

Abstract

This paper examines the concept of authorship within Nigerian copyright law, highlighting its complexities and the ambiguities that arise due to inconsistent definitions across various types of creative works. The 2022 Copyright Act defines authorship differently based on the category of work, but lacks clear definitions for literary, musical, and artistic creations, which complicates judicial determinations. Aiming to clarify authorship standards, this doctrinal research explores the legal criteria of originality and fixation, which are critical to authorship ascription. Rooted in philosophical theories such as Locke's labour theory and personality theory, the analysis justifies the protection of moral and economic rights, which are vital to incentivising creativity and respecting the creator's personal connection to their work. Key findings reveal that while Nigerian copyright law addresses authorship broadly, it lacks a cohesive framework that aligns with international standards on eligibility and copyright criteria. The paper recommends clearer definitions within the Act and consistent judicial interpretations to reduce ambiguity, especially in collaborative works. By establishing comprehensive authorship criteria, Nigerian copyright law can foster a supportive environment for both individual and collective creators, enhancing legal clarity and predictability in copyright administration.

Keywords: Authorship Criteria, Copyright Law, Intellectual Property, Nigeria

1. Introduction

In the intricate field of intellectual property, authorship is a foundational concept, pivotal to the recognition and protection of creators' rights. Unlike its everyday usage, which associates authorship with the creator of a written text, the term in copyright law encompasses a broader, more nuanced range of definitions and implications. In Nigerian copyright law, the concept of authorship is further complicated by varying definitions depending on the type of creative work. The Copyright Act of 2022, for instance, provides differing criteria for defining an author across categories like audiovisual, collective, and photographic works. Yet, the Act lacks explicit definitions for literary, musical, and artistic works, leading to ambiguity and potential challenges in the judicial determination of authorship. The absence of a universal definition of 'author' in both international treaties and Nigerian law raises essential questions regarding what constitutes authorship and the criteria needed to substantiate it. At the heart of this issue is the need for clarity in authorship criteria, particularly in a landscape where the creative process is collaborative, and disputes over copyright are frequent.

This paper examines the standards for ascribing authorship under Nigerian copyright law, with a focus on the principles of originality and fixation. It also explores the philosophical foundations that justify authorship, considering how these underpinnings shape the legal framework for copyright eligibility and ownership. By analysing these elements, this paper seeks to provide a clearer understanding of authorship criteria, addressing the need for legal definitions that support both creators' rights and practical enforcement. In doing so, this paper discusses the various works protected under the Act. This analysis is crucial for comprehending the legal rights of authors and the broader implications for the creative sector in Nigeria. It addresses the core problem of ambiguity in Nigerian copyright law concerning authorship; it investigates how the law currently defines an author, the implications for rights holders, and the potential for more cohesive criteria to support the administration of copyright. The paper explores the necessity of protecting authors, focusing on two key aspects: moral and economic rights. Moral rights preserve the personal and emotional connection between authors and their creations, while economic rights incentivise creative work by offering authors control over the commercial use of their intellectual property. This duality underscores the value of authors as essential contributors to cultural, educational, and economic growth. Additionally, the paper examines how Nigerian copyright law aligns with international standards, determining copyright eligibility based on factors like nationality, habitual residence, and publication origin. Through this exploration, the paper ultimately aims to enhance the understanding and application of authorship criteria within Nigeria's copyright system, fostering a legal environment that better supports both individual and collaborative contributions to creative works.

2. Works Protected Under the Nigerian Copyright Act

One of the fundamental objectives of the Copyright Act, 2022 ('The CA') is to 'protect the rights of authors to ensure just rewards and recognition for their intellectual efforts.'¹ The CA addresses the concept of authorship and the definition varies based on the type of work, with a focus on the eligible work. The works of authorship which are eligible for protection under the CA are literary works, musical works, artistic works, audiovisual works, sound recordings, and broadcasts.² The comprehensive protection for this wide range of creative works under the CA aims to safeguard the rights of creators and incentivise the production of new works, thus fostering cultural and economic development. Understanding the scope of protected works under the CA is essential for both creators and users of these works, thus this segment of the paper aims to explore each of the six categories of protected works.

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¹ Section 1(a) of the CA

² Section 2(1) of the CA

Literary work

The genesis of copyright primarily centered on literary works, initially confined to the writings of authors. Over time, however, the scope has expanded, encompassing works that were once considered within the literary domain but are now aptly categorised as artistic works.³ Rather than defining 'literary work' explicitly, the CA instead itemises various works falling under this classification. Section 108(1) simply states that 'literary work' includes, irrespective of literary quality, any of the following works or similar works-

- a) novels, stories and poetical works,
- b) plays, stage directions, audiovisual works scenarios and broadcasting scripts;
- c) choreographic works;⁴
- d) computer programmes;⁵
- e) text-books, treatises, histories, biographies, essays and articles;
- f) encyclopaedias, dictionaries, directories and anthologies;
- g) letters, reports and memoranda;
- h) lectures, addresses and sermons;
- i) law reports, excluding decisions of courts;
- j) written tables or compilations.

The use of the term 'includes' signals that the listed works are not exhaustive, allowing for extension by analogy to include similar works. It is important to note that the term 'literary' transcends the conventional notion of high literary quality. The phrase 'irrespective of literary quality' emphasises that the yardstick for inclusion is not the artistic merit but rather the manifestation of the work in a medium perceptible to the senses. In the landmark case of *University of London Press v. University Tutorial Press*⁶, the court clarified that 'literary work' encompasses content expressed in print or writing, regardless of its quality or style. Despite the case's vintage nature, Asein suggests its obsolescence in light of technological advancements that have liberated literary works from being exclusively in written or printed form.

