COPYRIGHT FOR

SMALL AND MEDIUM SCALE ENTERPRISES (SMEs)

IN NIGERIA



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# Foreword

Small and Medium Scale Enterprises (SMEs) are an important component of any economy. It is therefore not surprising that they are increasingly being acknowledged as vehicles for economic growth, particularly in developing and least developing countries. SMEs play strategic roles in the utilization of local raw materials, employment generation, rural development, and the provision of opportunities for the training of managers and semi-skilled workers. They constitute about 90 percent of all enterprises worldwide and account for more than 70 percent of the production of goods and services.

New products and creative expressions appear almost daily on the market and are the result of continuous human innovation and creativity. SMEs constitute the main driving force behind these innovations and creativity. However, they face the immense challenge of effectively harnessing the latent value of their innovations and creativity as their business strategy. This has been traced partly to ignorance and lack of awareness on the use of intellectual property to give their businesses the needed competitive advantage.

Copyright is one aspect of intellectual property that is intricately linked with everyday life. Individuals and companies are daily confronted with copyright issues and SMEs are involved either in the creation or use of copyright works. For instance, many SMEs are involved in copyright-related businesses such as music production and promotion, book publishing and distribution of copyright materials, advertisement and the hosting of business information on websites.

Given their importance to national economy, it is necessary to strengthen the capacity of SMEs to facilitate the strategic use of copyright as a tool and catalyst for the creative industries.

The aim of this handbook therefore is to provide a practical resource and serve as a tool kit for the use of SMEs in Nigeria. It also offers useful information for the copyright practitioner and the general reader on the protection of rights and the workings of the Nigerian copyright system.

**Afam Ezekude**

Director-General

Nigerian Copyright Commission

September, 2011

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INTRODUCTION

# Introduction

Small and Medium Scale Enterprises (SMEs) have a long history and it is well known that most multinational corporations of today began as SMEs. SMEs constitute about 90% of the economic activities in most economies of the world and are important for employment creation, the facilitation of broad-based development and distribution of income, (Matambalya, 2000, p. xi). In Nigeria, 10% of total manufacturing output and 70% of employment are generated by SMEs promoting industrial and economic development through the utilization of local resources; production of intermediate goods and transfer of rural technology, (Aderemi, 2003, p. 3). Although, Nigeria has a significant number of viable SMEs, it is believed that they can add more value to their businesses by consciously integrating copyright in their business strategy. At face value, this viewpoint may appear to be true only for SMEs in copyright-based industries but with the benefit of experience, it is true for SMEs in all fields of endeavour.

The importance of using intellectual property, including copyright, in enhancing the competitiveness of SMEs has continued to generate interest especially in today’s knowledge-based world. Wealth, in this new economy, is generated through creating and harnessing the value of knowledge primary subject of intellectual property. (Cornish, 2004, p. 45). Most SMEs are daily involved in the generation and use of copyright works. This Handbook therefore examines the key copyright issues that should interest SMEs, in their quest to maximize profit. It draws attention to the imperatives of copyright protection in business success.

The Handbook is presented in four distinct sections. Section one examines the fundamental concept of copyright while two deals with copyright management. Section three highlights the regulatory framework for copyright in Nigeria section four shows how SMEs can benefit from copyright protection.

Section One

Fundamentals of Copyright

## Section One fundamentals of Copyright

### 1.1 What is copyright?

Copyright is the exclusive right granted by law to the creator of certain works to do or control the doing of specified acts in relation to the work. The law provides free and automatic protection for an author’s original expression of ideas and information captured in a medium that is capable of being reproduced. It requires that an idea should first be put in a tangible medium such as in a written form, in a CD, DVD etc for it to be protected.

The most common copyright works are books, films, computer software, sculptures, paintings, sound recordings and broadcasts. The law confers on creators of these materials, the right to prevent others from copying their work without organisation. The singular objective is the protection of expression of the human mind in order to reward creativity for the benefit of society. In its bid to achieve this objective, copyright grants exclusive rights to the creator of the work, giving him the right to control its exploitation. It is not intended to stop others from using the work ordinarily.

### 1.2 Is copyright the same as intellectual property?

The term copyright is sometimes used inter-changeably with intellectual property rights in the sense of rights over works that emanate from intellectual activity. In its more technical sense however, the term *intellectual property* refers to a broad range of subjects derived from the application of someone’s intellect in creating something new or original. In this sense it is classified into two broad branches viz: (i) copyright and (ii) industrial property (trade marks, patents, industrial designs, etc).

While copyright and industrial property rights share the similarity of being creations of the mind or intellect, the two differ in some fundamental respects. Copyright is an automatic right that arises from the moment a work is created and protection does not depend on registration. This is unlike trade marks, patents and industrial designs which are generally subject to registration. The duration of protection for copyright also differs from those of industrial property rights. Copyright enjoys longer protection. For instance, the term of copyright in books is for the life of the author and 70 years thereafter; whereas patents are protected for 20 years.

Though there are marked differences in the nature of the different intellectual property rights, one thing that is common to them is that they all seek to protect the interests of creative persons.

**Fields of intellectual property and what they protect**

|  |  |  |
| --- | --- | --- |
| **IP field** | **What is protected** | **Examples** |
| **Copyright** | Literary, musical and artistic works, cinematograph films, broadcasts, sound recordings, artistic performances. | Novels, stories, plays, stage directions, film scenarios, broadcasting scripts, choreographic works, text books. |
| **Trademarks** | Marks, designs or labels used in identifying goods. | Words, slogans, phrases, logos, pictures, colours, or combination of these. |
| **Patents** | Inventions or new processes | A patent protects new ideas and inventions in the area of science and technology. |
| **Industrial designs** | Designs of products that are meant for industrial replication | Industrial designs protect the visual appearance of a product, but not the way it works. |
| **Other IPs** | Trade secrets, confidential information, etc. | Trade secrets and confidential information protect business ideas, know how, etc.. |

### 1.3 Why is copyright protected?

One reason for the protection of copyright is the need to provide reward and incentives for authors and boost economic and cultural development. Authors will be motivated to create if they have the assurance that their works would be protected. An author of a book, for example, will be interested in knowing that his book will enjoy some form of protection if it is made available to the public.

