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RECENT DEVELOPMENTS

Fracturing Constitutional Rights: The Prosecution of Alleged Broadcast Infringers in Nigeria

Bankole Sodipo*
Babcock University
sodipob@babcock.edu.ng

Abstract

Infringement of broadcasts is often treated as a crime. The Nigerian Constitution guarantees that no-one can be prosecuted for any act that is not prescribed in a written law. Section 20 of Nigeria's Copyright Act only criminalizes dealing with infringing copies. A "copy" is defined in terms of material form. An infringing broadcast therefore connotes a recorded broadcast or a copy of a broadcast. This article argues that, statutorily, not every act that gives rise to civil liability for broadcast copyright infringement constitutes a crime. The article reviews the first broadcast copyright prosecution Court of Appeal decision in *Eno v Nigerian Copyright Commission*. Eno was unlawfully prosecuted, convicted and imprisoned. The article seeks to stem the wave of prosecutions on the type of charges used in *Eno*. In the absence of law reform, the prosecutions based on the line of charges in *Eno* constitute a fracturing of constitutional rights.

Keywords

Broadcast, copyright, infringe, constitution, crime, material, prosecution

INTRODUCTION

Given the significant investment in the acquisition of rights, programming and equipment, the infringement of broadcast rights is proscribed in many

* PhD (London), BL. Professor of law, Babcock University (former dean); visiting scholar, Queen Mary University of London; visiting scholar, University of Cambridge; visiting fellow, British Institute of International and Comparative Law; partner, GO Sodipo & Co (barristers, solicitors and arbitrators). The author is indebted to Femi Fajolu, Professor Yemi Arowolo, Dr Bukola Olugasa and Teni Akanni who commented on earlier drafts. Any remaining errors are the author's.

parts of the world.[1] Whether in Africa,[2] the United Arab Emirates,[3] India,[4] Singapore,[5] Japan[6] or Europe,[7] broadcast infringement, often a borderless impairment, erodes the profitability of broadcasting stations and their business partners.[8] Sometimes broadcast infringements are carried out by reputable organizations, including state backed broadcasters.[9] The problem is so

1 *Online Copyright Infringement in the European Union: Music, Films and TV (2017–2018), Trends and Drivers* (20019, European Union Intellectual Property Office), available at: <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/quantification-of-ipr-infringement/online-copyright-infringement-in-eu/online_copyright_infringement_in_eu_en.pdf> (last accessed 2 November 2020). *Money for Nothing: The Billion-Dollar Pirate Subscription IPTV Business* (2020, NAGRA - Digital Citizens Alliance), available at: <https://dtv.nagra.com/DCA-Money-for-Nothing-Report> (last accessed 2 November 2020). S Sharma "Signal piracy: A threat to Asia-Pacific broadcasters" *WIPO Magazine* (2018), available at: <https://www.wipo.int/wipo_magazine/en/2018/01/article_0002.html> (last accessed 2 November 2020). *Piracy of Digital Content* (2019, Organisation for Economic Co-Operation and Development), available at: <https://read.oecd-ilibrary.org/science-and-technology/piracy-of-digital-content_9789264065437-en#page3> (last accessed 2 November 2020).

2 A Foster "African football bosses call out beoutQ on piracy" (8 July 2019), available at: <https://www.ibc.org/trends/african-football-bosses-call-out-beoutq-on-piracy/4068.article> (last accessed 13 October 2020).

3 S Bainbridge "A guide to piracy protection for sports broadcasting rights-holders in the UAE" (8 December 2015), available at: <https://www.lawinsport.com/content/articles/item/a-guide-to-piracy-protection-for-sports-broadcasting-rights-holders-in-the-uae> (last accessed 13 October 2020).

4 S Sharma "Signal piracy", above at note 1.

5 D Wong "The EPL drama – paving the way for more illegal streaming? Digital piracy of live sports broadcasts in Singapore" (October 2016) 35/5 *Leisure Studies* 534.

6 KS Lambert "Unflagging television piracy: How piracy of Japanese television programming in east Asia portends failure for a US broadcast flag" (April 2006) 84/5 *Texas Law Review* 1317.

7 The European Broadcasting Union "Legal & policy focus - Broadcasters' rights: Towards a new WIPO treaty" (February 2019), available at: <https://www.ebu.ch/files/live/sites/ebu/files/Publications/Position_Papers/Legal_focus_Broadcasters_rights_WIPO_treaty.pdf> (last accessed 4 November 2020).

8 B Sodipo "Business of sports: Issues in broadcasting, marketing, sponsorship" (address at the GO Sodipo memorial lecture, December 2009); B Sodipo "Towards a national position on proposed WIPO instrument on the protection of broadcasting organizations" (paper presented at the National Consultative Meeting on the Proposed WIPO Treaty for the Protection of Audiovisual Performances, NICON Luxury Hotel Abuja, 16 October 2010); B Sodipo "Deregulation: The politics of funding and increasing local content in broadcasting" in E Azinge and B Owasonoye (eds) *Deregulation: Law, Economics and Politics* (2013, Nigerian Institute of Advanced Legal Studies)107; B Sodipo "Issues and dimensions in pay subscription broadcast piracy in Nigeria" (paper presented at the National Broadcasting Commission / Nigerian Copyright Commission, Lagos workshop, May 2009); B Sodipo "The National Broadcasting Commission decree: Matters arising" (paper presented at the quarterly meeting of the National Broadcasting Commission and radio and television licence holders, December 1997).