⁷ Addressing the essence of a literary work, Davey, L.J, asserted that it should intend to provide information, instruction, or literary enjoyment.⁸ This perspective led to the rejection of the term 'EXXON' as a literary work, with Oliver, L.J, deeming it devoid of qualities demanded by common sense.⁹

Musical work

The term 'Musical work' within the context of Nigerian Copyright Act is defined to mean 'musical composition, irrespective of musical quality.'¹⁰ Similar to literary works, the musical quality or merit of the work holds no relevance; what matters is the presence of a sequence of notes and sounds. Therefore, any musical composition, regardless of its seriousness or lightness, qualifies as a musical work as long as it meets the criteria of originality and fixation. The use of the term 'composition' implies that the work must consist of music, setting it apart from mere lyrics, which fall under the category of literary works. When words are set to music, dual ownership of copyright arises: the composer retains copyright in the composition, while the lyricist is entitled to copyright in the lyrics.¹¹

Artistic work

According to the Nigerian Copyright Act, 'artistic work' includes, irrespective of artistic quality, any of the following works or similar works-

- a) painting, drawing, etchings, lithographs, woodcuts, engravings and prints;
- b) maps, plans and diagrams;
- c) works of sculpture.
- d) photographs not comprised in audiovisual work;
- e) works of architecture in the form of buildings models; and
- f) works of artistic craftsmanship, including pictorial woven tissues and articles of applied handicraft.¹²

The essence of an artistic work lies in its visual significance, as articulated by Lord Oliver in *Interlego v. Tyco Industries*.¹³ Notably, artistic works do not necessarily require artistic merit, except in the case of works of artistic craftsmanship. The term 'works of artistic craftsmanship' lacks a specific definition in the Act. However, as suggested

³ For instance, maps, charts, and plans.

⁴ This is defined to mean a composition of movements for dancing or any other patterned succession of gestures mostly created to accompanying music.

⁵ This means a set of statements or instructions, whatever may be the mode or form of their expression, to be used directly or indirectly in a computer in order to bring about a certain result.

⁶ *University of London Press v. University Tutorial Press* (1916) 2 Ch. 601.

⁷ JO Asein, *Nigerian Copyright Law and Practice* (2edn Books and Gavel Ltd, 2012) p.53

⁸ *Hollinrake v. Truswell* (1884) 3 Ch. 420.

⁹ *Exxon Corporation v. Exxon Insurance Consultants International* (1982) R.P.C.69; (1982) 1 Ch.119. See also *Express Newspaper v Liverpool Daily Post* [1985] F.S.R. 306 where Whitford, J found that the grid of five by five letter and two additional lines of five letters published of the plaintiff qualify as literary work in that at least it provides information to those who have one of the Millionaire club cards for the purpose of knowing whether they have won or lost in the 'Millionaire of the Month' competition.

¹⁰ Section 108(1)

¹¹ See *Chappell & Co Ltd v. Redwood Music Ltd* [1981] R.P.C. 337

¹² See section 108(1)

¹³ (1988) RPC 343

by Lord Reid in *Hensher v. Restawile Upholstery (Lanes) Ltd*¹⁴, it implies something valued by its owner for its artistic character, whether or not it has practical utility. The concept of 'artistic appeal' plays a crucial role, with Lord Oliver highlighting that the maker's or designer's intention for an object to have artistic appeal is significant but not necessarily conclusive.

Audiovisual Work

The term 'audiovisual work,' is defined to mean the aggregate of a series of related visual images, with or without accompanying sound, which is capable of being shown as a moving picture by means of a mechanical, electronic, or other device, and irrespective of the nature of the material on which the visual images and sounds are carried and includes the sound tract, but does not include a broadcast. The comprehensive definition encompasses both silent and sound motion pictures, irrespective of their purpose, genre, or duration, whether fixed on transparent films or electronic videotape. Notably, the definition explicitly excludes broadcasts from the scope. The exclusion is essential to differentiate audiovisual works from broadcasts, emphasising the distinct nature of these two categories within the realm of copyright.¹⁵ Asein, explaining the meaning of cinematograph film under the repealed Copyright Act of 1988 states that the definition of cinematograph film excludes slide shots, being incapable of presentation as a moving picture, are instead protected solely as photographs.¹⁶ The position is not different under the extant law consequently slide shots do not fall under the classification of audiovisual works.

Sound recording

The CA defines sound recording to mean the fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound track accompanying or incorporated in an audiovisual work.¹⁷ A sound recording has to do with the ear, while audiovisual work to visual images.

Broadcast

'Broadcast' means the transmission by wireless means of sound or images or both, in such a manner as to cause such images or sound to be received by the public.¹⁸ The definition includes cable programmes, but excludes rebroadcast. 'Re-broadcast' means a simultaneous or subsequent broadcast by one broadcasting organisation of the broadcast of another broadcasting organisation.

It is in respect of the works discussed above that an author enjoys exclusive economic right, and to be accorded protection each of these eligible works must satisfy the requirements of originality and fixation. Section 3 of the CA however make ideas, procedures, processes, formats, methods of operation, concepts, principles, discoveries or mere data ineligible for copyright. Additionally, official text of a legislative or administrative nature as well as any official translations thereof; except their compilations; and official state symbols and insignia, including flags, coat of arms, anthems, and bank note designs are excluded.¹⁹

3. Defining Authorship and Criteria for Ascription in Nigerian Copyright Law

Within the broad realm of intellectual property, authorship serves as a foundational element, crucial in defining the origins of creative expression and the rights and responsibilities that accompany it. In everyday terms, an 'author' typically refers to the writer of a written work, but this interpretation does not align with copyright law, and there is no single, universal definition of the term. In Nigeria, the term 'author' is defined differently based on the type of eligible work. Section 108 of the Copyright Act of 2022 provides definitions tailored to each category. For example, in the case of audiovisual work, the author is the person responsible for making arrangements for the creation of the work, unless otherwise specified by contract. For a collective work, the author is the individual responsible for selecting and arranging the collection, while for photographic work, the author is the person who took the photograph. In the context of sound recordings, the author is the individual who arranged for the creation of the sound recording, and for a broadcast transmitted from within any country, the author is the person who made arrangements for the creation or transmission within that country. Notably, the Copyright Act of 2022 does not define 'author' in relation to literary, musical, and artistic works. Under the repealed Copyright Act of 2004, however, an 'author' of literary, artistic, or musical works referred to the creator of the work.²⁰ The varied definitions of 'author' in the Copyright Act, as well as the ambiguity surrounding what constitutes 'arrangements' for creating audiovisual works or sound recordings, present challenges to defining authorship in Nigerian copyright law.²¹ Nonetheless, from the multiple definitions of 'author' in the Act, it can be inferred that an author is the originator of intellectual or creative work—the individual who has expended effort in creating an original work.