The need to benefit from the use of a copyrighted work is another reason why copyright is protected. It is a fundamental rule of natural justice that a person should be entitled to the fruits of his labour. Anybody who has put in some effort in the creation of a work has the right to expect some benefit from the usage of such work. Large scale investment will also be encouraged if there is the assurance of return on investment in the creation and dissemination of copyright works. This will invariably boost the economic and cultural development of a society as people will be encouraged to create and disseminate their works. Disrespect for copyright will be a disincentive to the creative sector.

Another reason for the protection of copyright is the so-called “personhood theory”. An author’s work is an expression of his personality so he deserves to have his works respected. This is the basis for the requirement of acknowledgement where the work is used in public or research.

### 1.4 What laws govern copyright in Nigeria?

The primary law protecting copyright in Nigeria is the Copyright Act, Chapter C28, Laws of the Federation of Nigeria 2004. In addition to this Act, there are Regulations and Orders made pursuant to the powers conferred under the Act. The following are the Regulations that have been issued:

1. Copyright (Video Rental ) Regulations 1999;
2. Copyright (Security Devices ) Regulations 1999;
3. Copyright (Optical Discs Plants) Regulations 2006; and
4. Copyright (Collective Management Organisations) Regulations 2007.

At the international level, Nigeria is signatory to the following conventions in the field of copyright:

* Universal Copyright Convention, 1952 (last revised in 1971);
* Berne Convention for the Protection of Literary and Artistic Works, 1886 (last revised in 1971);
* Rome Convention for the Protection of Producers of Phonograms, Broadcasting Organizations and Performers, 1961;
* Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Part of the World Trade Organization Agreement concluded in 1994).

The country has already expressed its willingness to ratify the WIPO Copyright Treaty, 1996 and the WIPO Performances and Phonograms Treaty, 1996. It is hoped that this will be achieved soon.

### 1.5 What does copyright law protect?

Copyright law protects the expression of ideas and thoughts and not the ideas themselves. Similarly, the law does not protect mere information or concepts. To enjoy copyright protection, an idea must have been expressed in a tangible form like writing, or recording that allows the idea to be perceived or reproduced. For instance, while copyright will not subsist in the idea of a house, an architectural plan showing the idea may be protected.

The Copyright Act lists the types of works that are eligible for copyright to include: literary works (novels, stories, text books, computer programmes, etc.); musical works (musical scores and notations); artistic works (drawings, paintings, maps, diagrams, sculpture, photographs, building models, etc.); cinematograph films; sound recordings and broadcasts. The Act also protects, as neighbouring rights, the rights of performers in their performances and expressions of folklore. The performances protected include dramatic performances, dance and mime, musical performances. In the case of folklore, protection is extended to tradition-based creations like folk poetry, folk songs, folk dances and folk arts like drawings, paintings, carvings and sculpture.

**General Nature of Copyright Protection**

|  |  |  |
| --- | --- | --- |
| **Type of work** | **Protection** | **Term** |
| **Literary and Musical** | Right to:   * Reproduce work in any material form; * Publish work; * Perform in public; * Produce, reproduce or publish translation; * Make cinematograph film; * Distribute for commercial purposes; * Broadcast or communicate to public; * Make adaptations; or * Do in relation to an adaptation any of the acts specified above. | 70 years after the end of the year of the author’s death. |
| **Artistic work** | The right to:   * Reproduce work in any material form; * Publish work; * Include work in any cinematograph film; * Make any adaptation of work; * Do in relation to adaptation any of the acts specified above. | 70 years after the end of the year in which the author dies. |
| **Sound recording** | The right to control:   * Direct or indirect reproduction; broadcasting or communication to the public; * Distribution of copies for commercial purposes | 50 years after the end of the year in which the recording was first published. |
| **Cinematograph films and photographs** | The right to control:   * Making a copy of the film; * Causing film to be seen (or heard) in public; * Making a record embodying the recording of sound track associated with the film; * Distributing for commercial purposes. | 50 years after the end of the year in which the work was first published. |
| **Broadcast** | The right to control:   * The recording and rebroadcasting of the broadcast in whole or in part; * Communication to the public of the broadcast; * Distribution for commercial purposes. | 50 years after the end of the year in which the broadcast first took place. |
| **Performances** | The right to control:   * Performing; * Recording; * Broadcasting live; * Reproducing performance in any material form; and * Adaptation of performance. | 50 years from the end of the year in which the performance first took place. |

### 1.6 What qualifies a work for copyright protection?

For a material to enjoy copyright protection it must first belong to one of the categories of protected works listed in the Copyright Act. In the case of literary, musical and artistic works, it must also be original and fixed in a tangible medium of expression.

Originality in this context does not mean novelty. The underlying idea in the work need not be new or novel. It is enough that the author has put in sufficient effort to give it an original character. In other words, the author must have created the work through direct and independent exertion or labour; without copying from another person. The practical application of this principle means that copyright will not be infringed where two or more works based on the same ideas are created, provided that none is copied from the other. That somebody else had created a similar work in the past does not deny it copyright so long as there was independent skill and judgment.

On the requirement of fixation, the moment an idea is put down in a material form such as on paper, recorded on tape or stored on a computer disc; it is automatically protected by copyright. Understandably, fixation is not required for broadcasts which are ephemeral and for cinematograph films which are, by their nature in fixed forms.

In addition to the requirement of originality and fixation, the Copyright Act also provides that either the work or the author should be connected to Nigeria by way of citizenship, domicile or through the first publication of the work in Nigeria. Works of government or prescribed international bodies are also protected as such.

### 1.7 What is not protected by copyright?

As mentioned above, copyright does not protect ideas or thoughts. It does not also protect concepts, facts, names, titles, slogans and short phrases. Most of these are not protected as they do not satisfy the originality test. If an idea can only be expressed in one particular way, then that expression will not be protected since conferring copyright protection would effectively grant an unfair monopoly. For instance, protection will not be accorded the arrangement of letters of the alphabet in their logical sequence; or the mere arrangements of dates in a month.

