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Re-importing the concept of ‘authorisation’ of copyright infringement to Nigeria from the UK and Australia

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The work forms a small part of the author’s ongoing PhD research of the author at the University of Leeds, Leeds, United Kingdom.

Re-importing the concept of ‘authorisation’ of copyright infringement to Nigeria from the UK and Australia *

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Abstract

The concept of ‘authorisation’ was one of the innovations under the (Imperial) Copyright Act of 1911. The concept, which has found its way into many common law countries jurisprudence, has been very crucial in imposing secondary liability on parties whose services have been used by a third party to infringe an intellectual property right. However, the law of secondary liability is one of the areas badly understood under intellectual property rights. This position has been compounded by technologies which are of dual use. Though secondary liability for copyright infringement is a creation of statutes both in the United Kingdom and Australia, the courts have tried to delimit the scope of liability incurred by a party for authorising, sanctioning or ‘participating’ in an infringing act. Comparing the Nigerian position with that of the United Kingdom and Australia, this paper examines the scope of ‘causes...to do’, an equivalent of the tort of authorisation, under the Nigerian Copyright Act 2004. This paper argues that uncertainty around the current approach under the Nigerian Copyright Act might defeat the purpose of copyright to reconcile the right of the copyright holder and the right of unsuspecting technology providers whose facility might have been used to infringe.

Keywords: Copyright; authorisation; Nigeria; “cause...to do”; secondary copyright liability

Introduction

The concept of authorisation is one of the precursors to a finding of secondary liability where it is alleged that a defendant has sanctioned or initiated an infringing act. In respect of a copyright infringement, secondary liability includes an instance where liability is imposed on a person who does not actually commit or carry out the infringing act but has provided the means through which the infringement is committed (Angelopoulos 2013). In other words, copyright may be infringed not only where a defendant has exercised any of the exclusive rights of a copyright holder directly without consent, but also authorises or approves the doing of such act by another person (Caddick, Davies and Harbottle 2016, Riordan 2016). The concept of authorisation has a long history in both the United Kingdom and Australian copyright jurisprudence where it has been invoked by copyright holders against manufacturers of copying technologies for providing members of the public with the means to engage in unauthorised reproduction and communication of their works (Bowrey, Handler and Nicol 2010). The emergence and the surge in the use of digital technology have brought about a renaissance of the concept when it was again invoked by copyright owners against internet service providers, software

* Although with modifications, this article forms part of the author’s PhD research at the School of Law, University of Leeds, Leeds, United Kingdom. While the PhD research focuses on the UK, the US and Nigeria, this paper explores the positions under Australia, the UK and Nigeria.

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manufacturers and other internet intermediaries for the role in various copyright infringement cases (Landes and Litchman 2003, Pessach 2007).

The creative industry, in Nigeria, has witnessed a tremendous growth in the last two decades. The industry, visibly represented by its music and entertainment sectors, does not only promote the image of the country overseas but it has also become a major source of revenue for the country. For example, the film industry known Nollywood is estimated to worth between \$200 and \$300 annually (BGL Research & Intelligence 2011) while the entire entertainment and media industries' revenues to grow at a compound annual growth rate of 16.1 percent from \$4 billion in 2013 to an \$8.5 billion in 2018 (PricewaterhouseCoopers Inc. 2014). Interestingly, there has also been a considerable growth in the Internet usage in Nigeria. There were about 100, 000 internet users in 1999 but this number rose to 11 million in 2008 and around 44 million in 2010 (Freedom House 2011). This geometric growth could also be traced to the mobile phone usages and data services heralded by the further liberalisation of the telecommunication sectors (Freedom House 2011). While more Nigerians now have access to information through the Internet, some users have already deployed the platform towards various nefarious and illegal activities. Producers of music and films have rued financial losses attributed to the act of piracy (Fielding-Smith 2014).

The concern of this paper is that internet intermediaries who are a gateway to online activities may be faced with secondary liability where it is alleged that they authorised or participated in the commission of the infringing act. A concept analogous to 'authorisation' is also recognised under the s15 of the 1988 Nigerian Copyright Act. Section 15 provides 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.' Despite the legislative provenance of this tortious wrong, the court has not attempted to interpret this provision making this area of law largely uncharted under the Nigerian copyright jurisprudence. This dearth of case law does not suggest that there are no incidences of secondary infringement; rather, in fact, the courts have side-stepped this provision or decided to follow other common law principles such as vicarious liability and agency in holding defendants liable. Cases like *Island Records Ltd & Ors v John Holts Shipping Services*¹ and *CBS Inc v Intermagnetic Co Ltd*² are instances of missed opportunity to interpret and develop the relevant statutory provision.

Assuming Z had given Y a pen which was borrowed from Z to write a letter but Y used the pen to stab X in the course of a fight. Did Z cause Y to stab X because Z provided Y with the instrument for the commission of the wrongful act? It will be absurd to answer in affirmative because there was nothing to suggest that Z supported Y's action. In the absence of a clear judicial pronouncement on the meaning and factors for the court to consider in finding liability for 'cause to do', third parties and especially internet intermediaries are left to assume the nature and extent of their liability. The aim of this paper is to investigate the uncertainty surrounding the meaning of the phrase, 'cause to do' an act controlled by copyright under the Nigerian Copyright Act and the implications for both right holders and third parties accused of providing facilities for the infringements. The tort of authorisation has been decided upon by courts in the United Kingdom and Australia, and it has been extensively debated by the academics as it relates to copyright infringement. The positions in these two countries have become points of reference and precedents for other

common law countries with similar or equivalent provisions. As a result, this article will also explore the guidance that the Nigerian courts can get from both Australia and the United Kingdom in interpreting the phrase. Therefore, the first part of the article provides a concise summary of the Nigerian legal system, the rules of statutory interpretation and finally, the introduction of copyright law into the Nigerian legal system in order to establish the link it has with both Australia and the UK. From both the UK and the Australian perspectives, the second part traces the evolution of the tort of authorisation. It examines the development of case law and the divergence under the two jurisdictions. It is not the aim of this article to discuss the breadth of all the cases addressing the concept of authorisation but selected ones which are relevant in drawing out the key elements that the courts have employed in distinguishing the tort of authorisation from mere facilitation. The third part addresses the uncertainty around the meaning of 'cause to do' and argues that the phrase whether interpreted narrowly or broadly will defeat the fundamental purpose of the copyright system which is to balance the interests of right holders and society in having access to creative work.

The Nigerian Legal System and the Interpretation of Statutes in Nigeria

The sources of law in Nigeria are the (Received) English Law, Nigerian legislation, Nigerian case law and customary law/Islamic law (Obilade 2002, Asein 2005). Early statutes in Nigeria which later became received English Law were introduced as part of the colonial rule. In 1861, when the Lagos Colony was annexed by the British Government, the English Law was formally introduced by Ordinance No 3 of 1863. In 1914 under the administration of Lord Lugard, the Lagos Colony, the Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were amalgamated to become the geopolitical entity now called Nigeria. For the purpose of administration of justice, the colonial British established the Supreme Court, Provincial Court, and the Native Court. These courts, except the Native Court at their inception, operated English Law which encompassed the English common law, the statutes of general application and the rules of equity.³

