defendant / appellant which was a lithographic company in regard to a photograph and that the defendant had violated his copyright in the photograph by reprinting it. The defendant argued that the photograph is not a "writing" nor the production of an "author" to become protected under the Constitution. The defendant insisted that a photograph, being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which the producer is the author. The trial court upheld the claim and the defendants appealed. The U.S. Supreme Court, in dismissing the appeal, held that the word "author" in that sense of copyright is not limited in the sense of a book and its author, but is extended to "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." The Court also held that by "writing" in that Clause in the Constitution is meant the literary productions of those authors includes all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression and that the photograph was entitled to copyright protection as contemplated by the Constitution.

In the U.S., the primary purpose of intellectual property law is to ensure a rich, diverse and c competitive marketplace. To achieve this purpose, intellectual property doctrines all provide property rights as incentives to individuals who create new products, services or works of art or literature. This is because property rights in the fruits of creativity increase the chances that the creator can recoup his investment in the creation process and make a profit from his work. By making creative endeavors financially feasible and potentially rewarding to a large number of people, intellectual property law facilitates provision of a variety of creative products and serves to the public.[4]

In addition to economic incentives, a competitive marketplace requires free access to innovation. Competitors need the freest possible use of others' intellectual creations in order to copy and improve on them. Therefore, requiring competitors to "re-invent the wheel" is highly inefficient. Thus, the U.S philosophy is that the ability to copy results in still greater variety and lower prices

[1] Barrett, M., ***Intellectual Property. Cases and Materials*** (4th edn., U.S., West Publishing Co., 2007), 18
[2] See: Article 1, Section 8, Clause 8 of the United States Constitution 1789, otherwise known as the "Copyrights and Patents Clause."
[3] 111 US 53, 4 S.ct 279 (1884)
[4] Barrett, M., ***Intellectual Property. Cases and Materials*** (n1), 2

in the marketplace. Moreover, since the general public is meant to be the ultimate beneficiary of this bounty of products and services, it is important that the general public have as much access to the products of creativity as possible.[5]

Obviously, the twin goals of giving creators rights in their works and ensuring that competitors and the public have free use of those works can conflict. Each intellectual property doctrine of the U.S. therefore seeks to achieve the optimal balance between provision of private property rights and retention of public access to the products of creativity, in order to enhance the competitive marketplace to the fullest possible extent. Each intellectual property doctrine grants property rights to provide an incentive to create, but limits those rights, seeking to provide the greatest public access possible without undermining that incentive.[6] In ***Stanley v Columbia Broadcasting System, Inc.***,[7] Traynor, J, Justice of the Supreme Court of California opined that:

> [T]he object of copyright is to promote science and the useful arts. If an author, by originating a new arrangement and form of expression of certain ideas or conception, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright instead of being promoted.

Traynor, J., cited with approval, the dictum of Lord Mansfield in in ***Sayre v Moore,***[8] where he stated that:

> We must take care to guard against two extremes equally prejudicial: the one that men of ability, who have employed their time for the service of the community may not be deprived of their just merits and the reward of their ingenuity and labor; the other, that the word may not be deprived of improvements, nor the progress of the arts be retarded. The Act that secures copyrights to authors guards against the piracy of the words and sentiments but does not prohibit writing on the same subject.

In totality, copyright in the U.S. is generally said to be justified as a means for encouraging the creation of new works for the benefit of the public, rather than to recognize the more personal natural, or moral rights of authors, which reflects a kind of quid pro quo, where authors receive exclusive rights for a limited time, in exchange for eventual contributions of their works to the

[5] ibid, 2-3.
[6] Barrett, M., ***Intellectual Property: Cases and Materials*** (n1), 3.
[7] 35 Cal. 2d 53 (1950)
[8] (1785) 101 Eng. Rep. 140

public domain in a way that is somewhat similar to the English view, but different from the European Continental view.[9]

As stated earlier, the U.S. Constitution specifically authorized Congress to enact both patent and copyright laws. The Constitutional language did not mention trademark law. Indeed, when Congress attempted to rely on this clause to adopt a Trademark statute in the 19th Century, the Supreme Court struck down the statute as going beyond the scope of the Constitution on intellectual property. As a result, congress relied on its general power under the Commerce Clause to enact Trademark laws.[10]

The U.S. Copyright Act has set forth the requirements for, and limitations on copyright protection, and has established administrative agencies to implement them.