### 1.8 Who owns the copyright in a work?

Generally speaking, the author of a work is the first owner of the copyright. The person who created the work is regarded as the author. Where a work is created by more than one person, all the creators may be addressed as co-authors or joint authors. An author in most cases is a human being, while the owner of copyright may or may not be a human being. For instance, an author may assign (or sell) his copyright to a company thereby making the company the copyright owner.

The authorship of a work also depends on the type of work involved. In the case of a photographic work, he is the person who took the photograph. In the case of a broadcast, it is the person by whom the arrangements for the making or the transmission of the broadcast were undertaken. In the case of sound recordings, the author is the person by whom the arrangements for the making of the sound recording were made, except that in the case of a sound recording of a musical work, the author will be the artiste in whose name the recording was made, unless in either case, the parties to the making of the sound recording, provide otherwise by contract.

### 1.9 What are the rights conferred?

Within the period of copyright, the copyright owner has certain exclusive rights to, for instance, reproduce (copy) or publish the work, communicate it to the public, control distribution to the public by way of sale, hire, rental or such other commercial arrangements, broadcast the work; or make an adaptation of it. These rights can be assigned or licensed by contract. Where the author assigns(sells) his rights to a third party, that third party becomes the owner of the copyright as opposed to the original author.

The author of a work is also entitled to certain non-economic rights called “moral rights”. These include the right to be identified as the owner of the work (attribution) and the right to object to any derogatory treatment of the work. These rights are reserved for the author and unlike the economic rights, are perpetual and cannot be assigned.

### 1.10 How long does copyright last?

Copyright is not a perpetual right. The law stipulates a definite term of protection. The term of protection varies according to the type of work. In the case of literary, musical or artistic works (other than photographs) the term is 70 years after the end of the year in which the author dies. in the case of cinematograph films and photographs it is 50 years after the end of the year in which the work was first published. Sound recordings and broadcasts are for 50 years after the end of the year in which sound recording was made or the broadcast first took place.

### 1.11 Is copyright transferable?

Copyright is akin to other proprietary rights and can be dealt with like other properties. It can be assigned, licensed or passed on to ones estate by will or on intestacy.

In the case of an assignment the copyright owner can either transfer the entire rights or part of it. For an assignment to be valid it must be in writing and signed by the copyright owner. The owner of a work can also grant a license which gives permission for others to use either part or all of his rights. A licence may be exclusive or non-exclusive. Under an exclusive licence, the licensee alone has the right to use the work according to the terms of agreement. An exclusive licence must be in writing. On the other hand, a non-exclusive licence may be limited and restricted. The holder of a non-exclusive licence may be given permission to do acts which the author has also permitted others to do. Even though the law only prescribes writing for exclusive licences it is advisable for both exclusive and non-exclusive licences to be in writing for sake of certainty.

### 1.12 How is a work protected outside Nigeria?

Copyright is the only aspect of intellectual property rights that guarantees international protection without need for any act in the other countries. Most international instruments on copyright enjoin member countries to extend the same level of protection given to their nationals to citizens and works emanating from other convention countries. A work created in Nigeria will therefore enjoy copyright protection outside Nigeria by reason of the international copyright treaties to which Nigeria is a party. Similarly, the Nigerian Copyright Act provides for protection of works of citizens or works published in countries with which Nigeria has treaty obligations.

### 1.13 How is copyright infringed?

Copyright can be infringed by doing in relation to copyright work acts which are against the exclusive and moral rights of the copyright owner. For instance, to reproduce a substantial portion of a work without the organisation of the copyright owner or his agent is an infringement. Infringement may be direct or indirect. In the case of a literary or artistic work, for example, there will be direct infringement if a person reproduces the work in any material form, publishes the work, performs the work in public and does any adaptation of the work. The Copyright Act also provides for what can be termed indirect infringement. This will occur when a person deals in an infringing work. The following acts will constitute indirect infringement:

* importing infringing copies of a work;
* exhibiting in public an infringing article;
* distributing, hiring or selling an infringing copy of a work;
* making or having master tapes/equipments for the purpose of making infringing copies of a work;
* Permitting a place of public entertainment to be used for the performance of a copyright work.

Some infringements are deemed to also constitute criminal offences under the law. For instance, making copies of a work without the organisation of the copyright owner, being in possession of an infringing copy of a work, or exposure for sale, or hire, or commercial distribution of any infringing copy of a work are criminal. It is also a criminal offence to make or cause to be made a tape or master tape for the purpose of making infringing copies of a work.

### 1.14 What remedies are available for infringement?

There are various remedies available to a copyright owner whose copyright is infringed. He can take civil action or, if it involves criminal infringement, report the infringement to the Police or the Nigerian Copyright Commission for investigation and possible prosecution. In a civil action, the copyright owner will be entitled to award of damages, an injunction or account of profits. Apart from the award of damages and order of injunction, a court can also make consequential orders including an order directing the defendant to surrender all infringing copies of the work to the copyright owner. This order is premised on the provision of the Act which deems all infringing copies of a work (including tapes, master tapes, machines or equipments used or intended to be used for the production of such infringing copies) to be the property of the copyright owner.

Sometimes, it may be necessary for a copyright owner to obtain an *ex parte* order, to enter into premises in which infringing activities are suspected. This is to enable the right owner obtain evidence of such infringement. In doing this, the copyright owner must be accompanied by a police officer not below the rank of an Assistant Superintendent. The court will normally give conditions for the grant of such orders.

On the other hand criminal actions are initiated by a law enforcement officer who can either be a police officer or a Copyright Inspector. The Police have general powers to investigate and prosecute all crimes including copyright offences but the Copyright Act specifically empowers the Nigerian Copyright Commission through its Copyright Inspectors to also investigate and prosecute copyright offences. The procedure for initiating a criminal action against a suspected infringer begins with a complaint to the Commission that he has reasonable ground to believe that his rights have been infringed upon. The Commission will then carry out investigations which may include an anti piracy raid for the purpose of gathering evidence and may involve arrests. If at the end of investigations, the Commission finds that a good case has been made out, the suspected infringer is charged to court. On conviction, the court may sentence the accused to appropriate terms of imprisonment or fine, or both fine and imprisonment. The court can also order the destruction of any infringing materials and contrivance used in the infringing activity.

