



## THE PROPRIETY AND MORALITY OF COMPULSORY LICENSING UNDER COPY RIGHT

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### ABSTRACT

*Copy right refers to an exclusive legal right of a holder to reproduce, publish, sell, or distribute the matter and form of something (such as a literary, musical, or artistic work). It is a property right in an original work of authorship including literary, musical, dramatic, choreographic, pictorial, graphics, sculptural, and architectural works: motion pictures and other audio visual works; and sound recording fixed in any tangible medium of expression, giving the holder the exclusive rights to produce, adapt, distribute, perform, and display the work. However, this right is not absolute because it is morally prejudicial and socially unacceptable of an author to further and promote the concept monopoly by limiting the circulation availability of needed and affordable literary works. Therefore, compulsory licensing is based on the need to have access to protected works on practicable terms, realizing the difficulty or impossibility of obtaining license from copy right owners and seeking to avoid the creation of monopoly at the expense of the public. Therefore, it is not arguable that the grant of compulsory license is founded on necessity. This work will pivot around the Nigerian and International legal framework on compulsory licensing, the eligibility criteria for application of compulsory license, an evaluation of the morality of compulsory licensing under copy right and the author's prejudice shall lastly be considered. Conclusion and recommendations shall be drawn from the outcome of the research.*

### INTRODUCTION

In the past<sup>1</sup>, compulsory licensing was a phrase missing in the Nigerian statute books but the legal environment is one that is constantly subject to change. Today,<sup>2</sup> compulsory license is a legal right which has gained so much prominence and should be protected against prejudice and infringement just like every other right created by the Statute. Copy right gives an exclusive legal Right to a holder to reproduce, publish, sell, or distribute the matter and form of something (such as a literary, musical, or artistic work).<sup>3</sup> It is also a property right in an original work of authorship.<sup>4</sup> It is a general rule under intellectual property law that an

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<sup>1</sup> Copy Right Act of 1970.

<sup>2</sup> Copy Right Act of 2022.

<sup>3</sup>Merriam Webster, 'Copy right' (16 November 2023) available at <<https://www-MerriamWebster.com/dictionary/copyright>> accessed 23/11/2023

<sup>4</sup> Bryan Garner, *Black's Law Dictionary*, (9<sup>th</sup> edition: West Publishers) 386.



intellectual property owner enjoys exclusive rights that it may license or decline<sup>5</sup>. However, compulsory license provides that the owner of a Copy Right, licenses the use of their rights against desirable payment set by the owner of the Copy Right. In essence, such license is a compulsory one because it is obtained from a Rights holder by compulsion though in line with statutory guidelines<sup>6</sup>.

Compulsory licensing regime is a practice in certain jurisdictions in which the government authorization law allows a person other than an author of a copyrighted work under certain circumstances to make, use, copy, sell, and reproduce a literary, musical, cinematographic film, artistic, recording without the consent of the owner.

Copy Right Protection, has been accepted worldwide as a necessary tool to foster innovation and Nigeria is no exception. Accordingly, the Copy Rights Act, section 15<sup>7</sup> prohibits any person without the license or authorization of the owner from doing or causing any person to do an act, the doing of which is controlled by Copy Right. In the same vein section 18 of the same Act criminalizes some forms of Copy rights infringement.

However, situations may arise where exclusive right may not stand the test of public interest and breach is allowed. This research will primarily access the propriety or morality of a compulsory licensing regime for the translations and production of some literary and artistic works that are unavailable either because they are out of print or they have never been printed.

## **VIEWING COPY RIGHT COMPULSORY LICENSING THROUGH THE LENS OF LOCAL LEGISLATIONS**

### **(a) The constitution**

The Constitution of the Federal Republic of Nigeria, section 44(1)<sup>8</sup> states that no moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:

- (a) Requires the prompt payment of compensation therefore and

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<sup>5</sup>Copy Right Act, ss 10 and 12, Cap 28 Laws of the Federation of Nigeria

<sup>6</sup>Bankole Sodipe, Copy Right Law, Principles Practice and Procedure (2nd edn, Swan Publishing 2017) 349.

<sup>7</sup>Cap 28 Laws of The Federation of Nigeria.

<sup>8</sup>The Constitution of the Federal Republic of Nigeria (1999) as amended.



