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# Protection of Copyright in Foreign Works in Nigeria: An Analysis of the Decision in *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors*

The protection for copyright in foreign works in Nigeria has been a contentious and controversial issue for over three decades. In this case analysis, through a trilogy of cases, we trace the judicial trend and jurisprudence on this issue of copyright law. We argue that although Sec. 5 and Sec. 41 of the Nigerian Copyright Act provide two methods by which foreign works can receive protection under the Act, the courts have repeatedly declined to confer such protection. The most recent case on this issue, *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors*, provided an opportunity for the courts to lay the issue to rest; however, unfortunately, the courts again failed to do so. In this opinion, we critically examine the case and discuss the legislative history conferring protection to foreign works. We conclude that the correct statutory interpretation in determining the protection of foreign works is reciprocity, and this was satisfied in the case under review.

## I. Introduction

This case analysis examines the most recent decision of the Federal High Court on protection of foreign works under extant copyright law in Nigeria. From the standpoint of jurisprudence, questions relating to protection of foreign works under the Copyright Act have been one of the most controversial and contested themes in the development of copyright law in Nigeria. This has been so since the first reported case on the issue was decided almost three decades ago.<sup>1</sup> It may be argued that protection of foreign works presents a special case in two essential respects. First of all, like other aspects of intellectual property, copyright protection is territorial in nature, meaning that protection and enforcement of copyright in works are generally limited to the territory of the country where it is granted.<sup>2</sup> Secondly, while copyright works are exploited beyond State boundaries, there is a need for protection of foreign works within local boundaries. Though global protection is available through international instruments, protection is mainly enforced through domestic law and before domestic courts.

Therefore, for copyright in a work to be protected in all the countries in which it is republished or reproduced, each one of those countries must, by legislation, extend copyright protection to that work. Against this background, several international treaties require each State party to accord protection to authors who are nationals of all the other State parties on the same terms as they do to their

nationals,<sup>3</sup> a legal principle referred to as ‘national treatment’.<sup>4</sup> In effect, a country extends copyright protection to works published by persons of another jurisdiction on the basis that in that other jurisdiction, authors from the first-mentioned country enjoy copyright protection. In this manner, a working web of global copyright protection is built on the twin principles of reciprocity and national treatment. As party to a number of treaties containing significant provisions for reciprocal protection of copyright, including the Berne Convention for the Protection of Literary and Artistic Works 1988<sup>5</sup> (hereinafter ‘the Berne Convention’), the Universal Copyright Convention (UCC) 1952,<sup>6</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1995, among others, Nigeria has committed to extend copyright protection to works of nationals of and works first published in countries that are State parties to these international agreements. However, while this obligation exists in international law, these treaties have no force of law in domestic courts except as enacted into law by the National Assembly.<sup>7</sup> Foreign authors must therefore turn to domestic legislation for copyright protection.

<sup>3</sup> Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) art 1(3): ‘Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property ...’; see also Berne Convention (n 2), arts 3 and 5; Universal Copyright Convention 1952, art 2. Under these treaties, the principles of reciprocity and national treatment were laid down as the cardinal principles of customary international law.

<sup>4</sup> Robert Brauneis, ‘National Treatment in Copyright and Related Rights: How Much Work Does it Do?’ (2013) GW Law Faculty Publications & Other Works 810.

<sup>5</sup> WIPO, ‘Berne Notification No. 147’ (14 June 1993) <[https://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_147.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_147.html)> accessed 12 May 2021.

<sup>6</sup> WIPO, ‘IP Treaties Collection’ <<https://wipolex.wipo.int/en/treaties/parties/208>> accessed 12 May 2021.

<sup>7</sup> Constitution of the Federal Republic of Nigeria 1979 Cap 62 Laws of the Federation of Nigeria (‘LFN’) 1990, s 12(1); Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 LFN 2004, s 12(1).

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<sup>1</sup> *Island Records Ltd v Pandum Technical Sales and Services Ltd & Anor* [1993] FHCLR 318.

<sup>2</sup> David Bainbridge, *Intellectual Property* (8th edn, Longman 2010) 890; Emmanuel Kolawole Oke, ‘Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset’ (2018) 15 SCRIPTed 313, 315.

Consequently, enforcement of protection of foreign works in Nigeria is essentially dependent on relevant provisions of the Copyright Act, which accord such protection and the judicial interpretation thereof in cases brought before the courts.<sup>8</sup> At the core of these provisions is reciprocity, evidence of which is specifically required under the Act. An emergent judicial trend indicates that it may be difficult to guarantee copyright protection for foreign works largely due to a somewhat restrictive interpretation of relevant provisions adopted by the courts in successive decisions on the issue. In this analysis, the authors examine the most recent decision of the Federal High Court in the case of *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors* (hereinafter *Voice Web*), which followed the path of previous decisions on the controversial issue.<sup>9</sup> Through decided cases, the authors trace the salient legal provisions enabling foreign copyright proprietors to enforce their copyright protection in Nigerian courts. Unfortunately, the authors find that Nigerian courts have repeatedly missed the mark and thus established antecedents that deny foreign authors copyright enforcement in court – a position that serves neither the Act nor the creative economy.