¹⁴ (1976) A.C. 64, H.L

¹⁵ See Section 108(1) of CA.

¹⁶ JO. Asein, *Nigerian Copyright Law and Practice* (2edn Books and Gavel Ltd, 2012) p.71 explaining the meaning of cinematograph film under the repealed Copyright Act of 1988.

¹⁷ Section 108(1)

¹⁸ *ibid*

¹⁹ Section 3(b) and (c) of the CA

²⁰ It is the view of this writer that the omission under the Nigerian Copyright Act 2022 was not intended and that the meaning of author in the Copyright Act Cap C28 Laws of Federation of Nigeria, 2004 applies to these categories of works. This raises questions about the definition of a 'creator,' since the term is not defined either in the Copyright Act 2004 or the extant CA.

²¹ See SK Mokidi, AU Onochie, and OE Ihenyen, 'Defining Authorship in Nigerian Copyright Law: Overcoming Legal Ambiguities and Challenges,' in *International Journal of Law and Clinical Legal Education (IJOLACLE) 5 (2024) 24-31*

International treaties relating to copyright fall short of providing a uniform definition of authorship. For instance, the 1886 Berne Convention for the Protection of Literary and Artistic Works, a key international copyright treaty, does not define an 'author.' Article 15.1 suggests that merely having one's name on a work, even if it is a pseudonym, establishes authorship, regardless of actual creative input. While this presumption can be rebutted, it raises concerns about attributing authorship solely based on nominal inclusion. The use of 'his' in Article 15.1 implies a human creator; however, Article 15.2 expands authorship to include legal persons for cinematographic works. Similarly, Sections 5(b) and 8(1)(a)(ii) of the Copyright Act recognise legal persons as 'authors,' introducing ambiguity about whether corporations can be considered authors, depending on the nature of the work.

When an allegation of copyright infringement arises, the defendant may challenge the eligibility of the work or argue that the relevant aspects do not qualify as works of authorship. In other words, the defendant may contend that the work does not meet the criteria for protection. The dispute may also centre on whether the contribution made by a claimant is sufficient to establish joint authorship. Given the challenges in defining authorship, the court faced with the dispute will need to investigate the nature of the activities that constitute authorship to resolve the issue. This is crucial because only those aspects of a work that are copyrightable are protected as works of authorship. Without determining the activities that define authorship, one cannot ascertain which aspects of a work are protected.

In the absence of a universal definition of an 'author' most copyright laws set some kind of activities that makes a work eligible for copyright and therefore a work of authorship. The criteria for determining authorship vary among different national copyright laws. Some jurisdictions place a strong emphasis on the act of creation, asserting that for a work to be safeguarded, it must stem from the author's 'personal intellectual activity,'²² embody the 'intellect' and possess a 'creative character,'²³ or demonstrate 'originality' arising from the author's free and creative choices.²⁴ The criteria for eligibility under Nigerian copyright law are crucial in establishing who holds the rights to a work. Section 2(2) of the Nigerian Copyright Act of 2022 outlines the criteria for eligibility of a work for copyright. It states that a literary, musical and artistic work shall not be eligible for copyright unless: a) some effort has been expended on making the work, to give it an original character; and b) the work has been fixed in any medium of expression known or later to be developed, from which it can be perceived. Reproduced or otherwise communicated either directly or with the aid of any machine or device. The requirement that some effort has to been expended on making the work to give it an original character means that the work must involve a degree of skill, labor, or creativity to make it unique. The provision that the work must be 'fixed in any medium of expression' means that the work must be captured in a form that can be perceived, reproduced, or communicated, either directly or indirectly. Fixation is crucial because it provides a tangible form of the work that copyright can protect. These requirements translate into originality and fixation, which will now be discussed, but it is important to state that the express mention of literary, musical and artistic works suggests that these conditions are inapplicable to other categories of work eligible for copyright not mentioned. Section 2(3) however, provides that any work that meets the requirements set out in subsection (2) shall be eligible for copyright, notwithstanding the quality of the work involved or the purpose for which the work was created. The inference of this is that 'any work' that fails to meet the requirements of originality and fixation will be ineligible for copyright, thus other categories of works will necessarily satisfy these criteria to be eligible for copyright.

Originality in Copyright

The primary purpose of granting copyright to an eligible work is to afford the author exclusive rights over certain acts related to it in order to ensure fair compensation for his creativity. The law therefore requires that a work should be original before it can be eligible for copyright. Thus, originality is a fundamental requirement for authorship. Remarkably, copyright statutes fail to provide a concrete definition of originality, leaving it to each jurisdiction to delineate.²⁵ As Reytblat puts it, 'originality is inherently nebulous, and as such, it is extremely poorly suited to judicial interpretation.'²⁶ Courts have devised tests to determine originality, ranging from the 'sweat of the brow'²⁷ principle to requiring the work to be the 'author's own intellectual creation'²⁸ and involving a 'modicum of creativity' and 'skill in

²² See Section 31 of the German Copyright Act (UrhG).

²³ Art 1 of Copyright law of Italy, and article 2575 (Italian) Civil Code.