Section 45 of the Interpretation Act provided that the statutes of general application that were in force in England on the 1st day of January 1900 shall be in force in the Federation.⁴ It follows that any of the English statutes sought to be enforced in Nigeria must have been in force in England on 1 January 1900. It does not matter whether such statute has been repealed in England by another statute. For example, the Copyright Act 1911 continued to have force in Nigeria despite its repeal by the UK Copyright Act of 1956. It is important to note the difficulty in identifying which statute will constitute a 'statute of general application' in the absence of a definition under the Interpretation Act.⁵ Despite this, statutes such as Fraudulent Conveyances Act,⁶ Conveyancing Act 1881,⁷ Statute of Frauds 1677,⁸ and the Sale of Goods Act 1893⁹ among others have been held as statutes of general application. These statutes and those that have not been directly brought before the court will only apply as far as local circumstances allow.¹⁰

Similarly, the common law of England and the doctrines of equity shall be in force within the jurisdiction. This provision has been interpreted to mean the English common law as well as the English doctrines of equity. This interpretation appears to

be too narrow and has the tendency to prevent the growth of a uniquely Nigerian common law and equity (Allot 1970). Should common law in the regard be read to include principles of English law as they have been adopted by other common law countries like the USA, Canada and Australia, among others? Allot was of the opinion that the term common law in reception statutes should be construed as ‘the common law of England’ and nothing more (Allot 1970). Another controversy on the application of common law relates to its dates. It is contended that in as much the enabling enact prescribes a date; the received law is the common law and doctrines of equity existing as of January 1, 1900. Thus, a court should search and apply only as they were as of this date. An opposing but better view suggests that what was received was the rule of common law and doctrines of equity as they are from time to time (Park 1963). It is important to understand that common law and doctrines of equity will continue to apply where there is no local enactment that has codified or repealed them. It remains to add that the principles of common law and decisions of English court continue to have a persuasive authority in Nigeria.¹¹

Rules of Statutory Interpretation

Ambiguities and uncertainties about the meaning of words are unavoidable in the process of enacting a statute by the legislature. The objectives of legislative drafting are efficacy, efficiency, effectiveness and precision (Xanthanki 2014). However, Lord Denning noted that ‘the draftsman... conceived certainty but has brought forth obscurity; sometimes even absurdity’ (Denning 2005, 9). The reason being that in the context of copyright laws for example, legislatures are faced with a complex task of drafting copyright law which balances stakeholders’ rights when drafting law that responds to technological challenges (Bosher and Mendis 2016). In such an instance, the onus is on the courts to discover the intention of the legislature, *the sententia legis*, and resolve the ambiguity that may surround the meaning of the words used in a statute. The court must “ascertain the meaning of the legislation through the medium of the authoritative forms in which it expressed” (Fitzgerald 2008, 132). Besides some presumptions of law, the Nigerian courts adopt other major common law principles or canons of statutory interpretation. They are the Literal Rule, the Golden Rule, the Mischief Rule and the Purposive Rule (Obilade 2002, Asein 2005). The Literal Rule requires statutes to be construed according to their literal meaning or in their usual grammatical sense where they appear to be clear and unambiguous.¹² The Supreme Court of Nigeria in *Mohammed Abacha v the Federal Republic of Nigeria*¹³ concluded that the duty of the court is to simply interpret the clear provision by giving the plain wordings their ordinary interpretation without more. The court of law is not expected to bend backwards to sympathise with a party in a case in the interpretation of a statute merely for a reason, that the language of the law seems harsh or is likely to cause hardship.¹⁴ Since words in themselves do not have any proper meaning, a court is required to adopt a contextual interpretation of such words as reflected in the legal maxim, *noscitur a sociis* that is, the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. Apart from the concern that Literal Rule may result in a miscarriage of justice as observed in *R v Bangaza*,¹⁵ other notable drawbacks include that its rigid application may stifle social change through the law, perpetuate hardship or ignore the realities of modernisation.

To overcome some of these drawbacks, the courts do resort to another guiding principle known as the Golden Rule as established in *Becke v. Smith*.¹⁶ According to the principle, the court may follow the secondary meaning of a word where the adherence to the plain grammatical interpretation would lead to an absurd, inconsistent or ambiguous result.¹⁷ This principle is based on the assumption that the legislature could not have intended an absurd result.¹⁸ As such, Golden Rule recognises that there may be some internal disharmony or logical inconsistency either between parts of the same statute or between a statute and some other principle of law. In this respect, the court may construe the word “or” as “and” as it was in *Ejor v Inspector-General of Police*.¹⁹ In a similar vein, it is not in all instances that the court of law will interpret the word “shall” as mandatory, the court must examine the context within the word is used to deduce the intention of the legislation. As posited per Muhammed JSC, ‘it is not always that the courts would interpret the word “must” (in Order 2 Rule (2) supra) or “shall” as mandatory, both words are interchangeable and can both mean “may” where the context so admits.’²⁰ Considering the emphasis given to the Rules of the Court, what is not clear is whether his Lordship was suggesting a different interpretation standard for the Constitution and other statutes on the one hand and another for the Rules of the Court, on the other hand.²¹ It is, however, clear that the court of justice has a duty to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.²² For example, in interpreting the s370 of the Nigerian Criminal Code, the court in *R v Princewell* interpreted the word “marries” not as contracting a valid marriage but as going through a form of valid marriage recognised by law.²³ The leeway permitted in the Golden Rule does not grant the court the liberty to embark on an interpretative frolic but to confine itself within the precincts of the statute.

When the literal rule or golden rule of interpretation leads to ambiguity or a mischief that makes the intention of the legislator uncertain, the court will look at other provision or provisions of the statute with preference to view aimed at avoiding a public mischief. The rule is known as Mischief Rule of interpretation or the rule in *Heydon’s case*.²⁴ Under the Mischief Rule, the court aims to determine the intention behind a legislation rather altering its expression. The court would examine the position of law when the statute was enacted, what the objective of the statute for which the old law did not address and the remedy provided by the statute to be construed. Like the Golden Rule, the court cannot read words into a statute unless reasons for doing so can be discerned in the statute itself.²⁵ Because the Golden Rule is not a perfect cannon in itself, there is a new school of thought which favours what seem like a hybrid of the golden rule and the mischief rule. This hybrid is called the Purposive approach. Denning L.J. in *Seaford Court Estates v Asher*²⁶ noted that:

When a defect appears in an Act of the Parliament, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give and life to the intention of the legislature.

The purposive approach allows the court to look beyond the confines of the language as used in the statute and the position of the common law before it. It calls for a broad and liberal interpretation which will protect and preserve the dynamic character of the law and translate it into an instrument of social engineering. The move towards

purposive approach was supported by a retired Justice of the Nigerian Supreme Court (Oputa 1996) who argued that:

Law is like an old but vigorous tree which has its roots in the past, but takes on new grafts, puts on new sprouts, and occasionally drops dead wood. He is a better judge who accepts the challenges to be the husbandman [and who does] the necessary pruning, who accepts to adapt the existing law to a fast changing society. Such judge must shake off all the inhibiting legacy of the past and assume a dynamic role in interpreting the law to meet the realisation of all the human rights of our oppressed and disadvantaged citizenry.

The attitude of the Nigerian courts to the purposive approach could be gauged in *Garba v. Federal Civil Service Commission*;²⁷ *Attorney General of Bendel State v. Attorney-General of the Federation*;²⁸ and *Fawehinmi v. Akilu*.²⁹ Most of these cases focus on the interpretation of the country's Constitution and other acts of the executive arms of the government. The judicial activism heralded by the purposive rule has been criticised by some members of the judiciary for amounting to a "naked usurpation of the legislative function under the thin disguise of interpretation".³⁰ Another Honourable Justice of the Supreme Court of Nigeria, Ayoola J.S.C also noted that 'Judicial lawlessness manifests in deciding cases knowingly in disregard of a well-known and established principles and arbitrary exercise of discretion...' (Ayoola 1998, 58). With due respect to his lordship, it appears that his lordship missed the modalities of the purposive approach. The purposive approach does not confine itself within the legislation only; it examines the legislative documentation and the history of the law to be construed. It, therefore, gives consideration to the social, the political or the economic conditions which necessitated the enactment of the legislation. The purposive approach advocates an interpretation of law according to the spirit of the law and not just its letters.