Under the Act, a 'Work' is created when it is fixed in a copy or phonorecord for the first time and where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.[11]

Copy protection subsist in original literary works; musical works (including any accompanying words); dramatic works (including any accompanying music); pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audio-visual works; sound recordings; and architectural works. However, in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.[12] In ***Feist Publications v Rural Telephone Service***,[13] the US Supreme Court held that the selection, coordination, and arrangement of the plaintiff's telephone directory white papers do not satisfy the minimum constitutional standards for copyright protection, because the white pages directory is devoid of the slightest trace of creativity. In contrast, in ***West Publishing Co. v Mead Data Central Inc.***,[14] the US Court of Appeals Eight Circuit held that a comprehensive arrangement of cases in Law Reports was an original work of an author that can be protected by copyright as the Law Reports arrangement and pagination is the result of considerable labour, talent and judgment.

[9] Lange, D., LaFrance, M and Myers, G., ***Intellectual Property Cases and Materials*** (3rd edn, U.S. Thomson West, 2007), 727.

[10] Schecter, R.E., ***Intellectual Property*** (3rd edn,U.S. West Publishing Co. 2006) 68.

[11] *Section* 101, U.S. Copyright Act, 1976. "Copy" as used in this section means material objects, other than phonorecords in which a work is fixed by any method now known or later developed and from which the work can be perceived, reproduced or otherwise communicated either directly or with the aid of a machine or device.

[12] See: *Section* 102 of the U.S. Copyright Act, (USCA) 1976

[13] 499 US 340, 111 S.ct 1282 (1991)

[14] 799 F. 2d 1219 (1986)

Unpublished works are subject to protection without regard to the nationality or domicile of the author, while published works are subject to protection if, *inter alia*:

(a) on the date of first publication, one or more of the authors is a national or domiciliary of the U.S., or is a national, domiciliary or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled; or
(b) the work is first published in the U.S. or in a foreign nation that, on the date of first publication is a treaty party.[15]

There are some limitations on exclusive rights, under certain conditions, including:

(a) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution;
(b) performance of a nondramatic literary or musical wok or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;
(c) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters or organizers.[16]

Regarding infringement, infringement of copyright under US law occurs whenever somebody exercises any of the rights reserved exclusively for the copyright owner without authorization.[17] One important difference between US Law and that of Nigeria the UK, is that under US law, infringement need not be intentional. There can be an innocent infringement or even unconscious infringement in the sense that an author, in creating what he conceives to be his own original product may, unintentionally and thus in a sense, unconsciously, "borrow" the work of another.[18] For instance, in ***Bright Tunes Music Corp v Harrisongs Music Ltd.***,[19] the US. Southern District of New York Court held that George Harrison of the Beatles singing group, has infringed a song previously recorded by another music group, the Chiffons. The plagiarism, even though it was proved to be unconscious was actionable because it seems Harrison had access to the earlier work (meaning he had heard it performed) and because of the almost exact similarity between the two songs, the court concluded that, although Harrison did not plagiarize deliberately, and although he was not conscious of copying the earlier work, "his subconscious knew a song his conscious mind did not remember." Similarly, in ***Fred Fisher Inc. v Dillingham***,[20] the claimant succeeded on the

[15] See: *Section* 104 USCA
[16] See: *Section* 110 USCA
[17] See: ibid *Section* 501.
[18] Miller, A.R, and Davis, M.N;*Patents, Trademarks and Copyright in a Nutshell*(n9) 345.
[19] 420 F. Supp 177 SDNY (1976).
[20] 298 Fed 145 (1924)

ground of subconscious copying. In contrast, in the English case of ***Francis, Day & Hunter v Bron***,[21] a case similar on facts as the *Bright Tunes case,* Willmer, L.J., of the Court of Appeal, unable to accept the notion of subconscious copying stated thus:

> I confess that I have found the notion of subconscious copying one of some difficulty, for at first sight, it would seem to amount to a contradiction in terms, the word 'copying' in its ordinary usage connoting what is essentially a conscious process…Our attention, however was called to a number of cases in the US in which the subject has been discussed, and in some of which a decision in favour of the claimant has been based on a finding of subconscious copying. It appears to me that the question must be considered in two stages, viz., (i) whether subconscious copying is a psychological possibility, and (ii) if so, whether in a given case it is capable of amounting to an infringement of the claimant's copyright?

With respect to administrative agencies, the Act established the US Copyright Office as an agency within the Library of Congress.[22] All administrative functions and duties of the Copyright Office are the responsibility of the Register of Copyrights as director of the Copyright office of the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright office is appointed by the Librarian of Congress, and act under the Librarian's general direction and supervision.[23] The Registrar of Copyrights performs the following functions, *inter alia*:

(a) advice Congress on National and International issues relating to copyright;
(b) provide information and assistance to Federal departments and agencies and the Judiciary on National and international issues relating to copyright;
(c) participate in meetings of international inter-government organizations and meetings with foreign government officials relating to copyright; etc.[24]

We submit that the function of advising Congress is an important one so that Congress can be abreast with various changes in the intellectual property industry to enable it pass appropriate laws as quickly and as effectively as possible because changes occur rapidly especially with regard to technological advancements and changes in exploitation of copyright works. For instance, while preparing the 1976 Revisions of the Copyright Act, Congress established the National Commission on New Technological Uses of Copyright Works (CONTU) to study and make recommendations regarding the provisions needed to make copyright law responsive to significant technological

[21] (1963) Ch. 587 C.A.
[22] The Library of Congress's primary mission is to research inquires made by members of Congress, which is carried out through the Congressional Research Service. It also houses and oversees the U.S Copyright Office. *https://en.m.wikipedia.org>wiki* (accessed 21/2/2022).
[23] See: *Section* 701 USCA.
[24] See: *Section* 107 USCA.

developments such as computer and photocopying. CONTU submitted its final report in 1978 and Congress implemented most of its recommendations soon after. For example, in 1980 Congress amended Sections 101 and 117 to address the copying of computer software and to ensure that the definition of literary works was broad enough to include computers in the Act of 1980. Similarly, in 1987, Congress banned record rentals, fearing the ease with which they could be copied, and in 1990, Congress also banned the commercial renal of computer software also fearing the ease with which software could be copied by those who rented it.[25]

In the U.S., because of its advanced technology environment, greater pressures have been brought to bear upon the copyright system by the rapid growth of the internet, which enables copyright works to be disseminated instantly in digital format throughout the world in circumstances in which, a digital copy is for most practical purposes indistinguishable from its predecessor in any medium.

In fact, because the stakes are high, US copyright today is said to resemble a battlefield in which the contest is between proprietors and the forces of the public domain. The proprietors are always on the offensive where effective lobbying efforts have led to new legislation aimed at curtailing the worst excesses of digital unauthorized copying, for instance, the Digital Millennium Copyright Act of 1998, a major piece of legislation designed principally to deal with efforts by hackers to circumvent digital security measures, such as motion picture industry's CSS encryption system, intended to protect on-line movies from unauthorized copying. Meanwhile, the forces of the public domain on the other hand fought back through the achievement of a 15-year-old Norwegian boy, Jon Johanssen, who deconstructed the CSS Code and then posted his results on the internet so that others might make use of his hacking skills.[26]

As a result, the Intellectual Property and Communications Omnibus Reform Act of 1999 adopted further provisions respecting advance technologies, many of which establish rights for broader than those of traditional copyright. The provisions make it unlawful to circumvent protection measures that control access to copyright works. Unlike traditional copyright, the law does not directly protect the expressions themselves, but instead, the technological measures employed to prevent the expressions from being copied, forbidding descrambling, decrypting or otherwise circumventing those measures.[27]