²⁴ Article L112-1 Copyright law of France. French laws consider that only individuals can be authors, the only exception being the case of collective works.

²⁵ Within the same jurisdiction, the approach to originality has not been consistent. As pointed out by HB Abrams, 'Originality and Creativity in Copyright', *Law and Contemporary Problems* Vol. 55: No 2 (1992) 3-44, prior to *Feist*, two standards were invoked by courts to determine whether the compilation of facts had the requisite originality: the 'sweat of the brow' test and the view that the compilation must display originality in the 'selection, creativity, and judgment' in choosing the compiled facts.

²⁶ J Reytblat, 'Is Originality in Copyright Law 'A Question of Law' or A 'Question of Fact': The Fact Solution (199), 17 *Cardozo Arts and Ent. L.J.* 181, cited by I Hoare, 'Originality in Copyright Doctrine', available at <<https://www.kent.uk/law/ip/resources/ip.../hoare.rtf>> accessed August 2, 2024.

²⁷ This is the threshold of originality in English copyright law, which requires that the author must have put in skill, labour, and judgement (*Walter v Lane*, [1900] A.C. 539 (H.L. 1900)). The Canadian Copyright Law test for originality is that the work must not have been copied and require more than trivial or mechanical intellectual effort. The Canadian Supreme Court in *CCH Canadian Ltd. v Law Society of Upper Canada*, (2004) SCC 13, held that an original copyrightable work must be more than a mere copy of another work', but it 'need not be novel or unique.' Thus, the proper approach to determining originality lies between the two extremes of industriousness and creativity.

²⁸ This is a test for the threshold of originality in the European Union. See the decision of the Court of Justice of the European Union (CJEU) in *Infopaq International v. Dagblades Forening, Bezpečnostní softwarová asociace v. Svaz softwarové ochrany v Ministerstvo kultury* [2009] ECDR 16 (Case C-5/08). In *Bleistein v. Donaldson Lithographing Co.*, 188 US 239 (1903), Originality was seen in terms of the individual effort or contribution put in creating the work.

judgment.²⁹ The UK courts, adopting the ‘sweat of the brow’ test, stress that originality necessitates the work originating from the author rather than being copied from another source.³⁰ In Nigerian law, ‘Original character’ does not mean that the work must be entirely novel or groundbreaking, but it must demonstrate that the creator has added personal input or creativity, that is it must be independently created and not copied from another source. This means that the work must involve a degree of skill, labour, or creativity to make it unique. This aligns with the idea that copyright protects the expression of an idea, not the idea itself, and requires a minimum threshold of originality.

Previous decisions in the repealed copyright law serve as a guide in determination of the test adopted by Nigerian courts since the subsection have not yet been subjected to judicial interpretation although the use of ‘some’ in the extant law as against ‘sufficient’ effort in the repealed copyright Act of 2004 is indicative of lower threshold for originality. A perusal of the cases decided under the repealed law indicates that what is required is a consideration of the amount of skill, labour, and judgment expended by the author. In the case of *Offrey v. Chief S.O. Ola & Ors*,³¹ the court asserted that copyright exists if a product results from substantial mental or physical effort, not negligible or commonplace. Similarly, Belgore, J., in *Oladipo Yemitan v The Daily Times (Nig) Ltd. and Gbenga Odusanya*³², emphasised that copyright is to protect the fruits of one's work, labour, skill, or taste, and the key is the actual expenditure of effort. In essence, the court's inquiry into originality involves determining whether one person has appropriated the product of another's labour, skill, and capital³³ since copyright does not protect ideas but the expression of ideas.³⁴ This principle is commonly known as the idea/expression dichotomy. The crucial question however, is the quantum of skill, labour, and judgment required for a work to exhibit an original character. Authorship requires a qualitative contribution to the creation of the work. This contribution must be more than merely providing ideas or suggestions; it involves a significant input that shapes the final form of the work. Quantitative measures, such as the amount of time or energy spent, are less important than the creative impact of the contribution.³⁵ For instance, a simple factual compilation may not be deemed original if it lacks creative input.³⁶

Fixation in Copyright Law

The second prerequisite for copyright eligibility is fixation, requiring that the work must be fixed in any medium of expression. This means that the work must be recorded, written, or otherwise captured in a physical form that it can be perceived, reproduced, or communicated either directly or with the aid of any machine or device.³⁷ The language allows for adaptability to new technologies, meaning that as long as the work is captured in a perceivable form—whether in print, digital, or even future formats—it meets the fixation requirement. This ensures that copyright law remains relevant as new forms of media emerge. The requirement of fixation ensures that the work is sufficiently concrete to warrant protection and serves evidential purpose. Though Nigerian courts lack specific cases, fixation's significance is evident in the historic *Walter v Lane* case.³⁸ The House of Lords, under the Copyright Act 1842, affirmed a reporter's copyright in transcribing Lord Roseberry's speeches. While *Walter v Lane* seemingly equates fixation with authorship, it's contextual, considering the era and technology constraints. Modern advancements suggest mechanical fixation, like recording, may not confer copyright without evidence of skill and judgment. Notably, *Express Newspapers Plc v News (U.K.) Plc*³⁹ affirms *Walter v Lane*, emphasising the importance of skill in reporting. The cases highlight that copyright requires expressing ideas in a perceivable, permanent form. However, the Copyright Act remains silent on responsibility for fixation and lacks a clear definition. Determining authorship becomes crucial, especially in joint authorship claims involving conceptualisers and executants, necessitating exploration of joint authorship concepts.