- (b) Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body/having jurisdiction in that part of Nigeria.

From the foregoing, on the fulfillment of the exceptions clearly provided by subsections (a) and (b) above, compulsory licensing is also founded on the constitution of the Federal Republic of Nigeria being the grundnorm law.

### **(b) Copy Rights Act.**

The Law<sup>9</sup> enjoins the Nigerian Copy Right commission to grant compulsory license in a copyrighted work to applicants once the necessary conditions have been fulfilled. Again, apart from the grant of a compulsory license, there is indeed no doubt that there must necessarily be some acts which should not in the interest of the public be regarded as an infringement of the right of the copy right owner. Those acts are contained in the second and third schedule to the Copyright Act<sup>10</sup>.

From the foregoing statutory provisions on compulsory license, it is clear that compulsory licensing is founded on necessity. The previous enactments on Copy Right such as the Copy Right Act of 1970 did not contain any provision on compulsory licensing. It is indeed noteworthy that the 1988 Copy Right Act had however corrected this anomaly.

### **VIEWING COPY RIGHT COMPULSORY LICENSING THROUGH THE LENS OF INTERNATIONAL LEGISLATIONS**

Nigeria, like most countries of the world is a subscriber to international conventions which are intended to set internationally acceptable standards that the domestic legislation on various species of intellectual property must attain as well as to accord intellectual property an international protection. Consequently, there are numerous international conventions lending weight to the Compulsory Licensing of Intellectual properties.<sup>11</sup> These include, but are not limited to, Berne Convention for the Protection of Literary and Artistic Works of Authors, Universal Copyright Convention, World Trade Organization Agreements on Trade-Related Aspects of Intellectual Property Rights. The aforementioned International Legislations shall be considered seriatim.

<sup>9</sup> Copy Rights Act, s37(1), Cap C28 Laws of the Federation, 2004.

<sup>10</sup> Copy Rights Act Schedule 11 and 111, Cap C28 Laws of the Federation of Nigeria.

<sup>11</sup>B. Abubakar, 'An Appraisal of Copyright Administration in Nigeria towards a Sustainable Development' [2014] (16) *Journal of Business and Management*.

### (a) **Berne Convention**

Berne Convention's primary function is protection of original works and legal rights of their authors/creators, which Nigeria is a signatory amongst a host of other countries.<sup>12</sup> Article 11(2) and Article 13(1)<sup>13</sup> provide the legal basis for compulsory licensing at the international level. They specify conditions under which members to the Berne Convention may determine which exclusive rights may be exercised, for example through compulsory licensing. The Berne Convention states that, 'Member states are free to determine the conditions under which certain exclusive rights may be breached in their national laws. They also provide for the minimum requirements to be set when compulsory licenses are applied, such that the right of the owner is not prejudiced.' Accordingly, Article 11<sup>14</sup> states that:

It shall be a matter for legislation in the country of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by a competent authority.

Article 13(1) states that:

Each country of the Union may impose for itself, reservations and conditions on the exclusive right granted to the author of a music work and to the author of any words, the recording of which together with the music work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Suffice to say that the system of exceptions allowed in the national laws of member states involves a set of compulsory licenses which are not exclusive, non-transferable and remunerative like what is obtainable in the Legal Regime of Compulsory licensing under Nigerian Copyright, which is in tandem with the international standards.

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<sup>12</sup> (n11).

<sup>13</sup> Article 11 of the Appendix to the Berne Convention for the Protection of Literary and Artistic Works.

<sup>14</sup> *ibid.*



### **(b) Universal Copyright Convention**

In countries that subscribe to the Universal Copyright Convention (U.C.C.) including the United States, an author may be required to grant a compulsory license to a subscribing government to translate his or her work into that country's primary language if no translation has been published within seven years of the work's original date of publication. This rule precludes copyright owners in most countries from preventing the translation of works covered by their copyrights into different languages.<sup>15</sup>

### **(c) World Trade Organization Agreements on Trade-Related Aspects of Intellectual Property Rights:**

One of the important International Law relating to compulsory licensing is the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. Article 8, paragraph 2<sup>16</sup> provides that countries may need to take appropriate measures to prevent the abuse of intellectual property rights by Copy Rights holders or anti-competitive practices which impede trade and general economic growth.