9 P Nicholson "Saudis 'welcome' FIFA legal action in KSA as beoutQ piracy continues" (16 July 2018), available at: <http://www.insideworldfootball.com/2018/07/16/saudis-welcome-fifa-legal-action-ksa-beoutq-piracy-continues/> (last accessed 13 October 2020).

significant that regulators in some territories have proposed technological solutions.[10] Infringers are bold to engage right-holders in litigation whether in the United States,[11] England,[12] Portugal[13] or Nigeria[14] and decisions handed down by superior courts have sometimes sent shock waves through the international broadcast industry.[15] There have been calls for a new broadcast treaty[16] to deal with activities like streaming.[17] Being a statutory right, broadcast copyright is limited only to the extent that a local statute circumscribes it and unauthorized dealings with broadcasts will only amount to a crime if Parliament prescribes such acts as offences.

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For unauthorized broadcasts of tennis by the same station, see "Saudi Arabia-based channel beoutQ accused of 'industrial-scale piracy' over tennis broadcasts" (6 July 2018), available at: <https://www.alaraby.co.uk/english/news/2018/7/6/saudi-arabia-based-channel-beoutq-brazenly-stealing-tennis-broadcasts> (last accessed 13 October 2020).

10 D Kaplan "Broadcast flags and the war against digital television piracy: A solution or dilemma for the digital era?" (2005) 57/2 *Federal Communications Law Journal* 325; "FCC lets fly anti-piracy 'broadcast flag'" (2003) 18/23 *This Week in Consumer Electronics* 4. Broadcast flags have also been suggested in Japan: KS Lambert "Unflagging television piracy: How piracy of Japanese television programming in east Asia portends failure for a US broadcast flag" (April 2006) 84/5 *Texas Law Review* 1317.

11 *ABC, Inc v Aereo Inc* 134 S Ct 2498 (2014) 128 *Harvard Law Review* 371. For more discussion on this case, see P Samuelson "Updates on the intellectual property front" (2014) 57/11 *Communications of the ACM* 28; J Hane "Aereo's TV internet broadcasts are a simple case of piracy" (21 April 2014) *Wall Street Journal* (eastern ed) at A13. See also discussion by P Rodriguez and MB Senosiain of *ABC Inc v Aereo, Inc*, available at: <https://www.law.cornell.edu/supct/cert/13-461> (last accessed 13 October 2020).

12 *ITV Broadcasting Ltd v TV Catchup Ltd*, CJEU case C-607/11 (fourth chamber) 7 March 2013; *ITV v TV Catchup* case c-275/15, 1 March 2017. *Football Association Premier League v QC Leisure* [2008] EWHC 1411 (Ch).

13 AL Dias Pereira "Portugal: Broadcast works in bars and restaurants: 'Resistant' case-law to the CJUE's rulings" (2016) 6/4 *Queen Mary Journal of Intellectual Property* 503.

14 *Digital Communication Network (Nig) Ltd v NCC* [2013] LPELR-20797 (CA). For more information on the anti-piracy drive in Nigeria, see: A Ezekude "Anti piracy drive field result" (2012) *WIPO magazine*. MI Obianuju Nwogu "The challenges of the Nigerian copyright commission (NCC) in the fight against copyright piracy in Nigeria" (2014) 2/5 *Global Journal of Politics and Law Research* 22, available at: <http://www.eajournals.org/wp-content/uploads/The-Challenges-Of-The-Nigerian-Copyright-Commission-Ncc-In-The-Fight-Against-Copyright-Piracy-In-Nigeria.pdf> (last accessed 13 October 2020).

15 Dias Pereira "Portugal", above at note 13.

16 European Broadcasting Union "Legal & policy focus", above at note 7 at 1; A Doyle "Toward a broadcasting treaty dealing with signal piracy" (paper presented at the African ministerial conference 2015: Intellectual Property for an Emerging Africa, Dakar, Senegal, 3–5 November 2015), available at: <https://www.wipo.int/edocs/mdocs/africa/en/ompi_pi_dak_15/ompi_pi_dak_15_cluster_ii_9.pdf> (last accessed 13 October 2020).

17 B Burroughs and A Rugg "Extending the broadcast: Streaming culture and the problems of digital geographies" (2014) 58/3 *Journal of Broadcasting & Electronic Media* 365, available at: <https://www.researchgate.net/publication/274696843_Extending_the_Broadcast_Streaming_Culture_and_the_Problems_of_Digital_Geographies> (last accessed 13 October 2020).

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Section 20 of the Nigerian Copyright Act criminalizes copyright infringement. This article argues that not every act amounting to broadcast infringement under sections 8 and 15 of the Act constitutes a crime. The National Assembly did not criminalize every act that breaches copyright in a broadcast. This article reviews the Court of Appeal decision on broadcaster's copyright in *Eno v Nigerian Copyright Commission (NCC)* (*Eno*)[18] and demonstrates that the appellant was unlawfully prosecuted, convicted and imprisoned. This successful prosecution and imprisonment of Eno opened the floodgates against broadcast infringers who are regularly arrested[19] and prosecuted along the lines of the *Eno* charges.[20] Although some of the alleged broadcast infringers were only fined meagre sums such as ₦5,100,[21] ₦10,000[22] or ₦15,600,[23] others served prison sentences ranging from 14 days with a ₦20,000 fine,[24] to 12 months with hard labour[25] or six and a half years with two years each to run concurrently.[26] A broadcast company with a valid government broadcast licence that could not be sentenced to prison was fined ₦9,000.[27] This article argues that the prosecution, conviction and imprisonment of persons based on the *Eno* line of charges is unconstitutional. It urges that the Supreme Court should overturn the *Eno* line of cases.