Joint Authorship in Nigerian Copyright Law

Joint authorship in Nigeria faces significant challenges due to the absence of a clear definition of who qualifies as a joint author in Nigerian copyright law. Generally, by Section 2(2)(b) of the CA, to be an author for purposes of copyright, the person must produce something that is eligible for copyright, and to be eligible for copyright, the work must be original and fixed in a medium of expression. An author therefore, is one who has fixed an original work in a medium of expression from which it can be perceived, reproduced, or communicated with the aid of a machine or device. This is what is referred to as the Marshall- Goldstein approach to determining authorship.⁴⁰ There is, however,

²⁹ This is the Indian approach as exemplified in the case of *Eastern Book Company v. DCB Modak*, Appeal (civil) 6472 of 2004, thus giving rise to two doctrines of originality. Prior to this decision the test was that of the ‘sweat of the brow’.

³⁰ See *University of London Press v University Tutorials* (1916) 2 Ch. 601; *British Northrop Ltd. v Texteam Blackburn Ltd.* (1974) RPC 57.

³¹ Unreported suit No. HOS/23/68, decided June 27, 1969, cited in FO Babafemi, *Intellectual Property: The Law and Practise of Copyright, Trade Marks, Patents, and Designs in Nigeria* (Justinian Books Ltd., 2006)

³² (1980) FHC 186 at 190

³³ Per Lord Atkins in *Macmillan & Co. Ltd v Cooper* [1923] 40 TLR 186.

³⁴ *British Northrop Ltd v Texteam Blackburn Ltd* (1974) RPC 57

³⁵ See *I.C.I.C. (Directory Publication) Ltd. v Ekko Delta (Nig) Ltd. & Anor* (1977), 3 F.H.C.R. 346, where the court held that the plaintiffs who copied from the documents of the Federal Ministry of Trade and those of P.T. and turned around to claim authorship were mere copyists and not authors of the National Telephone Directory of Nigeria.

³⁶ *Feist Publications, Inc. v Rural Telephone Service Co.* 499 U.S. 340 (1991). The United States Supreme Court held that originality requires independent creation and at least some minimum degree of creativity. This decision marked a departure in the approach to originality, introducing a higher threshold for certain works, such as compilations.

³⁷ See section 2(2)(b) of the CA.

³⁸ (1900) A.C. 539. See also *Merchandising Corporation of America v Harpbond* (1983) FSR 32

³⁹ (1991) FSR 36; (1990) 1WLR 1320

⁴⁰ R VerSteeg, ‘Defining ‘Author’ for Purposes of Copyright’ in *The American University Law Review*, vol. 45, 1323–1327 The Marshall-Goldstein approach is derived from the combination of the statements. The first is that of Justice Thurgood Marshall in

another school of thought based on Nimmer's treatise that proposes that to be a joint author, what a person needs to achieve is to make more than a *de minimis* contribution to the resulting copyright work. It requires only an intention to form a unitary work.⁴¹ This is the minority view, and it has not really found favour with many judges. A close perusal of Section 2(2) of the Copyright Act supports the position that the requirements of originality and fixation are cumulative and therefore tend to lean towards the Marshall-Goldstein approach.

The Copyright Act recognises the concept of joint authorship.⁴² A 'work of joint authorship' is defined to mean, 'a work produced by the collaboration of two or more authors in which the contributions of the author are merged into an inseparable or interdependent part of a whole.'⁴³ An appraisal of the Nigerian position will reveal that the essential elements to be considered when determining whether a work is that of joint authors are 'collaboration' between the putative authors, 'contribution', and 'merging' of the contributions.⁴⁴ The CA is however silent on the meaning of 'collaboration' or what kind of 'collaboration' that is required between putative joint authors. However, collaboration requires working together therefore what is required is that, 'when setting out to do the work, there must have been some common design, cooperation or plan that united the authors, even if only on a very loose sense.'⁴⁵

The next question is the level of contribution or participation that is required of putative joint authors. This, again is not expressly stated in the CA, but in view of section 2(2)(a) of the CA, it is expected that each putative joint author would have contributed something original and not merely non-copyrightable ideas. Does this also require that a putative joint author must have personally been responsible for fixing his work in a definite medium? By Section 3(3) of the UK Copyright Designs and Patents Act, 1988 ('CDPA'), it is immaterial whether the work is recorded by or with the permission of the author, and where it is recorded by the author, nothing in subsection (2) affects the question whether copyright subsists in the record as distinct from the work recorded thus, making fixation key to a work's eligibility under the U.K. copyright law, as exemplified by the case of *Walter v Lane*. It must, however, be emphasised for purposes of authorship that 'to have regard merely to who pushed the pen is too narrow a view of authorship'⁴⁶ In light of the use of the words 'by or with the permission of the author' in Section 3 of the CDPA, a joint author need not personally participate in the act of fixation; it is sufficient if he communicates his original ideas to another who now records the same on his authority. Whether the recorder is qualified to be a joint author will again depend on whether he also contributed something original to the work. In Nigeria, the Copyright Act is silent on who does the fixing, thus leaving it for the courts to determine, whether a person who communicates an original expression to another, who subsequently fixes it in a definite medium of expression can qualify as an author. It is one's view that what is required is originality of the work and fixation; there is no specific requirement that the fixation must be done by the person who contributed the original expression. The act of fixation only goes to the question of eligibility for copyright and not authorship.⁴⁷

The third requirement for a work to be a work of joint authorship' is the element of merger or integration of the contributions of each putative author in the work produced. The CA requires that the 'contributions of the authors are merged into an inseparable or interdependent part of the whole.' This means that the contributions of each author must not be distinct.⁴⁸

Authorship criteria ensure that rights are fairly distributed among contributors. In collaborative works, it is essential to distinguish between those who made significant creative contributions and those who provided ancillary support. Clear authorship criteria help prevent disputes by providing a legal basis for determining who holds the rights to a work. This clarity is crucial for avoiding litigation and ensuring that all parties understand their rights and obligations.

Community for Creative Non-Violence v. Reid, 490 U.S. at 737, which is that an author is 'the person who translates an idea into a fixed, tangible expression entitled to copyright' and the other is that of Goldstein, P., in his work, *Copyright: Principles, Law, and Practice*, cited by VerSteeg, which is that a collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest unless the contribution represents an original expression that could stand on its own as subject matter of copyright'.

