Are foreign copyright works protected in Nigeria?

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Despite Nigeria's treaty obligations, Nigerian courts have, in the last quarter of a century, consistently but erroneously held that the Nigerian copyright statute does not protect copyright works of foreign persons. The purport of the decisions is that foreign persons cannot sue to protect their copyright in Nigeria. Given that the decisions of three trial courts and a Court of Appeal decision were never appealed to the Supreme Court, they arguably remain good precedent. The decisions suggest that foreign direct investors who need copyright protection are exposed in Nigeria. Relying on two of these cases, a leading intellectual property law text echoed this erroneous position.

This article demonstrates that the decisions were reached in ignorance of applicable statute. As such, the decisions should not be followed by trial courts irrespective of the rule of binding judicial precedent. The article outlines various mechanisms within the copyright statute that extend the protection of the Nigerian copyright statute to foreign works. This article goes further than previous works. Unlike earlier works, this article suggests the path trial courts should tread, despite the rule of precedent, in distinguishing this line of cases to hold that foreign corporations incorporated in many treaty countries and foreign works emanating from many treaty countries are protected in Nigeria. Unlike earlier works, this article demonstrates that lower courts may refer this issue to higher courts for interpretation and guidance under the case stated procedure. Whilst other works made passing references to the Copyright (Reciprocal Extension) Order 1972 (the 1972 Order), that arguably extends copyright to foreign works under the Copyright Act 1970, none cited judicial authority that held that the 1972 Order made under the repealed Copyright Act 1970 is still valid under the current Copyright Act. None referred to the Interpretation Act that supports this judicial authority. Unlike previous work, this article reveals that if the Microsoft case that is the most significant of these cases is appealed to the Nigerian Supreme Court, the court will extend the time within which the Microsoft Corporation can appeal and reverse Microsoft and the line of cases identified in this article.

Keywords: *copyright, foreign works, protection, treaty, reciprocal, binding*

INTRODUCTION

In 2016, a Nigerian court in *Nigerian Copyright Commission v Nnam Sunday Gabriel*¹ (*Gabriel*) discharged and acquitted the alleged pirates facing criminal prosecution for copyright infringement of foreign pirated works. The court held that there was nothing before the court to establish that the Minister had extended the application of the

1. Unreported Suit No: FHC/UY/81c/2013, per Ojukwu J, judgment delivered on Wednesday 3rd of February, 2016.

Nigerian Copyright Act to the foreign works listed in the charge. Consequently, the pirated works were released to the defendant. Five years earlier in 2011, the Nigerian Court of Appeal in *Microsoft Corporation v Franike Associates Ltd (Microsoft)*,² held that the Microsoft Corporation, being a company incorporated in the United States of America, could not sue to protect its copyright in Nigeria. These decisions appear to re-echo the 1997 decision of Jinadu J in *Societe Bic S.A. v Charzin Industries Limited and Anor (Societe Bic)*³ and the 1993 decision of Belgore CJ in *Island Records Ltd and Ors v Pandun Technical Sales and Services Ltd*⁴ (*Island Records*).

These four decisions handed down by Nigerian courts in 1993, 1997, 2011 and 2016, a period of almost a quarter of a century, consistently suggest that the Nigerian copyright statute does not protect the copyright works of foreign corporations. These decisions which have not been appealed, arguably question whether Nigeria respects her copyright treaty obligations.

The tone of these cases portends grave danger for the international copyright industry in Nigeria, hence the need for this article. Citing *Island Records* and *Societe Bic*, Babafemi, an authoritative Nigerian intellectual property law text concluded that ‘only companies that are incorporated by or under Nigerian Laws can bring an action for the infringement of Copyright’.⁵ Unless reversed, these authorities seem to suggest that foreign direct investors who need copyright protection are exposed in Nigeria and that Nigeria is a perilous nation as far as foreign copyright is concerned.

This article goes further than previous work.⁶ It demonstrates that the decisions were reached *per incuriam*, that is, in ignorance or forgetfulness of an enabling statute as the courts were oblivious of applicable Nigerian law. As such, the decisions should not be followed by any trial courts irrespective of the rule of *stare decisis*, which is the rule of binding judicial precedent. This article outlines the ways in which Nigerian copyright statutes have always protected foreign works. The first part discusses the four cases that held that the foreign copyright works in dispute are not protected in Nigeria. The second part outlines the various mechanisms within Nigeria’s copyright statutes that extend the protection of the Nigerian copyright statute to foreign works.