With respect to copyright formalities of Registration, since the US accession to the Berne Convention in 1989, the usual copyright formalities, especially with respect to works published and distributed after the accession, have lost almost all their legal significance. However, there are

[25] Lange, D, LaFrance, M and Myers, G; Intellectual *Property Cases and Materials*(n9), 730 - 731.
[26] Lange, D, LaFrance, M and Myers, G;*Intellectual Property Cases and Materials* (n9), 731.
[27] Miller, A.R, and Davis, M.N;*Patents, Trademarks and Copyright in a Nutshell*(n18), 343

still some formalities with respect to Registration, Deposit and Notice. We shall briefly look at these formalities.

(a) Registration.

Under U.S. Copyright law, copyright protection is basically self-executing. Thus, an author automatically is protected by Federal Copyright when he fixes the work in a tangible medium. There is no need to obtain approval, conduct a prior search, or secure registration by any agency, like in the registration of patents.[28]

Nevertheless, there still are procedures for registration, even though it is optional and failure to register does not destroy a subsisting copyright. One of the legal consequences concerning registration is that an owner of a United States work cannot sue for copyright infringement until he has registered the copyright.[29] However, as long as registration is accomplished before litigation, there is nothing wrong in registering a copyright only after discovering an infringement and deciding to sue. It is a defence to an infringement suit that the plaintiff has failed to register a U.S. work prior to instituting the action.[30]

There are some rights that can be permanently lost by the failure to register soon enough. For instance, statutory damages are not recoverable for infringements that occur prior to registration except in the case of first published works if registration is accomplished within three months of first publication. Attorney's fees are also not recoverable under the same circumstances.[31]

An important function of registration is the part it plays in curing a failure to affix notice of copyright properly publicly distributed copies, although that is true now only with respect to works distributed prior to March 31, 1989, the effective date of the US Berne Convention Implementation Act, 1989.[32]

However, the requirement of registration as a prerequisite to an infringement action raises two important problems. First, it is possible that registration may be denied by the Copyright Office. In fact the question whether an infringement has occurred may turn upon the very same issue that led the Copyright Office to deny copyrightability, for instance, if a work were based upon a new technology of questionable copyright subject matter. Thus, to require registration in such a circumstance prior to suit would pose a problem and ideally, one cannot sue for infringement of a work whose copyright status was questionable, because it is on that ground that registration was denied in the first place.[33] Under the earlier U.S. Copyright Acts, the remedy was to sue the Copyright Office to compel registration, as was the case in ***Vacheron & Constantin-Le Coultre***

[28] Miller, A.R., and Davis, M.N., ***Patents, Trademarks and Copyright in a Nutshell*** (n18), 405.
[29] See: *Section* 408(a) USCA
[30] Miller, A.R., and Davis, M.N., ***Patents, Trademarks and Copyright in a Nutshell*** (n18), 406
[31] See: Section 412 (2) of the US Copyright Act, 1976.
[32] Miller, A.R., and Davis, M.N., ***Patents, Trademarks and Copyright in a Nutshell*** (n18), 407.
[33] Miller, A.R., and Davis, M.N., ***Patents, Trademarks and Copyright in a Nutshell*** (n18), 407.