⁴¹ See T Huang, 'Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material', 20 *Berkeley Technology Law Journal*, 673 (2006). This rule was applied by Judge Posner in *Gaiman v McFarlane*, holding that where two or more people intend to create an indivisible copyright work and succeed in doing so, each contributor is a joint author.

⁴² See sections 5 and 8(1)(a) of the CA.

⁴³ See section 108 of the CA. This is similar to section 101 of the U.S. Copyright Act, which, defines a 'joint work' as 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or independent parts of a unitary whole.' Section 10(1) of the English CDPA is more apt. It defines a 'work of joint authorship' to mean 'a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.' Section 10(1A) thereof states that a film shall be treated as a work of joint authorship if the producer and the principal director are the same person, while 10(2) states that a broadcast shall be treated as a work of joint authorship in any case where more than one person is to be taken as making the broadcast.

⁴⁴ The marked difference between the Nigerian law and U.S. law on joint authorship is the element of 'intention' required under the U.S. Act. In *Childress v Taylor*, 945 F2d 500, 506-7 (2d Cir. 1991) the 2nd circuit affirmed summary judgment of Childress on the basis that the intent necessary for joint authorship was lacking.

⁴⁵ See Bently, L and Biron L, 'Discontinuities Between Legal Conceptions of authorship and Social Practices' in *Works of Authorship*, p238; See also *Cala Homes v McAlpine*, (joint authorship occurs when collaborators worked to produce copyright work of a single kind 'in prosecution of a concerted joint design')

⁴⁶ Laddie J in *Cala Homes v Alfred McAlpine Home* [1995] FSR 623

⁴⁷ See Section 2(2) of the Copyright Act.

⁴⁸ This is the position under the U.S. Copyright Act and the CDPA, but in some legal systems, like France, the element of integration is not a requirement.

The Intersection between Eligibility Criteria for Copyright and Authorship

This discussion centres on how the originality and fixation of a work, earlier examined, influence both its copyright protection and the recognition of authorship. Establishing a link between authorship and copyright eligibility criteria calls for a philosophical approach that considers authorship as a distinct form of creative expression deserving of protection. Two prominent philosophical theories that reinforce this relationship are the Lockean labour theory and the personality theory. In John Locke's labour theory, property rights are justified by the labour and effort expended in transforming raw materials into something valuable. This idea extends well to copyright. When an author invests time, skill, and creativity into producing a work, they gain a legitimate claim over the work because they have imbued it with personal labour. In line with the copyright eligibility criteria, this theory argues that the effort spent in 'making it to give it an original character' justifies authorship rights, because the author has effectively 'mixed' their labour with the work, making it deserving of protection. Since copyright eligibility requires originality, this theory further suggests that authorship exists where the author's individual effort has given the work a new, identifiable character. This connection between effort and originality allows the author to stake a claim to their work as something distinctively their own. The Personality theory, notably advanced by philosophers like Hegel, posits that creative works reflect the personality and identity of their creators. This theory sees an author's creation as an extension of their self-expression, connecting the author's identity with their work. When the copyright law requires fixation, it ensures that the author's unique vision and self-expression are captured in a stable form that others can experience, respect, and recognise as emanating from a particular individual. The 'fixation' criterion also safeguards the author's intellectual identity by marking the work as a personal extension, not just an abstract idea. Because fixation provides a tangible representation of the author's personality and creativity, it allows copyright law to protect this embodiment, recognising the author as the rightful originator. Authorship, therefore, is philosophically justified as the basis for copyright protection because it encompasses both labour and personality. By establishing the criteria of originality and fixation, copyright law recognises and protects an author's investment in creating something new and affirms their unique personal contribution. This philosophical foundation ensures that authorship is not only the act of creation but also a moral and intellectual bond between the author and the work. The implication of this is that to ascribe authorship of work to a person, the work must have satisfied the eligibility test.

Distinction between Authorship and Ownership of Copyright

There is the tendency to equate authorship with ownership of copyright, therefore understanding the distinction is crucial in the application and enforcement of copyright law. In legal disputes, clearly defining authorship and ownership helps resolve conflicts over rights and obligations. While these terms are often used interchangeably in common parlance, they hold distinct meanings within the legal framework of copyright protection. As stated, an author is the person who exerted effort in creating an original work, and by Section 28 of the Copyright Act, copyright initially vests in the author. A fundamental difference between an author and an owner of copyright is that the author is entitled to enjoy moral rights, as encapsulated in Section 14 of the CA. Ownership of copyright, refers to the person or entity that holds the economic rights to the work. These rights include the ability to reproduce, publish, perform, distribute, and communicate the work to the public. While ownership can initially vest in the author, it may also derive from assignment, testamentary disposition, or operation of law, meaning the owner of copyright in a work may not necessarily be the author. Assignment involves the transfer of copyright ownership from the author to another party. The assignee then holds all the rights that the author originally possessed. For example, an author may assign their rights to a publisher, who then becomes the owner of the copyright and can exploit the work commercially. Section 30(3) specifies that any assignment of copyright or an exclusive license related to a copyright-controlled act must be in writing to be effective. While the absence of a written assignment renders it unenforceable, it may still be considered an equitable assignment if coupled with consideration.⁴⁹

Testamentary disposition involves the transfer of property through a will, becoming effective upon the testator's death. An author can dispose of their copyright via testamentary disposition, transferring these rights to the beneficiary immediately upon the author's demise. In the event of an author with copyright passing away, the copyright is bequeathed to the beneficiaries under the author's will. In cases of intestacy, where there is no valid will, the heirs and successors in title inherit based on the relevant intestacy rules, with the personal law of the deceased applying. In the case of *Anikulapo Kuti v T.M. Iseli*,⁵⁰ the survivors of Olufela Anikulapo Ransome-Kuti sought damages and a perpetual injunction against the defendants for reproducing the musical works of the late Fela. These works had not been produced or sold for public consumption before Fela's demise. The defendants argued that the works did not meet the requirements of fixation as they had not been published to the public. However, the court, recognizing Fela as the author with copyright in the recorded materials, held that the plaintiffs, being Fela's heirs and successors-in-title, were entitled to enforce their deceased father's rights.