## II. Judicial trend

Before examining the *Voice Web* decision, it is important to briefly review the trajectory suggested by judicial trends on the issue. There have not been many judicial responses to the question of enforcement of copyright protection for foreign works in Nigeria. From a trilogy of decisions that laid the foundations for protection of foreign works under Nigerian copyright law, the inclination of the courts has been to limit the enforceability of copyright in Nigeria for works produced by non-Nigerians and foreign corporations. In what is likely the earliest reported decision on the issue, the court in *Island Records Ltd v Pandun Technical Sales and Services Ltd & Anor*<sup>10</sup> held that under the Copyright Act of 1970,<sup>11</sup> a work produced by a person who is not a citizen of or domiciled in or incorporated under Nigerian law is not protected. The plaintiffs claimed jointly and severally against the defendants, *inter alia*, an injunction restraining the defendants from infringing the copyright in any sound recording belonging to the 1st-6th plaintiffs. The 1st and 6th plaintiffs were recording companies incorporated in England, while the 2nd, 3rd, 4th and 5th plaintiffs were incorporated in the United States of America. The 7th-9th plaintiffs were recording companies incorporated in Nigeria. The court, per Belgore CJ, held that by virtue of Secs. 2(1)(b) and

3(1) of the 1970 Act, the 1st-6th plaintiffs, being foreign companies when the work was first recorded, had no basis to institute the action.<sup>12</sup> Relying on the above provision, the learned judge declared that foreign companies were ‘outside the protection of Nigeria [sic] law’.<sup>13</sup>

The second decision on the issue, *Societe Bic S. A. v Charzin Industries Limited & Anor*<sup>14</sup> (hereinafter *Societe Bic*), was decided in 1997. Like in *Island Records*, the court held that on the basis of Sec. 2(1)(a) of the 1988 Act, ‘only a Nigerian Citizen or Nigerian incorporated companies can sue in this court for infringement of copyright’.<sup>15</sup> In the case, the plaintiff was a corporation registered under the law of France, and its claim was for, *inter alia*, infringement of copyright. The defendant raised a preliminary objection, asking the court for an order striking out the part of the plaintiff’s claim dealing with copyright infringement on the ground that the plaintiff was not a qualified person within the meaning of Sec. 2(1)(a) of the Copyright Act 1988, conferred with copyright in Nigeria.<sup>16</sup> Relying on that section only, the court agreed with the defendant’s contention and struck out the part of the claim complained of.

More recently, the Federal High Court again towed a similar line in its decision in *Microsoft Corporation v Franike Associates Ltd*<sup>17</sup> (hereinafter *Microsoft*) in 2011. The court decided that a foreign company cannot enforce its copyright in Nigeria unless such plaintiff company produces a Ministerial Order signifying reciprocal protection in its country of works authored by Nigerians, as required under Sec. 41 of the Copyright Act 1988.<sup>18</sup> The plaintiff/appellant was a company registered in the United States of America. It instituted an action against the defendant/respondent claiming *inter alia* that the defendant/respondent had infringed its copyright in a range of Microsoft and or ‘Windows’ software by installing the same onto products for sale to the public. The plaintiff sought, amongst other reliefs, a declaration that the plaintiff as owner of copyright in the software products was the only person authorised by law to exercise the copyright in the said software and an *ex parte* as well as perpetual injunction restraining the defendant from selling or otherwise dealing in said software in a manner that infringed the copyright of the plaintiff. The learned trial judge granted the *ex parte* order in favour of the plaintiff. Subsequently, the defendant filed a preliminary objection

<sup>12</sup> *Island Records* (n 10) 327.

<sup>13</sup> *ibid* 328; s 2 of 1970 Act provides as follows: ‘(1) Copyright shall be conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is at the time when the work is made, a qualified person, that is to say – (a) an individual who is a citizen of, or is domiciled in Nigeria; or (b) a body corporate incorporated by or under the laws of Nigeria’.

<sup>14</sup> *Societe Bic S. A. v Charzin Industries Limited & Anor* [1997] 1 FHCLR 727.

<sup>15</sup> *ibid* 732; s 2 of 1988 Act *in pari materia* with s 2 of the 1970 Act.

<sup>16</sup> *ibid* 730.

<sup>17</sup> *Microsoft Corporation v Franike Associates Ltd* [2011] LPELR-8987(CA) 17[G-18[A].

<sup>18</sup> It is our position that the court ought to have taken judicial notice of the Order without requiring further proof. See the criticism of this rationale of the learned judge by learned authors Adebambo Adewopo and Olanrewaju Ajetunmobi, ‘*Microsoft Corporation v Franike Associates Ltd*: A Critical Analysis of Copyright Protection for Computer Software in Nigeria’ (2013) 2 NIALS Journal of Intellectual Property [NJIP] 219-222, where they argued that the said Order gazetted as an Act of the National Assembly is a public document, which is a proof of itself before any court of law. Accordingly, all courts of law ought to take judicial notice of laws, enactments and other subsidiary legislations.

<sup>8</sup> Cap 68, LFN 2004.

<sup>9</sup> *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors*, Suit No FHC/L/CS/576/2017. See the text of the decision also in this issue of GRUR International at doi: 10.1093/grurint/ikab109.

<sup>10</sup> *Island Records Ltd v Pandun Technical Sales and Services Ltd & Anor* [1993] FHCLR 318.