The History of Statutory Copyright Protection in Nigeria

It is a settled matter that statutory copyright law is a part of the colonial legacy in Nigeria. However, opinions are divided as to which copyright law was the first copyright statute in Nigeria. More writers regarded the Imperial Copyright Act of 1911 which was extended to Nigeria pursuant to the colonial Order-in-Council dated 24 June as the first copyright law in the country (Ocheme 2000, Adewopo 2002 and Asein 2012). Although a lone voice, Gana on the other hand, noted that the Literary Copyright Act of 1842 was the Nigeria's first contact with copyright law through an Ordinance that introduced English Law into Lagos in 1862 (Gana 1996). Whichever of the legislations is agreed as the first copyright legislation; both legislations had ceased to apply in Nigeria when they were repealed by the Nigerian Copyright Act of 1970.³¹ The Copyright Act of 1970 was later repealed by the current Nigerian Copyright Law of 1988 as amended in 1992 and 1999.

The emergence of the Nigerian Copyright Act of 1988 was motivated by the failure of the Copyright Act of 1970 to tackle appropriately the high rise in incidences of copyright infringements faced by copyright holders and the copyright-based industry as a whole. Some of the provisions of the 1970 Act were found to be ineffective and inadequate to tackle and respond to the 'realities of the age' (Adewopo 2012). One of the drawbacks of the 1970 Act was the absence of criminal sanctions that could serve as deterrence to infringers. Shyllon argued that the Act create a false progress in the protection and encouragement of creativity in Nigeria (Shyllon 2003). (Gana 1996)

was also of the view that '[t]he creation of a "Nigerian" copyright decree did not foster Nigerian creativity, nor did it reflect Nigerian interest groups concerned about the development of an effective system of copyright protection.' Gana's view might have been influenced by the history of the 1970 Act as a military decree. In other words, it was promulgated as a Copyright Decree (No 61) 1970 which made it more of an imposed legislation and did not go through any democratic legislative process. Thus, the opportunity for a thorough review and the provision of comments by stakeholders did not form part of its promulgation. The lobby and campaigns by the indigenous copyright industry culminated into Nigerian Copyright Act of 1988. Just like the 1970 Act, the 1988 Act was also promulgated as a decree by the military government headed by General Ibrahim Babangida.³² Similarly, the Copyright Decree 47 of 1988 as the Nigerian Copyright Act of 1988 was then known was never subjected to the rigour of legislative vetting because the democratically elected legislative houses had been dissolved during the *coups d'état* that brought the military government to power. Arguably, the decree turned an Act may also have the same problem as its predecessor. It should, however, be noted that some principles of the WIPO Tunis Model Law for Developing Countries drafted in 1976³³, Universal Copyright Convention and Berne Convention were influential in the drafting of the 1988 Act provisions.

Like both the Imperial Copyright Act 1911 and the Nigerian Copyright of 1970, the 1988 Act continued to be founded on the orthodoxy of having to reward labour and encourage creativity, utilitarian and natural rights of the creator. Authors of literary works, musical works, artistic works, cinematograph films, sound recordings and broadcast are granted exclusive rights under the newly enacted law.³⁴ Because these categories of works are exhaustive, no copyright can be claimed outside these categories except neighbouring rights which are also guaranteed under the Act. The restriction of copyright protection to the six categories may appear to have denied other works which are not specifically enumerated, however, the definitions of each category is very comprehensive to accommodate other varieties of works. For example, s.51 defines literary work to include computer programmes, choreographic works, written tables and compilations.³⁵ The Nigerian Supreme Court explains the nature of the right of a copyright holder in *Plateau Publishing Co. Ltd. vs. Adolphy*, where the court held that:

this legal right, though abstract in nature, vests the holder with the sole and exclusive privilege of multiplying copies of his creative work by publishing, selling or disposing of the same as it pleases him for a stated period of time.³⁶

Before being granted copyright protection, any of the classifications will not be eligible for copyright unless sufficient effort has been expended to give the work certain level of originality and fixed in a known or later to be developed medium of expression.³⁷ The exclusive rights mentioned above were made subject to exceptions among which are fair dealings for research, private use, and criticism or review or the reporting of current affairs.³⁸

From “cause...to do” to “authorisation”

United Kingdom

In the United Kingdom, the discourse around the concept of authorisation of copyright infringement began when the Imperial Copyright Act of 1911 repealed about seventeen previous Acts and amended some sections of four other Acts.³⁹ Although the introduction of the word “authorise” was deemed to be redundant and superfluous by the court in *Performing Right Society v Cyril Theatrical Syndicate Ltd*⁴⁰, some writers contended that it was an innovative act which expanded the jurisprudence on secondary copyright infringement. For example, the editor of *W A Copinger, Law of Copyright* explained that:

it would seem that the new Act has enlarged the protection accorded to the owner by making it part of this monopoly to authorise any of the acts referred to in sub-sect (2) of section 1 and that a person may be liable to an action for infringement of copyright if he has, without consent of the owner of the copyright, ‘authorised’ any of these acts, although the authorised act has not been completed.⁴¹

Thus, where the defendant had announced, by means of posters and handbills, their intention to exhibit a cinematograph film in which the plaintiffs had the copyright, at certain theatres, it was held that the defendant had authorised ‘a performance of the film’ within the meaning of s.2(1) of Imperial Copyright Act 1911.⁴² Another important effect of the introduction of ‘authorise’ is to extend the scope of copyright liability beyond the agent-principal or master-servant relationship. Earlier, the court in interpreting ‘cause to be represented and performed’ had held in *Russell v Briant*,⁴³ a case decided under the Dramatic Copyright Act of 1833 that:

No one can be considered as an offender against the provisions of the Act so as to subject himself to an action of this nature, unless by himself or his agents he actually takes part in a representation which is a violation of copyright.⁴⁴

The holding in *Russell* was rejected for being too narrow in *Evans v E Hulton & Co Ltd*.⁴⁵ Currently, s.16(2) of the Copyright, Designs and Patents Act 1988 provides that ‘[c]opyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright’.

Whilst the nature of the relationship between the authoriser and the actual infringer has been broadened, the meaning of the term, ‘authorisation’ was not immediately clear since none was provided in the United Kingdom’s Copyright Act 1911. Adopting the decision of Tomlin J. in *Evans v E Hulton & Co Ltd*⁴⁶ and the dicta of Buckley L.J. in *Monckton v Pathé Frères Pathephone Ltd*⁴⁷, Bankes L.J., in *Falcon v. Famous Players Film Co. Ltd*⁴⁸ held that the word ‘authorise’ in the Copyright Act 1911 was to be understood in its ordinary dictionary sense of ‘sanction, approve and countenance’.⁴⁹ The definition was extended by Atkins L.J. who stated that to ‘authorise’ means ‘to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor’.⁵⁰ However, Sir Hugh Laddie argued that ‘this so-called definition replaces one vague expression by an equally vague one’ (Laddie, Prescott and Vitoria 1995). This writer is also of the view it is difficult

reconciling the two definitions by their Lordships in *Falcon*. The terseness of Bankes LJ's definition would require further clarification. One of such clarifications would be whether the authorisation must be expressed or implied. Also, it is not clear whether the phrase "sanction, approve and countenance"⁵¹ should be construed conjunctively or disjunctively. The Court of Appeal in *Pensher Security Door Co Ltd v Sunderland City Council*⁵² was of the view the phrase should be construed conjunctively while the subsequent adoption of the definition in the Australian case of *Winstone v Wurlitzer Automatic Phonograph Co of Australia Pty Ltd*⁵³ prefers a disjunctive reading. Furthermore, unlike the meaning of authorisation as 'sanction, approve and countenance' which favours a broad view, it appears that Atkins LJ definition of 'to grant or purport to grant' tends toward a narrower approach. A narrow approach may suggest that the defendant must have an actual or legal authority before they can be liable for authorising an infringement. If this is the position, this definition will be too restrictive in imposing liability. Be that as it may, since *Falcon*, a body of law has emerged from the definition.

