

GROUP 8.

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QUESTION:

Hassan is visually impaired due to a fire accident which occurred while he was 6 years old. Upon his desire to get educated, he was able to get some basic education from the specialized school for the blind. Having desired to proceed to tertiary education, he gained admission into the University for his desired course. However, the university lacks materials that are suitable for the blind and other visually impaired persons. Although Hassan has seen some books and materials both online and offline, he is concerned that any attempt to convert them to accessible formats for his use will make him liable for copyright infringement. Hassan has shared his concerns with

you. Advise him based on the provisions of the second schedule to the COPYRIGHT ACT and the Marrakesh Treaty.

ANSWER:

Copyright is the exclusive and assignable legal right, given to the originator for a fixed number of years, to print, perform, film, or record literary, artistic, or musical material. Copyright is the right to copy although that is not the only thing which it entails. Furthermore, copyright refers to the legal right of the owner of intellectual property.. This means that the original creators of the products and anyone they give authorization to are the only ones with the exclusive right to reproduce the work. **The COPYRIGHT ACT, CAP 28, LFN 2004** regulates copyright in Nigeria and under **Section 1 of the Act**¹. Materials and books which Hassan wants to convert to accessible format will seem to come under literary works pursuant to the provision of the aforementioned **Section 1 of the Act**. However, the Second Schedule of the Act provides for exceptions² from Copyright control. Thus, in the light of the above, the advise given to Hassan will be whether Hassan can convert the materials and books online to render them accessible for his own use. In another way, can Hassan do what he is desirous of doing under the aforementioned exception and in the light of the provisions of the Marrakesh Treaty³.

There are three issues at hand here to be determined;

- What category of protected work does the online and offline material and books fall under?
- Whether the work can be protected under the Copyright Act and Marrakesh Treaty?
- Does Hassan attempt to convert the online and offline books and materials for his use and for educational purpose make him liable for copyright infringement under the Copyright Act and the Marrakesh Treaty?

¹ Section 1 of the Copyright Act

² Second Schedule of the Copyright Act

³ Exceptions to Copyright infringement under the Marrakesh treaty

These issues will be provided for accordingly;

- The online and offline materials and books of the category of the protected works falls under the Copyright Act.

Section 1(1) of the copyright act provides the following works shall be eligible for copyright; (i) Literary works (ii) Musical works (iii) Artistic work (iv) Cinematography film (v) Sound recording (vi) Broadcast. However, in answering this issue which is the first issue for determination, **Section 51 of the copyright act** should be taken into consideration, the said act provides that literary works are works that are expressly in prints and writing, it should however be understood that books and materials which are in writing will qualify as literary works. These literary works includes books, anthologies, journal, newspaper articles, reports, conference papers, working papers, computer software and programs, letters, emails, novels, poetry, song lyrics, databases, tables and compilations. Even short works such as abstracts, individual poems, dictionary meanings or encyclopedia entries are protected by copyright. You can use a literary work for certain purposes such as educational use, research, study, criticism or review. You must properly acknowledge any literary work that you use⁴.

In University of London Press Ltd vs. University Tutorial Press (1916) 2 ch 601.

Examiners were hired to create exam scripts for the university of London, in this case Peterson J held that the papers were originally literary works: Assuming that they are “literally works” the question of originality is relevant in determining a literary work as it is also relevant in other works provided in **section 1(1) of the copyright act**. The case of **Davey J in Hollinrake vs. Trustwell (1894) 3 ch 420 at 427** should be taken into consideration when discussing literary works. From the scenario given it can be deduced that Hassan made use of both online and offline books and materials and from the explanation given with the help of the copyright act and the precedent case mentioned it will be safe/ appropriate to refer to the offline and online materials and books used by Hassan as a literary work.

- . The next issue for consideration is whether the work can be protected under the Copyright Act and Marrakesh Treaty?

⁴ Copyright Act 1988 as amended

Once a work is ascertained to fall within the category of protected work the next issue is whether copyright subsists in the work. When copyright subsists the work is however protected. It is trite in the copyright law to say that for copyright law to say that for copyright to subsist in a work, it must satisfy three conditions⁵ which are: Originality, Fixation and Qualifying author.

Originality in this context means the work was not copied from another. In the case of *University of London press v. University tutorial press*, Peterson J stated that the word “original” does not in this connection mean that the work must be the expression of original inventive thought. Fixation on the other hand means the work is fixed in any definite medium of expression. Qualify Author which is the third requirement applies to all categories of works, here it was provided that for a person to enjoy Nigeria copyright protection there must be a connection between the author and Nigeria. However for a work to be eligible for copyright it must satisfy these requirements. However under the Marrakesh Treaty-based works and notations, such as books, e-books, audiobooks, newspaper, journals and musical scores, are included, as well as related illustrations and images. The Treaty applies not only to works that are published but also to works otherwise made publicly available, such as material in digital repositories and pre-print servers. With the above explained it should be noteworthy that the online and offline books and materials attempted to be converted by Hassan will be protected under both the Marrakesh Treaty and Copyright Act. However, the legal question whether the work will be protected under the Marrakesh Treaty and Copyright Act will be answered in the affirmative.

- The third question which is whether Hassan’s attempt to convert the online and offline books and materials in a format that will be accessible to him for his educational use will make him liable for copyright infringement under Copyright Act and Marrakesh Treaty? This issue will however be resolved in the negative.