From the Foregoing the regime of compulsory licensing is protected not just locally but internationally.

### **APPLICANT'S ELIGIBILITY TEST/ LICENSE TO PRODUCE AND PUBLISH TRANSLATIONS**

There are certain persons and group of persons considered Eligible to Apply for Compulsory Licensing where the imposed conditions are fulfilled. For example, applications for the license to produce and publish translations of literary and artistic works; reproduce and publish literary and artistic works for certain purposes pursuant to this regime can only be made by a qualified person or body, and there are three categories of qualified persons: a Nigerian Citizen, an Individual domiciled in Nigeria and a body corporate incorporated under any written law in Nigeria.<sup>17</sup> By virtue of the Copy Rights Act,<sup>18</sup> compulsory licenses can also be obtained by broadcasting organizations or qualified persons to produce and publish the translation of certain works for the purpose of systematic instructional activities, teaching, or for the dissemination of the result of specialized, technical or scientific research to experts

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<sup>15</sup> Richard Stim, 'Copyright and Compulsory Licenses' [2005] Indian Journal of intellectual Property Law <<https://www.nolo.com/legal-encyclopedia/copyright-compulsory-license.html>> accessed on 23/11/2023.

<sup>16</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights <<http://www.cptech.org/ip/copyright/cl/trips.html>> accessed on 23/11/2023.

<sup>17</sup> Copy Right Act, 4<sup>th</sup> schedule, s1.

<sup>18</sup> (n17) section 4(1) a and b.



in any field. To be granted a license to produce and publish translations, the Nigerian Copy Right Commission must be satisfied that:

1. No translation of the work into the language in question has been published in printed or analogous forms of reproduction, by or with the authorization of the owner of the right of translation. Alternatively, where such authorized translations had been previously published, the Nigerian Copy Right Commission must then be satisfied that such previous editions in that language are out of print.<sup>19</sup>
2. The Nigerian Copy Right Commission must be satisfied that the Applicant had requested and had been denied authorization by the owner of the copyright to produce and publish such translations, or that he was, after due diligence on his part, unable to find such owner.<sup>20</sup>
3. The Commission must be satisfied that due diligence was established on his part, and due diligence may be established by an Applicant who demonstrates that he had sent a copy of the request through air-mail post to the publisher from the work not less than two months before the application for license<sup>21</sup> from the date of sending such copy, and the translation of the work in the language mentioned in the application has not been published by the owner of the Copy Right in the work or any person authorized by him within the period of six months<sup>22</sup> or nine months<sup>23</sup> as the case may be.
4. The applicant may need to satisfy the commission that at the time he submitted an application for authorization to translate he/she had informed any national or international information Centre designated for this purpose by the government of the country in which the publisher of the work to be translated is believed to have his principal place of business<sup>24</sup>. However the Applicant will be under no obligation to inform any center where no such Centre is designated by the Government of the country of origin of the Publisher<sup>25</sup>.
5. The Commission must be satisfied that the Applicant is competent to produce and publish a correct translation of the work and possesses the means to pay to the owner of the copyright the royalties payable to him under the Copy Right Act.<sup>26</sup>

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<sup>19</sup> Copy Right Act, s2(7).

<sup>20</sup> *ibid* 2(7) b.

<sup>21</sup> *ibid* 2 (7) c.

<sup>22</sup> A period of six months in the case of an application for a licence for translation into English.

<sup>23</sup> A period of nine months in the case of an application for a licence for translation into any language spoken in Nigeria

<sup>24</sup> *ibid* 2 (7) d.

<sup>25</sup> Bankole (n6)353.

<sup>26</sup> Fourth Schedule to Copy Right Act section 2 (7) (e).