Copyright matters can only be tried at the Federal High Court. The Federal High Court has several divisions in the different states of the Federation. The place to initiate civil proceedings against an infringer is the division of the Federal High Court the State where the act of infringement was done.

Both civil and criminal actions can be taken against an alleged infringer at the same time. The fact that a copyright owner has instituted a civil action against a suspect does not stop a criminal action.

Section Two

Managing Copyright

## Section Two Managing Copyright

One of the underlying principles of copyright is that authors of works should derive economic benefit from the use of their works. By conferring exclusive rights of control, the owner is expected to be able to manage his rights in a way that would yield economic returns. In principle, copyright owners can decide how and by whom their works are exploited.

While providing for the authors, the copyright system is also conscious of the wider interests of society to use and enjoy the creative works in a manner not prejudicial to the rights of authors. Consequently, the management of the rights of the authors must take into account the need to give members of the public reasonable access to the copyright works.

### 2.1. When is permission needed to use a work?

Copyright is the exclusive right granted to the owner of a work to control and authorize the doing of certain acts in relation to the work. It means that the owner’s organisation is required for anyone to do any of the acts. Authorisation will be required in the following instances:

* If the exploitation implies the use of all or substantial part of the work;
* If the use is not covered by any of the exception specifically under the; and

Prior authorisation will be required whether the use of the work is within the business premises (distribution to employees, product research, etc.) or outside (“road show,” company website, company newsletter, etc.) so long as the portion used is substantial in quality or quantity and is not exempted.

### 2.2 When is permission not required?

There are instances where an otherwise infringing use of a copyright work may be excused. The following are generally permitted:

1. If you are using a part of the work which is not protected by copyright. For example, if you are expressing facts or ideasfrom a protected work in your own way and have not copied the expression;
2. If the term of copyright has expired and the work is in public domain;
3. If use of the work falls within one of the exceptions provided in the second schedule to the Act.

One of the key exceptions is the one that allows for use by way of fair dealing for purposes of research, private use, criticism, review or the reporting of current events, subject to the condition that if the use is public, it should be accompanied by an acknowledgement of the title and the author.

Other exceptions provided in the schedule include:

* inclusion in a film or broadcast of an artistic work situated in a place where it can be viewed by the public;
* the reproduction and distribution of copies of an artistic work that is permanently situated in a place where it can be viewed by the public;
* the incidental inclusion of an artistic work in a film or broadcast;
* the inclusion in a collection of literary or musical works which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgement of the title and the author;
* the broadcasting of a work if the broadcast is approved by the broadcasting authority as an education broadcast;
* any use made of a work in an approved educational institution for the educational purposes of that institution, on condition that the reproduction is destroyed within the prescribed time frame
* non-commercial reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement;
* News of the day publicly broadcast or publicly communicated by any other means;
* any use made of a work for the purpose of judicial proceeding or of any report of any such proceeding;

Reproduction of a published work in Braille for the exclusive use of the blind and sound recordings made by institutions or other establishment approved by the Government for the promotion of the welfare of other disabled person for the exclusive use of such blind or disabled person are also permitted.

The Fourth schedule to the Act provides for the grant of compulsory licences for the reproduction of works without the permission of the copyright owner. Such licence is granted to facilitate the reproduction or translation of materials for educational purposes.

### 2.3 Are there limits on use by purchasers of works?

Owners of materials embodying copyright works often have the impression that purchasing the material gives them the right to do anything with the work embedded therein. Mere purchase of a tangible copy of a copyright work only guarantees the right to its personal use. For instance, the purchaser of a music CD is entitled to play the music in private for his listening pleasure. He is not allowed to rent it out for a fee, neither is he permitted to copy the CD and sell copies. Similarly, the purchaser of a book can read it and use the information in the book for his private purpose. He would be in infringement if he reproduces the book and sell to his students.

### 2.4 How do I ascertain if a work is still protected?

Copyright works have fixed indeterminate terms of protection after which they fall into public domain and anyone is free to use them without authorisation. It is therefore important to be certain about the copyright status of every work in which one deals. Normally, the particulars of the author and essential copyright ownership information will be indicated on the work. The year in which the author died may also be available in bibliographic works or public registers. As the Nigerian Copyright Act does not require any formality for grant of copyright, there is no comprehensive register of works and authors. However, there is a copyright notification system through which owners of copyright works may file information about their works and the database may be useful for sourcing information.

A prospective user of a copyright work may obtain particulars of authors and other particulars of the right owner from the Commission. Otherwise it would mean contacting the publisher, in the case of a literary work, the record producer, in the case of a sound recording or the relevant collective management organization representing the class of works concerned.

It should always be borne in mind that there may be several copyrights in one product, and these rights may belong to different owners, and with different terms of protection. For example, a book may contain text and photographs the copyright in which belong to different persons and likely to be expiring atdifferent dates.

### 2.5 How do I minimize my risk of infringement?

It is advisable to develop a comprehensive copyright policy that includes rights clearance procedures. Litigation for copyright infringement can be expensive in terms of resources, time and corporate reputation. Creating a culture of copyright compliance within your business will greatly reduce the risk of copyright infringement.

|  |
| --- |
| **To reduce the risk of copyright infringement, businesses should:**   * have a copyright policy that is well known to management and staff; * enlighten staff on copyright rules; * obtain written permissions for use of works and staff should be familiar with the scope of such permissions; * display appropriate copyright notices where the use of any equipment or machine is likely to infringe copyright; * expressly prohibit staff from downloading copyright-protected materials from the Internet to office computers without organisation |

### 2.6 Are there any formalities for protection?

Nigeria is a signatory to the Berne convention which enjoins members to protect copyright without any formality like registration. Copyright in Nigeria is therefore protected automatically upon creation subject to the fixation requirement discussed in paragraph 1.6 above. As a practical necessity it is advisable to have evidence of the existence of the work. This is particularly important for works that are not published. To help in this respect, the Commission has a voluntary notification scheme which is a databank of works. A notification under the scheme, though voluntary, could evidence the creation of the work. Other steps that an author can take to document the existence of a work include the following:

1. You may deposit a copy of your work with a bank or lawyer. Alternatively, you could send yourself a copy of your work in a sealed envelope by special delivery post (which results in a clear date stamp on the envelope), leaving the envelope unopened upon delivery. However, this practice depends on the effectiveness of the postal system.