Watches Inc. v Benrus Wastch Co.[34]However under the current Act, one can sue an infringer despite refusal of the Copyright Office to register, by giving notice to the Office that the suit has been instituted.[35]

The second problem raised by the registration requirement is the growth of new technologies, notably the development of live transmissions. Under the Act, such a transmission is protected just as first publications are protected so long as registration is accomplished within three months of the first transmission. However, unlike publications of more tangible works like books, the transmission of live programming is shorter, and the possibility of damages three or more months later is not nearly as important as the availability of injunctive relief before the infringement even takes place. In an apparent attempt to solve this problem, with respect to the live transmission of sound with or without visual matter, which by definition cannot be registered prior to initial broadcast, a special provision is made in the Act for injunctive relief by dispensing with the requirement of prior registration, as long as registration is accomplished within 3 months of transmission, and notice is initially served upon the potential infringer at least forty-eight hours prior to the live transmission.[36]

The way it works in practice, for instance, is that in the case of the live transmission of a championship basketball or football game, the owners of the future copyright in that program who have the license to cover the game, effectively, may prevent a threatened transmission of the program over a cable network by sending a 48-hour notice to the cable company before the game that registration of the program is intended. If the cable company persists in promoting their planned transmission of the game after receipt of the notice, the owners then are allowed to institute a suit prior to the registration, and, in fact, prior to creation of the work itself (i.e. the live transmission of a game yet to happen), in order to enjoin the threatened infringement. The Court can, in these circumstances, grant an injunction. This would otherwise not have been possible but for this particular special provision of the Act.[37]

(b) Deposit.

There are two deposit requirements in the U.S Copyright Act, neither of which imposes severe requirements or significant legal effects upon copyright ownership. Nonetheless, there is a general deposit requirement for al copyrighted works that mandates deposit of two “best editions” within three months of publication, but which explicitly specifies that deposit is not a condition of copyright protection. Failure to deposit a copy, but only after a demand for deposit by the

[34] 155 F. Supp. 932 SDNY (1957).
[35] See: *Section* 411 USCA
[36] See *Section* 411 (b) USCA.
[37] Miller, A.R., and Davis, M.N., ***Patents, Trademarks and Copyright in a Nutshell*** (n18), 409.

Copyright Office creates a potential liability of a fine, if there is a willful refusal to deposit after a demand has been made.[38]

The required copies deposited in the Copyright Office is for the use or disposition of the Library of Congress, and with respect to transmission programs that have been fixed and transmitted to the public in the U.S. but have not been published, the Registrar of Copyrights in consultation with the Librarian of Congress and other interested organizations and officials, establish regulations governing the acquisition, through deposit or otherwise of copies of such programs for the collections of the Library of Congress.[39]

For purposes of registration, there is required to be deposited, one complete copy in the case of unpublished work and in the case of a published work, two copies. In the case of a work first published outside the U.S., one complete copy so published. However, copies deposited for the Library of Congress may be used to satisfy the deposit requirements for registration, if they are accompanied by the prescribed application and registration fee, and by any additional identifying material that the Registrar may, by regulation, require.[40]

It has been opined that effect of failure to deposit the necessary copies and to register the copyright is not to invalidate the copyright in the first instance, but only to prevent any action for infringement being brought until such deposit and registration has been effected.[41]

(c) Notice.

Whenever a work published in the U.S or elsewhere by authority of the copyright owner, a notice of copyright may be placed on publicly distributed copies of works of authorship, and if a notice appears on the copies, it shall consist of the following three elements, i.e.

(i) a symbol © (the letter c in a circle) or the work "copyright" or the abbreviation "copr"
(ii) the year of first publication of the work, and
(iii) the name of the owner of the copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.[42]

The notice is required to be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright.[43]

[38] See *Section* 407 USCA
[39] See *Section* 407 USCA
[40] See: *ibid Section* 408
[41] Babafemi, F.O., ***Intellectual Property: The Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria*** (1st edn., Justinian Books Ltd., 2007) 21
[42] See: *Section* 402 (a) & (b) USCA
[43] See: ibid *Section* 402 (c)

Copyright notice, although minimally relevant under the USCA, under the earlier US Copyright Act, 1909 artworks exhibited at a semipublic showing in an art gallery to which the general public was not admitted, nevertheless for purposes of notice, could be held "published" at that time, and if there were no notices that reproduction or photography was prohibited, the lack of copyright notice potentially destroyed all copyright protection.[44]