The ability of the defendant to control or prevent the commission of the infringement is a crucial factor in finding liability for authorisation. In *CBS Inc v Ames Records & Tapes Ltd*⁵⁴ the court was provided with another opportunity to clarify the definition of authorisation put forward in *Falcon*'s case. It was held that:

An authorisation can only come from somebody having or purporting to have the authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act.⁵⁵

In the case, the question was whether the operation of a record lending scheme by the defendant amounted to authorisation of home taping by borrowers. The defendant had set up a record lending library which members of the public could join for a fee. The plaintiffs contended that through the scheme, the defendants were seeking to make money out of 'home taping' of sound recordings, knowing that such home taping was likely to occur and that the defendants were thereby "authorising" infringement of the plaintiffs' copyright. Rejecting the plaintiff's claim, the court held that the mere knowledge that borrowers were likely to tape the records could not amount to 'authorising' infringement of copyright where there is no evidence of ability to control the infringing act. Therefore, it would be wrong to conclude that the defendants had granted or purported to grant any right to home tape. It appears that what the *CBS Inc case* suggests is that there must be a sort of authority that the defendant must possess before they can be liable for authorisation of infringement and the defendants would only be liable when they make use of this authority, or they hold themselves out as someone having that power. There must be certain conduct by the defendant which endorses the infringing act. It could also be argued that this decision supports the maxim of *nemo dat quod non habeat*. In other words, the defendant must have the requisite authority or pretends to have authority before he could be liable for authorisation. Finally, this decision seems to distinguish authorisation from mere facilitation or assistance. The indifference exhibited by a defendant may not necessarily translate into authorisation this might just mean that the defendant does not think there is an obligation to interfere or prevent infringement but that of the right holder.

The thin line between authorisation and facilitation of infringement came to the fore in *C.B.S. Songs Ltd. v Amstrad Consumer Electronics Plc.*⁵⁶ The court approved the earlier definition of authorisation as meant to grant, or purport to grant the right complained of either expressly or by implication and held that the defendants by selling a high-speed twin-tape recorder might have facilitated the copying by purchasers of material in breach of copyright but did not necessarily "authorise" it. It was roundly rejected that the advertisement by the defendants constituted a form of authority for unlawful copying and that it is not sustainable to conclude that the defendants have the authority to grant that permission. In the court's opinion, the decision whether to record or play and what is to be recorded or play lies entirely with each user of the facility and the defendant has no control over the use of their models once they are sold. Possibly, what Lord Templeman meant was that though the defendant might have conferred on the purchaser the 'power' to copy but did not grant or purport to grant the 'right' to copy.⁵⁷ It is the view of this author that this decision was motivated by the need to support the development of technology. One of the concerns of lawmakers and the court has been how to reconcile the use of technology and protection of copyright ownership. To neglect this need for a balance, may tilt copyright protection in favour of holders and thereby leading to restriction of access to information and which can also hamper technological growth. As Lord Templeman observed, even if the defendants decided not to introduce the technology of double-tape double-speed into its products, other manufacturers would in all likelihood have done so. Therefore, the UK courts appeared to have adopted a narrow approach compared to the Australian jurisdiction which is later examined below. The view common in these two cases is that a person may not necessarily authorise an infringement though he placed into the hands of an alleged infringer the means by which the infringement is committed if those means can be used for other legitimate purposes. More importantly, it makes no difference if it is obvious that the means will be used to infringe.

It may appear that attempts to formulate a definition for 'authorisation' have been over-flogged or exhausted. Later UK decisions seem to suggest that evidence of culpable conducts is important to distinguish between facilitation and authorisation. As it would appear, the ghost of the infamous US case of *A & M Records v Napster*⁵⁸ has been resurrected in *Twentieth Century Fox Film Corporation v Newzbin Ltd.*⁵⁹ In *Newzbin Ltd.*, it was alleged that the defendant company operated a website which allowed users to engage in illegal file-sharing and thereby among other things authorised the infringements of the plaintiffs' copyrighted materials. The subscribers of the defendant were given access to Usenet, a platform that allows Newzbin users to upload and view messages on an electronic equivalent of public bulletin boards. Newzbin's subscribers were of two categories namely those with a basic membership and those on the premium membership for a fee. Premium members could download the contents of files gathered using Newzbin. Having examined early cases on the subject matter, the court found the approach in the Australian case of *RCA Corporation v John Fairfax & Sons Ltd*⁶⁰ too wide and affirmed the definition of "authorise" as the grant or purported grant of the right to do the act complained of which the court concluded is more than mere enablement, assistance or encouragement. In order to hold an alleged authoriser liable, it was held that regards must be had to certain factors namely: nature of the relationship between the alleged authoriser and the primary infringer; nature of the equipment or other material supplied whether constitutes the means used to infringe; whether it is inevitable it will

be used to infringe; the degree of control which the supplier retains, and any steps taken to prevent the infringement.

On the issue of the relationship between the defendant and its subscribers, there was a contractual agreement between the parties which gave the premium subscribers special treatment. Also, they have access to a special searching facility such as searching by reference to genre, sub-categories and through the genre. The nature of the facility goes beyond indexing and categorisation, but it additionally provides extensive support in identification and compilation of materials sourced. This configuration provides means for infringement and was a creation of the defendant and was well within the defendant's control. In respect of preventing the infringing act, the defendant did not only fail to exercise the ability to control the infringing act but actively encouraged users to make reports on the movies retrieved with rewards for doing so. This decision has been criticised for reverting to the already rejected definition of authorisation to mean sanction, approve countenance in Falcon's case (Angelopoulos 2013). While this may be true, the court should be commended for providing some guidelines for the first time on activities which may evidence authorisation of infringement. The problem with these guidelines is whether the presence of one of the factors would be sufficient to find a liability or whether all must coexist. The latter position might be preferable. For example, the etymology of authorisation as a legal principle has demonstrated a move away from *Russell v Briant* holding.⁶¹ However, isolating other factors like the nature of the equipment or the influence of supplier might defeat the objective of copyright protection system itself which is to balance the interest of holders to compensation and the right of the society to access the product of the authors' creativity.

