

Thought Leadership | *Afolabi Elebiju and Gabriel Omoniyi*

Incidences: Moral Rights in Nigerian Intellectual Property Regulatory Framework

“...it is agreed today that, independently of the exclusive rights of economic character, which are essentially temporary and transferable, the author does own one right, or a set of rights strictly inherent in his person, that are intransferable and without limitation in time...”

- Memorandum of the Italian Delegation to the 1928 Berne Convention, Rome.¹



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Introduction

From its humble origins reportedly dating back to the United Kingdom (UK)/English **Copyright Act 1709**,² copyright has assumed increasing importance, especially as the society recorded advances in intellectual breakthroughs. For some countries like the United States of America (USA), the concept of intellectual property (IP) rights has been recognised in their **Constitution** through the **Commerce Clause** and seen as one of the ways of furthering national development.³

Copyright, a right that automatically becomes vested in an author,⁴ gives such copyright owner some rights,⁵ all geared towards enabling the author accrue and maximise all

profits due to him for his creativity. Aside from the economic rights; the **Berne Convention for the Protection of Literary and Artistic Work 1886 (Berne Convention)** was reviewed in 1928 vide the **Rome Act**,⁶ to identify and make provision for another ‘leg’ or variant of the right of a copyright author: *the moral right*.⁷

Moral right seeks to regulate the right of the author by granting him the right to attribution, paternity and against derogation which, depending on the jurisdiction, may either be for the lifetime of the author, coexist with the economic right, or be in perpetuity. Varied implementation of some of the provisions, has followed the international recognition of moral right since 1928. Whilst the World Trade Organisation (WTO)’s **Agreement on Trade-**

¹Cited in Margaret Ann Wilkinson and Natasha Gerolami, ‘*The Information Context of Moral Rights under the Copyright Regime*’, University of Western Ontario Law School Law Publications, 6-2004, p. 6: <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1077&context=lawpub> (accessed 25.08.2021).

²Otherwise known as the “*Statute of Anne*.” See Chudi Nwabachili, ‘*Intellectual Property Law and Practice in Nigeria*’, (Malthouse, 2017), p.12.

³Article 1, Section 8 (Clause 8), USA Constitution, which provides: “The Congress shall have Power - To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Whilst the **1999 Constitution of the Federal Republic of Nigeria (as amended)** does not have the equivalent of the **Commerce Clause**, it however provides vide **section 16(2)(d)** that: “the State shall direct its policy towards ensuring that the economic system is not operated in such manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group.”

⁴**Section 2(1) Copyright Act, Cap. C28, Laws of the Federation of Nigeria (LFN) 2004 (CA)** with commencement date of 19th December 1988.

⁵For example in Nigeria, the rights are divided into two: moral rights; and economic rights. These rights affords the copyright holder and/or author the right to distribution, production, performance of work, claim authorship, integrity, etc. See **sections 6 and 12 CA**.

⁶While the **Berne Convention** was originally drafted in 1886, there were subsequent revisions at Berlin (1908), Rome (1928) and Brussels (1948).

⁷**Article 6bis, Berne Convention**.



Related Aspects of Intellectual Property Rights (TRIPS)⁸ gave Member States the discretion of enforcing moral rights; some other treaties like the *WIPO Performances and Phonograms Treaty 1996 (WPPT)* and *Beijing Treaty on Audiovisual Performances (BTAP)* (both *Article 5*) did not give such discretion.

But to what end is a moral right to an author? What are the relevance and impact of moral rights in a developing country like Nigeria and how do other jurisdictions like the UK and USA treat this right? Are there any international conventions that regulate moral rights, and what is the impact of speedy technological advancement on the moral rights of an author? This article explores the issues around these questions and seeks, pursuant to requisite analysis, to answer them.