The article demonstrates that the only act that constitutes a crime against a broadcaster's copyright must involve certain dealings with a recorded copy of a broadcast. This is because the Copyright Act only criminalizes dealings with infringing copies. Infringing copies are defined as copies in a material form of works, including broadcasts. Any dealing with a broadcast that does not

18 [2009] 10 NMLR 175.

19 "NCC, DSS pounce on illicit broardcast [sic] outfits, arrest copyright pirates" (14 March 2020) *Beats-Onit*, available at: <https://www.beats-onit.com/2020/03/14/ncc-dss-pounce-on-illicit-broardcast-outfits-arrest-copyright-pirates/> (last accessed 13 October 2020).

20 Several persons have been tried and more are being tried. Some have been convicted, sentenced and fined or have served terms of imprisonment. See, for example: *NCC v Godwin Kadiri* charge no FHC/B/43C/2010 judgment delivered 17 December 2012 in Benin, [2010] 53 NIPJD (FHC); *NCC v Joseph Daomi* charge no FHC/MKD/CR/38/11 judgment delivered 27 February 2012 in Markurdi; *NCC v Micheal Paul* charge no FHC/LF/CR/2/2013 judgment delivered 3 October 2013 in Lafia and charge no FHC/LF/CR/11/2013 judgment delivered 8 October 2013 in Lafia.

21 *Micheal Paul*, ibid.

22 *NCC v Emordi Henry Chukwuma* charge no FHC/ABJ/CR/90/13 judgment delivered 19 June 2013 in Abuja.

23 *Micheal Paul*, above at note 20.

24 *Joseph Daomi*, above at note 20.

25 *Eno*, above at note 18; *NCC v Ubi Bassey Eno, Otu Bassey Eno and Digital Communication Network (Nig) Ltd* charge no FHC/31c/2003.

26 *Chukwuma*, above at note 22. The defendant's sentence was effectively two and a half years.

27 *Ubi Bassey Eno*, above at note 25, delivered 12 December 2006 in Calabar. Digital Communications Network Ltd was fined ₦5,000 on the first count and ₦2,000 each on the second and third counts.

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involve a material form, such as a recorded broadcast or copy of a recorded broadcast, does not amount to a crime under section 20 of the act.

The aim of this article is to stem the wave of prosecutions of broadcast pirates along the lines of the charges against Eno.[28] Conversely, broadcast right-holders are urged to seek law reform if they insist that the *Eno* kind of broadcast infringers be prosecuted, rather than encourage the continued fracturing of constitutional rights. This article focuses on the rights of broadcasting companies and the consequential crimes that can be committed against broadcasters. It does not deal with the rights of persons whose works are broadcast or the crimes that can be committed against such persons.

The article is divided into three parts. The first provides an introduction and outlines the constitutional guarantees against prosecution for unwritten statutory crimes. The second outlines the nature of copyright in broadcasts and the kind of acts that attract civil liability for the infringement of broadcasts. From a constitutional perspective, the third part dissects the charges in *Eno* that have become a template for the wave of prosecutions against alleged broadcast infringers; it shows that the prosecutors and right-owners have fractured the constitutional rights of the broadcast infringers.

Constitutional guarantees: Immunity from trial / conviction in uncodified crime

The Constitution of the Federal Republic of Nigeria 1999 (the Constitution) guarantees that no person should be subjected to a criminal trial, convicted and punished over an alleged offence not created by any law.[29] The Constitution safeguards the right against retrospective criminal legislation[30] and immunity from trial and conviction for crimes or punishments that are not written in valid laws or by-laws,[31] or for an offence that did not exist at the time of its commission or is not contained in an existing law.[32] A written law refers to an act of the National Assembly or a law of a state, or any subsidiary legislation or instrument under the provision of a law.[33]

It is a rudimentary and elementary principle[34] that any trial or conviction that breaches any of these twin pillars is unconstitutional and is liable to be set aside.[35] For the prosecution of broadcast infringers to be constitutional,

28 Burroughs and Rugg "Extending the broadcast", above at note 17.

29 *Paul Onwughalu v Federal Republic of Nigeria* [2019] LPELR-47313 (CA).

30 Constitution, sec 36(8).

31 Id, sec 36(12). *Ifeanyi v FRN* [2018] LPELR-43941 (SC).

32 *Ogbomor v State* [1985] LPELR-2286(SC); *Aoko v Fagbemi* [1961] 1 All NLR 15 400; *Abidoye v FRN* [2013] LPELR-21899 (SC).