2. (2011) LPELR-CA/L/573/2008; (2012) 5 CLRN 145.

3. *Societe Bic S.A. v Charzin Industries Limited and Anor* (1997) FHCLR 727, [1990–1997] 2 IPLR 335.

4. *Island Records Ltd and Ors v Pandun Technical Sales and Services Ltd* (1993) FHCLR 318.

5. FO Babafemi, *Intellectual Property, the Law, and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria* (Justinian Books Ltd 2006) 39–40.

6. John Asein, *Nigerian Copyright Law and Practice* (2nd edn, Books & Gavel Publishing, Abuja 2012) 33–4; Adejoke Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press and Bookshop Ltd 2015) 47–8; Ifeoluwa Ayokunle Olubiyi, ‘Reciprocal Extension of Copyright and National Treatment: *Microsoft Corporation v Franike Associates Ltd*’ (2014) 2(1) South African Intellectual Property Law Journal 98; Cynthia Onyinyechi Igodo, ‘Enforceability of Foreign Copyright in Nigeria: A Review of the Court of Appeal’s Decision in *Microsoft v Franike*’ (2018) 44(2) Commonwealth Law Bulletin 227, DOI: 10.1080/03050718.2019.1608278, available at <<https://doi.org/10.1080/03050718.2019.1608278>> accessed 1 November 2019; Olumide Ekisola, ‘Microsoft Corporation v Franike Associates Ltd – an Error Reaffirmed on Appeal’ <<https://www.parkerip.com/ip-directory/display-newsletter?NewsletterID=362>> accessed 1 November 2019; Tracy Ayodele, ‘No Protection for International Works Under Nigeria’s Copyright Act? NCC Clears the Ambiguity’ <<http://ipeyeblog.com/no-protection-for-international-works-under-nigerias-copyright-act-the-ncc-clears-the-ambiguity/>> accessed 1 November 2019; IP Kenya, available at <<https://ipkenya.wordpress.com/tag/microsoft-corporation-v-franike-associates-ltd/>> accessed 1 November 2019.

The third part of this article adds to the body of knowledge by suggesting the path trial courts should tread, despite the rule of precedence, in distinguishing this line of cases. That is, how trial courts can, notwithstanding earlier authorities, hold that foreign corporations incorporated in many treaty countries and foreign works emanating from many treaty countries are protected in Nigeria. One of the distinguishing factors is the failure of counsel in the decided cases to cite the Order, depriving the courts of an opportunity for taking judicial notice and applying the Order.

This article suggests that lower courts may refer the issue to higher courts for interpretation and guidance under the case stated procedure. Whilst earlier works made passing references to the Copyright (Reciprocal Extension) Order 1972 (the Order) or (the 1972 Order), that arguably extends copyright to foreign works under the Copyright Act 1970, none cited judicial authority that held that the 1972 Order made under the repealed Copyright Act 1970 is still valid under the current Copyright Act. Earlier work did not cite the Interpretation Act that supports this judicial authority. Unlike previous work, this article reveals that if *Microsoft* is appealed to the Nigerian Supreme Court, the court will extend the time within which the Microsoft Corporation can appeal and reverse the decision in *Microsoft*.

Perturbed by this development, the Nigerian Copyright Commission issued a public notice indicating that *Microsoft* was an error of law,⁷ but the notice is not binding on courts. Many trial courts will face a quagmire when faced with this legal issue on the assumption that they are bound by *Microsoft*. This is the challenge taken up by this paper; it disabuses such sentiments and argues that these authorities must not, and cannot be followed.

PART 1

1.1 The unfriendly judicial pronouncements

The first of the four cases, *Island Records*, was instituted when Nigeria's Copyright Act, 1970⁸ was still in force and the decision was handed down pursuant to the 1970 Act. The second, third and fourth cases, *Societe Bic*, *Microsoft* and *Gabriel*, were instituted pursuant to the Copyright Act, 1988,⁹ which is the current applicable law in Nigeria. The 1988 Act repealed the 1970 Act. The 1970 Act was the first indigenous statute passed exclusively to govern copyright issues in Nigeria. Prior to this, the English Copyright Act 1911¹⁰ governed copyright matters in Nigeria. It became effective in Nigeria on

7. See the Commission's Public Notice, 'US Works are Protected Under Nigerian Copyright Act' <<http://www.copyright.gov.ng/index.php/public-notice/item/322-u-s-works-are-protected-under-nigerian-copyright-act>> cited by Igodo (n 6) supra and IP Kenya (n 6) supra.

