

**COURSE TITLE: INTELLECTUAL PROPERTY II**

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**QUESTION**.

Kimberly and Joyce are both students of the Abuja Fashion School, they were all asked to present design patterns that would be on some fabrics. Kimberly had a design with a combination of flowers and stripes, Joyce also had a design with flowers and stripes but the stripes on Kimberly’s design where very close to the flower while Joyce’s stripes looked a little far from the flower design. Kimberly saw Joyce’s designs during their exhibition and accused Joyce for copying her design. Joyce is seeing Kimberly’s design for the first time. Advice Joyce.

**ABSTRACT.**

The essence of this paper is to give a vivid picture of the meaning of Copyright, the various types of works that exist under copyright law. There are various points that would be examined such as requirements for Copyright protection ( originality, fixation, qualification of an author), as well as Copyright infringement and its defences with explanations, cases, sections and references these points stated will be touched.

**INTRODUCTION**.

Intellectual Property law includes ways to protect the creative expressions of the intellect that carry commercial and moral value. There are three main types of intellectual property including; Trademarks, Patents and Copyright. Therefore Copyright is a form or one of the branches of intellectual property rights.

Copyright is simply the protection extended to the creator of an original work. It provides the sole rights to the use and distribution of the work and normally ends after a specific period of time. After the time is up, the copyright can be renewed, or the work will pass into the public domain where it legally may be used without giving notice of the original creator and without the need for recompense to the former owner.

**LEGAL ISSUE**.

The legal issue for determination is whether Joyce copied Kimberly’s work and can be held liable for copyright infringement.

**WORKS ELIGIBLE FOR COPYRIGHT**:

It should be noted that before a work can be granted copyright, it must be eligible. Also, one must make enquires to know whether the alleged work falls within the works that are protect by copyright. **Sec 1(1) the Act** [[1]](#footnote-2)provides for the works protected under copyright namely:

1. Musical works.
2. Literary works.
3. Artistic works.
4. Cinematograph films.
5. Sound recordings.
6. Broadcasts.

**ARTISTIC WORKS**

They are those works that can be appreciated mainly with the eyes. It should be noted that the artistic quality does not matter. They can be two **(2)** dimensional like drawings and plans or three **(3)** dimensional like buildings, models, sculptures, carvings. **Sec 51 the Act** [[2]](#footnote-3)provides that artistic works also includes paintings, drawings, sculpture, diagrams, photographs not comprised in a cinematograph film. **The Act** [[3]](#footnote-4)provides that artistic works made with the intention of being used as a model or pattern to be multiplied by any industrial process will not be eligible for copyright as they fall within the category of works protected by the law of industrial Designs.

The next thing is to determine if copyright subsist in Joyce's work, and the answer to this is **YES**.

However, for copyright to subsist in a work there are some requirements that that work must met, these are known as requirements for copyright protection, which namely;

1. Originality
2. Fixation
3. Qualification of the Author.

**ORIGINALITY:**

A creative work must meet a basic level of originality to be considered the product of an author. The act [[4]](#footnote-5)provides that**,** a literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character. Originality means:

1. Sufficient time, effort, skill has been expended on the work by the author.
2. The work is not copied from another work.

In the case of **Feist Publications, Inc. v. Rural Telephone Service[[5]](#footnote-6)**, the U.S. Supreme Court explained that the requirement of originality is not particularly stringent and is comprised of **two** elements: that the work be independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity.

Originality is an important legal concept with respect to copyright. It is the aspect of a created or invented work that makes it new or novel, and thereby distinguishes it from reproductions, clones, forgeries, or derivative works. In this regard, an original work stands out because it was not copied from the work of others. It means the work must be as a result of the author's intellectual creation.

Moreover, most works are drawn from existing work, such could still qualify, it doesn't matter that the author creation existed before so far his creation is not as a result of copying the existing work. Originality is in the skill and labor involved in selecting existing subject matter to create a new work. In the cases of **Ladbroke football limited v William Hill football limited**[[6]](#footnote-7) it was held that, *there must be a sufficient resemblance between the copyright work and the alleged infringement, but there is no copyright in a mere idea and the word ‘original’ does not mean that the work must be the expression of original or inventivethought*.

The Copyright Actis not concerned with the originality of ideas, but with the expression of thought, originality is a matter of degree depending on the amount of skill, judgment or labor that has been involved in making the compilation. Therefore, author of the previous work and the author of the compiled or collective work have separate copyright each. Artistic works like drawings, maps, provided they have resulted from the judgment, effort and skill of the author will be eligible for copyright, **Kendrick v Lawrence** [[7]](#footnote-8)Ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original. According to **Section 1(3)[[8]](#footnote-9)**an artistic work shall not be eligible for copyright, of at the time when the work is made it is intended by the author to be used as a model or pattern to be multiplied by any industrial process.