33 Constitution, sec 36(12).

34 Ibid.

35 Yargata Byenchit Nimpar JCA in *Omatseye v FRN* [2017] LPELR-42719 (CA) at 7–8, para A. See also: *FRN and Another v Lord Chief UdensiIfegwu* [2003] 15 NWLR (pt 542) 113; *Udoku v Onugha* [1963] 2 All NLR 107; *Captain Asake v Nigerian Army Council* [2007] 1 NWLR (pt 1015) 408; *Aliyu v FRN* [2014] All FWLR (pt 720) 1272; *Prince Joshua Paulson v*

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the charges to which they are subjected must be in line with the Copyright Act.

COPYRIGHT IN BROADCASTS

This part explores the nature of copyright in broadcasts and the kind of acts that amount to infringement of broadcasts. It examines the extent to which the activities of the broadcast infringer can attract civil liability for breach of broadcast copyright.

Nature of broadcast rights in Nigeria

Nigeria is party to the World Trade Organization's Trade Related Aspects of Intellectual Property Agreement (TRIPS), the Berne Convention, the Universal Copyright Convention, the Rome Convention[36] and the World Intellectual Property Right (WIPO) copyright treaties.[37] The applicable law is the Copyright Act 1988 (the Act),[38] passed following local lobbying against piracy.[39]

Broadcasting stations have five general bundles of rights, a breach of which attracts civil liability. Broadcasters have TRIPS-plus rights[40] to control the following in Nigeria: recording the broadcast; broadcasting or rebroadcasting the broadcast; communicating the broadcast to the public; renting or hiring recorded broadcasts;[41] and distributing the recorded broadcast by way of trade hire or otherwise.[42]

In contrast to radio broadcasters, television broadcasters are given a sixth right: the exclusive right to control the taking of still pictures of the broadcast. Under the Act, copyright is infringed by any person who, without the licence or authorization of the owner of the copyright, does, or causes any other person to do an act, the doing of which is controlled by copyright.[43]

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The State [2011] LPELR 4875 (CA); *Major Adebayo v Nigerian Army and Another* [2012] LPELR-7902 (CA); *Hon Hembe v FRN* [2014] LPELR-22705 (CA).

36 B Sodipo "Nigeria accedes to Rome Convention: Is Rome satisfactory for Nigerian performers?" (January 1994) *Entertainment Law Review* 11.

37 "Nigeria joins four key copyright treaties" (4 October 2017), available at: <https://www.wipo.int/portal/en/news/2017/article_0017.html> (last accessed 13 October 2020).

38 Cap C28, 2004 Laws of the Federation of Nigeria. The act was amended in 1992 and 1999.

39 B Sodipo "The Nigerian Copyright Act 1988, as it affects the entertainment industry" (1993) *Entertainment Law Review* 17.

40 TRIPS-plus in the sense that neither TRIPS nor Rome requires rental rights for recorded broadcasters; see TRIPS, art 14(3). For Rome Convention, see Sodipo "Nigeria accedes", above at note 36.

41 Copyright Act, sec 8(1)(a), (b) and (c).

42 Id, sec 15(1)(d).

43 Id, sec 15(1)(a).

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THE CHARGES IN *ENO*

This part of the article beams a constitutional searchlight on the charges in *Eno* that have become a template for the wave of prosecutions against alleged broadcast infringers. It attempts to show that the prosecutors and right-owners have fractured the constitutional rights of alleged broadcast infringers in their attempt to prosecute alleged offences.

Broadcast infringers and copyright crimes

Section 20 of the Act encapsulates the criminal sanctions for broadcast infringement. Two points are apposite here. First, unlike section 30 (which defines criminal sanctions against performers rights to be the doing of "any of the acts set out in the said section 28" that outlines all civil breaches of performers' rights), copyright offences are not defined in the light of all the civil breaches of broadcast rights in sections 8 or 15. Secondly, copyright offences are defined as dealings with infringing *copies* of broadcasts or works. These two points are examined in some detail below.

Criminal liability: Copyright per se versus performers' rights

The tenor of the Act evinces two different treatments for offences created by section 20 relating to copyright per se and offences related to performers' rights under section 30. Unlike section 20, section 30 defines performers' right crimes as those that infringe performers' rights under section 28, the section that outlines what amounts to the infringement of a performer's right.[44] Section 30 provides that, "a person who does any of the acts set out in the said section 28 shall, unless he proves to the satisfaction of the court that he did not know that his conduct was an infringement of the performer's right, be liable on conviction". That means that all acts that amount to the infringement of a performer's right also amount to the commission of a crime. Lack of knowledge that the conduct was an infringement is a defence to criminal prosecution of a performer's right, but the law is silent as to whether it is a defence to civil liability.[45]

Paradoxically, unlike performers' rights, not every unauthorized dealing with broadcast copyright that attracts civil liability, attracts criminal liability. Section 20 did not refer to sections 5,6,7,8, 9 or 15, the sections that outline the

44 Id, sec 30 reads in full: "Criminal Liability in respect of infringement of performer's right (1) Notwithstanding the provisions of section 28 of this Act, a person who does any of the acts set out in the said section 28 shall, unless he proves to the satisfaction of the court that he did not know that his conduct was an infringement of the performer's right, be liable on conviction - (a) in the case of an individual, to a fine not exceeding N10,000; (b) in the case of a body corporate, to a fine of N50,000; (c) in all other cases, to a fine of N100 for each copy dealt with in contravention or to imprisonment for twelve months or to both such fine and imprisonment. (2) A court before which an offence under this section is tried shall order that the recording or any other part thereof be delivered to the performer."