8. Act 61 of 1970, which became operational from 24 December 1970, and was repealed by s 40(1) of the 1988 Act. For more information on the various attempts to review the 1970 Act, see Bankole Sodipo, 'The Reform of the Nigerian Copyright Law', an unpublished paper delivered to the Nigerian Law Reform Commission in Lagos on 18 October 1988.

9. No. 47 1988, now Chapter C28, 2004 Laws of the Federation of Nigeria (LFN), formerly Chapter 68, 1990 Laws of the Federation of Nigeria (LFN). It became effective on 19 December 1988.

10. The 1956 UK Copyright Act, was not applied to Nigeria and so the old and repealed 1911 Act continued to apply in Nigeria until 1970, when the Copyright Act 1970 was enacted. See also, Hon Dr Olakunle Orojo, *Nigerian Commercial Law and Practice* (Vol. 1, Sweet & Maxwell, London 1983) 1128.

24 June 1912, by virtue of Order-in-Council No. 912 of 1912, dated 24 June 1912 made under section 25 of the 1911 Act.¹¹ The provisions of the 1970 Act on the issues of eligibility and qualification in the three cases are on all fours with the provisions of the 1988 Act.

*Island Records Ltd and Ors v Pandun Technical Sales and Services Ltd*¹² was a dispute involving alleged piracy of sound recordings of nine recording companies. The defendants were sued jointly and severally for the infringement of copyright in photographs, illustrations, or other artistic works and sound recordings. Six of the nine companies were incorporated in England and the United States of America and three of the plaintiffs were incorporated in Nigeria. The trial judge who was the then Chief Judge of the Federal High Court, which had exclusive jurisdiction over copyright issues, dismissed the suit and held that ‘foreign companies, [were] by virtue of the 1970 Act, outside the protection of Nigerian law’. His Lordship held further that

Since the 1st to 6th plaintiffs, the alleged authors of the music, were foreign incorporated companies when the work was first recorded, by virtue of the provisions of Sections 2(1)(b) and 3(1) of the Copyright Act 1970 and in the absence of any evidence that the actual author, not the company, who might have superior authority on the right was a citizen of or domiciled in Nigeria, the 1st to 6th plaintiffs have no *locus standi* to institute this action.

The plaintiff in *Societe Bic S.A. v Charzin Industries Limited and Anor*¹³ was a French company that sued inter alia for copyright infringement. The defendant raised an objection that being a French company, the plaintiff could not claim to be entitled to copyright protection in Nigeria in view of section 2(1) of the Copyright Act, 1988.¹⁴ The court held that ‘I also agree that only a Nigerian Citizen or Nigerian incorporated Companies can sue in this Court for infringement of Copyright’.¹⁵

These cases appeared to have set the stage for the *Microsoft* case. The relevant issue in *Microsoft Corporation v Franike Associates Ltd*,¹⁶ was ‘Whether the provisions of the Copyright Amended Decree No. 42 of 1999 and any other relevant provisions of the Copyright Act for that matter is applicable to this case’. That is, whether section 5 of the Copyright Act that deals with the protection of foreign copyright protects the works of the Microsoft Corporation. Section 5 entitled ‘Copyright by reference to international agreements’ listed conditions for the protection of foreign works.¹⁷ Section 5(2) provides that ‘Where the question arises as to whether a country is a

11. Presumably, as suggested by Professor Uvieghara, common law copyright was applicable before the 1911 Act by virtue of the importation of the principles of English common law to Nigeria in 1862. See the Supreme Court Ordinance No. 3 of 1862; see also Egerton E Uvieghara, ‘Copyright Exceptions – Rational’ in Egerton E Uvieghara (ed), *Copyright Law and Administration in Nigeria* (Y-Books, Ibadan 1992) 73–4. Britain administered Nigeria for a little over a hundred years (c 1862–1960).

12. (1993) FHCLR 318.

13. (1997) FHCLR 727, [1990–1997] 2 IPLR 335.

14. This section is *in pari materia* with s 2(1) of the 1970 Act.

15. [1990–1997] 2 IPLR 335 at 342.