The position of the court in *Newzbin* is replicated in *Dramatico Entertainment Limited v BSKYB*⁶², a case addressing the liability of the infamous "Pirate Bay" file sharing site for authorising and communicating to the public copyrighted materials of a group of record companies. *Dramatico Entertainment* represents the first case where British courts were asked to award injunctions against ISPs in respect of peer-to-peer network using the BitTorrent file sharing protocol. The claimants had sought an injunction against the defendants under s97A of the Copyright, Designs and Patents Act 1988⁶³ requiring the Defendants to take measures to block or at least impede access by their customers to the Pirate Bay's (TPB) peer-to-peer file-sharing website. The Pirate Bay website enables users to upload, share and download various works in which copyright subsists. The defendants, major UK ISPs, were not the actual infringers they merely provided access to the internet and the website among other online facilities. They are not the actual provider of the tool for infringement. Although the actual secondary infringer was The Pirate Bay though no action was brought against it. On the evidence, it was not difficult for the court to establish a case of primary infringement which was an essential factor for authorisation of infringement. On whether The Pirate Bay authorised the infringing acts, Arnold J. relied on the dictum in *Twentieth Century Fox Film Corporation v Newzbin Ltd* where of Kitchin J highlighted five important factors to establish whether there is an authorisation or not. For the purpose of emphasis, these factors are: (i) the nature of the relationship, (ii) the means used to infringe; (iii) Inevitability of infringement; (iv) the degree of control, and (v) steps to prevent infringement. After analysing each of the factors, Arnold J found Pirate Bay operators liable for authorising the copying of the plaintiffs' work and

communicating them to the public. The act of the website operators transcended merely enabling or assisting the acts of the users. Most importantly, the court noted about the operators of Pirate Bay that

...[t]hey "sanction, approve and countenance" the infringements of copyright committed by its users. But in my view, they also purport to grant users the right to do the acts complained of.... I would add that I consider the present case to be indistinguishable from *20C Fox v Newzbin* in this respect. If anything, it is a stronger case.⁶⁴

The decisions in *Twentieth Century Fox Film Corporation v Newzbin Ltd* and *Dramatico Entertainment Limited v BSKYB* have found approval in approval in *Paramount Home Entertainment International Limited v British Sky Broadcasting Ltd*,⁶⁵ and *1967 Ltd v British Sky Broadcasting Ltd*⁶⁶ *Twentieth Century Fox Film Corp v Sky UK Ltd* (Popcorn Time)⁶⁷ among others.

Riordan, although agreed with the finding of liability in both *Twentieth Century Fox Film Corporation v Newzbin Ltd* and *Dramatico Entertainment Limited v BSKYB*, criticised the opinion of the court that Newzbin and Pirate Bay users might be under the impression their supplier of services possessed authority to grant permission in the infringed copyrighted materials. Such an assumption has "the appearance of fiction." (Riordan 2016). The assumption of authority is not sustainable because evidence showed that users of the facilities knew they had no authority from the copyright owners. Besides, the whole concept of authorisation will be rendered useless where a website dealing in exclusively infringed materials includes a disclaimer that it has no authority.

Nonetheless, as already observed instead of being preoccupied with a precise definition for 'authorise', the focus has now shifted to the activities of the defendant and other factual circumstances surrounding the allegation of infringement.

Australia

In Australia, the concept of authorisation has also had a lengthy history in the country's copyright jurisprudence. It is another jurisdiction where the concept has had extensive consideration by the courts. This jurisdiction is important considering the divergence of its interpretation of the authorisation when compared to the United Kingdom and Canada. The tort was first introduced under the Australian Copyright Act of 1905 which was repealed in 1912.⁶⁸ It is worth nothing that 'authorisation' is one of the areas where Australian law developed in advance of its UK counterpart and provided a template for the subsequent 1911 Imperial Copyright Act. In the amended Australian Copyright Act of 1968, s36 provides that:

Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or *authorizes* the doing in Australia of, any act comprised in the copyright.

Similar to the legislative approaches in the United Kingdom, neither the 1968 Act nor any of its predecessors provide a definition or guidance on the meaning of authorisation. While these legislations and cases which later developed from its interpretation may have shared legal ancestry, there is more of divergence in the

breadth and scope of definitions offered. What resonates clearly and follows the position in the United Kingdom is the ambit of 'authorise' which has been held to be wider than that of a principal-agent relationship in *WEA International v Hanimex*. The case concerned allegation that the defendant through an advert authorised the infringement of plaintiff's copyright. The defendant's advert stated that "if you don't want your favourite recordings ruined use FUJI GTI care tapes". Gummow J. affirmed that "[t]he introduction of the concept of 'authorisation' plainly was designed to meet perceived deficiencies in existing legislation".⁶⁹ If it had been otherwise, the court observed the plaintiffs in cases like *Sarpy v Holland*⁷⁰ would have been left without a remedy.

The divergence in the concept of authorisation is more reflected not just in the meaning but in its application by the courts of both Australia and the United Kingdom. In Australia, the leading authority on the authorisation of copyright infringement is the High Court decision in *University of New South Wales v Moorhouse*.⁷¹ The defendant, an educational institution was alleged to have authorised the infringement of the plaintiff's copyrighted literary works by placing in its library a photocopying machine which allowed the university's students to make photocopies of the plaintiff's work without the latter's permission. In holding the defendant liable for authorising the infringement of the plaintiff's copyright, the Australian court with approval, adopted the meaning of authorisation of the English court in *Falcon v. Famous Players Film Co. Ltd*⁷² and held that the word "authorise" in section 36(1) of the Copyright Act is used in the sense of "sanction, approve, countenance". Although there was no evidence of express permission given by the university to the students, the court inferred implied invitation based on indifference, exhibited by acts of omission. Per Jacobs J, the court concluded that:

[T]he word has a wide meaning which, in cases of permission or invitation, is apt to apply both where an express permission or invitation is extended to do the act comprised in the copyright and where such permission or an invitation may be implied.

So, Australian courts have widened the meaning of authorisation to cover 'permission' and 'invitation'. Applying the decision in *Performing Right Society v. Ciry Theatrical Syndicate*,⁷³ the court added that the word "authorise", in addition to meaning "sanction, approve, countenance" can also mean "permit". Later in *RCA Corporation v John Fairfax & Sons Ltd*,⁷⁴ the Supreme Court of New South Wales approved the definition in *Falcon* but gave the concept a different application. It appears that the Australian approach suggests that it is immaterial whether a person has a control or not, a person may be said to authorise another to commit an infringement if such a person is "responsible for placing in the other's hands materials which by their nature are almost inevitably to be used for the purpose of an infringement."⁷⁵ This Australian decision has adopted a broad view compared to the British decision in *CBS Inc v Ames Records & Tapes Ltd*. The conclusions in both *Moorhouse* and *RCA Corporation* have not been favourably received in the United Kingdom. Whitford J was unambiguous in declaring the proposition to be 'stated much too widely' and the House of Lords *Amstrad Consumer Electronics Plc v British Phonographic Industry Limited*⁷⁶ also rejected this broad application.⁷⁷

In 2000, the Copyright Amendment (Digital) Agenda was introduced among others things to provide further guidance on the element constituting infringements listed in s101 of the Australian 1968 Copyright Act. About authorisation of infringement, s101(1A) reads thus:

In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Although the *Explanatory Memorandum* to the Copyright Amendment (Digital Agenda) Bill 2000 suggested that the aim of the legislation was to codify the decision in *Moorhouse case*, it has however been argued that the amendments in s101(1A) are a departure from this claim (Ricketson and Ginsburg 2006). The Federal Court of Australia on appeal considered the application of the above section in *Cooper v Universal Music Australia Pty Ltd*⁷⁸. Previously, the lower court had held that a website operator and an internet service provider were both liable for authorising copyright infringement about a website that provided hyperlinks to sound recordings. The defendant operated a highly structured website with hyperlinks that enabled users to access and download music files. The website also had tools which allow users to include new links on the site. In dismissing the appeal against the decision of the Federal Court, it was found that there was an ongoing relationship between the defendant and the visitors to the websites. The defendants generated revenue from advertisements which were linked to the number of visits to the website. Also, the defendant did not take reasonable steps to prevent or avoid the use of his website for copying copyright sound recordings. Although there were disclaimers against copyright infringement, these steps were unreasonable and mere cosmetic steps which lacked the intention to genuinely prevent infringement. In dismissing the appeal, the court held that authorisation would be inferred where the relationship between the defendant and the alleged infringer is such that the defendant stands to gain financially from the infringing acts or activities leading to the infringement.⁷⁹