2. Works that are published should be marked with a copyright notice (the name of the author followed by the copyright symbol © and the year of creation). Even though there is no legal obligation to insert a copyright symbol in a work; the use of the symbol serves as notice the world that the material is protected by copyright and it identifies the owner of the copyright.

3. It is also advisable to mark your work with any standard identification numbering system as may be appropriate for the kind of work in question: (i) the International Standard Book Number (ISBN) for books; (ii) the International Standard Serial Number (ISSN) for serials; (iii) the International Standard Recording Code (ISRC) for sound recordings; (iv) the International Standard Music Number (ISMN) for printed music publications; (v) the International Standard Musical Work Code (ISWC) for musical works mostly controlled by CMOs; (vi) the International Standard Audiovisual Number (ISAN) for audiovisual works, etc.

### 2.7 Do I need pre-production agreements

Effective protection and management of rights in a work begins from the production point. It is always essential for the author to enter into legal agreements with persons involved in the production, promotion and distribution of the work. It is advisable to formalize copyright based agreements, in the form of legally binding contracts, before commencing production. The advantages of a written contract are numerous. It provides certainty, clarity and accurate records of the transaction. It can therefore be referred to in the event of a dispute.

Generally speaking, a pre-production agreement should contain certain basic provisions including:

* The activity should be clearly defined (book publishing, music production, agreement to perform, etc.).
* The rights being transferred or licensed by the copyright owner.
* The duration of the contract and modalities for the termination of the agreement;
* The remuneration to be paid if any. The payment may be in money or money’s worth. Monetary payment may fall into two broad categories: (i) fixed payments: which involves full payment upfront at the time of signing the agreement, or at certain intervals or on the occurrence of certain events (such as the achievement of certain targets); and (ii) running royalties which are typically a percentage of the net sales.

In the case of certain productions, pre-production contract is a requirement of the law. For instance, in the making of a cinematograph film, the law requires the person by whom the arrangements for the making of the film is made to have concluded contracts in writing with all those whose works are to be used in the film. This is in recognition of the independent status and creative quality of the different components that make up a film. While the final product becomes the property of the producer, the law nevertheless, seeks to protect the interest of other authors whose works are included in the film.

It is important to obtain the broadest possible grant of rights including:

* rights in characters embodied in the film;
* rights to do remakes, sequels and to exploit derivative works in all present or future formats;
* rights to distribute the film in all formats presently known or that maybe invented in the future.

### 2.8 How do I derive income from my works?

Since copyright confers an exclusive right to control certain acts that otherwise would have been free for all, the owner of a copyright work has an opportunity to earn from his exclusive right. If others want to use or commercialize his work, the copyright owner may license or sell a part of his rights in exchange for payment. The copyright owners may do any of the following:

* sell the work, or the copies while retaining all or most of the rights;
* allow someone else to reproduce or otherwise use the works. This can be done by licensing the economic rights in the work; or
* sell (assign) the whole of part of the copyright.

An alternative to direct management of rights is to contract its management to a third party such as a CMO, where one exists. The Nigerian Copyright Commission has information on existing approved CMOs and how they may be able to help in generating income from copyright works.

### 2.9 How do I grant permissions to others?

A copyright owner may sell the copyright in a work completely or sell the publishing rights to a book publisher, the film rights to a film company, the right to broadcast the work to a radio station and the right to adapt the work dramatically to a drama society or television company.

An assignment of a right is different from licensing. While an assignment involves the transfer of part or all of the legal title/ownership right in the copyright, a licence is a permission or organisation to do an act in relation to a work. Once a copyright is assigned (sold), the owner is divested of control over the copyright. The assignee then has the right to alter the work provided moral rights are not infringed. An assignment must be in writing to be valid. No formality is required in the documents. For instance, it need not be a deed; nor do parties need to use the words “assign” or “grant” for a document to be an effective assignment.

A licence as a fundamental mechanism for commercializing intellectual property rights has some stunning advantages. It provides flexibility; no formal registration process (as in the case of landed property or chattels); it may be exclusive or non-exclusive. Where it is exclusive, the holder shall be the only one to the exclusion of all other, including the original owner, to control the use of the said rights. An exclusive licence must be in writing and signed. On the other hand, a non-exclusive license may be given to any number of persons; and may operate in different aspects of the copyright.

The copyright owner is therefore advised to develop the strategy which will best suit the work and his commercialization strategy.

### 2.10 When should rights be collectively managed?

It is in the interest of copyright owners that their works are enjoyed by the widest audience provided that they are rewarded for their work. In some sectors, copyright can be managed through individual contracts between the authors and users. However, in many cases it is impossible to negotiate individual licenses or permissions for dissemination of works. Think of playing songs on a radio station, showing a movie on a cable network, or performing a play in theaters around the world. In these scenarios, it will be difficult, if not impossible for each user to remunerate each individual creator or rights holder every time a work is accessed or enjoyed. In many of these cases rights are managed through the system of collective management.

A collective management organization is a non-profits making organization set up by an association of right owners for the purpose of negotiating and issuing licenses on behalf of authors; collecting royalties due from such licenses and distributing them to the authors. Under the Nigerian Copyright Act, it is to be established as a company limited by guarantee and its basic object should be to negotiate and grant licences to users on behalf of the copyright owner; collect royalties and distribute same to right owners. The Nigerian Copyright Commission regulates the operation of the organization to ensure that the interest of the right owners and the users are protected and that licenses for use of works in the repertoire of the organization are granted on fair and equitable terms. The Commission also ensures that the organization remits royalties collected on behalf of right owners to them as at when due. Membership of a collecting society is open to right owners who own works in the relevant class of rights for which the collecting society is authorized to operate.