16. (2011) LPELR-CA/L/573/2008; (2012) 5 CLRN 145.

17. (1) Copyright shall be conferred by this section on every work if—

- (a) on the date of its first publication at least one of the authors is—
 - (i) a citizen of or domiciled in; or
 - (ii) a body corporate established by or under the laws of, a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party;

party to an obligation in a treaty or other international agreement to which Nigeria is also a party, a certificate from the Commission to that effect shall be conclusive proof of that fact’.

The trial court’s decision that was affirmed by the appellate court was based on the lack of evidence of two factors before the courts. If either of the facts had been presented in evidence, the court would have reached a different decision. There was neither a certificate from the Copyright Commission that the Copyright Act protects works emanating from the United States of America or a gazette showing that the Nigerian Copyright Act was extended to the USA. This is extrapolated from the decision of the court as shown below.

Pemu JCA who delivered the lead judgment of the Court of Appeal, posed the question: ‘On what Grounds did he strike out the suit?’. His lordship replied with the answer given by Microsoft lawyer; ‘Learned counsel for the Appellant C.F. Agbu Esq. had pointed that he did so on the ground of lack of proof of reciprocal protection of Copyright Laws between Nigeria and the United State[s] of America’. Pemu JCA then quoted extensively from the judgment of the trial judge:

‘The Defendants’ main contention respecting [the] issue of jurisdiction is that having registered the copyright in [the] USA, its application has to be extended by a Minister in the Federal Gazette which has not been done. On behalf of the plaintiff it was contended that a foreign company can assert its copyright in Nigeria by virtue of section[s] 15 and 16 of the Copyright Act, And that the question as to the requirements of gazeting [sic] the contention is a matter of evidence at trial ...’¹⁸

... in paragraphs 4–8 of the Plaintiff’s supporting affidavit, it emphatically averred that the Plaintiff is the owner of several software programs particularly the popular ‘windows’ operating system/software computers; the ownership of which is nowhere controverted or denied by the Defendant. The only area of disagreement is the extent of the application of this copyright, same having been registered in the United States of America.¹⁹

In particular, Pemu JCA held that ‘Page 16 of the Judgment of the learned trial judge is instructive, in declining jurisdiction over the subject matter’. His Lordship quoted the trial judge who observed thus:

‘The averments in paragraph 1 of the plaintiffs’ Statement of Claim and paragraph 4 of the Plaintiff/Applicant’s supporting affidavit leave no one in doubt that the plaintiff/applicant company is a reputable software Company registered according to American Laws with its Head office situated at 7 Microsoft Drive, Redmond, Washington D.C., United States of America. That being said ... the application of the said foreign copyright in Nigeria is subject to a reciprocal extension of protection in accordance with section 33 of the Copyright Act. And in the absence of which this court will not in my view exercise the requisite jurisdiction over the matter.

This is premised on the fact that the exclusive jurisdiction of this Court pursuant to Section 251(1)(f) of the 1999 Constitution is only limited to the listed Federal Enactments and does not

(b) the work is first published—

- (i) in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is party;
- (ii) by the United Nations or any of its specialised agencies; or
- (iii) by the Organisation of African Unity; or
- (iv) by the Economic Community of West African States.

18. At pp. 13–14 of the Ruling – pp. 96–7 of the Record of Appeal.

19. At pp. 13–14 of the Ruling – pp. 96–7 of the Record of Appeal.

extend beyond copyright etc. other than those listed therein, In the instant case, the copyright sought to be protected [w]as established pursuant to law other than the Federal Enactments listed in Section 251(1)(f) of the 1999 Constitution. There is also nothing before the Court to show that there is any reciprocal extension of protection of the Copyright in question ...²⁰

After noting that the trial court's decision was based on the fact that 'There is also nothing before the Court to show that there is any reciprocal extension of protection of the Copyright in question', Pemu JCA continued by agreeing with the respondent's counsel that

... there is nothing from the records of the Court to show any certificate which was either Presented to or exhibited by the Appellant. Nor was any certificate pleaded to show that a certificate must be presented from the Nigeria Copyright Commission (as required by Section 5(2) of the Copyright Act) for the Purpose of conferring it with the status of eligibility.