45 This id, sec 30 provision is absent from sec 28.

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exclusive rights of copyright owners and copyright infringement. The Act does not reflect any intention of the Nigerian legislature to criminalize every act that is a breach of copyright. Unlike section 30, which criminalizes all dealings with performers' rights, section 20 only criminalizes certain dealings with "infringing copies" of works including broadcasts: a significant difference.

Section 20 offences: Infringing copies in object or material form only

There can be no section 20 offence if there has been no dealing with an infringing copy of a broadcast. A section 20 copyright offence involves the unauthorized making, importing, distribution or possession of infringing cop(y)ies or the unauthorized rental of cop(y)ies of a work. What then is an infringing copy? What is a copy?

While the Act does not define "infringing", it defines the term "copy" as a "reproduction in written form", in the "form of a recording or cinematograph film" or "in any other material form", although "an object shall not be taken to be a copy" of an architectural work unless the object is a building or model.[46] A "written form", "recording" and "cinematographic film" are all fixations from which works can be reproduced. The Act defines "reproduction" to mean the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording.[47] A section 20 offence therefore requires "reproduction", that is a fixation of the broadcast[48] in a material form.

Statutory interpretations must be consistent with the smooth working of the statute.[49] Statutory construction is a holistic endeavour[50] with sections being construed together, not in isolation,[51] to bring an effective result.[52] By the principle of community construction of the provision of a statute, it is useful to consider some relevant provisions of the Act that may help in the proper understanding of the provision being construed.[53] The author did not find the term "material form" defined in any Nigerian statute, or by

46 Id, sec 51(1).

47 Ibid.

48 A fixation of a broadcast is arguably done when the broadcast is fixed in any definite medium of expression now 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 as under sec 1(2)(b).

49 *Dapianlong v Dariye* [2007] 8 NWLR (pt 1036) 239.

50 *United Savings Association of Texas v Timbers of Inwood Forest Associates Ltd* 484 US 365 at 371 (1988); *Abegunde v The Ondo State House of Assembly* [2015] 244 LRCN 1 at 374.

51 *A-G Federation v Abubakar* [2007] All FWLR (pt 389) 1264 at 1289–91; *Elelu-Habeeb v A-G Federation* [2012] LPELR-SC.281/2010; *Marwa and Others v Nyako* [2012] LPELR-7837 (SC).

52 *IMB v Tinubu* [2001] 15 NWLR (pt 740) 690; *Tukur v Government of Gongola State* [1999] 4 NWLR (pt 117) 517 at 579.

53 *Ojokolobo v Alamu* [1987] 3 NWLR (pt 61) 377; *Aqua Ltd v Ondo State Sport Council* [1988] 4 NWLR (pt 91) 622 at 641–47; *Salami v Chairman LEDB* [1989] 5 NWLR (pt 123) 539 at 550–55; *Buhari and Another v Yusuf and Another* [2003] LPELR-812 (SC).

any reported Nigerian appellate court or in *Black's Law Dictionary*.[54] However, the term "material" occurs 14 times in the Act, although it is not defined in the general definition section of the Act. "Material" is only defined in the Act for the purpose of section 40, to include "any object, equipment, machine, contrivances or any other device used or capable of being used to infringe copyright in a work".[55] This is consistent with the ordinary meaning of "material" in this context, as a physical object.

Following the literal rule of statutory interpretation, the clear and unambiguous term "material form", used in defining "copy", must be given its natural ordinary meaning.[56] "Material form" is a form that has a body that can be held or touched, in contrast to incorporeal or intangible forms that have no body. To prosecute for "infringing copy" in section 20, the offending broadcast must have been reproduced in written form, in the form of a recording or cinematograph film or in any other material form.[57] The use of "any other material form" in the context of tangible, permanent or physical forms that have a body that can be held or touched, like a "written form", "recording", "cinematograph film" or "object", suggests strongly that the only legislative intention in the Act is that a "material form" is a tangible object.

By the canons of statutory interpretation, foreign statutes with identical provisions are persuasive authorities.[58] In Australia, "material form" means a form of storage or body from which a work can be reproduced;[59] thus a temporary or transient copy or storage of a work in a contrivance does not constitute reproduction in a material form.[60] This contrasts with statutes like the UK Copyright, Patents & Designs Act 1988[61] that define "copy" to include transient copies, that is, non-permanent copies made in an object. In Nigeria, "infringing copy" does not accommodate transient reproduction that is not in a material form that does not have a body.

Consequently, making an unauthorized broadcast or transmission per se is not a copyright offence under section 20, as it does not involve the

54 BA Garner (ed) *Black's Law Dictionary* (11th ed, 2019, Thomson Reuters).

55 Copyright Act, sec 40(5).

56 *Ojokolobo v Alamu* [1987] LPELR-2392 (SC); *University of Ibadan v Adamolekun* [1967] 1 All NLR 213; *Lawal v GB Ollivant Ltd* [1972] 3 SC 124; *Ahmed v Kassim* [1958] 3 FSC 51; *Yerokun v Adeleke* [1960] 5 FSC 126.