### 2.11 How do I help to prevent infringements?

It is the primary responsibility of every proprietary owner to ensure the adequate protection of his/her property and Copyright ownership is no exception. Whatever stirs a person to put in necessary security devices to his car, house, business premises, phone etc, should also prompt and spur such person to address the need to prevent infringement by deploying the requisite security measures to his copyright works. As in normal proprietary works where different models are adopted for security, be it the civil defense style or the more technologically motivated closed circuit system, the same applies to copyrighted works and the mechanism adopted would very much depend on the work and indeed could be a combination of one or more of the following methods:

#### Copy Authentication

As part of a commercialization strategy, it is advisable that copyright owners develop a means of identifying and authenticating their works in the market place. This is essential in case of issuing physical copies of works like books, CDs, DVDs etc. Copyright owners should examine options for applying simple, low-cost solutions that can help differentiate authentic products from infringing ones, including deliberate packaging flaws and covert product design flaws. In addition, copyright owners should consider the applicability of new technologies that offer more technically advanced features such as bar code symbologies, RFID tags, holograms and watermarks, and anti-counterfeiting ink technologies. In Nigeria, one mechanism that has been employed with reasonable success is the use of special identification holographic stamps (holograms). Holograms are essentially security stamps that sometimes have multi-layer security features that may not be visible to the physical eyes. The right owner can easily identify his work in the market place with the use of hologram. This solution has been very effective in some places, but it must be noted that it is not full-prove as it is possible to counterfeit the stamps or even use legitimately issued stamps on infringing products.

In the case of CDs and DVDs, there is also the Source Identification Code which is a tracking device used by manufacturers of CDs to identify the source of replication or stamper making. The SID Code is inscribed on the mould of a replicating machine in such a way that all CDs replicated by the machine will be inscribed with the code. In Nigeria, the use of SID code is mandatory for all replicating plants and mastering facilities.

#### Technological Protection Measures

The advent of the digital technology has created new challenges of managing copyright. This is because works are increasingly being issued in digital format and distributed via digital networks. Digital copies of works lend themselves to easy reproduction without loss of quality. Infringing copies of works can no longer be identified based on their poor quality since they may be perfect imitations of the original. Many businesses employ technological measures to protect their copyright in digital content. Such measures are generally referred to as “Digital Rights Management” (DRM) tools and systems. They are used for defining, tracking and enforcing permissions and conditions through electronic means and throughout the content lifecycle. There are two ways in which DRM tools and systems can help control copyright in digital works: Marking the digital works with information about its copyright protection, owner, etc., which is called “rights management information;” and Implementing “technological protection measures” (TPMs) that help to control (permit or deny) access or use of the digital works. Examples of technological protection measures are encryptions, watermarking and digital holograms. TPMs, when used in relation to different types of copyright works, can help control the user’s ability to view, hear, modify, record, excerpt, translate, keep for a certain period of time, forward, copy, print, etc., in accordance with the applicable copyright or related rights law. TPMs also ensure privacy, security and content integrity.

Technological protection measures are therefore a digital response to the issues of digital copyright infringement. The WIPO Copyright Treaty 1996, and the WIPO Performances and Phonograms Treaty 1996 both contain provisions which enjoin member countries to make provisions in their domestic laws to prevent circumvention of TPMs when they are used by creators in the management of their rights. In many countries, it is an offence to circumvent a TPM or to traffic in a device that is meant for circumventing TPMs.

### 2.12 What should I do in the event of infringement?

Since copyright is a property right; like any other property right, the owner has the primary responsibility of safeguarding his interest by monitoring and ensuring that his right is not infringed; and when it is infringed, to take appropriate measures for redress. Right owners need to monitor the retail outlets and report copyright infringements to enforcement agencies; enhance market intelligence by utilizing “mystery shopping” techniques to gather random samples of products for inspection and authentication and to monitor the marketplace environment. In addition, there are a number of steps a copyright owner can also take when there is an infringement of his right or a threat of such infringement. Such includes the following:

* Take steps to determine the nature and the extent of infringement.
* Obtain evidence of the infringement if possible.
* You may chose to consult a legal practitioner who will provide information on the existing options and help you to decide if, when, how and what legal action to take against infringers, and also how to settle any such dispute through litigation or otherwise.
* Sometimes, you can take a preliminary step of sending a “cease and desist letter” to the suspected infringer informing him of the implication of his actions and the need for a discontinuance of such acts forthwith. Such a letter is very important, and may lead to an early resolution of a case without need for further legal action. It is advisable to seek the help of a lawyer to write this letter.
* An early warning in the nature of a cease and desist letter may pre-warn a suspected infringer to hide or destroy crucial evidence of infringement. It is therefore important to weigh the possible outcome of a preliminary notice of infringement. If you consider the infringement to be willful, and you know the location of the infringing activity, then you may wish to go to court without giving any notice to the infringer and ask for an ex parte order that allows for a surprise inspection of the infringer’s premises and the seizure of relevant evidence. The Copyright Act makes provision forsuch a proceedings, and the right owner, during the execution of the order should be accompanied by a Police Officer not below the rank of an Assistant Superintendent of Police as well as officials of the court. In addition, the right owner may also apply for an interim order of injunction in the same proceedings, to restrain the suspected infringer from continuing any further acts of infringement and preserve relevant evidence, pending the final determination of the case. This will ensure that the infringing materials do not find their way into the channels of commerce, to the detriment of the right owner.
* It should be noted that bringing a legal action is both expensive and time consuming. Sometimes, due to technicality in the procedural and evidence law, an otherwise straight case of infringement may be lost. It is thus advisable for right owner, before deciding to take legal action to consider among others, if the value of succeeding in the legal action outweighs the costs of the proceedings. Make sure that any such decision meets your overall business strategy and objectives. The remedies that courts may provide to compensate for an infringement include damages, injunctions, orders to account for profits, and orders to deliver up infringing goods to right holders. In addition, the court may order, upon request, that infringing goods be destroyed without compensation.

### 2.13 Who is responsible for criminal enforcement?

Criminal prosecution of copyright infringement is typically the responsibility of federal government prosecutors (Attorney General of the Federation, the Nigeria Police and the Nigerian Copyright Commission). Prosecution of copyright infringement depends on cooperation between right owners and law enforcement agencies. Without information sharing, prosecutors can neither determine the most effective overall enforcement strategies nor meet the burden of proof in a given case. There are a number of things that copyright owners can do to help in the effective prosecution of violations of copyright. Right owners are encouraged to take the following steps:

#### Preliminary investigation

A copyright owner may conduct thorough background investigations. These investigations generally encompass a variety of investigative steps, including acquiring pirated products, conducting surveillance of suspects, and examining computers and other evidence.