**FIXATION:**

A fixed work is defined as a work that is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration. For example, a sandcastle or ice sculpture that you worked all day on would probably not be considered fixed so it’s not copyrightable. However, as soon as you take a photograph of your sandcastle or ice sculpture, thus fixing it in reproducible medium other than your own memory, the image and design of the sandcastle can legal protection.

A literary, musical or artistic wok shall not be eligible for copyright unless

* 1. *the work has been 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 aid of any machine or device.*

In ***Yeni Anikulapo Kuti& Ors v. T.M Iseli & Ors***[[9]](#footnote-10), the survivors of the great Nigerian music icon**,** Olufela Anikulapo Ransome-Kuti(Fela) had sued the defendants for damages and perpetual injunction to restrain the defendants from reproducing the composed Musical works of the late Fela, but which had neither been produced nor sold for public consumption. Stated clearly, Fela had not put the songs in CD’s, DVD’s and had not disseminated the songs for public use before he died. Since Fela actually recorded the music in master tape, he had fixated it in a tape from which it can be perceived and observed by others directly or by using a machine. In summary, the court granted a perpetual injunction under the **Copyright Act of Nigeria[[10]](#footnote-11).**

Moreover, nothing in the Act specifies that fixation must be by the author. A sermon, lecture or speech delivered by someone and recorded by another would still have copyright. A mere amanuensis does not, by taking down word for word, the language of the author, become in any sense the owner of the copyright’.[[11]](#footnote-12)

**QUALIFICATION OF THE AUTHOR:**

The third requirement for protection, unlike the previous two requirements, implies to all categories of works, is qualifying factor. Before a person can qualify for copyright protection under Nigerian law, there must be some connection between the work and Nigeria.

The required connection could be in respect of the status of the author, the place of first publication, government works, and by virtue of international agreements. The law [[12]](#footnote-13)provides for these provisions succinctly. In the case of **Francis, Day and Hunter v. Feldman and co[[13]](#footnote-14),** a copy of a work was sent to the British Museum, one was filed at the London office of the plaintiffs, four were sent to agents for university libraries and six were exposed on the counter in the retail department of the plaintiff’s business premises. It was held that these acts sufficed to constitute publication.

It is however important to educate Joyce on the principle of copyright infringement and its defenses;

***COPYRIGHT INFRINGEMENT:***

As all right provided for under copyright which are protected by provisions stipulated in the act **[[14]](#footnote-15)** so is the prevention of infringement of copyright also protected.

Copyright infringement can be defined as the use of works protected by copyright law without permission for a usage where such permission is required, thereby infringing certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works.

All intellectual property rights are protected and one of the very important reasons for protection is to prevent infringement. Copyright infringement [[15]](#footnote-16)is provided for under **Section 6[[16]](#footnote-17)**, and it analysed and spelt out the right. All these rights are only exclusive to the originator as any form of usage of the work done without the consent of the originator will amount to infringement.

According to the scenario given, to deduce whether there has been a copyright infringement between Kimberly and Joyce's dress designs. Before it can be said that an infringement of a person's work has occurred, the allegedly infringing work must substantially reproduce a whole or substantial part of the copyright work it is alleged to infringe. The fact that a later work bears some similarity to an existing work does not on its own and without more amount to infringement of the reproduction right. In the case of ***Hawkes and Sons(London)limited v Paramount film service ltd***[[17]](#footnote-18)second segment of a 4-minute song, played in the background of a news clip, was found to be substantial. One of the reasons for this finding was the recognizable nature of the song; there was no doubt that anyone who knew the song would be able to identify it in the clip. The court held that the producer of the news reel should have obtained the permission of the copyright holder. This case gave rise to a legislative response seen in **Section 30 (7)[[18]](#footnote-19)** which permits the incidental and not deliberates inclusion of a work in another work.

Some of the other common defenses to copyright infringement[[19]](#footnote-20) are:

1. Independent creation: If you created your work without any knowledge of the copyrighted work, you have not infringed on the copyright because you didn’t actually copy the original. In order to prove this, you generally must prove that there was no reasonable way for you to have been aware of the copyrighted work prior to the creation of your own work.
2. First sale: The owner of a lawfully made copy of a copyrighted work has the right to sell or otherwise dispose of it. He may also display his copy of the work to the public. Therefore, if you buy a painting, you can sell it to your friend or display it at a museum without infringing on the copyright owner’s exclusive rights to distribution and display.
3. Violation of the statute of limitations: If the copyright owner waits too long to bring a suit against you, he may not have a valid suit at all.