5.2. Scope of Copyright Protection in France.

The main source of copyright law in France is the Intellectual Property Code, which was created by law. No. 92-597 of 1 July 1992 and codified the laws of 11 March 1957 (Copyright) and 3rd July 1985 (Related Rights). Other sources of law include the Berne Convention, the UCC, the WIPO Treaty, the TRIPS, the Rome Convention, etc. However, if there is a conflict in applying any of either the main code, or the international treaties/conventions, the rule of precedence in the law court is: the French Constitution; International Treaties including European Law; and then French Laws and Regulatory Acts.[45]

Unlike in Common Law jurisdictions, in France, case law does not constitute a source of law and is not binding on other courts even if it has a persuasive effect on similar cases. Thus, French courts are not bind by any other national or foreign court decisions. As an exception, after a second appeal before the *Cour de Cessation*,[46] the Court's decision will be binding on the Court of French law. However, French courts are likely to consider the case law of the European Court of Justice, as well as any other French Court decision in similar cases. Copyright, like all other civil causes are enforced in the specified civil courts of first instance called 'Tribunal de Grade'. Criminal courts also can sometimes have jurisdiction over copyright infringement.[47]

Under French law, copyright is conferred on every type of work of the mind independent of its type, form, merit or purpose. The work need only be original: that is reflect the personality of the author. However, protection cannot be granted to a mere idea, or characteristics dictated by functional purposes, or documents such as legal texts and court decisions.[48]

The Intellectual Property Code provides for a non-exhaustive list of works that are eligible for protection, including:

(a) Books, pamphlets, and other literary, artistic and scientific writings;

[44] Miller, A.R., and Davis, M.N., ***Patents, Trademarks and Copyright in a Nutshell*** (n18) 41, cited *American Tobacco Company v Werckmeister* U.S. 284 (1907).

[45] Bertho, J., Robert, A. and Advocats, J. ***Copyright Litigation in France: Overview*** (U.K. Thomson Reuters Practical Law, Westlaw U.K) <https://uk.practicallaw.thomsonreuters.com>, 1-2 (accessed 22/03/2022)

[46] The Cour de Cessation (Court of Cessation) is one of the four courts of last resort in France. It has jurisdiction over all civil and criminal matters triable in the judicial system and is the Supreme Court of appeal in these cases. <https://en.wikipedia.org> (accessed 23/02/ 2022).

[47] Bertho, J., Robert, A. and Advocats, J. ***Copyright Litigation in France: Overview*** (n.47), 3-4.

[48] Bertho, J., Robert, A. and Advocats, J. ***Copyright Litigation in France: Overview*** (n.47), 4

(b) Lectures, addresses, sermons, pleadings and other works of that nature;
(c) Choreographic works, circus acts and feats and dumb-show works, the acting form of which is set down in writing or in another way;
(d) Creation of personal industries of dress and articles of fashion, etc.[49]

The author of a work is granted an exclusive incorporeal property right, enforceable against all person, and the right includes attributes of an intellectual and moral nature as well as attributes of an economic nature, and a work is deemed to have been created, irrespective of any public disclosure, by the mere fact of realization of the author's concept, even if incomplete.[50]

The author's rights under the French Code are referred to as *droits moraux and droits patrimoniaux* (Moral Rights and Patrimonial Rights). For moral rights, the author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person and it shall be perpetual, inalienable and imprescriptible and it may be transmitted *mortis causa*[51] to the heirs of the author, or may be conferred on and exercised by another person under the provisions of a will.[52]

Under the Patrimonial Rights, the right of exploitation belongs to the author, and comprises the right of performance and the act of reproduction. Performance consists in the communication of the work to the public by any process whatsoever, particularly; public recitation, lyrical performance, dramatic performance, public presentation etc.; and Reproduction consists in the physical fixation of a work by any process permitting it to be communicated to the public by way of printing, drawing, engraving, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording, and in the case of works of architecture, reproduction consists in the repeated execution of a plan or of a standard project.[53]

The main acts of copyright infringement (primary and secondary) included, representing; reproduction, broadcasting and adopting a work without consent from the right holder; manufacturing, offering for sale, selling, exporting, importing, transshipping in France, copies of a work without consent from the right owner.[54]