#### Evidence preservation

Any physical, documentary, or digital evidence acquired in the course of an investigation should be preserved using generally accepted forensic techniques for later use in a legal proceeding.

#### Law enforcement agencies

Copyright owners can maximize the potential for obtaining legal remedies by contacting law enforcement agencies as soon as possible after detection of potential violation. Early referral is the best way to ensure that all investigative avenues, such as the execution of a timely anti-piracy raid and possible undercover law enforcement activities, are fully explored.

#### Identification of infringing copies of works

Sometimes, in the course of, or after an anti-piracy raid, it may be difficult for the law enforcement officer to identify infringing copies from original. Copyright owners should assist law enforcement officers in identifying infringing copies of copyright works at the relevant moment. Law enforcement officer may call upon an owner, his representative or expert to examine items obtained during an investigation to determine their origin or authenticity. Moreover, prosecutors typically seek testimony from the owners at trial. In certain investigations, law enforcement agents may want to have a copyright owner present during the execution of a search warrant to help the agents identify specific items to be seized. In those circumstances, the owner’s activities will be strictly limited to those directed by supervising law enforcement agents.

Section Three

Copyright Industry Regulations

## Section Three Copyright Industry Regulations

The Nigerian Copyright commission is empowered to make regulations specifying the conditions necessary for the operation of businesses involving the production, public exhibition, hiring or rental of any work in which copyright subsists. The purpose of this provision in the Copyright Act is to enable the Commission control certain activities in the business environment that may be prone to abuse of copyright. Even though such businesses may in themselves be legitimate, it may be necessary for the Commission to specify certain operational modalities to ensure that some operators do not operate in a manner that may promote infringing activities. A number of such regulations have been made, and their implementation has proved to be very effective in the general anti-piracy campaign of the Nigerian Copyright Commission.

This section provides basic information on such regulations issued by the Commission and how they affect operations of certain businesses.

### 3.1 The Copyright (Video Rentals) Regulations

This regulation was made for the accreditation of all persons engaged in the business of rental, leasing, hiring, loaning or otherwise distributing cinematograph works (video films), to the public for commercial purposes. Such persons are required to apply in prescribed forms and pay the required fees to the commission for accreditation to carry on such business. Upon being accredited, a rental outfit shall be given a certificate which shall be renewable annually.

Every accredited rental outlet shall keep books of its business and make periodic returns to the Commission in the prescribed manner. Under this regulation, a copyright owner is required to make available to the outlets specially packaged copies of his cinematograph film in a library jacket. Every one of such accredited outlet is required to give an undertaking not to produce or otherwise engage in any form of copyright infringement or any form of abuses. Failure to honour compliance may lead to forfeiture of licence.

### 3.2 The Copyright (Optical Discs Plants) Regulations

Prior to 2006, it was observed that due to strict regulatory regime in Asian countries, a lot of discs replicating plants relocated to Nigeria resulting in high level of pirated CDs, VCDs and DVDs in circulation in Nigeria. This also resulted in huge loss in income accruable to the right owners and revenue to the government in taxes. Thus, it became obvious that domestic piracy is fast gaining ground and may become more damaging if not checked.

In response to the above situation the Nigerian Copyright Commission put in place the Copyright (Optical Discs Plants) Regulations 2006. The basis of the regulation is the power vested in the Commission under section 37(4) of the Copyright Act. The Optical Disc Manufacturing Plants Scheme is a regulatory system that aims to monitor the operations of all local optical discs manufacturers and replicating plant in Nigeria as well as import of such products in order to forestall any illegal production and distribution of the products .Under this Scheme, all persons involved in the manufacture of optical disc or the production or importation and exportation of optical discs, production parts, raw material, or manufacturing equipment are expected to obtain a license from the Commission to engage in such activities. On being registered, the outfits are enjoined to maintain appropriate records of the works they produce in line with the provision of Section 13 of the Copyright Act. Every registered plant is to be allocated a special security identification numbers, which must be incorporated in the works they produce before they are released into the market. Such numbers becomes relevant in determining the origin of a CD, DVD and DVD in circulation.

Pursuant to its powers under Section 21(1) of the Copyright Act, Cap C28, Laws of the Federation of Nigeria 2004, and Section 7 of the Copyright (Optical Discs Plants) Regulations 2006, the Nigerian Copyright Commission prescribes the Mandatory Use of Source Identification (SID) Code on all Optical Discs produced in Nigeria. The germane part of the regulation is that every plant that has been allocated SID codes shall ensure that every stamper and discs produced by them bears the appropriate SID code(s).Such codes must be installed/inscribed in compliance with the technical specifications set out in the regulation on their machines and equipments. Furthermore, plants are under obligation to inform the Commission every time new equipments are imported for use in their factories.

### 3.3 Copyright (CMO) Regulations

A company desiring to function as a collective management organisation (CMO) is expected to:

* be incorporated in Nigeria as a company limited by guarantee;
* perform the general duties of negotiating and granting copyright licences as well as the collection of royalties on behalf of, and distribution to, copyright owners;
* represent a substantial number of copyright owners in a category of works protected under the Act; and
* comply with the terms and conditions prescribed by regulations made by the Commission.

The CMO regulations further require four specific conditions for approval, namely:

* a statement indicating the class of rights or category of right owners the CMO intends to represent;
* a membership list of not less than 100 right owners in that class;
* an undertaking by at least 5 Directors including the Chairman of the company; and
* the membership agreement that is has with its members.

Licences are valid for 3 years and renewable every 2 years. The Commission on its own motion or upon an application by an interested party or person may revoke a license if the organisation contravenes or fails to comply with any provision of the Act or regulation.

The regulation mandates the organisation to make membership open to all copyright owners within the category of works or class of rights in which it administers rights. Any breach of the provision attracts a fine of N50,000. It is also mandatory that a CMO informs the Commission within 30 days of any alteration to its memorandum or articles of association or in the internal rules, tariffs; reciprocal representation agreements with foreign CMOs and about judicial decisions or official proceedings.