However, if you had no reason to believe that the original work was protected by copyright, or if you thought that your use was fair, you may be considered to be an innocent infringer. Innocent infringers still have to stop their infringing behavior and pay the copyright owner for the commercial value of their use, but they typically do not have to pay damages to the copyright owner. A copyright claimant must prove the following three elements, to win an infringement claim: • A valid copyright exists *(Registration provides a presumption of validity)*

• The defendant copied the work without authorization

• The infringing work is substantially similar to the protected work[[20]](#footnote-21)

**APPLICATION:**

From the above, it is evident that the works done by both Kimberly and Joyce are artistic works. And we were told that Joyce was seeing Kimberly's work for the first time and that the works are not exactly alike. From these, it is obvious that Joyce's work is an original. From the above we can also see that originality means that sufficient time, effort, skill has been expended on the work by the author and that the work is not copied from another work. This shows that Joyce did not copy Kimberly's work and as such Joyce is entitled to copyright protection of her own. Also, it is important for Joyce to know that in the event that Kimberly brings an infringement action, she can raise the defense of **INDEPENDENT CREATION** [[21]](#footnote-22)which means that Joyce created her work without any knowledge of Kimberly's work and as such has not infringed. In order to prove this, Joyce has to prove that there was no reasonable way for Joyce to have been aware of Kimberly's work prior to the creation of her own work.

Our advice for Joyce is that, her work is qualified for her own copyright protection as she did not copy Kimberly's work. Her work possesses originality.[[22]](#footnote-23) Also, in the event that Kimberly brings an infringement action against Joyce, she is entitles to the defense of independent creation. The scenario is at best a coincidence coupled with the fact that the works are not exactly the same.

**CONCLUSION:**

In conclusion, from the above, Joyce has not copied Kimberly's work and cannot be accused of such because the works are not exactly the same, Joyce had not seen Kimberly's work prior to the time; making Joyce's work an original and making her work qualified for copyright protection. Both parties may have separate copyright protections.

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* Kristen Johnson, ‘Defences to Copyright Infringement’ 2009 <https://www.legalmatch.com> accessed 4th April 2020.

1. Copyright Act 1988 [↑](#footnote-ref-2)
2. Copyright act 1988 [↑](#footnote-ref-3)
3. Section 1[3] of the Copyright act 1988 [↑](#footnote-ref-4)
4. Copyright act 1988, Section 1(2) [↑](#footnote-ref-5)
5. [ 1991] 499 U.S. 340 [↑](#footnote-ref-6)
6. [1964] 1 WLR 273 [↑](#footnote-ref-7)
7. [1890] 25 Q.B.D 99. [↑](#footnote-ref-8)
8. Copyright Act 1988 [↑](#footnote-ref-9)
9. [2003] 5 I.P.L.R 53. [↑](#footnote-ref-10)
10. CAP C28 LFN. [↑](#footnote-ref-11)
11. Donoghue v. Allied Newspaper Ltd [1938] Ch 106 [↑](#footnote-ref-12)
12. Copyright Act 1988, Sections 2, 3, 4, 5(1) and (2) [↑](#footnote-ref-13)
13. [1914] 2 CH 728 [↑](#footnote-ref-14)
14. Copyright Act 1988 [↑](#footnote-ref-15)
15. Ifeoluwa Olubiyi, The Nigerian Intellectual Property law Handbook, A compilation of Intellectual Property Laws in Nigeria (Fem-fem prints 2019) [↑](#footnote-ref-16)
16. Copyright Act 1988 [↑](#footnote-ref-17)
17. [1934] 1 Ch. 593 [C.A], A 20 [↑](#footnote-ref-18)
18. Copyright Act 1988 [↑](#footnote-ref-19)
19. Kristen Johnson, “Defenses to Copyright infringement” (2009) <https://www.legalmatch.com> accessed 4th April 2020 [↑](#footnote-ref-20)
20. Copyright Act 2004, Section 52 [↑](#footnote-ref-21)
21. Kristen Johnson, “Defense to Copyright Infringement” (2009)<<https://www.legalmatch.com>> accessed on 4th April 2020 [↑](#footnote-ref-22)
22. F. O. Babafemi, Intellectual Property The Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria (Justinian books, 2007)14 [↑](#footnote-ref-23)