57 Copyright Act, sec 51(1).

58 *Skye Bank Plc v Iwu* [2017] 16 NWLR (pt 1590) 24; *Olaleke Obadara and Others v President, Ibadan West District Council Grade 'B' Customary Court, Iddo* [1965] NMLR 39; *Incorporated Trustees of Paradigm Initiative for Technology Development and Others v A-G Federation and Others* [2018] LPELR-46655 (CA).

59 Australian Copyright Act, sec 10.

60 *Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd* [2001] RCA 1719 (Fed Ct, Aus), where an Australian court held that the temporary storage of a motion picture in the RAM, during the viewing of a DVD, does not constitute "reproduction" of the movie. See G Middleton "Australia: Intellectual property - copyright" (2002) 8/5 *Computer & Telecommunications Law Review* 81.

61 Secs 297–98 and 17(5). See also UK Broadcasting Act 1990, sec 179.

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unauthorized reproduction in a material form of the broadcast. A section 20 crime will only occur either if an unauthorized material form of a broadcast is made and then such unauthorized material form reproduction is broadcast or if an unauthorized copy of a broadcast is made and that unauthorized copy is then distributed by sale, rental or importation.

Similarly, it is not an offence under section 20 to clone devices for broadcasting without permission. Interestingly, records do not show that anyone has been prosecuted for manufacturing, distributing or using counterfeit contrivances that are able to intercept broadcast signals. To be prosecuted under section 20, the counterfeit contrivance must have been used in making a material copy of a broadcast. It is in the light of the above that this article examines the *Eno* type charges against the constitutional guarantees.

What happened in *Eno*?

Eno, his colleague and his employer, Digital Communication Network Ltd (Digital), were arraigned in November 2003 on a four-count charge. Digital, a licensed cable station, had bought Multichoice private viewing decoders and smart cards. Digital was negotiating re-broadcast rights with Multichoice but the negotiations were not consummated. The defendants pleaded not guilty. In December 2006, Ajakaiye J struck out the third charge, found the first and third defendants guilty on charges one, two and four, but discharged the second defendant. Eno was sentenced to 12 months with hard labour with no option of a fine. The third defendant was fined ₦5,000 on count one and ₦2,000 each for counts two and four. Appeals by Eno[62] and Digital[63] were dismissed. The growing body of successful broadcast prosecutions on the kind of charges in *Eno* justifies the following examination.

Constitutionality of the charges in Eno

Eno and his employer were charged under section 18(1)(c), (2)(a), (2)(c) and (3) of the Act, now amended as section 20(1)(c), (2)(a), (2)(c) and (3).

Count one: In count one, Eno's charge under section 18(1)(c) was that he, "did have in [his] possession two (2) Nos Multichoice Satellite decoders and two (2) Nos Multichoice smart cards being equipment / contrivances for the purposes of illegally re-broadcasting / transmission of the whole or substantial parts of Multichoice Programs (channels) in which Copyright subsist in favour of Multichoice Nigeria without the consent or authorization of the copyright owners".[64]

Section 18(1)(c) (now section 20(1)(c)) seeks to penalize anyone who "makes, causes to be made, or has in his possession, any plate, master tape, machine, equipment or contrivance for the purposes of making any *infringing copy of*

62 Above at note 18.

63 *Digital Communication Network (Nig) Ltd v NCC* [2013] LPELR-20797 (CA).

64 *Eno*, above at note 18 at 177.

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any such work" (emphasis added). To be guilty, Eno needed to have made an infringing copy of the programmes or broadcasts, or needed to have been in possession of contrivances used in making infringing copies of a broadcast. That was not the allegation or evidence against Eno. On the contrary, Eno was accused of being in possession of two original decoders and smart cards used for the purpose of illegally re-broadcasting or transmitting.

"Infringing copy" of a work under section 20 necessarily imports reproduction in a material form, not transient reproduction, which does not qualify as "copy" under the Act. There was no evidence that Eno did reproduce the Multichoice programmes in a written form, in the form of a recording or cinematograph film, or in any other material form. Eno's section 18(1)(c) charge and conviction are unfortunate. Although illegally re-broadcasting or transmitting attracts civil liability, the Act did not make illegally re-broadcasting or transmitting a broadcast an offence. It is unconstitutional to initiate a criminal charge on the act of unauthorized re-broadcasting or transmission.

Count two: In count two, Eno's section 18(2)(a) charge was that he, "by way of re-broadcasting and / or transmission through Digital Communication Network (Nig) Ltd did sell or let or hire or for the purposes of trade or business, exposed or offered for sale or hire the whole or substantial parts of Multichoice Nigeria Programs (Channels) in which Copyright in Broadcasts subsist in favour of Multichoice Nigeria".[65]

Section 18(2)(a) (now section 20(2)(a)) creates an offence if "[a]ny person … sells or lets for hire or for the purposes of trade or business, exposes or offers for sale or hires any infringing copy of any work in which copyright subsists". Count two erroneously suggests that re-broadcasting or transmitting constitutes selling or letting for hire etc whole or substantial parts of a broadcast. However, to be guilty under this subsection, Eno needed to have been a person who sells or lets for hire or for the purposes of trade or business, exposes or offers for sale or hires any "infringing copy".