Unlike in the U.S.A there are no formalities for copyright protection under French Law. Registration is not required to enforce copyright since original works are protected from their creation. Similarly, no copyright notice is required. Thus, there is no consequence for failing to register copyright or display a notice. The claimant must only evidence the date of first disclosure

[49] See: Art. L. 112-2.
[50] See Arts. LIII-1 and L III-2.
[51] A gift made by a person (the donor) in contemplation of impending death. Also known as a deathbed gift, when the donor dies, the subject matter of the gift does not pass to the personal representative, but to the person the deceased intended to benefit (the donee) – https://www.law.corwell.edu>wex (accessed on 22/02/2022).
[52] See: Articles, L121-1 and L121-2.
[53] See Art. L122-1, L122-2, and L122-3.
[54] Articles L.122-4, L.335-3 and L. 335-4.

and ownership of the rights to consider legal action. Moreover, since copyright is not registered under French Law, it cannot strictly speaking be invalid for this reason. However, within the framework of a trial, the defendant can challenge the originality of the work and a court may deny protection to the claimant and dismiss the copyright infringement claim. Under French Law, there is no rule or precedent. Therefore, a court decision denying copyright protection to a piece of work is not binding in other similar cases, and other courts can decide differently and grant the protection, although it is likely that prior case law could influence later court decisions, but not as binding precedent.[55]

Under the French Constitution of 1958, a ratified international treaty is superior to French domestic law. Thus, with respect to French Copyright law, the conflict of laws provisions of the Berne Convention will be used in determining the applicability of the French Intellectual Property Code.[56]

5.3 Similarities and Differences between Nigerian, U.S and French Copyright Regimes.
Both Nigerian, U.S and French copyright laws or regimes share common similarities in that they are rooted in international copyright treaties, such as the Berne Convention. They also share fundamental principles like granting exclusive rights to creators, protecting original works of authorship, and establishing certain limitations and exceptions, the specific details of which are contained in their respective national copyright laws and regulations.

However, there are three main distinctions between the French Civil law and the U.S / Nigerian Common law copyright systems. First is that, subject to some exceptions, the *droit d'auteur* (author's right) grant the benefice of the right to natural persons (the author and heirs) and denies it to legal persons (except for collective works and for software), whereas *droit voisins* (neighbouring rights), grants rights to the editor or the producer. But both author's rights and neighbouring rights are copyrights in the sense of English or U.S laws.[57]

Secondly, whilst the Nigerian / U.S copyright system requires a material fixation of the work, as for example as for example a speech or a choreography work, which, although is an intellectual work, will not be protected if they are not embodied in a material support. Such a requirement does not exist under the French *droit d'auteur* because an improvised live performance would still benefit from copyright protection of *droit d'auteur*.[58] The important lesson to be learnt here is that under Nigerian copyright, a person who crafts a brilliant speech does not get the speech protected, but the person who listens to it and reports it is the one who gets the copyright, as was the case in ***Donoghue v Allied Newspapers.***[59]

[55] Bertho, J, Robert, A, and Advocats, J;*Copyright Litigation in France: Overview*(n.47), 8 - 10.
[56] See: *ibid* Article 55
[57] 'Copyright Law of France <https://en.wikipedia.org> 8 (accessed 20/1/2023)
[58] ibid
[59] (1936) Ch. 106

Thirdly, the classical difference between the common law and the civil law systems is the recognition of moral rights in the *droit d'auteur* whereas such rights did not initially exist in copyright law. Hence, in civil law, the author is granted a moral right which sees is the expression of the personality of the author in the work. In practice, the author will have a right to disclosure, paternity right, a guarantee that the integrity of his work and his wishes are respected, as well as a right of withdrawal. This right is attached to the author, it is inalienable and transmissible at the death of the author. Historically, such rights do not exist in copyright, as copyright has for decades been an economic model, granting solely proprietary rights to authors. However, several countries have harmonized their legislation since the ratification of the Berne Convention to include and apply moral rights as recognized by the Berne Convention.

