

Moral Rights in Nigeria—Lessons from More Developed Jurisdictions

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Introduction

Experts on intellectual property (IP) law are few in Nigeria. This is why there is relative laxity and dearth of discussions on topical issues in the field. Though basic discussions on the topics are available, these discussions are not effectively presented from the perspective of advancing IP in Nigeria. So Nigeria still has a long way to go in IP, and a vital way of ensuring this is creating IP-discussion fora. The few experts in the field in Nigeria must take on issues by writing articles that expound progressive IP principles and keep suggesting improvements to the Nigerian government. This is critical if one looks at the various merits attached to a vibrant IP regime. And this is why this article deviates from the conventional type of articles on IP in Nigeria and presents a lacuna in Nigerian IP law on moral right and the need for us to embrace it.

No doubt, when one mentions ‘moral rights’, the first thought that comes to mind is often in relation to copyright. This is because of the Berne Convention on copyright made explicit provisions regarding them. But today moral rights have spilled into other IP mechanisms as patents, trademarks, and designs via contracts. Moral rights are simply the other types of rights one has in an intellectual creation that is protected—either with copyright, patent, trademark, or designs—under an IP regime.

For every IP, there are two classes of gains. One is pecuniary; the other is moral rights. Pecuniary gains is an aspect that confirms the ability of an IP owner to exploit the IP to make money from it. Thus, an inventor having a patent in respect of an invented machine or process can give another inventor wanting to build on the patented invention a license for a fee. A proprietor of a trademark can sell it; so is the owner of an invention. These are outright sale of IPs and they are some of the ways IP owners make money. Maximizing IP for pecuniary gains is a different

discussion on its own which most IP owners are not acquainted with in Nigeria. Licensing, outright sale, lease, franchising, merchandising, and sponsorships are ways IPs are exploited and IP owners make money.

Just on the side of pecuniary gains are moral rights. Moral rights demand that the creators of copyright works¹, inventor of an invention or process, proprietor of a trademark, have e.g their names on their work, invention, or trademark. Presently, there are three conceivable and applicable moral rights—the two most notorious are paternity and integrity. The third one which is more visible in UK IP law is the right to object to false attribution².

Explanation of each moral right

As a form of introduction, it is important to highlight the source of moral right contained in Article 6bis of the Berne Convention for the Protection of Literary and Artistic Work 1886 (as amended)³.

Article 6bis provides that:

“Independent of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author’s honor or reputation.”

The Berne Convention clearly recognizes two moral rights – paternity and integrity. The UK’s recognition of false attribution is a reverse of paternity as shall be seen later in this article.

The right of paternity

¹ As mentioned earlier, moral rights is more loud when it comes to copyright works, but IPR owners are ensuring its inclusion in contracts in relation to patents, trademarks, and designs. The basic thing is to get the idea of what moral right itself means.

² See section 84 of the UK CDPA, 1988

³ Nigeria ascended and became a part of the Berne Union in 1993, so as a signatory State, the provisions of Berne applies as a guide, since the convention has no penal outlook unlike the WTO TRIPS Agreement.

What this right means is that when a creator creates a work and the same work has been copyrighted (it must be remembered that copyright in works arises automatically, and there is no formality as regards registration to *pull* protection), then the creator's name should appear on the work anywhere in the world. So if A writes a book, and in a television broadcast part of the book is quoted, the right to paternity requires that A—the author of the book—be mentioned following the quote or before the quote. From the idea of what paternity means, the public must know from whom the work emanates from. The same thing applies to work of art, songs, craft, and any other copyrightable works, when used or when transferred e.g via a license, sale, franchise etc. The owner who created the work has the right to have his or her name on that work. This is the idea of authorship the right to paternity protects.