It is submitted that no-one can be prosecuted for running a subscription service on the grounds that that act is similar to an act of sale, lease or hire as required by section 18(2)(a) under which Eno was charged. In the absence of the word "similar" or "similar arrangement" from section 18(2)(a) under which Eno was prosecuted, a subscription service should not be regarded as hiring. Unlike section 18(3), section 18(2)(a) did not go further by adding the phrase "or similar arrangement" to "sells or lets hire". The list of prohibited acts was closed in the statute and cannot be extended by prosecutors. Moreover, there was no evidence that Eno did reproduce programmes in a "material form". Eno's trial and conviction were unconstitutional, breached the safeguards for criminal prosecution and are regrettable.

65 Ibid.

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Count three: Although count three was struck out, it is submitted that it did not relate to any offence known to law. The charge suggested that possession of smart cards for purposes other than private purpose is an offence under the Act. In count three, Eno's section 18(2)(c) charge was that he: "did have in [his] possession other than for [his] private or domestic use two (2) Nos Multichoice Satellite decoders and two (2) Nos Multichoice Smart card properties of Multichoice Nigeria".[66]

Section 18(2)(c) (now section 20(2)(c)) makes it an offence for "[a]ny person who has in his possession, other than for his private or domestic use, any infringing copy of any such work". The possession of a MultiChoice decoder or smart card other than for private or domestic use is not an offence known to law. Moreover, Eno had original Multichoice smart cards and decoders in his possession. The situation would have been different if Nigerian law made it an offence for anyone to possess a device that could circumvent another's technology such that the use of the device could enable a person to access programmes to which he would not have otherwise had access. Fortunately for Eno, count three was dismissed. However, another defendant, Kadiri, was sentenced on a similar charge of possessing equipment including three Strong decoders, smart cards, splitters for the purpose of illegal broadcasts.[67] However, that is not Nigerian law; it should never be the basis of any prosecution in Nigeria as it is unconstitutional. This issue is considered further below.

Count three: Possession of unauthorized decoders / smart cards / contrivances: The Act empowers the NCC to prescribe some devices as anti-piracy devices.[68] It is an offence to sell, rent, hire or offer for sale, rent or hire any work in contravention of any NCC anti-piracy device prescription.[69] It is also an offence to import or possess any NCC prescribed anti-piracy device or any contrivance used to produce an NCC prescribed anti-piracy device without the NCC's permission.[70] Furthermore, it is an offence to possess, reproduce or counterfeit any NCC prescribed anti-piracy device without the NCC's permission.[71] While this provision is a good anti-piracy broadcast framework, it is limited to prior NCC prescription, without which no liability can arise under section 21. Even then, courts may not hold that persons found in possession of these devices have committed a crime unless the devices can only be used for circumventing copyright and not for other lawful uses. In *Sony Corporation of America v Universal City Studios*,[72] the US Supreme Court held that the sale of Betamax copying equipment did not

66 Ibid.
67 *Godwin Kadiri*, above at note 20.
68 Copyright Act, sec 21(1).
69 Id, sec 21(2).
70 Id, sec 21(3).
71 Id, sec 21(4).
72 464 US 417 at 442; 220 USPQ 665 at 678 (1984).

constitute contributory infringement as the equipment could be used for substantial non-infringing use.[73] It is therefore not surprising that the Nigerian court in *NCC v Edolo*[74] acquitted the defendant, as the contrivances in his possession could have been used for purposes other than cloning smart cards and decoders.

Criminal prosecution for possession of devices like decoders such as in the *Eno*[75] line of cases should be reversed for at least three reasons. First, the offences for which the defendants were prosecuted are not known to law. Secondly, the devices that the defendants were alleged to be using for infringement could have been used for other purposes. Thirdly, the NCC never prescribed the decoders as anti-copying devices. Eno used original devices. Neither TRIPS not the Berne Convention requires national laws to prohibit the manufacture of devices that circumvent anti-copying devices or technology; as such, they are arguably wanting.[76] While it is comforting that the court in *Eno* struck out that charge, it is notable that Kadiri was sentenced on a similar unconstitutional charge.[77]

Count four: In count four, Eno's section 18(3) charge was that he: "did distribute in public for commercial purposes by way of re-broadcasting and / or transmission Multichoice Programs (channels) through Digital Entertainment Television (DET) to wit: Movie Magic, Channel O, M-Net, Super-Sports and Discovery Channels, etc. in which copyright in broadcast subsists by way of rental, lease, hire, loan or similar arrangement and thereby committed an offence".[78]

Section 18(3) (now section 20(3)) required Eno to be a "person who, without the consent of the owner, distributes, in public for commercial purposes, copies of a work in which copyright subsists … by way of rental, lease, hire, loan or

73 *Sony* was based on three reasons, including the fair use defence that is somewhat similar to Nigeria's fair dealing defence. Fair use is open ended but fair dealing is purpose-specific and subject matter-specific.

74 2008–2012 6 IPLR 1.

75 *Eno*, above at note 18; *Godwin Kadiri*, above at note 20; *Joseph Daomi*, above at note 20; *Micheal Paul*, above at note 20.