History of Moral Rights

Moral rights were reportedly first traced to France (termed 'droit moral')⁹ and Germany.¹⁰ These rights

are said to include the right to publish, right to attribution, right to integrity and right to retract.¹¹

Unlike the economic right that has been rightly recognised alongside the development of copyright under the *Berne Convention*, moral rights came to the fore globally following the review of the *Berne Convention* by the *Rome Act* in 1928. This review led to the introduction of *Article 6bis Berne Convention* which provides for the right to authorship (otherwise known as the right of paternity) and the right to object to certain modifications which may be derogatory to the work of the author, or the right of integrity. Other IP international instruments which have affirmed the moral rights of the author are the *WPPT* and *BTAP*. However, the provision regarding moral rights was not incorporated into the *TRIPS*¹² based on the alleged political and economic pressure of the USA during the Uruguay Round of the *General Agreement on Tariffs and Trade 1994* that such will stifle trade relations.¹³

All these *Treaties* (the *Berne Convention*, *BTAP* and *WPPT*) unanimously agree that the minimum period for the protection of the rights shall be until the expiry of the economic rights; and where the Member States at the time of ratification of or accession to the *Treaties* do not have any legislation providing for protection after the death of the author (or performer), such a right will cease at his death. Similarly, *Article 27(2) Universal Declaration of Human Rights 1948*¹⁴ (*UDHRs*) and *Article 15(c) International Covenant on Economic, Social and Cultural Rights 1967*¹⁵ recognises the moral rights of the author.

There are also other rights which though were not recognised globally, have formed part of the moral rights granted to authors in other jurisdictions. Some of these include: the right of withdrawal, right of divulgation, right of the author to have access to the original copy of a work to "exercise his rights", right to prevent others from associating one's work with an undesirable "product service, cause or institution", right to pseudonymity and right of an author to compel the completion of a commissioned work of art.¹⁶

Definition and Scope of Moral Rights

Moral rights protect the product of an author's genius and labour from harmful intrusions by publishers; that is, those who make the author's work-product public.¹⁷

One driving inspiration for moral rights doctrine has been the belief that some artists could fall prey to the vultures of

⁸Article 9(1) *TRIPS* gives the Member States, the option to apply *Article 6bis Berne Convention* in their respective jurisdictions.

⁹*Carter v. Helmsley-Spear, Inc* 71 F.3d 77 (2d Cir. 1995) per Cardamone, Circuit Judge held thus: "The term 'moral rights' has its origins in the civil law and is a translation of the French *le droit moral*, which is meant to capture those rights of a spiritual, non-economic and personal nature. The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved... Because they are personal to the artist, moral rights exist independently of an artist's copyright in his or her work." Emphasis supplied.

¹⁰The Germans refers to it as the author's right of personality in his work. See William Cornish and David Llewelyn, 'Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights', (Sweet & Maxwell, 6th ed., 2007), p. 486.

¹¹Michael B. Gunlicks, 'A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy', *Fordham Intell. Prop. Media & Ent. L.J.*, 2001, Vol. 11, No. 3, p. 608: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1220&context=plj> (accessed 15.09.2021).

¹²Article 9.1 *TRIPS* provides that "... However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention [Berne Convention] of the rights derived therefrom". Emphasis supplied.

¹³See Elizabeth Schere, 'Where is Morality? Moral Rights in International Intellectual Property and Trade Law', *Fordham International Law Journal*, 2018, Vol. 41, Issue 3, p. 774: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2703&context=ilj> (accessed 15.09.2021).

¹⁴Article 27(2) *UDHRs* provides that: "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

¹⁵This provides that: "the State Parties to the present Covenant recognise the right of everyone: to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

¹⁶See United States Copyright Office, 'Authors, Attribution, and Integrity: Examining Moral Rights in the United States', A Report of the Register of Copyrights, (April 2019), pp. 13-14: <https://www.copyright.gov/policy/moralrights/full-report.pdf> (accessed 15.09.2021).

¹⁷Michael B. Gunlicks, (*supra*) pp. 607-608.

copyright industries, thus moral rights seek to remedy that by protecting at least the integrity of the work and the connection with it.¹⁸ According to a learned author, moral rights are part of the bundle of rights enjoyed for creating social wealth which can be justified in two ways – external, that is, economics external to the author’s identity, internal creative processes and inner personality; or internal, that is, the elements of the personal dimension of the author affected by harm on his reputation or honour of the author’s artistic message.¹⁹

One major difference between economic and moral rights is that the ownership of the rights may vary depending on the situation. While the authorship and copyright are mostly vested in one person or entity, it is not always the same at every time. For example, by **section 10(3) CA**, the copyright in a work done by an employee may be vested in the employer, notwithstanding that the employee is the author.