<sup>11</sup> The Copyright ACT 1970 (promulgated as Decree No 61 of 24 December 1970 under a military government) was the first indigenous statute dealing with copyright protection in Nigeria. With the advent of a civilian regime, the Decree was then designated as an Act of Federal legislature. See Kunle Ola, ‘Evolution and Future Trends of Copyright in Nigeria’ in Brian Fitzgerald and John Gilchrist (eds), *Copyright Perspectives: Past, Present and Prospect* (Springer International Publishing 2015) <[https://doi.org/10.1007/978-3-319-15913-3\\_7](https://doi.org/10.1007/978-3-319-15913-3_7)> accessed 11 May 2021.

challenging the jurisdiction of the court. The court vacated the *ex parte* order and struck out the suit on the ground that it lacked the jurisdiction to entertain and determine the plaintiff's claim.

Upon appeal, the Court of Appeal was faced with the question of whether the lower court had jurisdiction to entertain the plaintiff's/appellant's claim in view of the provisions of the Copyright Act. The court concluded that pursuant to Sec. 41 of the Act, the trial court lacked jurisdiction to entertain the matter in the absence of an Order in a Federal Gazette extending to the appellant's copyright protection under the Act.<sup>19</sup> The decision in *Microsoft* is the most oft-cited authority on the issue and is the only decision delivered by an appellate court. This decision firmly establishes an insistence by Nigerian courts that copyright protection of a foreign work can only be enforced where a Ministerial Order establishes a reciprocal treatment of Nigerian works in that other country in a Federal Gazette. With this decision, it can be said that Nigerian courts are constrained in their enforcement of copyright in foreign works. Evidently, the stage was set for any future case on the issue.

### III. The *Voice Web* decision

On 1 March 2021, the Federal High Court of Nigeria, sitting in Lagos,<sup>20</sup> delivered a ruling<sup>21</sup> in *Voice Web International Limited v Emerging Markets Telecommunication Services Ltd & Ors*,<sup>22</sup> the most recent decision on the subject. The plaintiff is a company incorporated under the law of Cyprus. The thrust of the claim of the plaintiff was that the defendants, by their registration, publication and use of the 'Etisalat Easy Win Promotion' without the authorisation and consent of the plaintiff, infringed the plaintiff's copyright in the source code and other data contained in the 'Check and Win' gaming concept. In response, the 2nd defendant/applicant filed an objection praying the court to dismiss the suit on the ground, *inter alia*, of failure, namely, to produce a Gazette issued by the Minister as required under Sec. 41, to show that its alleged domicile reciprocally protects rights in works protected by the Copyright Act and to demonstrate that it is party to any international agreement with Nigeria.<sup>23</sup>

The defendant argued that by Sec. 41(c) of the Copyright Act, where the author of a work is a foreigner or foreign company, it must show that the Minister designated by the Act<sup>24</sup> has by a Gazette extended copyright protection to the foreign company, after being satisfied that the domicile of the company reciprocally protects copyright in works protected by the Copyright Act of

Nigeria.<sup>25</sup> On the other hand, the plaintiffs argued that besides the provision of Sec. 41, a work published by a foreign company is eligible for copyright protection in Nigeria under the provisions of Sec. 5 of the Act.<sup>26</sup> They further contended that Sec. 5 of the Act would only apply where Sec. 41 does not apply.<sup>27</sup> The court analysed the provisions of Secs. 5, 16 and 41, particularly Secs. 5 and 41 of the Act<sup>28</sup> and decided that the plaintiff, by reason of its status as a foreign company and upon failing to provide an Order of Reciprocity extending the application of the Act to Cyprus, the country under whose laws the plaintiff is established, could not maintain the action before the court.

The court was of the opinion that Sec. 5 of the Act offers protection to works which would ordinarily be capable of eligibility for copyright, had they been works first published in Nigeria, so far as they are works published in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party.<sup>29</sup> However, infringement of such a right shall be actionable only if the condition in Sec. 41 is fulfilled, in view of the provisions of Sec. 16 of the Act, which stipulates that infringement shall be actionable at the suit of the owner of the copyright, but this shall be 'subject to the Act'.<sup>30</sup> In the words of the learned Justice C. A. Obiozor:

'As it is, therefore, persons who enjoy copyright in Nigeria as owner under Sec. 5 of the Act, by reference to international agreements, are to enjoy their right of action by virtue of Sec. 16 of the Copyright Act but subject to Sec. 41 of the Copyright Act – a related provision to Sec. 5 of the Act. This is the impact (*sic*) of a holistic construction of Secs. 5, 16, and 41 of the Copyright Act.'<sup>31</sup>

The authors' position is that the court in *Voice Web*, in its analysis of Secs. 5 and 41 of the Act, fell into error.

<sup>25</sup> *Voice Web* (n 9) 8.

<sup>26</sup> *ibid* 9, 11.

<sup>27</sup> *ibid* 10.

<sup>28</sup> For clarity, ss 5 and 41 of the Act are reproduced hereunder:

SECTION 5 – Copyright by reference to international agreements

(1) Copyright shall be conferred by this section on every work if –

(a) on the date of its first publication, at least one of the authors is –

(i) a citizen of or domiciled in; or

(ii) a body corporate established by or under the laws of a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party;

(b) the work is first published;

(i) in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is party;

(ii) by the United Nations or any of its specialised agencies; or

(iii) by the Organisation of African Unity; or

(iv) by the Economic Community of West African States.

(2) Where the question arises as to whether a country is a party to an obligation in a treaty or other international agreement to which Nigeria is also a party, a certificate from the Commission to that effect shall be conclusive proof of that fact.