In discussing moral right and the idea of “owner” and “creator”, we must be careful. “Owner” and “creator” are not always the same person. In IP discussions, there is a difference between these two. Too often, IP law puts deference on the owner, not the creator. And the owner of an IP or the rights in it need not necessarily be the creator. Imagine an employee-employer case. An employee who drafted a report for the employer—a company—is the creator, but often not the owner of the copyright in the report. Agreements/contracts between employees and employers also play a role in this type of instance, and in some jurisdictions, the law put deference on the owner for pecuniary purpose, but on the creator for moral-right purpose. In some jurisdictions (like the UK), the moral right belongs to the owner, unless the creator asserts it. These issues would be touched at the later part of this article.

The right of Integrity

As succinctly put in the Berne Convention in the last limb of Art. 6bis, an author has the right *to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.*” This means if an artist, for example, makes a drawing of Jesus Christ with his twelve disciples at the biblical Last Supper, a person cannot add a thirteenth disciple to the disciples. If an author writes a book in which he makes the protagonist heterosexual, a person cannot adapt the book or re-write it and make the protagonist homosexual. Another example, a person cannot make another

drawing of Monalisa and distort it. The reason is because such modification of the work has the potential of prejudicing the author's honour and/or reputation. So if an author publishes a book, a reader who disagrees with the content cannot for example publicly set the book on fire — distortion — as that would offend the moral right to the integrity of the book. The right to integrity is in the work, not in the author.

The last example above must be understood in the light of the first sale doctrine popular in the United States. Under that doctrine (as an exception to the copyright-owner right), a buyer of a copyrighted work can sell, display, or otherwise dispose of the copyrighted work to the exclusion of the desires of the copyright owner. The doctrine is often referred to as the 'exhaustion rule', and what it really represents is that upon sale of a copyrighted work to a buyer, the author's right on the copyrighted work exhausts and the buyer can do what he or she likes as regards the work, including specifically selling, displaying, or otherwise disposing of the work e.g. renting it out, reselling it, etc.

In relation to the moral right of integrity, whether the heaven is the limit of the buyer is unclear, i.e. can the buyer also distort or mutilate the work purchased, since the author's right has now ceased? The answer would be in the negative — at least in a country as the US since the law specifically mentions what buyers can do with purchased works. Distortion, mutilation, or anything that could offend the right to the integrity of a work are not included. Discussions on first-sale doctrine is silent in Nigeria. In more developed jurisdictions, there is a debate on its fairness and scope. For example, in most European countries, where the moral right of integrity is loud e.g. in France and Germany, the first sale doctrine does not validate offending the moral right to the integrity of a work or offending any moral right for that matter.

Note that according to the Berne Convention, the test is whether the refusal to properly attribute a work or modifying a work would be prejudicial or constitute dishonor to the creator. If an act will not be prejudicial or constitute dishonor to the creator, then it won't offend the creator's moral right.

The right to object to false attribution

As mentioned earlier, the right to object to false attribution is a reverse of the right to paternity and is recognized in the UK. Therefore, while the moral right of paternity suggests authorship and having the author's (true) name on copyrighted works, the right to object to false attribution suggests that when referring to the copyrighted work, the referral must not be to a different author. This right gives the author the moral right to preclude others from attributing a work as belonging to him. If A wrote books B, C and D, a reporter/critic X listing the books written by A cannot say A wrote E as well since A has not written book E. Thus, A can preclude X from attributing E to have been written by him.

In law, uncommonly, the right to object to false attribution can be used in the reverse sense as well just as other legal principles⁴. In our example above, assuming books B and C written by A contains a description of a particular 'problem' and D contains the 'solutions' to the problem, X cannot for example in his report/critique criticize A as merely publishing problems in books B and C and not the solutions by intentionally refusing to mention D—where A has discussed the solutions. A can (inclusively) preclude X from attributing B and C alone to him (in the 'problem' discourse) if X chooses not to mention D—depending on the point X is trying to make. In summary, the idea of "false" attribution can be interpreted widely, including and especially in respect of false advertisement as shall be seen later.