Pemu JCA referred to the argument of the respondent's counsel that the plaintiff could have shown if the Minister, by Gazette, extended the Copyright Act to foreign works pursuant to his powers under section 41 of the Copyright Act. All that the Appellant needed to do was to bring before the Court a copy of the Federal Gazette, if indeed it exists. His Lordship held that in the absence of the Gazette, the learned trial judge, Shuaibu J, was right in discharging the ex parte order and dismissing the entire suit for want of jurisdiction, as he did.

Although the *Gabriel* court made no reference to the arguably binding precedent of the *Microsoft* case, the judge held that 'I have perused through the length and [breadth] of the evidence of the prosecution, and I have not seen evidence that *R Kelly*, *Micheal* [sic] *Jackson*, *Beyonce* [sic], *Madonna* and *Celine Dione* [sic] are citizens or domiciled in Nigeria or that the alleged infringing copies were first published or recorded in Nigeria.' After referring to section 41, which empowers the minister to extend the protection of the Nigerian Copyright Act to foreign works, the trial judge held:

I have not seen any Federal gazette produced before this court, or referred to, for the court to take Judicial Notice of, in order to establish that the Minister has extended the application of this Act in respect of the works listed in the charge to the particular country and evidence that the owner of the work listed are citizens [sic] of the country.

1.2 Why *Island Records*, *Societe Bic*, *Microsoft* and the *Gabriel* cases are not binding

Before offering further analysis of these cases, a few comments are apposite. None of the cases made a categorical statement that Nigerian copyright law does not protect any foreign corporation or 'foreign work'. Such a sweeping statement could have been regarded as an authority that is binding on trial courts in the case of *Microsoft*, being a Court of Appeal decision and a persuasive authority in the high court cases of *Island Records*, *Societe Bic* and *Gabriel*.

The four cases considered only the works of the plaintiffs before them. None of them made a categorical statement excluding copyright protection in Nigeria for all foreign works. As suggestive as the cases may appear, they are only valid for the proposition that the courts in those cases did not have jurisdiction to adjudicate over those

20. Page 99 of the Record of Appeal.

cases because there was no document or statute placed before the courts to show that the Nigerian copyright statute protected the plaintiffs.

Further, if the court was right about the works of the six foreign plaintiff corporations, the *Island Records* case could have proceeded and not been dismissed on the grounds that three of the nine plaintiffs were companies incorporated in Nigeria. The decision should not be followed because the court failed to adjudicate the claims of the three Nigerian companies.

Similarly, in *Gabriel*,²¹ out of the 3513 infringing films and musical works before the court, only 1054 were foreign works, the remaining 2459 works belonged to leading local music composers and performers such as *Wizkid*, *Terry G*, *D'Banj*, *P-Square*, *2 Face* and *Chinwe*.²² The decision should not be relied on as the court failed to pronounce on the eligibility of the works of the Nigerians that were in the majority.

Two unassailable points can be deduced from these three cases to support the discussion in Part 3 below, suggesting that the trial courts can depart from these cases. The first is that it is clear from the judgment that the *Island Records*, *Societe Bic*, *Microsoft* and *Gabriel* cases could have been decided otherwise if the courts were presented with a government gazette extending the protection of the Nigerian Copyright statute to foreign works.

The second is that the decisions were made because the courts were unaware of Nigeria's copyright treaty status or her legislative attempts to implement her treaty obligations. The court would have reached a different decision if any gazette extending Nigeria's copyright law to foreign works was presented in court. This makes the discussion that follows, demonstrating there is a subsisting gazette Order extending Nigerian law to foreign works, significant.

PART 2

2.1 Nigeria's copyright treaty status

Nigeria became party to the Universal Copyright Convention, UCC on the 14 February 1962. On 14 September 1993 and 29 October 1993, Nigeria became party to the Berne and Rome Conventions, respectively.²³ Nigeria is party to the World Trade Organization's Trade-Related Aspects of Intellectual Property Agreement (TRIPS) and the World Intellectual Property Copyright Treaties that is, the WCT and WPPT.²⁴

In Nigeria, the Constitution provides that no treaty has the force of law in Nigeria except to the extent that such treaty has been enacted into law.²⁵ Consequently, Nigerian laws must be examined in order to determine the extent to which a treaty is enforceable in Nigeria. This is irrespective of the fact that some treaties claim to be self-enforcing or executive. Nigerian statutes must be examined in order to determine the extent of protection offered by Nigerian copyright law to foreign works.