Conversely, where there was evidence of copyright infringement on a large scale, the court in *Roadshow Films Pty Ltd v iiNet Ltd*⁸⁰ held that the ISP, iiNet the did not authorise the infringing acts of its subscribers. The case against the defendant was the authorisation of the infringement of the claimants' films and television programs being carried out by the defendant's customers, through the use of the BitTorrent protocol. In finding no liability for authorisation, the court gave three reasons. First, the copyright infringement did not occur as a result of the iiNet provision of access to the internet but because of the use of the BitTorrent system. As the court explained, 'the "means" by which the applicants' copyright is infringed is an iiNet user's use of the constituent parts of the BitTorrent system.'⁸¹ Since the defendant has no control over the BitTorrent system, it is wrong to attribute the liability of infringement arising from the operation of the BitTorrent system to the defendant. The decision severs the two technologies under consideration – the BitTorrent and the access to the internet which is not the actual means of infringement. Second, iiNet did not have the

necessary “power to prevent infringement”. Schemes such as notification, suspension and termination of customer accounts do not fall within the relevant power to prevent copyright infringement pursuant s101(1A)(a) of the Copyright Act. It could be argued that this second reason follows from the first. The power to prevent will arise from the power to control. Third, on evidence iiNet did only provide an internet service to its users, it could not be said to have sanctioned, approved or countenanced copyright infringement. This position is clearly different from the defendants in Cooper’s case in which the respondents intended copyright infringements to occur, and in circumstances where the website and software were deliberately structured to achieve this result.

Nigeria: The Jungle of ‘Causes to do.’

‘Causes any other person to do’: Too clear or too ambiguous?

As already observed, the legislative provenance of ‘cause to do’, as a form of infringement could be traced to pre-1911 copyright legislations. If we adopted the argument of Ruth L. Gana on the history of copyright legislation in present day Nigeria, it is appropriate to assert that ‘*cause...to do*’ has been part of Nigerian copyright legislation since 1842. As already discussed, the English Literary Copyright Act of 1842 was introduced to Nigeria when the Ordinance No 3 of 1863 extended the Laws of England to the Lagos colony which was created in 1862 until it was displaced by authorisation as provided under the 1911 Act.⁸² When the Copyright Act of 1911 was passed in the United Kingdom, in pursuant to its s28, it was made part of the Nigerian law. Except where the cases interpreting the provisions are overruled by subsequent decisions or by a statute, such decisions continue to be the law in Nigeria.

As already mentioned, s15 of the Nigerian Copyright Act of 1988 provides that copyright is infringed by any person who without licence or authorisation of the owner of the copyright- (a) does or cause any other person to do an act, the doing of which is controlled by copyright...’ This provision is reminiscent of the wording s11 of the 1970 Act, which was earlier noted departed from the concept of authorisation introduced by the Imperial Copyright Act of 1911. Therefore the doctrine of “cause to do” which had been rejected was re-imported with applicable case law interpreting into the Nigerian legal system under the s15 of the Nigerian Copyright Act of 1988.

Either under the 1970 Act or the 1988 Act, none of the superior courts of records in Nigeria has attempted to define the breadth of liability that may be imposed on a third party where they are alleged to have supported or participated in the act of infringement. What is nature of the relationship between a secondary infringer and the actual infringer? The uncertainty created by this lacunae could only be better grasped in a hypothetical case. As noted in the introduction of this paper if Z had lent Y his employee a pen to write a letter but Y, however, used the pen to stab X in the course of an argument, it will be absurd to conclude that Z caused Y to stab X without doing nothing more. In other words, Y had the authority to use the pen to write his letter but not to use has a weapon of attack or defence. Z lacked control over what Y will do or is doing with the pen apart from requesting for the pen to be returned. The position would be different if Y requested for the pen in the course fighting with X and Z knew the intention of Y. The case may not be straightforward where the object Z gave Y is capable of one use but Z did nothing more than placing the object in Y hands and

Z was not aware of the intent of Y. Holding Z responsible for the action of Y may result in the much criticised Australian decision in *University of New South Wales v Moorhouse*.⁸³ Therefore, it is submitted that unless 'cause to do' is given a purposive interpretation; the phrase may be too broad will encompass such acts like facilitation, inducement, permission, aid and abet, persuasion, incitement, and procurement among others as the hypothetical case suggests. Looking at decisions like *Russell v Briant*, it may also be too narrow to incorporate those who may have the perceived authority to grant the right to infringe but who are not in a master-servant relationship with the primary infringer. The court, adopting a purposive rule of interpretation, could lean on the history of the Nigerian Copyright Act of 1988 in ensuring it cures the mischief which necessitated the Act and not just focuses on the existing case law.

Further uncertainty about the phrase could be gleaned when examined in relation to the right conferred on copyright owners. In granting exclusive rights to owners of copyright, the Act provides that 'in the case of a literary or musical work, to do and *authorise* the doing of any...'.⁸⁴ It is also used for infringement in respect of artistic works,⁸⁵ and cinematograph films.⁸⁶ Surprisingly, in enumerating the actual acts of infringement, the Act reverts to 'cause to do'. Two conclusions could be made at this point. First, the Act has used 'authorise' and 'cause to do' interchangeably and synonymously. The effect of this is that 'cause to do' may mean 'sanction' in the context of infringements listed under s15. Second, another effect lies in the fact that 'cause to do' could be interpreted as separate or another form of infringement from 'authorisation' for two reasons. The concept of authorisation was introduced to address some of the deficiencies identified in the interpretation of 'cause' as already noted. It will be absurd to conclude that the intention of the drafters of the Nigerian Copyright Act is to limit the liability for infringement to a master-servant relationship only. This logical inconsistency will defeat the purpose of the legislation except the court considers the Golden Rule approach which allows the court to consider the secondary meaning a word may have. However, there is no court decision in Nigeria that has considered the meaning of authorisation. If no cut off date is placed on the applicable common law which forms part of the imported law, the court may then benefit the interpretations from both the United Kingdom and Australia examined above. While there is nothing preventing Nigerian courts to look at these decisions, they remain persuasive authority until they are legislated or expressly adopted by the Nigerian Supreme Court.⁸⁷

Another uncertainty could be inferred from the order of appearance of both 'authorise' and 'cause...to do'. Under legislative interpretation in Nigeria, the approach is to resolve any inconsistency between two legislative provisions in the same statute in favour of the latter provision. If this interpretative approach is not followed, it may appear that the intent of the Act is to distinguish the instances where a person has an actual authority or right with 'authorisation' from 'causing to do' which amounts to 'unauthorised authorisation'. This is further supported by s31 which protects the expressions of folklore. That section has protected the expressions of folklore against reproduction, communication to the public, adaptations, translations and other transformations. Specifically, subsection 31(4) mentions the *right to authorise* these acts the power of which is vested in the Nigerian Copyright Commission. In respect of the right of broadcasting right, s9(1) provides that:

Where the owner of the copyright in any literary, musical or artistic work authorises a person to incorporate the work in a cinematograph film and a broadcasting authority broadcasts the film, the owner of the copyright shall, in the absence of any express agreement to the contrary between the owner and that person, be deemed to have authorised the broadcast.