As the right to object to false attribution is a reverse of the right to paternity, the reverse of the right to integrity has already been included in the right to integrity, since the right covers all sort of modifications to the copyrighted work.

Other Moral Rights

⁴ Imagine a legal principle as "Easement by prescription". Let's assume after 5 years of continuous adverse use is the ultimatum that confers easement by statute. If A is the servient and B is the dominant, if A had allowed B to use the land adversely for the statutory 6 years – this means B now has easement by prescription in A's land. In the reverse, assuming B stopped using A's land after the 6 years because A had constructed a blockage on the land restricting B from continuous use of the land, if this situation persists for 5 years – A in the "reverse" can claim adverse possession as well for the 5 years period of continuous obstruction.

Apart from the three moral rights discussed above, there are other moral rights. These other moral rights are notably the right to make a work anonymously or under a pseudonym and the right to the adaptation of a work.

In the former, the difference between anonymous and pseudonym is that, when a work is made anonymous, the name of the author is absent but under a pseudonym, the author has assumed a name. A reader might confuse the author's pseudonym to the author's actual name. A common pseudonym is Alan Smithee, used by film directors who wish to disown a project. The moral right allows an author to publish a work in this manner.

The right to adaptation, on the other hand, implies that the author can stop a person from adapting his copyrighted work—encapsulated under the right to integrity. An important principle in the Berne Convention is the minimal standard of protection and rights to be conferred on “authors”, their “works”, and the “terms of protection”. As regards authors, the Berne Convention provides for the author's right to reproduce work⁵, to perform it publicly⁶, translate⁷, adapt⁸, broadcast⁹ etc. So another party may not adapt a work without the author's permission.

It is unclear whether the artists resale right as in the EU is a moral right. Since it is pecuniary in nature, it can be classed as economical. But because *it follows the author, this* gives room for believing resale right it is a moral right. The right gives the author (if alive) or to his heirs (if dead) or to such authorized body¹⁰ some interests, usually in the form of royalty, in respect of the subsequent sale of an artist's work. In simple terms, if artist A sells his or her work of art to B and B resells the work of art to C, artist A still has some interest (in the form of royalties) from the income in the sale by B to C. This explains why the right is often referred to as author's “resale right”¹¹.

⁵ Art. 9, Berne Convention

⁶ Art. 11, Berne Convention

⁷ Art. 8 and 11, Berne Convention generally

⁸ Art. 12, Berne Convention

⁹ Art. 11 bis, Berne Convention

¹⁰ Usually authorized by legislation

¹¹ See for example, The Artist's Resale Right Regulations 2006, UK

There are two peculiarities of author's resale right. Firstly, it does not apply to all rights, but only to "original works of art and original manuscripts of writers and composers". If Nigeria wants to adopt this principle, we can expand it to cover even more copyrightable works. Secondly, the right is "inalienable". This means that an artist cannot be stripped of this right even when he or she has, for example, assign his or her IP rights in a work of art to another party. From the French meaning of the phrase, *the right (still) follows the artist*. So the right is a direct contravention of the "first-sale doctrine", especially in the United States¹². Remember the first-sale doctrine forbids the author's interest in a subsequent sale by B to C. It relies on the idea that when (in our above example) A has first sold the work of art to B, his right in the work (including to any royalty if B subsequently sells to C) has ceased and B is then free to do whatever he or she likes with the work (aside from violating the artist's moral right). The first sale to B effectively terminates A's subsequent rights, including right to royalties.

False Advertisement and Defamation in relation to Moral Rights

Two other issues that need to be mentioned before closing this article is 'false advertising' and 'defamation' as they relate to moral rights.