SECTION 41 – Reciprocal extension of protection

Where any country is a party to a treaty, or other international agreement to which Nigeria is also a party and the Minister is satisfied that the country in question provides for protection of copyright in works which are protected under this Act, the Minister may by Order in the Federal Gazette extend the application of this Act in respect of any or all of the works referred to in subsection (1) of section 1 of this Act to –

(a) individuals who are citizens of or domiciled in that country;

(b) bodies corporate established by or under the law of that country;

(c) works, other than sound recordings and broadcasts, first published in that country; and

(d) broadcast and sound recordings made in that country.

<sup>29</sup> *Voice Web* (n 9) 22.

<sup>30</sup> *ibid* 23.

<sup>31</sup> *ibid* 23-24.

<sup>19</sup> *Microsoft* (n 17) 17[G-18[A].

<sup>20</sup> And presided over by the Honourable Justice (Professor) Chuka Austin Obiozor.

<sup>21</sup> The Nigerian Supreme Court in *Contract Resources Nigeria Limited v Standard Trust Bank Limited* (2013) LPELR-19934(SC) has held that the use of the words judgment or ruling both connote a decision of a Court. In the words of Ogunbiyi, J.S.C. 'I would want to believe that the respondent's objection has to do with the use of the word judgment instead of ruling in the course of the application for extension of time within which to apply for leave to appeal. Without having to belabour the issue, the law is well established and therefore held as trite that the use of the words judgment or ruling both connote a decision of a Court. This should not therefore be a reason for controversy.'

<sup>22</sup> *Voice Web* (n 9).

<sup>23</sup> *ibid* 6.

<sup>24</sup> Copyright Act, s 51(1).

#### IV. Critical analysis of the *Voice Web* decision

Clearly, from the time of *Island Records* to *Voice Web*, the courts have declined to enforce copyright protection for foreign works. The rationale has sometimes differed. However, it has been consistently flawed. The authors shall demonstrate in the succeeding paragraphs that from two or three main perspectives – legislative history, but more importantly, interpretation of the letters of the Act in the contexts of the two main provisions applicable to copyright of foreign works, and the application of the principle of reciprocity and national treatment under international law taken together with the principle of domestication under the Nigerian Constitution – the decision in the instant case, *Voice Web*, like previous decisions, was afflicted by errors primarily on the ground of statutory interpretation. The aforementioned perspectives are examined together because of their contextual relationship in the analysis of applicable provisions of the Act.

##### 1. Legislative history

Yet again, the first case, *Island Records*, where it all started, comes to the fore. The discussion of the jurisprudence requires a legislative historical account in order to place the provisions of Sec. 2 of the repealed 1970 Act and the Copyright (the Reciprocal Extension) Order 1972 (hereinafter ‘the Reciprocal Extension Order’) in their correct context. To be clear, Sec. 2 of the old 1972 Act, a precursor to Sec. 2 of the current Act, did nothing more than confer copyright by virtue of nationality or domicile. As an extension of Sec. 1 on eligibility for copyright, it proceeds to guarantee copyright on every eligible work generally referred to as eligible by reference to ‘qualified persons’ in two categories, namely by citizenship of or domicile in Nigeria and a corporate body registered in Nigeria. Against the plaintiff’s argument in *Island Records* that the court was bound by the 1988 Act, which provides certain presumptions in their favour, Belgore CJ was emphatic that the action fell within the 1970 Act.<sup>32</sup> As it were, though provisions for the statutory presumptions in question were not included in the 1970 Act, protection for copyright in foreign works was.<sup>33</sup> The court made no references to any statutory provisions for the protection of copyright in foreign works but instead summarily declared that foreign companies are not within the contemplation of the 1970 Act.<sup>34</sup> We can tell that this statement cannot be accurate.

The court in *Societe Bic SA* took a similar approach, citing the *pari materia* provision under Sec. 2 of the 1988

Act. Like Belgore CJ, Jinadu J wasted no time or effort in concluding that the plaintiff, being a French company, was a foreigner and therefore ineligible for copyright protection in Nigeria. Nothing could be more spurious were the Reciprocal Extension Order 1970 considered, which itself made reference to Sec. 2. We take the position that the courts’ application of Sec. 2 in both cases to summarily determine and preclude protection of foreign works in Nigeria is inconsistent with the Acts both of 1970 and 1988 (as amended) that followed. The decision of the courts’ was made without reference to the provision relating to circumstances where foreign works or authors are protected. This calls into question the applicability of the Reciprocal Extension Order issued under the 1970 regime.<sup>35</sup>

The Reciprocal Extension Order essentially implies that the Copyright Decree 1970 did, in fact, empower the Federal Commissioner for Trade to extend the protection of copyright under the 1970 Decree to countries, upon satisfaction that said countries are parties to an international convention, namely the UCC, to which Nigeria is a party, and that they provide for the protection of copyright in works which are protected under the Copyright Decree 1970.<sup>36</sup> Accordingly, in the two cases of *Island Records* and *Societe Bic SA*, had the Reciprocal Order, which listed the countries affected in them, namely Germany, the United States, the United Kingdom and France, among the 57 countries to which Nigeria is to extend reciprocal protection, been considered, the decisions would have been different. While *Island Records* was decided based on the 1970 Act, the *Societe Bic*, *Microsoft* and *Voice Web* decisions were based on the 1988 Act.<sup>37</sup>

It is instructive to note that the 1988 Act preserved the Reciprocal Extension Order, a position which makes the Order applicable to the determination of protection of foreign works under the 1988 regime.<sup>38</sup> On that note, Sec. 3(3) of the Fifth Schedule to the Copyright Act 1988 puts the matter to rest. It states:

‘Any subsidiary legislation made under the repealed Act which was in force immediately before the commencement of this Act shall remain in force, subject to any necessary modifications, as if it had been made under this Act, and may be added to, amended, revoked or varied accordingly.’<sup>39</sup>

<sup>35</sup> Copyright (Reciprocal Extension) Order 1972, available on <<https://ictpo.licyafrica.org/en/document/dt9g27ddid8?page=1>> accessed 10 May 2021; see also *Gazettes. Africa* <<https://gazettes.africa/archive/ng/1972/ng-governent-gazette-supplement-dated-1972>> accessed 10 May 2021.