Licensing allows the copyright owner to permit another party to use the work under specific conditions without transferring ownership. Licenses can be exclusive or non-exclusive and are often used to control how the work is used and ensure that the author or owner retains certain rights.

⁴⁹ The difference between legal assignment and equitable assignment is that while legal assignment is enforceable, and equitable assignment is unenforceable against a purchaser for value without notice.

⁵⁰ (2003-2007) 5. *IPLR*.

In conclusion, the distinction between authorship and ownership of copyright is fundamental to the proper application and enforcement of copyright law. Authorship pertains to the creation of the work and the associated moral rights, which remain with the author. Ownership involves the economic rights, which can be transferred through various means, including assignment, testamentary disposition, or licensing. Understanding these differences is essential for resolving legal disputes and ensuring that both authors' and owners' rights are adequately protected under the law. Authorship is central to copyright, but there is no universal definition of an author hence various jurisdictions set up criteria for ascription of authorship. Having regards to the preceding discussions, an author in Nigeria copyright law may be a human being or a juridical person, and originality and fixation are imperatives to becoming an author.

4. Why Authors Need Protection

Copyright encompasses a wide array of economic and cultural domains while bestowing specific exclusive rights upon authors. This relative monopoly granted by copyright has faced criticism from various quarters.⁵¹ One key argument questions the treatment of ideas as property, asserting that ideas, unlike tangible property, are non-rivalrous. Consequently, the conventional rationale justifying private property rights in land and physical resources may not apply to ideas. Sir Louis Mallet, in his separate report from the Royal Commission of 1878, expressed this viewpoint, suggesting that constraining the inherently boundless nature of ideas by bestowing an exchangeable value on them results in an artificial monopoly. Such a monopoly, he contended, lacks a natural basis, fosters scarcity where abundance should prevail, and restricts access to gifts meant for all.⁵² In light of these criticisms, the economic rights of authors come under scrutiny and challenge. Despite these objections, there are calls for even greater protection for author's rights because authors are the cornerstone of creative industries, and their works contribute significantly to cultural, educational, and economic landscapes. The basis for protecting authors' rights can be broadly categorised into moral and economic reasons.

Moral Rights

The protection of copyright is rooted in the protection of the author's personality as reflected in their creative work. During the Romantic era, the author was perceived as an inspired individual who infused his own being into the creative process. Consequently, an author's work was seen as a manifestation of aesthetic values and taste. An author is perceived as more than just a creator of works, but a person with a distinct personality, moral rights, and creative autonomy. Thus, a strong emphasis is placed on 'protecting the emotional bond between the artist and her creations.'⁵³ This framework forms the foundation for what is known as the author's moral rights, which are about safeguarding the personal and moral interests of the creator. The two pillars of moral rights are the right to paternity and the right to integrity. The right to paternity allows authors to claim authorship of their works, ensuring proper credit is given. This right extends to the author's ability to object if falsely attributed as the creator. The right to integrity empowers authors to object to actions prejudicial to their honour or reputation, extending beyond distortions or mutilations to any derogatory action that significantly alters the work's nature or message.⁵⁴ Section 14(2) grants an author the right to object to a work being falsely attributed to them. Moral rights can be exercised by the author at their discretion, for instance, by publishing their work under a pseudonym.⁵⁵ The CA specifies that moral rights subsist for the duration of copyright. However, these rights are non-transmissible during the author's lifetime, becoming transferable only through testamentary disposition or operation of law after the author's death.⁵⁶

Economic Rights

The criteria for authorship in copyright law are not just technicalities; they play a crucial role in the functioning and fairness of the legal and creative ecosystems. Authors are often vulnerable to exploitation and infringement. Correctly determining authorship and protecting authors is essential for the enforcement of economic rights. It ensures that authors can control the use of their works, license them, and receive financial compensation. Without clear criteria, disputes over ownership and the division of royalties would be more frequent and harder to resolve. The argument for protecting the author's economic rights is hinged on the utilitarian theory, which posits that granting property rights acts as an incentive for creators. Without this incentive, authors may be discouraged from continued creative production, fearing that others might freely use and undercut their work, potentially driving them out of their profession.⁵⁷ Therefore, a reasonably efficient copyright system enhances both rights holders and user welfare in the long run. By rewarding creative authors, the copyright system ensures that society benefits from a wealth of creative works.⁵⁸ It has also been asserted that protecting authors' economic rights serves as a motivation for them to share their creations. This is based on the incentive to disclose theory that posits that copyright protection operates not just as a mechanism to reward authors but also as a means to encourage them to disclose their creations to the public. By offering legal protection and the prospect of financial gain, authors are motivated to reveal their works, which ultimately benefits society as a whole. In Nigeria, this theory is particularly significant, considering the nation's rich and diverse cultural heritage, where numerous creative expressions remain untapped.

⁵¹ Unlike other forms of Intellectual property, such as patents, copyright does not subsist in ideas and therefore does not give monopoly rights in any particular form of words or design. See also C Colston, *Principles of Intellectual Property Law* (Cavendish Publishing Ltd., 1999)

⁵² Separate Report by Sir Louis Mallet, xlvi, cited in R Deazley, (2008) *Commentary on the Royal Commission's Report on Copyright* (1878).