6. The Applicant must satisfy that the name of the author and the title of the particular edition of the work proposed to be translated are printed on all the copies of the translation<sup>27</sup>
7. The Commission is obliged to ensure that where the work sought to be licensed is composed mainly of illustrations, the provisions of section 3 of the Copy Right Act must be complied with.<sup>28</sup>
8. The Applicant needs to show that the author of such work to be translated has not withdrawn from circulation copies of the work.<sup>29</sup>
9. It is also a statutory pre-requisite that an opportunity of hearing should be given to the owner wherever practicable.<sup>30</sup>

### **License to Reproduce and Publish Literary and Artistic Works for Certain Purposes**

Any of the three conditions listed below may trigger an application for a compulsory license to reproduce and publish literary and artistic works, which are:

1. That after the expiration of the relevant period from the date of the first publication of an edition of a literary or artistic work, the copies of such edition are not made available in Nigeria.
2. That such copies have not been put on sale in Nigeria for a period of six months, by the owner of the right of reproduction or by any person authorized by him in that behalf to the general public.
3. He may establish that copies of the work have not been sold at a price reasonably related to that normally charged in Nigeria for comparable works in connection with systematic instructional activities, any qualified person may apply to the Commission for a license to reproduce and publish such works in printed or analogous forms of reproduction at the price at which such edition is sold or at a lower price for the purposes of systematic instructional activities.

However, none of these three conditions may be fully exploited until after the statutory period. The relevant period that must have elapsed before a work can be susceptible to compulsory licensing depends basically on the nature of work. Sections 3(7a) and 3(7b)<sup>31</sup> provides for the relevant period in clear terms.

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<sup>27</sup> (n26)2 (7) g.

<sup>28</sup> *ibid* 2 (7) h.

<sup>29</sup> (n26) 2(7) i.

<sup>30</sup> *ibid* 2 (7) j.

<sup>31</sup> The relevant Period for an application for the reproduction and publication of any work of, or relating to fiction , poetry, drama, music, or art is seven years from the date of the first publication of that work'. where



4. Every such application shall be made in such forms as may be prescribed and shall state the proposed retail price of a copy of the work to be reproduced and prescribed deposit application fee<sup>32</sup>.

The Commission may however grant the applicant a non-exclusive license under this paragraph, after holding such inquiry as may be prescribed, to produce and publish a reproduction of the work mentioned in the application subject to the conditions that<sup>33</sup>

- (i) The Applicant shall pay the owner of the copy Right in the work royalties calculated at such rate as the Nigerian Copy Right commission may in the circumstance determine.
- (ii) The proposed licensee shall not have the right to export copies of the reproduced works outside Nigeria and every copy of such reproduction shall contain a notice that the copy is available for distribution only in Nigeria.<sup>34</sup>

The Nigerian Copy Right Council must not grant a license unless the two conditions above are satisfied, the above conditions sought to be fulfilled by the applicant remains a shield against the unnecessary prejudice of the owner of a Copy right.

### **THE PROPRIETY AND MORALITY OF COMPULSORY LICENSING UNDER COPY RIGHT**

Compulsory licensing is created to cure the problem of monopoly which is a mischief created by some authors who negate societal norms by restricting the publicity on literary and artistic works. The morality and propriety of compulsory licensing shall be considered successively;

1. A non-compulsory Licensing regime will lead to scarcity of books and other literary and artistic works, and scarcity of books will eventually attract more pirates which was a mischief sought to be cured by the Copy Right Act.
2. By allowing compulsory Licensing, developing and underdeveloped countries can ensure availability of needed literary works to their citizens at affordable prices.
3. The Local industries which produce pirated works employ thousands of works and therefore reduce unemployment.

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the application is for the reproduction and publication of any work of, or relating to fiction, poetry, drama, music or art; and three years from the date of the first publication of that work, where the application is for the reproduction and publication of any work of, or relating to natural science, physical science, mathematics or technology.

<sup>32</sup> (n26) 3(2) and 3(3).

<sup>33</sup> (n26) 3(4)(a).

<sup>34</sup> *ibid* 3(4)(b).



4. In order to advance in science and technology, third world countries need maximum access to intellectual property of advanced nations<sup>35</sup>.
5. Absolute Copy Right protection will impede the growth of developing nations unless access to educational materials in particular is liberalized.
6. Compulsory licensing is necessary in situations where its refusal may prevent utilization of another important creation of an artistic work which can be significant for the nation's growth.
7. The use of compulsory licensing to protect the public interest can be defended on social justice grounds; strict adherence to Copy Right protection can hardly be recommended at the cost of National Intellectual growth.
8. Since Copy Right is a privilege granted to the copy Right holder by the government, it is morally acceptable for the government to limit the privilege in deserving circumstances.