Another major difference is the alienability of the rights. Whilst the economic rights are easily transmissible by assignment, testamentary disposition or by operation of law, moral rights may not. For instance in Nigeria, such rights are deemed “**perpetual, inalienable and imprescriptible**”²⁰ whereas under the **Berne Convention**, the minimum requirement is for such rights to subsist until the expiry of the economic rights, thereby giving Member States, the latitude to dictate to what extent same applies, thereafter.

Moral Rights Protection in Nigeria

Copyright Act

Pursuant **section 12 CA**, Nigeria unlike the USA, makes specific provision for

the moral rights of the author. An “*author*” under the combined reading of **section 12(1) and (3) CA** includes the author’s heirs and successors-in-title. The scope of the moral right extends to the “*author of a work in which copyright subsists*” that is, *literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts*²¹ under the **CA**. *Once there is a work qualified to be copyrightable, the moral rights become automatically vested on the author and are “perpetual, inalienable and imprescriptible”*.²² The moral rights recognised under the **CA** are: (i) right of paternity; and (ii) right of integrity.

Right of paternity may entail the author either placing the author’s name on the copies (title pages or fly leaves, film subtitles, signatures on pictures, sculpture).²³ However, this may be sidestepped where such right was infringed by way of mistake (incidentally or accidentally), for example in the course of broadcast.²⁴ **Right of integrity** on the other hand, can have great benefits for the society, especially where the work extends to the public domain, as a means of protecting the cultural heritage through the lifetime of such a work.²⁵

The essence of moral right is to give the author the continued reputation of his work, which will in turn likely translate to the preference, and demand for, his current and subsequent work. Thus, where this is breached, the author’s work may either get disdained, despised and thereby occasion reputational or economic hardship on him.

Other Protective Frameworks

Apart from under the **CA**, an author can seek an extension of his moral rights by bringing an action for defamation, passing off of his goods, unfair competition, and also the utilisation of

contracts and licenses to regulate his interaction with third parties. The challenge with some of these reliefs like contracts and licenses is its limitation to only the parties to such contracts.

Proposed Amendments

In line with views in certain quarters that the Nigerian copyright regime was ripe for revision in line with global developments, particularly technological advances, and penetration, the **Copyright Bill 2015 (the CB)**²⁶ was drafted and proposed by the Nigerian Copyright Commission (NCC) to replace the extant **CA**. A quick review of the **CB** on moral rights reveals its extension to the protection of the performer *vide* **section 58**. There is also provision for the regulation of internet-related concepts which has effect on the moral rights of an author, like the rights management information (RMI) and the extension of protection to online contents.

RMI by **section 45(3) CB** means “*information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.*” Breach of this provision will make the person liable for damages, injunctions, accounts or such other remedies available for the copyright owner.

However, as innovative as the **CB** is, more so considering its domestication of the provision of the **WPPT** on the moral rights of the performer and the protection of the copyright management information (CMI), nothing much seems to have been

¹⁸William Cornish and David Llewelyn, (*supra*).

¹⁹Lior Zemer, ‘Response: The Dual Message of Moral Rights’, *TLRSA*, Vol. 90:125 (2012), p. 134: <http://texaslawreview.org/wp-content/uploads/2015/08/Zemer-90-TLRSA-125.pdf> (accessed 15.09.2015).

²⁰**Section 12(2) CA**. It is however difficult to understand how such an alienation will be challenged considering that the authors who by their right ought to challenge such, have ‘waived’ their right.

²¹**Section 1(1) CA**.

²²**Section 12(2) CA**.

²³See WIPO, ‘Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)’ (WIPO, 1978), p. 41-42: www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf (accessed 23.08.2021).

²⁴**Section 12(1)(a) CA**.

²⁵Mira T. Sundara Rajan, ‘Moral Rights: Principles, Practice and New Technology’, (OUP, 2011), p. 5.

²⁶The CB is available at: http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER_2015.pdf (accessed 15.09.2021).

heard, since the draft was presented to the National Assembly (NA).

Comparative Pictures: UK and USA

The United States of America

The protection of moral rights in the USA has not been a smooth ride, owing to the lack of specific provision(s) in the USA **Copyright Act 1976 (USA CA)**. This, according to the US Congress, is due to a host of federal and state law provisions like the **section 43(a) Lanham Act 1946** on false designation, misdescriptions and misrepresentation of facts; **Visual Artists Rights Act 1990 (VARA)**; **section 1202 USA CA** on the integrity of CMI (which puts in place the provision of the **Article 12 WCT and Article 19 WPPT**). There are also some other States' legislative provisions and contractual arrangements, which conjunctively can offer protections similar to what the moral rights seek to achieve. Majorly, these provisions only recognise the author's right to attribution and integrity.