<sup>36</sup> *Ola* (n 11).

<sup>37</sup> Copyright Act (n 11) s 40(1).

<sup>38</sup> See *Liberty Records & E. M. I Records v M Y Owotutu Enterprises*, Unreported Suit No FHC/L/116/86 delivered 16 March 1990 (which held that ‘the provisions of copyright (Reciprocal Extension) Order 1972 is [sic] still very much in force by virtue of para. 3(2) of schedule 5 of the Copyright Decree 1988’); see also Bankole Sodipo, ‘Copyright Enforcement in Nigeria’ in Bankole Sodipo and Bunmi Fagbemi (eds), *Nigeria’s Foreign Investment laws and Intellectual Property Rights* (Centre of Commercial Law Studies, The Intellectual Property Law Unit, Queen Mary & Westfield College, University of London 1994) 178, 183.

<sup>39</sup> In the same section, the Act states expressly that ‘the Transitional and Savings Provisions in the Fifth Schedule to this Act shall have effect notwithstanding subs (1) of this section or any other provisions of this Act’; s 40(3); Copyright Act. This is also supported by the Interpretation Act, which provides that where an enactment is repealed and replaced by another, any subsidiary instrument in force by virtue of the repealed enactment shall, so far as it is not inconsistent with the substituted enactment, continue in force as if it were made pursuant to the substituted enactment. See Interpretation Act Cap I23 LFN 2004, s 4(2)(c).

<sup>32</sup> *Island Records* (n 10) 326.

<sup>33</sup> See the Copyright (Reciprocal Extension) Order of 1972 made under the 1970 Act; s 14 of the Copyright Act 1970 provides: ‘Reciprocal extension of protection. Where any country is a party to a treaty or other international agreement to which Nigeria is also a party and the Commissioner is satisfied that the country in question provides for protection of copyright in works which are protected under this Act, the Commissioner may by order in the Federal Gazette extend the application of this Act in respect of any or all of the works referred to in Section 1(1) of this Act –

a. to individuals who are citizen of or domiciled in that country,  
b. to bodies corporate established by or under the laws of that country,  
c. to works, other than sound recordings and broadcast, first published in that country, and  
d. to sound recordings made in that country.’

<sup>34</sup> *Island Records* (n 10), s 328.

Therefore, it is beyond question that the Reciprocal Extension Order subsists, though the 1970 Decree under which it was made has been repealed. While the courts did not consider or advert their minds to the Order in three successive decisions in *Island Records*, *Societe BIC SA* and *Microsoft*, when they did so in *Voice Web*, the Order did not carry much weight. For example, in *Microsoft*, the court dismissed the appeal of the appellant on the ground that it failed to produce the Reciprocal Extension Order in favour of the United States, the home country of the appellant. Neither counsel nor the court made mention of the Order. It is safe to assume that it was an oversight. A reading of the court's judgment shows that had the court been aware of the Reciprocal Extension Order, it would have ruled otherwise. This much was conceded by the Federal High Court in *Voice Web* when it observed that 'the Court of Appeal had not adverted to the Order of 1972 in that case. Additionally, the Court of Appeal had not effusively discussed the fundamental effects of reciprocity . . .'.<sup>40</sup>

It has been suggested that the Reciprocal Extension Order was the unknown saving grace of the appellant in that case.<sup>41</sup> To this extent, the authors agree. However, it is our view that *even if* the court did not learn of the existence of the Order, the appellant company would still have a remedy under Sec. 5 of the Copyright Act 1988.<sup>42</sup> Thus, beyond considering the Order or its relevance as the case may be, the state of affairs calls into question a more pertinent issue of the precise scope of its application when taken together with other relevant provisions of the Act in the context of statutory interpretation.

## 2. Statutory construction

Statutory interpretation plays a prominent role in the determination of the question of protection of foreign works before the *Voice Web* court, particularly where, unlike previous decisions, the Reciprocal Extension Order was actually considered but failed to avail the plaintiff. Ultimately, the question therefore turns on the correct interpretation and application of the two main provisions, namely Secs. 5 and 41 of the Act, an important question not for defining the validity of the Order, but for clarifying the boundaries of its application to the cases.

Though the 1988 Act contains those provisions on protecting foreign works, we must bear in mind that these provisions have not been the same through the cases. The Copyright Act 1988 was amended in 1992 and 1999.<sup>43</sup> At the time of *Societe Bic*, the Copyright Act 1988 included the provisions of the current Sec. 41<sup>44</sup> but had not

been amended to incorporate what is now Sec. 5 until the 1999 amendment to the principal Act. In contrast, *Microsoft* and *Voice Web* were decided after the existing Sec. 5 had been added to the Act by amendment. This distinction is important in our analysis.