From the above, it is submitted that 'cause to do' in s15 will not be synonymous authorise as used in s6 and other parts of the Act.

This legislative uncertainty was identified by Ogunkeye when examining the nature of copyright infringement under the repealed Nigerian Copyright Act 1970 (Ogunkeye 1992). Drawing from an unreported case in which he, Ogunkeye was the plaintiff's counsel, the writer observed the absence of clear guidance on what may constitute 'causes another person to do under the legislation and case law. The writer drew inferences from the decisions from the English case of *Amstrad Consumer Electronics Plc v British Phonographic Industry Limited*⁸⁸ and the *Moorhouse v University of New South Wales*⁸⁹ and concluded that:

In general, it must be noted that the Nigerian statute differ from the English and Australian Acts in that these Acts specify "authorise" whilst our Acts states "caused". It can, and it has been successfully argued that in most situations, the two words are synonymous. However, there exist decisions where that indicate that they are not totally synonymous (Ogunkeye 1992).

Though both "authorise" and "causes...to do" may be interpreted as being synonymous, this does not mean that the position is correct in the light of the legislative history and already examined court decisions. As already explained above, it should also be noted that both United Kingdom and Australia have the interpreted authorise differently. While the UK has adopted a narrow approach, the Australia approach is broad.

'Causes any other person to do': Too narrow or too broad?

If 'cause to do' is to be interpreted strictly following pre-1911 copyright legislations and decisions, it is obvious from the above that the legislation will suffer from a restrictive construction of the statute. In the context of online infringers, apparently, the relationship between many copyright infringers and technology providers cannot always be circumscribed within the principal-agent or master-servant relationship. In such instances, the relationship may be contractual, vendor-purchaser, distributor or provider of technology and end-user or customer. It may also be possible that an authoriser has no knowledge of the infringer and the relationship between them is too remote and may be unfair to attribute the act to the technology provider.

On the meaning of the phrase, the Oxford Advance Learners Dictionary gives the meaning of 'cause' as 'to make something happen' whilst the Oxford Thesaurus suggest synonyms such as 'bring about', 'give rise to', 'result in' 'induce' or 'inspire'.⁹⁰ There are two problems in relying on the dictionary meaning of 'cause'. First, in its ordinary dictionary or literal meaning 'cause' has a negative denotation unlike 'authorise' which is neutral and could encompass both positive and negative acts. Second, using thesaurus synonyms may not give an accurate meaning of the word in the context of the provisions of the Act. Arguably, it is clear that the use of

the word 'cause' under the s15 of the Nigerian Copyright Act suggests that the Act expects the defendant to have actively influenced the infringing act. It is in this instance that it could be argued that the defendant actually induced or brought about the infringement. On the other hand, it is not quite clear if an omission or wilful blindness to the infringing act will fall within the meaning of the phrase. *Cooper v Universal Music Australia Pty Ltd*⁹¹ and *Twentieth Century Fox Film Corporation v Newzbin Ltd*⁹² are decided on the positive acts of the defendants in encouraging infringement. Conversely, the absence of positive act or active inducement in *Roadshow Films Pty Ltd v iiNet Ltd*⁹³ is a factor in finding no liability for authorisation.

Finally, is the presence of authority or power to control a requisite factor for liability based on 'cause to do'? Authorisation can be inferred from command or permission, and this distinguishes it from procurement (Carty 1999). It may be argued that 'causes to do' does not necessarily connote presence of authority as demonstrated in the dictum of Whitford, J that "an authorisation can only come from somebody having or purporting to have authority..."⁹⁴ Considering the synonyms, 'bring about', 'give rise to', 'result in' 'induce' or 'inspire', it is doubtful if 'authority' is a relevant or a mandatory factor. It is possible to induce an act without having authority to do so. This is supported by the provision of 31(4) provides the right to *authorise* the reproduction of expression of folklore when compared with 'imports or causes to be imported under s15(b) under the Nigerian Copyright Act. The provision of s31(4) requires an actual or apparent authority from the authoriser while this may not be the case for 'cause'. Unless there is a narrow purposive interpretation making 'authority' a relevant factor, it will be possible to subsume acts like enablement, assistance, incitement and authorisation under 'cause to do'. Such a broad reading will miss the fine distinction between the 'provision of access' from the 'provision of means of infringement' as it was in *Roadshow Films Pty Ltd v iiNet Ltd*⁹⁵

Conclusion

The concept of authorisation has continued to evolve since it was introduced to address the liability of persons that might have been responsible for others' acts of infringement. Though with some difficulties, the concept has been found useful in addressing the liabilities of online intermediaries. The recent interpretation and application of the concept, in both Australia and the United Kingdom, appears to be moving towards the same direction. On the other hand, the concept of 'cause to do' has been stifled since it was replaced in the Imperial Copyright Act 1911 and continued to remain shrouded in legislative uncertainty in a country like Nigeria. The reason for this is not far-fetched from the absence of unequivocal and contemporary judicial pronouncement providing the needed clarity.

While it may be easy to find liability for secondary copyright liability based on the common law doctrine of vicarious liability, the breadth and scope of 'cause to do' will be less than certain when it forms the ground of allegation of infringement by a plaintiff. This uncertainty will be further complicated when the liability relates to online infringement where the defendant has only provided the means but not necessarily authorising or condoning the act of infringer. Any application of decisions on the pre-1911 Copyright Act will be too narrow and without a doubt leave a plaintiff without a remedy. On the other, a broad reading will fail to identify the fine line between authorisation and facilitation or enablement. This distinction has been

found to be important in not exposing technology provider to a blanket of liability. In summary, it is submitted that the lawmakers should reimport the doctrine of authorisation in the Nigerian copyright jurisprudence to replace the current phrase of ‘cause to do’ and also provide factors which will guide the court when finding liability authorisation of copyright infringement.

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Notes

¹(1985) F.H.C.L.R 264

² 1987 F.H.C.L 150

³ English Laws that are applicable fall into two categories: (i) those which were made to apply directly to Nigeria by their own force or by the order of the British Government and (ii) those which were received into Nigeria by local legislature.

⁴ Interpretation Act s45(1) provides that:

Subject to the provisions of this section, and except in so far as other provision is made by any Federal Law, the common law of England and the doctrines of equity together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in elsewhere in the Federation.

⁵ See the tests put forward by Osborne C.J. in *Attorney-General v John Holt & Co* (1910) 2 N.L.R 1

⁶ *Braithwaite v Folarin* (1938) 4 W.A.C.A 76

⁷ *Sanusi v Daniel* (1956)1 F.S.C. 93

⁸ *Molomo v Olusola* (1954) 21 N.L.R. 1

⁹ *Khami v McCaul & Co Ltd.* [1956] L.L.R 32

¹⁰ See Interpretation Act s45

¹¹ In *Plateau Publishing Co Ltd v. Chief Chuks Adophy* [1986] 4 NWLR (Part 34) 205 the Supreme Court found the common law position stated in Halsbury’s Law of England as a guide in explaining the requirements for a successful plea of innocent infringement under the 1970 Copyright Act.

¹² *Nabhan v Nabhan* [1967] 1All NLR47 at 54

¹³ (2014) LPELR-22014 (SC)

¹⁴ *ibid*; see also *Kraus Thompson Organisation v. National Institute for Policy and Strategic Studies NIPSS* (2004) 9 - 12 SCM (Pt.2) 53; (2004) 17 NWLR (Pt.901) 44.