Firstly, the **Berne Convention** was not acceded to by the USA until 1988, sixty (60) years after its revision in Rome to provide for moral rights. The rationale for this has been revealed to be the seeming contradiction between the provision of **Article 6bis Berne Convention and Article 1, Section 8, Clause 8 USA Constitution**; the latter empowers the US Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors." USA was however left with no choice but to sign the **Berne Convention** to enjoy the worldwide protection of her citizens' work, based on the national treatment principle.²⁸

The Congress also enacted the **VARA** to provide for moral rights, (viz, the right



to attribution and integrity), for only visual artists. The duration of the moral right in visual art where it is made on or after the enactment of the **VARA** is co-terminous with life of the author, or in case of a joint author, upon the decease of the last surviving author.²⁹ This enactment was "not yet Uhuru" for virtual artists - as by **section 101 USA CA**, it only applies to original works of virtual art of 200 copies or less, which are signed and consecutively numbered by the author and not to digital works. In fact, moral rights will be displaced where works of art are manipulated in electronic media, as it is the digitised copy, not the original work of art, that will be used.³⁰

The challenge for authors in the USA has appeared to turn to other provisions for relief like trademark under **section 43(a) Lanham Act**, unfair competition, passing off and the use of contracts and licenses to regulate conduct between the parties.

United Kingdom

The **CDPA** through its **Chapter IV** recognises and makes express provision for moral rights. These rights include the right of paternity (**section 77**), right of integrity (**section 80**), right against false attribution (**section 84**) and right to privacy in private photographs and films (**section 85**). The duration of the moral right is dependent on the type of rights. While the right of paternity, right of integrity and right to privacy in private photographs and films subsists with the right of the copyright; the right against false attribution of a work is limited to 20 years after the death of the author/holder.³¹

By **section 78 CDPA**, the right of paternity must be asserted, before being exercisable by the author. Assertion under the **CDPA** entails that the author or the director's right in writing be identified (or where in case of an assignment, through the instrument of assignment).³² Unlike the

²⁷Rather, another *Bill* appears to have been introduced – "A Bill for an Act to Repeal the Copyright Act Cap C28 LFN 2004 and to Re-Enact the Copyright Act 2021 and for Matters Connected Therewith, 2021 (SB. 688)". It has apparently passed Second Reading at the Senate on 6th August 2021. Unfortunately, this *Bill* is however unavailable for review. See <https://nass.gov.ng/documents/bill/11019> (accessed 20.09.2021). (accessed 20.09.2021).

²⁸Elizabeth Schere, (*supra*), p. 778.

²⁹17 USC § 106A (d). However, where the title has not, as of effective date of the **VARA**, been transferred from the author, such moral rights shall be co-terminous with the economic rights of the author as provided by **section 106**.

³⁰John Kennedy et al, 'Internet Law and Practice', (Thomson Reuters, S. Asian ed., 2013), p. 12-51.

³¹Section 86 CDPA.

³²See **section 78 CDPA** generally.

Nigerian provision, **section 87 CDPA** allows the author to either consent to doing any of the prohibited acts; or (conditional or unconditional) waiver, of his moral rights.

Equally, the **Copyright and Related Rights Regulations 2003** amended the **CDPA** by prohibiting circumvention of protection measures to computer programs and electronic rights management information. This will help to curb the removal of vital details that may have helped preserve the right of attribution of the author.

Moral Rights and Technological Advancement

The narrative of the copyright system generally has always either been overhauled or modified, following significant technological advancements. For example, the introduction of the printing industry has created the need for the exclusivity of printing on the authors and their assigns.³³ Due to these widely available technologies - especially with the internet and the innovation of various creative applications, information sharing (some of which are shared via unauthorised channels, and without due remittances to the owners of the copyright), have made it easy for metadata of files to either be stripped off copyrighted works thereby removing the possibility of proper attribution of the authors, the works edited without due reference to or preservation of the author's reputation.