The first issue to clarify is that the express preservation of the Order by the 1988 Act as amended implies that it must be interpreted or read in conjunction with other provisions, for example, in the context of Secs. 5 and 41 of the Act in determining whether reciprocal protection is *ipso facto* extended to a particular country. Citing authorities in that regard, Obiozor J in *Voice Web* alluded to this long-standing principle of statutory interpretation. According to the learned Professor and Honourable Judge:

'[w]hile it is true that one of the basic rules of interpretation of statutes is that a lawmaker will not be presumed to give a right in one section and taken away it in another – see *Osadebey v Attorney General of Bendel State* (1991) 1 SC (PT. 11) 73. It would be wrong to take Sec. 5 of the Copyright Act in isolation, for it is wrong to take a section of a statute in isolation of the other provision. The proper guide is to approach the question of interpretation of a section on the footing that the section is a part of a greater whole. See *James Orubu v NEC* (1988) 5 NWLR (PT. 94) 232. So a provision in a statute should not be interpreted in isolation rather in a context of the statute as a whole. See *Action Congress v INEC* (2007) 6 SC (PT. 11) 212. In effect, the principles dictate that all the related provisions in a statute, as well as the statute as a whole, must be read together.'

Laying this foundation, the court proceeded upon a 'holistic construction' of Secs. 5 and 41 in determining the protection of foreign works. This is where questions of actual application, as opposed to validity, of the Reciprocal Extension Order deserve further examination in the juridical determination of reciprocal protection of foreign works in the context of the combined effect of Secs. 5 and 41 of the Copyright Act with particular reference to the *Voice Web* decision. In that regard, the court opined that the intendment of the Copyright Act is to subject the enjoyment of copyright in foreign works by reference to international agreements under Sec. 5 to the principle of reciprocity under Sec. 41 of the Act.<sup>45</sup> This would mean that to be protected by a court in Nigeria, the foreign work in question must also qualify under Sec. 5 to be conferred with copyright, in addition to which the Minister must also extend the application of the Act to the work in question. In effect, compliance with Sec. 41 carries with it compliance with Sec. 5. As could be gleaned from the two sections, reciprocity is the common denominator or underpinning factor for protection of foreign works in Nigeria. Therefore, how would the plaintiff seeking to enforce his copyright in a foreign work be required to produce both a Reciprocal Extension Order and at the same time a certificate from the Nigerian Copyright Commission (hereinafter 'the Commission') if both are essentially to satisfy the same end or purpose, that is, to show or establish reciprocity?<sup>46</sup> This raises the question of whether the two sections are mutually exclusive.

<sup>40</sup> *Voice Web* (n 9) 26.

<sup>41</sup> Olumide Ekisola, 'Microsoft Corporation v Franike Associates Ltd – An Error Reaffirmed on Appeal' (*Parker & Parker*, 13 July 2012) <<https://ipat.torneys.parkerip.com/ip-directory/display-newsletter?NewsletterID=362>> accessed 14 May 2021.

<sup>42</sup> John Onyido, 'Teaching Intellectual Property Law as a Pedagogical Imperative at The Faculty Of Law of The University Of Ibadan, Nigeria' (Intellectual Property Law Symposium, Ibadan, 13 July 2018) <[http://www.spaaibade.com/resources/wp-content/uploads/2018/09/JohnOnyido.Teaching-Intellectual-Property-Law-as-a-Subject-in-the-Faculty-of-Law-of-the-University-of-Ibadan.Final\\_.pdf](http://www.spaaibade.com/resources/wp-content/uploads/2018/09/JohnOnyido.Teaching-Intellectual-Property-Law-as-a-Subject-in-the-Faculty-of-Law-of-the-University-of-Ibadan.Final_.pdf)> accessed 14 May 2021; Cynthia Onyinyechi Igodo, 'Enforceability of Foreign Copyright in Nigeria: a review of the Court of Appeal's decision in *Microsoft v Franike*' (2018) 44 Commonwealth Law Bulletin 227-236 <<https://www.tandfonline.com/doi/abs/10.1080/03050718.2019.1608278>> accessed 14 May 2021.

<sup>43</sup> WIPO, 'Copyright Act' (n 13).

<sup>44</sup> In the Copyright Act 1988 Cap 68 LFN 1990, the provisions of s 41 are contained in s 33.

<sup>45</sup> *Voice Web* (n 9) 24.

<sup>46</sup> It should be noted that by s 41 of the Act, a work produced in a foreign country or by a person domiciled in a foreign country is protected by the Act if the Minister extends the application of the Act to that

Section 41 of the Act does not say that a gazetted order of reciprocity is a precondition for enforcement of copyright in foreign works. It could only have been regarded as such because, before 1999, it was the singular method of bringing foreign works within the purview of the Copyright Act. Post-1999, Sec. 5 introduces issuance of the Commission's certificate to serve as conclusive proof of whether a country is a party to an obligation in a treaty or international agreement to which Nigeria is also a party in satisfaction of the requirement of reciprocity already established by the Reciprocal Extension Order under Sec. 41. Because Sec. 41 predates Sec. 5, the authors are inclined to submit that Sec. 5 was inserted into the Act to solve a problem or 'mischief', as it were, that Sec. 41 of the Act could not solve but which Sec. 5 intended to cure using the mischief rule of statutory interpretation. The authors' opinion that the insertion of Sec. 5 into the Act in effect empowers the courts in Nigeria to enforce copyright in foreign works without a Reciprocal Extension Order issued under Sec. 41, so far as the work falls within Sec. 5 of the Act, has a rational basis.