Now, the two primary moral rights, both of which are provided for under the Berne Convention is the right of "attribution" and the right of "integrity". "Attribution" refers to an author's right to be credited by name for his work, while "Integrity" refers to an author's right to object to particular uses of his work. It provides that independently of the author's economic right, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation. [60]

Even Moral rights under the Berne Convention are inalienable from the author. However, the Berne modern states whose legislation does not provide for the protection after the death of the author of his moral rights and may provide that some of these rights may, after his death, cease to be maintained.[61]

The Berne Convention's mandate of moral rights was a primary stumbling block that prevented the U.S from joining the convention until 1989. Nonetheless, the U.S has passed moral rights amendments to its Copyright Law in 1990 so as to bring it into compliance with the newly ratified Berne Convention, but limited the application of moral rights only to works of visual arts.[62]

In what can best be described as an attempt at harmonization of the French and common law systems, both systems have converged somewhat overtime. Analogues to moral rights are increasingly recognized in the U.S. For instance, the U.S. Visual Artists Rights Act, incorporated moral rights of artists in a federal law for the first time.[63] In the U.K, moral rights have been incorporated in copyright law.[64]

[60] See: Article 6bis(1) of the Berne Convention.
[61] See Article 6bis (2) *ibid.*
[62] See the U.S Visual Artists Rights Act of 1990. (17 U.S. Code 106 A).
[63] ibid
[64] For instance, see: *Sections* 77(1) – 79 of the UKPDA 1988, which provides for the Attributory moral rights and *Sections* 80 – 86, which provide for the Integrity moral rights.

5.4 Lessons for Nigeria from the U.S and France

(1) The U.S. regime seeks to achieve the optimal balance between provision of private property rights and retention of public access to the products of creativity, in order to enhance the competitive marketplace to the fullest possible extent, whereby copyright in the US is justified as a means of encourage the creation of new works for the benefit of the public, rather than to recognize the more personal natural or moral right of authors.

(2) In terms of readiness to adapt to new and transformative studies in the area of copyright, the US has a Copyright Office as an agency within the Library of Congress. The task of the Copyright Office is to advice Congress on national and international issues relating to copyright with the end result of advising Congress so it can be abreast of changes in the copyright industry with a view to passing appropriate legislation timeously, since copyright is a product of legislation and enforceable as a chose-in-action. The lesson to be learned here is that the Nigerian Copyright Commission's role should be more advisory, rather than a fully executive administrator of copyright affairs.

3. The Deposit and registration system, serves for important functions, which can also be a useful lesson for Nigeria copyright regime, which is: firstly, by warning owners that a failure to affix notice will work an effective abandonment, and it assures that works that are unimportant to owners (i.e. unimportant enough for them to publish the material without notice), will enter into the public domain. Secondly, it serves to the public that works are copyrighted. Thirdly, it identifies the copyright owner and fourthly, it serves to determine the date upon which the work was published for purposes of computation of time for statutory copyright protection in the work.[65]

4. Under French Law, there are limitation periods which apply to copyright infringement actions. In other words, a valid copyright can be deemed unenforceable after a certain lapse of time. For civil action, it is a period of five years from the date on which the claimant should have known the facts of the infringement.[66] This is a system that might need to be implemented as part of Nigerian copyright law, to incentivize copyright owners to an early enforcement of copyright in cases of infringement, to avoid cases of limitation of action

[65] See: Miller, A.R, and Davis, M.N; *Patents, Trademarks and Copyright in a Nutshell* (n18), 410
[66] See: Article 2224 of the French Civil Code of 17 June 2008.

Global Journal of Politics and Law Research
Vol.12, No.4, pp.14-28, 2024
ISSN: ISSN 2053-6321(Print),
ISSN: ISSN 2053-6593(Online)
Website: https://www.eajournals.org/
Publication of the European Centre for Research Training and Development -UK