Ordinarily, a creator of an advertisement in his or her own advert would be precluded from suggesting or making a false attribution to her competitor. The law on advertisement is still underdeveloped in Nigeria. For example, competitors still make adverts and refer to their other competitors subliminally. (The courage to address a competitor expressly in an advert by another competitor is not visible in these adverts.) Often, to show the defects or exploitive activities of other competitors and to show its own merits for example, a telecommunication company as MTN would show it is superior to a competing network provider as Globacom or Airtel Telecommunication Company by showing a yellow colour on top of a green and red colour—colours associated with Globacom and Airtel respectively. In more developed jurisdictions, a network provider would expressly mention the trade practice of her competitor in her own advert and compare it with hers, and state how hers is better, and why consumers should

¹² With exception to California – which allows resale rights of artists when they meet certain conditions, see: California Resale Royalty Act (Civil Code section 986)

patronize her instead. Nigeria is yet to develop to this extent. So most competitors still cower in fear of a defamation suit for comparative advertisement.

Without distracting from the point as regards “moral right”, the point is that where comparative advertisement is allowed, a competitor cannot falsely make an advert about her competitor as this would offend the moral right of (true) attribution. Of course, this part is a futuristic consideration for Nigeria since we still do not have a comparative-advertisement practice. In discussing the idea of comparative advertisement in Nigeria, a legislation should be made regulating this aspect of competition practice as it obtains in the EU and the US. Competitors must be made to remember via the legislation that fair business practices are allowed in consumer’s interest and also that *justification* still remains a defense to a possible defamation suit.

Conclusion

In Nigeria, of all the moral rights discussed and other related issues, the Nigerian Copyright Act only recognizes the paternity right in subsections (a) and (f) of the Second Schedule to the Act, even when the provisions of Art. 6 Ibis of the Berne Convention uses the word “shall” and maintained the necessity of the moral right of paternity and integrity at the least. Nigeria ensures only the former right¹³ but not the latter and does not even provide that the moral right survives the author’s death as well as suggested under the Berne Convention. This is an anomaly. An amendment must be made in our laws to remedy this.

Partly, the right to adaptation in relation to the right to integrity and use of anonymous/pseudonym are recognized in our law. This is commendable. But other issues as false/comparative advertisement, explicit right to integrity, right to object to false attribution are not protected. Our laws and practice should embrace moral rights as they have a way of encouraging authors in creating even more works to protect the non-commercial interests of creative authors¹⁴.

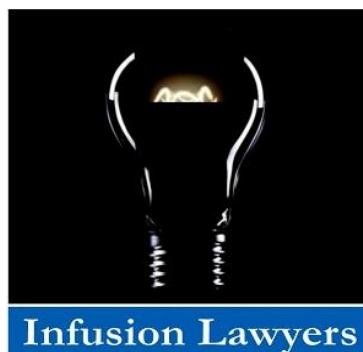
¹³ See sections 2(7)(g), 3(5)(g), Berne Convention

¹⁴ See Mira T Sundara Rajan “Moral Rights in the Digital Age: New Possibilities for the Democratization of Culture”, *International Review of Law Computers & Technology*, Volume 16, 2002, No 2, 187–197, 187

The last issue is whether moral right should be alienable/waivable or inalienable, whether it should survive the author or not; whether it could be assigned upon transfer or if it should always remain personal; and whether authors must assert it (before it operates) or not. Nigeria must provide the right answers to these questions to fully embrace the tenets of moral rights. In this author's view, the moral right to paternity should be subject to contracts (i.e. it should be waivable), while the right to integrity and false attribution should not be waivable to avoid confusion of works—the law should not be an author of confusion in the society. Moral right should also always be personal and not assignable, apart from the right to paternity. And whenever a moral right is recognized, it is pertinent that it should at least be perpetual to the extent of copyright protection in a work. Whether authors must assert the right as done in the UK is also an option, but this option has the potential of causing confusion when neither the author nor the owner of IPR asserts it for example, in that situation, what happens? The legislature must be vibrant in making laws as regards defamation, comparative advertisement, and false advertisement aimed at ensuring fair business practices and healthy competition amongst traders as advertisements are intellectual creations protectable by copyright.

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