¹⁵ (1960) 5 F.S.C. 1

¹⁶ (1836) 150 E.R. 724

¹⁷ *Saraki v the Federal Republic of Nigeria* (2016) LPELR-40013(SC); see also *Nigerian Army v Aminu Kano* (2010) 5 NWLR (Pt 1188) 429

¹⁸ *Okeke v Attorney General Anambra State* (1992) N.W.L.R 60

¹⁹ (1963) 1All N.L.R. 250; See also *Nwakire v Commissioner of Police* (1992) N.W.L.R. (Part 241) 289

²⁰ *Fidelity Bank PLC vs Monte* (2012) 10 NWLR (Pt.1307) 1 at 31

²¹ His Lordship had approved in entirety the decision of the lower court and the dictum of Oguntade JCA that “[the] Rules of Court are made as an aid to the dispensation of Justice. The Court should not readily adopt an interpretation which defeats or stultifies the delivery of Justice in the interpretation of court rules”

²² *Francis Adesegun Kato v Central Bank of Nigeria* (1991) 9 NWLR (Pt 214) 126

²³ (1963) 2 All N.L.R. 31

²⁴ *Agbaje v Fashola* (2008) 6 NWLR (1082)

²⁵ *Okumagba v. Egbe* [1965] 1 All N.L.R. 62

²⁶ [1949] 2 K.B. 481

²⁷ (1988) 1 NWLR (Pt.71) 449

²⁸ (1981) NSCC 314 at 388

²⁹ (1987) NWLR (Pt.67) 797

³⁰ *Magor and St. Mellons Rural District Council v Newport Corporation* [1951] 2 All ER 839

³¹ Hereinafter 1970 Act.

³² Decree No 47 of 1988

³³ The Model Law was adopted by the Committee of Government Experts convened by the Tunisian Government in Tunis from 23 February to 2 March 1976 with the assistance of WIPO and UNESCO.

³⁴ Copyright Act 1988 Cap C38 Laws of the Federation of Nigeria 2004 s1(1)

³⁵ *ibid* s51

³⁶ (1986) 4 NWLR (Partt.34) at p.205 per Karibi-Whyte, JSC

³⁷ *Ibid* s1(2)

³⁸ Copyright Act 1988 Cap C38 Laws of the Federation of Nigeria 2004, see generally Second and Third Schedules

³⁹ An Act to Amend and Consolidate Law Relating to Copyright 16th December 1911; See section 36 and Schedule 3 for the list of legislations repealed. Musical (Summary Proceedings) Copyright Act 1902, Musical Copyright Act 1906 and a section.

⁴⁰; [1924] 1 K.B. 1 at 12. This view was also shared by McCardie J in *Performing Right Society v Mitchell and Booker (Palais De Danse) Ltd.* [1924]1 K.B. 726 at 773

⁴¹ W.A. Copinger *Law of Copyright* 5th edition 1915 p 136

⁴² *Fenning Film Service v Wolverhampton, Walsall and District Cinemas* [1914] 3 KB 1171

⁴³ (1849) 8 CB 836

⁴⁴ *Ibid* at 849; See also *Kelly's Directories, Limited v Gavin and Lloyds* [1902] 1 Ch. 631 where it was held that the defendant who had himself contracted to do a printing had not “caused” it to be printed within the meaning of s. 15 of the Copyright Act, 1842

⁴⁵ [1924] W.N. 130

⁴⁶ [1924] W.N. 130

⁴⁷ [1914] 1 K.B. 395 CA.

⁴⁸ [1926] 2 K.B. 474

⁴⁹ *Ibid* [1926] 2 K.B. 474 at 490-491.

⁵⁰ *Ibid* at 499

⁵¹ *Ibid* [1926] 2 K.B. 474 at 490-491.

⁵² R.P.C. (2000) 117 (7): 249, 277

⁵³ [1946] VLR 338

⁵⁴ [1982] 1 Ch. 91

⁵⁵ [1982] 1 Ch. 91 at 106.

⁵⁶ [1988] A.C. 1013

⁵⁷ *Ibid*. See also Christina Angelopoulos “European Intermediary Liability in Copyright: A Tort-Based Analysis” (PhD Thesis, Institute for Information Law (IVI), University of Amsterdam, the Netherlands April 2016)

⁵⁸ 114 F Supp 2d 896 CND Cal 2000; *A&M Records Inc v Napster Inc* 239 F. 3d 1004 (2001) (9th Cir (US))

⁵⁹ [2010] EWHC 608

⁶⁰ [1982] R.P.C. 91

⁶¹ (1849) 8 CB 836

⁶² [2012] EWHC 268 (Ch)

⁶³ s97A of the CDPA implements Article 8(3) of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”)

⁶⁴ *Ibid* paragraph 81

⁶⁵ [2013] EWHC 3479 (Ch)

⁶⁶ These decisions should be compared to *Twentieth Century Fox Film Corp v Sky UK Ltd* (Popcorn Time) [2015] EWHC 1082 (Ch)

⁶⁷ [2015] EWHC 1082 (Ch)

⁶⁸ The Australian Copyright Act of 1905 ss 13, 14 and 34. The 1905 Act was repealed by the s4 of the Copyright Act 1912 which mirrored the Imperial Copyright Act of 1911.

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- ⁶⁹ (1987) 17 FCR 274 at 283
- ⁷⁰ (1908) 2 Ch. 198
- ⁷¹ (1975) 133 CLR 1
- ⁷² [1926] 2 K.B. 474
- ⁷³ [1924] 1 K.B. 1
- ⁷⁴ *RCA Corporation v John Fairfax & Sons Ltd* [1982] R.P.C 91
- ⁷⁵ *Ibid* at p 100
- ⁷⁶ (1986) FSR 159
- ⁷⁷ See also the decision of the Canadian Supreme Court in *Canadian Ltd v Law Society of Upper Canada* [2004] 1 S.C.R. 339, 2004 SCC 13 where it was concluded that the Moorhouse decision “shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole”.
- ⁷⁸ [2006] FCAFC 187
- ⁷⁹ *ibid*
- ⁸⁰ (No.3) [2010] FCA 24 available at <<http://www.austlii.edu.au/au/cases/cth/FCA/2010/24.html>> accessed on 25 June 2016
- ⁸¹ *ibid*
- ⁸² Emphasis supplied. It should also be noted that the provisions of the 1842 Act were made to apply in “... and all the colonies, settlements and possessions of the Crown which are now or hereafter may be acquired.” See Literary Copyright Act 1842, 5 & 6 Vict., c.45(Imperial).
- ⁸³ (1975) 133 CLR 1
- ⁸⁴ Nigerian Copyright Act 1988 s6
- ⁸⁵ *Ibid* s6(1b)
- ⁸⁶ *Ibid* s6(1c)
- ⁸⁷ Lower courts are to follow the decision of superior courts. Where a lower court follows a foreign decision which does not follow or align with the Supreme Court’s decision, such a decision will be reversed on appeal under the doctrine of *stare decisis*.
- ⁸⁸ (1986) FSR 159
- ⁸⁹ (1970) RPC 151
- ⁹⁰ <<http://www.oxforddictionaries.com/definition/english-thesaurus/cause>> accessed 08 March 2016
- ⁹¹ [2006] FCAFC 187
- ⁹² [2010] EWHC 608 (Ch.)
- ⁹³ (No.3) [2010] FCA 24
- ⁹⁴ *C.B.S. Inc. v. Ames Records & Tapes Ltd.* [1982] Ch. 91, 106
- ⁹⁵ (No.3) [2010] FCA 24

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