21. Unreported Suit No: FHC/UY/81c/2013, per Ojukwu J, judgment delivered on Wednesday 3rd of February, 2016.

22. But note that Ojukwu J, held that the prosecution failed to meet the requirement of juxtaposing the original works with the alleged infringing works.

23. *Copyright*, WIPO, January 1994.

24. The treaties were ratified on 24 August 2017 and the instruments were deposited on 2 October 2017.

25. Section 12, 1999 Constitution; JO Akande, *Introduction to the Nigerian Constitution* (Sweet & Maxwell, London 1982) 12–13.

Under the 1970 Act, eligible works qualify for protection if made by Nigerian citizens, persons domiciled in Nigeria or bodies corporate incorporated in Nigeria.²⁶ Eligible works also qualify for protection under the 1970 Act if, being a literary, musical or artistic work or a cinematographic film, it is first published in Nigeria or, being a sound recording, it is first made in Nigeria.²⁷ Works that do not qualify for protection under any of the categories listed above can be regarded as 'foreign works'. Foreign works could only be protected if the 1970 Act was extended to works emanating from countries party to treaties to which Nigeria is party.

2.2 Gazetted order protecting copyright of 'foreign works'

Section 14 of the 1970 Act empowered the Minister of Trade²⁸ to extend the protection of the 1970 Act to four categories of works where the Minister is satisfied that Nigerian works are protected in any treaty country. Pursuant to the ministerial powers, a Copyright Reciprocal Extension Order, 1972 was gazetted, extending the 1970 Act to 57 UCC countries.

Although the Order was made on 1 February 1972, its commencement date was backdated to 24 December 1970, when the 1970 Act came into force. The Order states that 'Nigeria is a party to the Universal Copyright Convention 1952' and that the Minister was satisfied that the countries named in the Order being also parties to the said convention provide for protection of copyright in works which are protected under the 1970 Act. The 1972 Order listed the following 57 countries: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Cambodia, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Denmark, Ecuador, Finland, France, German Federal Republic, Ghana, Greece, Guatemala, Haiti, Holy See, Iceland, India, Ireland, Israel, Italy, Japan, Kenya, Laos, Lebanon, Liberia, Liechtenstein, Luxembourg, Malawi, Malta, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Portugal, Spain, Sweden, Switzerland, Tunisia, United Kingdom, United States of America, Venezuela, Yugoslavia, Zambia.

The categories of works from the 57 countries include:²⁹

- (a) Eligible works made by citizens of or persons domiciled in the listed countries;
- (b) Eligible work made by bodies incorporated in the listed countries;
- (c) Works other than sound recordings and broadcasts first published in the listed countries;
- (d) Sound recordings made in the listed countries.

The first recorded reference to the 1972 Order in any case³⁰ was in *Island Records Ltd v I.C. Okalla Commercial Enterprises & Board of Customs and Excise*.³¹ The

26. Section 2, 1970 Act.

27. Section 3, 1970 Act.

28. Then referred to as the Federal Commissioner for Trade under s 19 of the Act.

29. By the combined effect of s 14 of the 1970 Act and the 1972 Order.

30. This author knows of no other case where the 1972 Order was referenced before the 1988 Act was passed.

31. Unreported Suit no FHC/PH/17/84 decided on Friday 13th December, 1985, but referred to in Obatosin Ogunkeye, 'Legal Remedies for the Infringement of Copyright' in EE Uvieghara (ed), *Copyright Law and Administration in Nigeria* (Y-Books, Ibadan 1993) at 109. See also Olusegun Friday Adesina, 'A Critical Appraisal of the Framework for Copyright Protection in Nigeria', Obafemi Awolowo University, unpublished M.Phil. thesis (March 2019).

plaintiff's counsel argued that Island Records was protected by copyright law in Nigeria under the Copyright Act 1970 by virtue of the 1972 Order. Although *Tofowomo J* did not make any specific pronouncement, the court indirectly upheld the validity of the 1972 Order to extend the protection of the Nigerian law to foreigners in effect by holding that the plaintiff established that its copyright had been infringed. It may be observed that the defendant did not contend that the plaintiff being a foreigner, was not eligible for copyright protection in Nigeria.