### **Compulsory Licensing Regime and the Author's Prejudice**

1. Compulsory license is an outright interference in the exclusive rights of the copy Right holder because it is an action of the government that forces an exclusive holder of a right to grant the use of that right to others upon the terms decided by the government compulsorily.
2. Incentive and motivation to innovate and create new works may be diminished as a result of compulsory licensing.
3. The public benefit principle underlying copyright suggests that the purposes of copy right is to encourage works to be created in order for the public to enjoy the works.<sup>36</sup> Authors should therefore be protected in the hope that the protection will encourage the creation of more works. However, such a protection is remotely and hardly expected due to compulsory licensing regime.
4. There must be an incentive to invent because commercialization of new ideas involves money and effort.<sup>37</sup> The amount of royalties set by the state granting a compulsory

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<sup>35</sup> Muhammad Z. Abbas, 'Pros and Cons of Compulsory Licensing : An Analysis of Arguments' [2013] *International Journal of Social Science and Humanity* Queensland University of Technology, Faculty of Business and Law; Australian Centre for Health Law Research <[www.ijssh.org/papers/2313.pdf](http://www.ijssh.org/papers/2313.pdf)> accessed on 23/11/2023.

<sup>36</sup> (n35)71.

<sup>37</sup> Gianna J. Arnold, 'International Compulsory Licensing: the Rationales and the Reality' [1993] *The Journal of Law and Technology*, < [www.ijssh.org/papers/239-D00013.pdf](http://www.ijssh.org/papers/239-D00013.pdf)> accessed on 23/11/2023.



license cannot be considered as an incentive for further research; it is no way near the potential financial benefit which the Copy Right holder would have enjoyed on an exclusive basis. This indeed remains an author's dilemma on whether or not to create more artistic works for the public at no charge.

5. Compulsory licensing has been opposed by many developed countries, the countries which implement compulsory licensing provisions are criticized by the United States and the foreign multinational firms because the licensee reaps the benefits of other's research without contributing their fair share to the cost incurred on research and development<sup>38</sup>
6. As a result of a weak Intellectual property regime, a country becomes less competitive, and brain drain is an obvious result. It becomes nearly impossible for such countries to retain their human capital; the talented artists and creative minds leave the country in search of better opportunities elsewhere in the world where their talents will be appreciated, protected and their efforts squarely rewarded.
7. Without strict compliance with laws regulating the acquisition and dissemination of Intellectual property (copyright), the creators of this work can neither be adequately compensated for their costs of research nor be encouraged or motivated for further research to create more works.

## CONCLUSION

The propriety and morality of a compulsory licensing regime under copyright is a complex and multifaceted subject matter with compelling arguments for and against it. Compulsory license is an absolute right of the government which restricts the rights of a copy right holder by authorizing third parties to use and sell copyrighted works without prior consent from the Copy Right holder. It may be argued that compulsory license is a necessary evil, a mechanism used by the government to regulate and sustain intellectual development but the author opines that compulsory licensing regime is a gross violation of the rights of the Copy Right holder because it is an action of the government that compels an exclusive holder of a right to grant the use of that right to strangers upon the terms decided by the government compulsorily.

It is noted again that compulsory license is a mechanism with legal back up and in a bid to ensure a Nigerian Legal system with a stable intellectual property regime a balance must be struck, this balance can only be attained if the government is willing to pay more

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<sup>38</sup> (n37).



attention to the remuneration and compensation payable to the Copy Right owner to assuage the feelings of emotional and financial loss occasioned by the grant.

## **RECOMMENDATIONS**

Having examined the concept of compulsory licensing under copy right in Nigeria, vis-à-vis the author's ordeal, the following recommendations are made, to wit;

1. A thorough review of the provisions of the Copy Rights Act which are archaic and moribund should be replaced with functional provisions thereby providing an adequate legal infrastructure and progressive policies on protection of Intellectual properties which Copy right is an aspect.
2. The laws and practice directions regulating remuneration of copy right holders whose rights are compulsorily infringed on should be reviewed to reflect a satisfactory compensation plan.
3. The Copy Rights Act should be reviewed to capture a lengthened exclusive proprietorship time before statutory expiration. Consequently, copy right holders will hardly entertain fear to grant license voluntarily knowing that they have enjoyed many years of proprietorship.