76 P Samuelson "Intellectual property and the digital economy: Why the anti-circumvention regulations need to be revised" (paper presented at the symposium on the legal and policy framework for global electronic commerce: A progress report, 1999) 14 *Berkeley Technology Law Journal* 519; JC Ginsburg "Copyright use and excuse on the internet" (2000–01) 24 *Columbia-VLA Journal of Law & the Arts* 1; LA Kurtz "Copyright and the internet: World without borders" (1996–97) 43 *Wayne Law Review* 117; PK Yu "Anticircumvention and anti-anticircumvention" (2006–07) 84 *Denver University Law Review* 13; RL Okediji "Trading posts in cyberspace: Information markets and the construction of proprietary rights" (2003) 44/2 *Boston College Law Review* 545; G Dutfield "To copy is to steal? TRIPS, (un)free trade agreements and the new intellectual property fundamentalism" (paper presented at the International Studies Association, 2006 annual meeting) at 1.

77 *Godwin Kadiri*, above at note 20.

78 *Eno*, above at note 18 at 177.

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similar arrangement". That is, Eno should have been charged with distributing or hiring infringing copies of the broadcasts. That was not Eno's charge, neither was it the evidence at the trial.

Count four suggests that rental rights extend to cable distribution of broadcasts, rather than cable distribution of recorded copies of broadcasts. It is submitted that there is no clause in the Copyright Act that criminalizes the act Eno did and was accused of doing: re-broadcasting or transmission. The prosecution introduced a new clause of "re-broadcasting / transmission", thereby avoiding the need to establish that copies of the broadcasts must have been rented or hired. This charge, the trial and the conviction are unconstitutional and highly reprehensible.

Judicial activism: Criminal charges incorporating the term "copy / copies"

The NCC has been ingenious in drafting charges to align with the Act by incorporating the word "copies" to the charges for newer cases. Count three of the charges against Daomi was that he distributed *copies* of broadcast to the public.[79] Count one of the charges against Kadiri was that he sold, expressed or offered for sale or the purposes of trade or business, *copies* of broadcasts or channels.[80] Count two against Kadiri was for distributing to about 100 subscribers *copies* of broadcasts. Count four against Kadiri related to the public distribution for commercial purposes of *copies* of the broadcasts / channels.[81] Needless to say, the allegations and evidence against these defendants were not that they dealt with copies in a material form. From the arguments articulated above, this attempt at ingenuity in drafting charges and prosecuting alleged offenders, is unconstitutional.

It may be argued that such ingenuity accords with judicial activism. On the contrary, the duty of judges is to interpret and enforce laws. While judicial activism can keep the law alive and prevent technicalities[82] from defeating the ends of justice,[83] judges must stop short of becoming legislators.[84] Judicial activism in criminal jurisprudence to fill legislative gaps and expand the scope of "copies" to mean anything other than "material form" usurps legislative power and can be regarded as judicial rascality. Courts are obliged to interpret the words in statutes as used; they must not travel on a voyage of discovery.[85] It is an accepted principle of statutory interpretation that provisions like section 20 of the Act, which can deprive citizens of their rights to freedom, must be construed narrowly.[86] Prosecutors or courts cannot expand

79 *Joseph Daomi*, above at note 20.
80 *Godwin Kadiri*, above at note 20.
81 Ibid.
82 *Transbridge Co Ltd v Survey International Ltd* [1986] 4 NWLR (pt 37) 578.
83 *BBN (Nig) Ltd v Alhaji S Olayiwola & Sons Ltd and Another* [2005] LPELR-806 (SC).
84 *Ugba and Others v Suswam and Others* [2012] LPELR-9726 (SC).
85 *A-G Bendel State v A-G Federation* [1981] 10 SC 1; (1981) 12 NSCC 314.
86 *Din v A-G Federation* [1988] 4 NWLR (pt 87) 147; *Garbo v Federal Civil Service Commission*

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section 20 to deprive defendants of their rights. Injured parties can opt for a civil action. Criminal action inconsistent with statute defeats the ends of justice.

CONCLUSION

Broadcasters who compete unfairly must not be condoned, especially where they infringe copyright. Tur JCA stated in *Digital Communication Network (Nig) Ltd v NCC*[87] that broadcasters whose rights are breached can institute a civil action, file a complaint for a criminal action or pursue both actions simultaneously. For obvious reasons, criminal prosecution is dreaded by the wrongdoer and thus preferred by the injured party over civil action.[88]

Section 20 of the Act penalizes certain acts, but not every act that gives rise to civil liability for broadcast copyright infringement constitutes a crime. The only acts that can constitute a broadcast copyright crime must involve certain dealings with a recorded copy of a broadcast, as the Act only criminalizes dealings with infringing copies. An infringing copy of a broadcast must be in a material form that can be presented to the court. The wave of prosecutions of broadcast infringers on charges similar to those instituted against Eno is unconstitutional and must cease immediately. Broadcasters must not breach the Constitution by urging the NCC to prosecute broadcast interlopers along the lines of the charges instituted against Eno, because Eno was wrongly convicted.

CONFLICTS OF INTEREST

None

contd
[1988] 1 NWLR (pt 71) 449; *A-G Bendel State v Aideyan* [1989] 4 NWLR (pt 118) 646 SC; *IBWA v Imallo (Nig) Ltd* [1988] 3 NWLR (pt 85) 633 SC; *Utih and Others v Onoyivwe and Others* [1991] LPELR-3436 (SC).

87 (2013) LPELR-20797 (CA).

88 MN Ouma "Optimal enforcement of music copyright in sub-Saharan Africa: Reality or a myth" (2006) 9 *Journal of World Intellectual Property* 592.

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