Works covered by the Marrakesh Treaty include text-based works and notations, such as books, e-books, audio books, newspaper, journal and musical scores, are included, as well as related illustrations and images. The treaty applies not only to works that are published but also to works otherwise made publicly available., such as pre-print serves, etc. It is important to note however that Audio-Visual works such as films are not covered, although textual works embedded in

⁵ Nigerian Copyright Act (CAP. 28) Laws of the Federation, 2004

audio-visual works such as an educational multimedia DVD are included ⁶. However, the online books and materials Hassan attempted to convert to an accessible format can be covered under the Marrakesh Treaty. The question “what is an accessible format?” may however be relevant in this work. An accessible format under the Marrakesh Treaty is a format that allows a print-disabled person to read the work as comfortably as a person who is not disabled.

For Copyright Act, **Section 6(1a) of the copyright Act** provides the nature of copyright in the case of Literary or musical works. This section provides the subject to the exceptions specified in the second schedule to this act, copyright in a work shall be exclusive right to control and authorize the doing of any of the following act; reproduce the work any material form, publish the work, perform the work in public, broadcast or communicate the work to the public by a loud speaker or any other similar device, make any cinematography film or record and make adaption. However, there are exceptions to the control of the copyright which is provided in the second schedule to the Copyright Act.

The exception “fair dealing” is perhaps the most significant exception however here in this question other exceptions which include for private use, educational purpose and exception given by the government for blind and disable people in this case will be equally significant. One factor that the courts would consider in determining “fair dealing” is the value of the portion taken relative to the work from which it is taken. Accordingly, substantiality is in relation not only to the quantity taken but also in relation to the value of the work. In **Ladbroke Football, ltd v. William Hill Football ltd** it was held that the test is qualitative not quantitative this simply means that the defendant in a case must have copied a substantial part depends more on the quality rather than quantity of what has been taken. Fair dealing in this case means that the dealing with the work must be genuine and reasonable. In the words of **Lord Denning M.R. in Hubbard V. Vosper**⁷ concerning “fair dealing” is indeed illuminating. He said:

⁶ Marrakesh Treaty, Article 6; WBU Guide, pg. 56

⁷ (1972) 2 Q.B .84. See s.6(2) C.A and see also **Hawkes & CO. London ltd v Paramount Film Services Limited** (1834) 1 CH 585; **Time Warner v Channel 4**(1994) E.M.L.R. 1. C.A; **Mawmann v. Jegg** (1826) 2 RUSS. 385

“it is impossible to define what is “fair dealing”. It must consider first the number and extent of the quotation and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them.”

However, it is noteworthy that for a person to successfully bring an action of infringement against another certain condition needs to be proved and satisfied. As the action for infringement is provided by Section 15 of Copyright Act.

It is however important to note that an action for infringement provided in Section 15 of C.A will only apply in a scenario where there is an infringement. It is important to note that Hassan cannot be liable for an infringement of copyright because he is covered by exceptions provided in the Second Schedule to the Copyright Act, also Hassan is covered by the exceptions of fair dealing which means dealing with the work for a genuine reason and also the exceptions of using the work for educational and private use. However, it is noteworthy that any person with a print disability can benefit under the Marrakesh treaty. Fair dealing is a limitation and exception to the exclusive right granted by copyright law to authors of creative work. It is users right in copyright law permitting use of a copyright protected work without permission or payment of copyright royalties.

The two basic rules applicable in this case is the exception stated under the **Second Schedule Section 6(1) of the Copyright Act**, which states that:

Reproduction of published work in braille for the exclusive use of the blind, and sound recordings made by institution or other establishment approved by the government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled person.⁸

The Marrakesh Treaty;

The Marrakesh Treaty was adopted on June 27, 2013 and came in force on 30th September, 2016 and it forms part of the body of international copyright treaties administered by WIPO. It has a clear humanitarian and social development dimension and its main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired, and otherwise print disabled (VIPs).

⁸ Section 6 of the Copyright Act

It requires Contracting Parties to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of accessible to VIP's and to permit exchange of these works across borders by organizations that serve those beneficiaries.

The broad definition includes persons who are blind, visually impaired, or print disabled persons with a physical disability that prevents them from holding and manipulating a book⁹.

This treaty makes the production and international transfers of specially adapted books for people with blindness or visually impairments easier.

Nigeria is one of the countries signed to the treaty and as such, Nigeria can allow for the production and importation of such materials that Hassan needs while adhering to the setup limitations and exceptions. Hassan can convert these works to the necessary format for his personal use under the protection of his personal use under the protection of the Principle of Fair Dealing, which is covered by **Section 6 of the Copyright Act**, which states that it must be for a purpose of research, private use, criticism, or review etc.

In conclusion, the advice to Hassan therefore is that he is protected under the copyright act as long as he maintains to use the work which he will be able to get access to as a result of the Marrakech Treaty, for Private personal studies or any of the other things stated by section 6 of the copyright act. Under the principle of Fair Dealing.

REFERENCES:

1. Getting Started; implementing the Marrakesh Treaty for persons with print disabilities: a practical guide for librarians
2. Intellectual Property the Law and Practice of Copyright, Trademarks, Patents and Industrial design in Nigeria by F.O Babafemi
3. The Nigerian Intellectual Property Handbook by Ifeoluwa A. Olubiyi
4. Copyright Act 1988 (as amended)

⁹ Fair Dealing under Marrakesh Act