⁵³ See J Meintertsma, 'Theories of Copyright', available at <<https://library.osu.edu>> accessed June 30, 2024

⁵⁴ See Section 14(1)(a) and (b) of the CA

⁵⁵ See WIPO, *Guide to the Berne Convention for the Protection of literary and Artistic Works (Paris Act, 1971)* (Geneva: WIPO, 1978)

⁵⁶ See Section 14(3) of the CA

⁵⁷ SS Bradford, 'Intellectual Property and Traditional knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law' *Berkeley Technology Law Journal* (2005) vol.20 1613

⁵⁸ See J Meintertsma, 'Theories of Copyright', available at <<https://library.osu.edu>> accessed June 30, 2024.

One of the primary motivations for creators to engage in creative activities and produce copyrighted works is the potential for commercial gain. Copyright protection therefore serves as an incentive for authors and creators to commercialise their creative endeavors, turning their intellectual property into economic assets. Without commercial exploitation, the work is of less value in that 'for society to benefit from any invention, products must be manufactured and consumed.'⁵⁹ Commercial exploitation of creations and inventions is indeed the root of the economic development of the state, and hence, the state provides a strong intellectual property mechanism and ensures higher commercial use of inventions, discoveries, and creations. A robust system of copyright protection, based on clear authorship criteria, helps foster a vibrant and dynamic creative industry. This, in turn, contributes to cultural development and the overall economy.

In conclusion, the protection of authors under copyright law is a multifaceted issue that involves balancing moral and economic rights. While criticisms exist regarding the monopoly nature of copyright, the benefits of protecting authors are substantial. Moral rights preserve the personal and emotional connections between authors and their works, ensuring the integrity and authenticity of cultural heritage. Economic rights incentivise creativity and innovation, providing authors with the necessary support to continue their contributions to society. In the context of Nigeria, where cultural diversity and creativity abound, strong copyright protection is essential for fostering a thriving creative industry and promoting economic development.

5. Eligibility for Protection by Virtue of Nationality or Habitual Residence, etc

The CA stipulates that in order for copyright to be conferred on a work, either the author or the work must be qualified. This qualification can be based on the nationality or residence of the author, or the place of first publication of the work; or by the fact that the work is made by or under the direction or control of a government, an agency of government or a prescribed international body, or by reference to international agreements and treaties. Copyright is conferred on works where the author (or any joint author) is a Nigerian citizen, habitually resident in Nigeria, or a body incorporated under Nigerian law.⁶⁰ This ensures that works with a strong connection to Nigeria, whether by individual authorship or corporate creation, are protected under Nigerian copyright law. Works first published in Nigeria, or sound recordings made in Nigeria, or broadcasts transmitted from Nigeria (or by a Nigerian broadcasting organization) are protected.⁶¹ This provision secures copyright for works that originate or are first made available in Nigeria, promoting local creative industries. Copyright is also granted to works made by or under the direction or control of the Nigerian government, its agencies, or prescribed international bodies.⁶² This ensures that intellectual property created by government entities or in collaboration with international organisations is protected, maintaining sovereign and organisational control over such works. Section 8 of the CA provides that copyright is conferred on works if, at the time of first publication, at least one author is a citizen, resident, or a corporate body from a country that has a treaty with Nigeria. Additionally, works first published in such countries are also protected. This reflects Nigeria's commitment to international copyright reciprocity, ensuring protection for works created or first published in countries with which Nigeria has mutual obligations. These provisions collectively ensure that copyright protection in Nigeria covers a broad spectrum of works, including those with connections to Nigerian authors, first publication in Nigeria, government and international body creations, and works linked to countries with which Nigeria has international agreements. This framework supports the protection of intellectual property both domestically and internationally, fostering creativity and international cooperation while upholding the rights of creators. The provisions emphasise the importance of the author's nationality, habitual residency, or corporate status in determining eligibility for copyright. The inclusion of works created by or under the direction of the government or international bodies expands the traditional understanding of authorship to include institutional authorship. By exploring how international treaties influence the determination of authorship and copyright protection the provision connects Nigerian copyright law to global standards, showing how authorship criteria are influenced by international obligations.

6. Conclusion

The concept of authorship within Nigerian copyright law remains complex and multifaceted, shaped by both statutory definitions and judicial interpretations. The lack of a universal definition of an 'author' poses challenges, particularly when considering the criteria for ascription that vary significantly across different types of works. As established in the Copyright Act of 2022, authorship is contingent upon two critical elements: originality and fixation. These criteria not only delineate who qualifies as an author but also underpin the legal framework for copyright protection in Nigeria. The interplay between these elements underscores the necessity for authors to demonstrate a significant degree of personal input and creativity while ensuring their works are captured in a perceivable medium. The philosophical foundations of authorship, rooted in the Lockean labour theory and personality theory, further emphasise the importance of recognising both the effort and identity of the creator in protecting intellectual property. Additionally, the distinctions between authorship and copyright ownership are crucial, as they highlight the separate rights that flow from the creation of a work and the subsequent economic exploitation of that work. Ultimately, a clearer understanding of authorship criteria is essential for both legal practitioners and creators alike, as it lays the foundation for equitable rights distribution and mitigates disputes over copyright. To enhance the clarity and effectiveness of authorship criteria in Nigerian copyright law, it is essential for lawmakers to provide clear definitions and criteria for authorship, particularly concerning various categories of works, including literary, musical, and audiovisual creations. Establishing a comprehensive legal framework would mitigate ambiguities and disputes regarding authorship. Nigerian courts should strive to develop consistent jurisprudence on authorship and copyright eligibility, particularly regarding joint authorship and the nuances of collaboration. Judicial decisions that clarify the interpretation of originality and fixation will contribute significantly to the predictability of copyright outcomes.

⁵⁹ H Kadiri, 'Understanding the Theories of Intellectual Property in the Contemporary World: An overview, *Commonwealth Law Review*, Annual volume (2020), 475 at 476

⁶⁰ Section 5 of the CA

⁶¹ Section 6 of the CA

⁶² Section 7 of the CA