Thus, *one of the challenges of present-day technological innovations is the balance of moral rights with the ownership of creativity by improved technology.* Considering **section 2 CA**, the conferment of moral rights is strictly on individuals and body

corporates and hence there will be a challenge to the extension of moral rights to a work improved or 'authored' by technology or artificial intelligence.³⁴

Another challenge is the appropriation of moral rights where the rights of the author has been passed to the public domain. The **First Schedule** and **section 27 CA** provide the duration for works eligible for copyright under **section 1 CA** and the performers respectively. Since moral rights are deemed to exist in perpetuity under the **CA**, the question thus is: *"how does a public work still have its moral rights in its author?"*

In combating the impact of technology on the moral rights of an author, the **WIPO Internet Treaties – WIPO Copyright Treaty (WCT)** and **WPPT**, together with the **BTAP** have made copious protections through the identification of technological protection measures and rights information technology. Some of these measures may include digital rights management, digital fences encryption, watermarking, digital signatures along monitoring and tracking devices that could be used to tackle infringement.³⁵

The issue with these **Treaties** in Nigeria is their not having been domesticated, because **section 12 1999 Constitution of the Federal Republic of Nigeria (as amended)** prescribes that international treaties to which Nigeria is signatory, are inoperative until they are domesticated vide enactment into law by the NA.³⁶ This legislative gap (of domestication), needs to be closed.

Cross-border enforcement of these rights, especially in a digital context, is another huge challenge. IP rights are territorial; hence the need for States to have such measures first enacted in their laws, before their application. Unlike the

economic rights - which owing to its wide recognition has at least some specific measures of provision in almost all the jurisdictions - moral rights are still suffering apathy in some jurisdictions. This may therefore affect what ideally should be the 'united' fight against the derogation of these rights.

As suggested by a commentator, the use of bilateral agreements may provide escape routes for the protection of these rights.³⁷ However, there is the drawback that such an approach only brings temporary relief to the authors involved, considering that infringement may take place in any other States, without a reciprocal commitment to the author's nationality or domicile. In addition, the borderless internet does not guarantee the success of the bilateral arrangements; thus, bringing the discussion back to the need for a global approach to combating moral rights protection.

Conclusion

As the foregoing shows, while the plight of moral rights has been represented in the **CA**, the need to fully address present-day realities of technology disruption and advancement require revision to the regulatory framework. The **CA** was enacted in 1988, 33 years ago, made even more distant by almost daily technological innovation.

Thus, Nigeria must first, in a bid to further the protection of the moral rights of the author, domesticate the applicable **Treaties**. Though there may be issues and challenges as to the enforcement and cross-border application of moral rights, its relevance as a means of sustaining artistic creativity can never be