A CMO must make its complete repertoire of works available to users on non-discriminatory terms and draw up tariffs for the usage of works administered. Fair and equitable distribution plans acceptable to members must also be put in place.

### 3.4 Copyright Notification Scheme

There is no requirement for copyright registration in Nigeria. However, owing largely to the need to satisfy the constant yearning of right owners for some evidence of the existence of their works, the Commission has introduced the Copyright Notification Scheme.

The Scheme allows an author or copyright owner to notify the Commission, using the appropriate form, that he is the creator or owner of copyright in the work. Notification is voluntary and does not confer additional right on a copyright owner outside of the rights available to him under the Copyright Act. In order to check false claims, persons making notifications are required to attest to the facts contained in their applications.

Any copyright work can be notified. Examples of the kinds of works frequently received by the Commission are:

1. Musical compositions, lyrics and sound recordings
2. Maps and charts
3. Computer programs
4. Films and scripts
5. Books, manuscripts and other written materials
6. Artistic works and photographs
7. Periodicals and catalogues
8. Written synopsis or descriptions of ideas

#### The Notification Process

1. Notification forms may be obtained from any of the offices of the Nigerian Copyright Commission on payment of N6,000.00 application fee, either in bank draft or by bank deposit into a designated bank account.
2. The duly completed form with the required sworn declaration is returned to the Commission accompanied with the required copies of the work being notified. Applicants are required to submit two copies in the case of published works and one copy only if the work is unpublished.
3. Upon receipt of the form, the NCC processes same and issues the applicant with an notification certificate.
4. Copies of works may be submitted in any acceptable formats, including CDs, DVDs, paper, etc.

Only work is allowed for each application. However items forming part of a collective work may be accepted if they come under a single title. Voluminous works requiring storage in parts or volumes may be accepted as one work. For instance, a film having the same title, but which is stored in more than one VCD/DVD may be accepted as one work. However, sequels or works presented in parts which are distinct from each other will be treated as separate and independent works.

Certified true copies of a work submitted to the under the notification scheme can only be issued at the request of the copyright owner or, in the case of any other applicant, with the written consent of the copyright owner; or pursuant to an order of court.

#### The benefits of copyright notification

Once a work is submitted and admitted for notification, the deposited copy forms part of the Commission’s depository of works. Data and information regarding the work and the author are kept in the Commission’s database. The certificate issued to the applicant provides prima facie evidence of the existence, authorship and date of creation of the work. In the event of a dispute, the Commission can act as an independent witness, providing evidence of ownership through the tendering of certified copies of the deposited works or other documents pertaining relating to the notification.

Notification eases the licensing process by furnishing prospective licensees with rights management information on the work. This also enhances the marketability of rights as the fact of ownership is more easily authenticated.

## Section Four Copyright Protection and SMEs

SMEs, in Nigeria, are defined from the perspective of policy and planning that classify SMEs on the basis of size, sector, organisation and location. However, as pointed out by the Small and Medium Enterprises Development Agency of Nigeria (SMEDAN) size provides the practical basis for classification. SMEs in Nigeria include micro enterprises, small enterprises, and medium enterprises.

Micro enterprises are those that employ less than 10 persons, with an asset base of less than 5million Naira (approx. $32,467 USD), excluding land and buildings. Small Enterprises refer to those that employ between 10 – 49 persons, and have an asset base of between 5million and 50million Naira (approx. $324,675 USD), excluding land and buildings. Medium Enterprises employ between 50 and 199 persons, and have an asset base of between 50million and 500million Naira, excluding land and buildings.

### 4.1 How does copyright affect SMEs?

As an SME in a copyright-based industry, you are likely to own works protected by copyright or you are likely to use the copyright works of others in the course of your business. For instance, your SME may be engaged in creation, recording, publication, dissemination, distribution or retailing of musical, artistic or literary works. Your SME may also have a website, a brochure, a corporate video or occasionally advertise itself and product(s) on radio, television or newspapers.

If your SME has a work protected by copyright, then it needs to take steps to properly manage and enforce its copyright in order to get fair economic rewards from any use made of such work(s). If however, your SME is a high user of copyright works belonging to others, then you need to either buy the copyright or get a copyright license to use the work in order to avoid disputes and costly litigations. As already seen, disputes and court actions are expensive and unhealthy for business. If you are interested in acquiring the rights in a copyright work, you may need to find out if there is a collective management organisation administering that category of work. If none exists, you may make direct contact with the owner of the copyright.

### 4.2 Is copyright protection important to my SME?

Yes, copyright protection is important to your SME. This is because of the various exclusive rights (discussed in para. 1.9 above). These exclusive rights give competitive advantage to your SME as copyright owner serving as a shield that protects the SME from attack and as a sword helping the SME to fight for more business (IP Australia, 2010, p.6)

### 4.3 How does copyright enhance SME investments?

Consumers will value your SME on the basis of its assets, its current business operations and expectations of future profits. As an SME, investing in equipment, property development, marketing and research can increase your market value and financial position. Similarly, the market value of your SME can increase significantly through investing in the development of or acquisition of copyright that is relevant to the operation of your SME. For instance, if your SME develops a valuable copyright work, you will make direct profit from its sale and some other business enterprises may be attracted to use it at a fee. So, it is clear that copyright protection adds value to SME businesses and this is immediately visible in the following ways:

* It turns the copyright work of your SME into an exclusive property rights which can be traded in the market place throughout the valid period of the copyright.
* It gives your SME a competitive advantage and greater market share. This is because the exclusive right over your copyright gives you monopoly in the market as it prevents others from commercially using your copyright work.
* The exclusive rights ensure that your SME is able to get quick and higher returns on investment of time, skill and money, i.e. the expenditure that may have gone into creating or acquiring the copyright work.
* Copyright protection can enable your SME to earn additional income either through licensing or assignment. This means that your SME may decide to license or sell the copyright to other businesses against payment of a lump sum or royalties.
* The availability of copyright protection can facilitate cross-licensing, whereby you authorise another business entity to commercially use your copyright on the condition that you are also authorised by that business entity to commercially use its copyright. Cross-licensing is particularly attractive where both parties have something that if of interest to the others.
* A well packaged business proposal that contains information on copyright owned by your SME and perhaps its value is more likely to help your SME in raising capital.

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