Similarly, this reasoning is also true of the Commission's certificate under Sec. 5. In some quarters, this has been taken to mean that a plaintiff seeking enforcement of copyright in a foreign work that is not armed with a Reciprocal Order *must* present a certificate from the Commission.<sup>47</sup> With respect, the authors disagree with this position. The words of Sec. 5(2) are clear: a certificate from the Commission stating that a country is a party to a treaty or some other international agreement to which Nigeria is a party is conclusive proof of that fact, not the *only* acceptable proof of it. Accordingly, the certificate is conclusive proof, not the sole determinant of whether a country is a party to an obligation in a treaty or other international agreement to which Nigeria is also a party. If the lawmakers intended a certificate from the Commission to be the only means of proving that the other country and Nigeria are parties to an international agreement, it would have stated so expressly. In the absence of such stipulation, other means of proof, such as an order pursuant to Sec. 41, if any, or indeed certified copies of the accession documents of the countries involved, would suffice. In our view, these two instruments cannot be intended as a dual or repeated requirement if reciprocity is the underpinning factor for protection of foreign works in Nigeria. By a holistic construction of the two provisions, the idea that only the Minister can authorise enjoyment of copyright in foreign works cannot be the correct or 'unblemished'<sup>48</sup> position.

Questions also arise from the 'treaty or international agreement' context of reciprocity found in both Secs. 5 and 41, which have implications for the reciprocal

protection of foreign works in Nigeria in the context of the effect of reference to a 'treaty or international agreement' and specifically with regard to the UCC. While the Act does not define 'treaty or international agreement', the terms in both sections as the basis of determining reciprocal extension of protection cannot be interpreted to limit such protection to the UCC, the only exception being in the Reciprocal Extension Order made pursuant to Sec. 41. Both the UCC and the Reciprocal Extension Order itself made in reference thereto are no longer of considerable importance given the membership of Nigeria to other copyright treaties and international agreements. Indeed, subsequent to the 1972 Order and in the cases on this issue, including the present case, Nigeria has acceded to the Berne Convention, the TRIPS Agreement and other international copyright treaties and agreements of greater significance than the UCC in the consideration of foreign works in Nigeria.<sup>49</sup> Consequently, though preserved under the 1988 Act, the Reciprocal Extension Order is now obsolete. So is the UCC test on which it is based in so far as it precludes other copyright treaties and international agreements for purposes of reciprocal protection of foreign works.

Applying the above reasoning to *Voice Web*, although the Order was issued in 1972 (when Cyprus, the country of origin of the work in the case, was not listed) at the time when the cause of action arose, both countries had not only become signatories to the UCC (Nigeria in 1962 and Cyprus in 1990), they had also acceded to the Berne Convention and TRIPS Agreement. With Nigeria in 1993 and Cyprus in 1964 in the case of Berne, and both in 1995 in the case of TRIPS, the court in *Voice Web* ought to have taken judicial notice of these circumstances. Therefore, denying protection to works of Cypriot origin in Nigeria merely because Cyprus was not listed in the Reciprocal Extension Order of 1972, when in fact Cyprus had become a fellow signatory country to the UCC when the cause of action arose in 2017, is inconsistent not only with the obligation on Nigeria contemplated under the Act which preserved the Order for that purpose, but also with the Order itself. The plaintiff in *Voice Web* tendered a certificate from the Nigerian Copyright Commission<sup>50</sup> showing that Nigeria and Cyprus are parties to the Berne Convention, UCC and TRIPS and tendered exhibits showing copies of the treaties and dates of accession by Cyprus and Nigeria.<sup>51</sup> This should have been more than enough to vest the plaintiff with an enforceable right to protect its copyright.

The evidential value of the Commission's certificate is significant and consistent with the statutory powers as the agency responsible for the administration and enforcement of copyright, among others. Conferring conclusive proof on a certificate issued by the Commission as evidence of whether a country is a party to an obligation in a treaty to which Nigeria is also a party is not only logical but consistent with its statutory powers of monitoring and supervising Nigeria's position in relation to international conventions and advising the government in this

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country, upon satisfaction that the country extends that equivalent protection to works authored by Nigerian persons; s 5, on the other hand, states that copyright is conferred in a foreign work if at least one of its authors is a citizen of or domiciled in or a company incorporated under the law of a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party.

<sup>47</sup> Bankole Sodipo, 'Are Foreign Copyright Works Protected in Nigeria?' (2020) 10 QMJIP 238, 249.

<sup>48</sup> In part of the ruling, the learned Justice had regarded as an 'unblemished' view that a person who enjoys copyright under s 5 by reference to international agreement is to enjoy his or her right of action (s 16) subject to s 41 – a related provision to s 5 of the Act. See *Voice Web*, at pages 23-24.

<sup>49</sup> According to WIPO, since almost all members are also members of the Berne Convention, which takes priority over the UCC, coupled with the emergence of TRIPS, UCC has lost significance. See <www.wipo.int/>.

<sup>50</sup> *Voice Web* (n 9), 10.