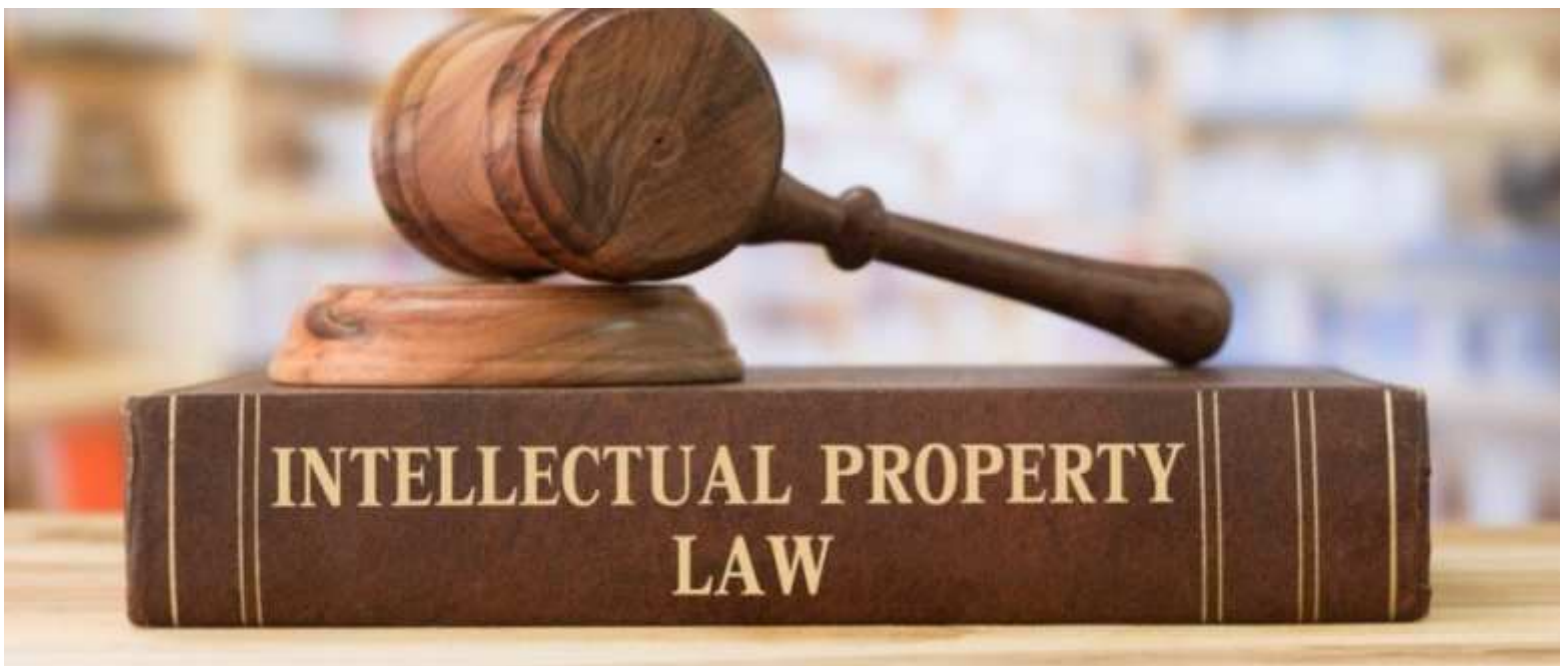
³³See William Cornish and David Llewelyn, (*supra*), pp. 375-6.

³⁴The attempt to ascribe copyright to a photo by a non-individual or non-corporate personality has been refused in the '**Naruto Selfie**' suit by a wildlife photographer, David Slater. Though the matter was eventually settled on appeal, the trial court had dismissed the suit, based on the inapplicability of copyright to animals. See Andres Guadamuz, '**Can the Monkey Selfie Case Teach Us Anything About Copyright?**', WIPO Magazine, February 2018: https://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html (accessed 30.08.2021). However, a persuasive argument may be the grant of patent to an artificially-intelligence patented inventor, DABUS by South Africa and upheld by the Australia Court. See Donrich Thaldar and Meshandren Naidoo, '**AI Invention: The Right Decision**', OSF Preprints: <https://osf.io/7uctg/> (accessed 30.08.2021). However, this decision by the Australian Court has been appealed by the Australian Commissioner of Patent. See IP Australia, '**Commissioner to Appeal Court Decision Allowing Artificial Intelligence to be an Inventor**', 30.08.2021: <https://www.ipaustralia.gov.au/about-us/news-and-community/news/commissioner-appeal-court-decision-allowing-artificial-intelligence> (accessed 31.08.2021).

³⁵Smita Kheria, '**Moral Rights in the Digital Environment: "Authors" Absence from Authors' Rights Debate**', BILETA 2007 Annual Conference, (2007), p. 6: <https://www.bileta.org.uk/wp-content/uploads/Moral-rights-in-the-Digital-Environment-Authors-absence-from-Authors-rights-debate.pdf> (accessed 23.08.2021).

³⁶See also *Abachav. Fawehinmi* [2000] 6 NWLR (Pt. 660), 228.

³⁷Mira T. Sundara Rajan, (*supra*), p. 277.



overlooked. The **CB** which appears to be a haven for authors must be given the needed attention and speedy passage into law.

Just like the protection of economic rights have presumably had a huge impact on the national economy, the moral rights equally gives the author the motivation to continually express his ideas into forms that can yield value, both to him and the nation.

Apart from the enforcement of anti-plagiarism sanctions imposed by educational and research institutions in Nigeria - which by the way are limited to written works - there appears to be no other or widespread record of enforcement of these rights. Even Nigerian case law on moral rights is either sparse or non-existent – as we did not come across any direct case in the course of our review.

Moral rights are however a vital thread that weaves the market into continual creativity. Thus, the regulatory framework must continue to value the author and protect his motivation.

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