<sup>51</sup> *ibid*.

regard.<sup>52</sup> This statutory power cannot be weakened or eliminated by Sec. 41. Accordingly, we also find support in the position taken by the Commission in the wake of the decision in *Microsoft*. In a public notice, the Commission publicly distanced itself from the position taken by the court in that case. It stated:

‘For the avoidance of doubt, the Commission hereby reaffirms that in addition to works authored by Nigerians and first published in Nigeria, Sec. 5 of the Copyright Act (Cap. C28, Laws of the Federation of Nigeria, 2004) extends the provisions of the Nigerian Copyright Act to works from over 165 countries (the USA inclusive) that are members of the Berne Convention or other treaties or international agreements to which Nigeria is party.’<sup>53</sup>

This Statement by the Commission may have provided some hope for foreign copyright holders. Yet the *Voice Web* decision has again dashed whatever hope there might have been. It is important to note also that Sec. 5 of the Act, when read as a whole, confers copyright not only on works authored by foreign persons but also on every work which is first published by named international organisations – the United Nations, the African Union and ECOWAS – even if said work is not published in a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party.<sup>54</sup> In all, we find that the reasoning of the court in *Voice Web* that persons who enjoy copyright protection under Sec. 5 do so subject to Sec. 41 is fundamentally flawed. It is the considered view of the authors that the lawmaker intended that Sec. 5 of the Act should be sufficient to confer on foreign authors a right to enforce their copyright as provided under Sec. 16 of the Act where *any* of the conditions under that section is met.

On a final note, the court’s reasoning on the application of reciprocity in the context of Sec. 12 of the Constitution has contributed to the denial, wrongly in our view, of the jurisdiction against the plaintiff. According to the section, ‘No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly’.<sup>55</sup> While this should not be confused as meaning that international treaties shall have no binding effect in our courts unless the entire text of the treaty is absorbed as law, neither the UCC nor Berne nor TRIPS has direct effect in cases that come before domestic courts in Nigeria. Our position is that the Copyright Act, as amended in 1999, now gives effect to a key provision of these treaties. The Constitution states that it shall not have the force of law unless and until it is domesticated. While the court asserted, correctly in our view, that until a treaty is enacted into law in Nigeria, it is incapable of enforcement as law in Nigeria,<sup>56</sup> the real question before it is not the application or enforcement of copyright conferred under a treaty. This is instructive because enforcing copyright conferred under a treaty and under the domestic Copyright Act are quite

separate and distinct. While the former requires domestication in terms of Sec. 12 of the Constitution in order to apply, the latter applies as the governing law. Clearly, neither the UCC nor Berne nor TRIPS has been enacted or domesticated into law in Nigeria.

While reciprocity constitutes the basis for protection of foreign works by the combined effect of Secs. 5 and 41, neither section amounts to an enactment or domestication of the UCC or any treaty for that matter in Nigeria to justify the court’s excursion ‘in the realm of recognition and enforcement of treaties/conventions among members of the international community’. This misdirection, in our view, prevented the court from appreciating the evidence of ascension in proof of reciprocity actually presented before it in compliance with both sections. According to the learned judge, ‘I did not find anything that the plaintiff satisfied Sec. 41 of the copyright act on order in the federal gazette by the minister of culture that Cyprus – the foreign country of the plaintiff – is such country to which the application of the copyright act is extended by the minister.’<sup>57</sup>

Nothing could be more mechanical. Aside from that, the finding is also in error because the court was looking at the 1972 Order and could not find Cyprus, whereas both Nigeria and Cyprus had acceded to the UCC and other copyright treaties, including Berne and TRIPS, by 2017, when the cause of action arose. Therefore, erroneously, it held that the plaintiff did not satisfy Sec. 41.

## V. Conclusion

From the foregoing, under the extant Copyright Act of Nigeria, Secs. 5 and 41 provide two methods by which a foreign work can come under the purview of the Act. For a foreign work to come within the ambit of the Act, it is enough if the other country is a party to a treaty to which Nigeria is a party by which certificate from the Commission provides a conclusive proof under Sec. 5, or where the foreign country indicated enjoys reciprocal extension of copyright via an Order made by the Minister under Sec. 41. In both cases, in carrying out the intentment of the Act concerning protection offered a foreign work, especially in view of the limited application or importance of the UCC, the court has the duty to examine the facts and circumstances of each case and to always ‘chronologically verify the status of protection of the work’, that is, current treaty standing, in relation between Nigeria and other countries in determining whether a particular foreign work is accorded protection under the Act.<sup>58</sup> This position is vital in administering justice through the law at the time the cause of action arose in each case. For emphasis, Secs. 5 and 41 of the Act are distinct provisions, which should not be lumped together; one of the two conditions is sufficient to clothe a foreign work with enforceable copyright in Nigeria. In the case under review, it would appear that the court taking such a restrictive view of its jurisdiction is regrettable and constitutes an unhealthy drag on the development of intellectual property law in Nigeria. It is hoped that the Supreme Court will have a chance to decide on this important question in the near future.

<sup>52</sup> See Copyright Act, s 34(3).

<sup>53</sup> Victor Nzomo, ‘Finding a Balance in Software Copyright Litigation: Microsoft Cases in Nigeria and Kenya’ (*IP Kenya*, 11 July 2012) <<https://ipkenya.wordpress.com/tag/microsoft-corporation-v-franike-associates-ltd/>> accessed 14 May 2021.

<sup>54</sup> Copyright Act 1988, s 5(1) (b) (ii)-(IV).

<sup>55</sup> Constitution of the Federal Republic of Nigeria 1979 Cap 62 Laws of the Federation of Nigeria (LFN) 1990, s 12(1); Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 LFN 2004.

<sup>56</sup> *Voice Web* (n 9) 28.

<sup>57</sup> *ibid* 32.

<sup>58</sup> See Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008) 86.