I have stated elsewhere that under the 1972 Order, a work of foreign origin will be eligible for copyright protection if it falls into one of the categories A–D listed below.³² It must be a:

- A. Literary, artistic and musical work, sound recording, cinematograph film or broadcast made by,
 - (i) Citizens of any of the countries listed in the Order,
 - (ii) Persons domiciled in any of the countries listed in the Order
 - (iii) A body corporate incorporated under the laws of any of the countries listed in the Order;
- B. Literary, artistic and musical work and cinematograph film which is first published in one of the countries listed in the Order;
- C. Sound recordings which are made in one of the countries listed in the Order.
- D. Broadcasts first made in one of the countries listed in the Order.

This would have settled the issue of protection of foreign copyright works in Nigeria, at least with respect to foreign works that qualify under the 1972 Order. Unfortunately, the 1988 Act repealed the 1970 Act.³³ Yet the 1988 Act did not make elaborate provisions for treaty obligations other than to repeat the power of the Minister to extend the protection of the 1988 Act to 'foreign works'.³⁴ This is one of the reasons why the 1988 Act was amended in 1999 to deal with the lacuna by the introduction of the provision that is now section 5 of the 1988 Act. This section 5 provision will be addressed shortly.

2.3 1972 Order valid despite the repeal of the 1970 Act

The absence in the 1988 Act of a direct provision similar to the 1972 Order and the repeal of the 1970 Act appears to have led the court in the *Gabriel*, *Microsoft*, *Island Records* and *Societe Bic* cases to assume that no gazette exists extending copyright to 'foreign works'. None of the courts considered the 1972 Order as Counsel did not raise or make any reference to the Order. The existence and applicability of the 1972 Order has escaped the attention of most commentators³⁵ and it is not surprising that many lawyers and courts are not conversant with the Order.

32. Bankole Sodipo, 'Copyright Enforcement in Nigeria', in Bankole Sodipo and Bunmi Fagbemi (eds), *Nigeria's Foreign Investments Laws and Intellectual Property Rights* (CCLS QMUL & CLIP, London 1994) 178 at 182–3.

33. Section 52(1).

34. Section 41 of the 1988 Act which vests the Minister with powers to extend the protection of copyright in Nigeria to 'foreign works' is on all fours with s 14 of the 1970 Act.

35. See for example Peter Ocheme, 'Nigerian Participation in International Copyright Affairs' in JO Asein and ES Nwauche (eds), *A Decade of Copyright Law in Nigeria* (Nigerian Copyright Commission, Abuja 2002) 224. Interestingly, Umaru alluded to the 1972 Order by arguing that

Oyewunmi³⁶ and Olubiyi³⁷ rightly argued that *Microsoft* was decided without reference to the 1972 Order; however, neither examined whether the 1972 Order subsists irrespective of the repeal of the 1970 Act which gave life to the 1972 Order. Asein suggested that the omission of the 1972 Order by the editors of the Laws of the Federation of Nigeria 1990 and 2004 in the edited versions of the Laws of the Federation may have misled the courts,³⁸ or, if I may add, the Counsel. This assumption may be correct if there was at least a reference to the 1972 Order by the Court or Counsel. It is more probable that neither the court nor the counsel were aware of the Order. But it is likely that courts and Counsel would have been aware and would have considered the relevance of the 1972 Order had it been listed as a subsidiary legislation in the 1990 and 2004 Laws of the Federation.

Fortunately, although the 1988 Act repealed the 1970 Act, the 1988 Act preserved the 1972 Order.³⁹ Section 52(3), which is the 'The Transitional and Savings Provisions' of the 1988 Act, provides that 'The Transitional and Savings Provisions in the Fifth Schedule to this Act shall have effect notwithstanding subsection (1) of this section or any other provisions of this Act'. Paragraph 3(3) of the Fifth Schedule to the Copyright Act, 1988, provides that 'Any subsidiary legislation made under the repealed Act which was in force immediately before the commencement of this Act, shall remain in force, subject to any necessary modifications, as if it had been made under this Act, and may be added to, amended, revoked or varied accordingly'. Consequently, given that the 1972 Order was in force when the 1988 Act was passed, the 1972 Order was preserved by the 1988 Act and is still in force despite the repeal of the 1970 Act.⁴⁰

Judicial support for this submission was given by Odunowo J in *Liberty Records & EMI Records Ltd v M.Y. Owotutu Enterprise*, when his Lordship rightly held that 'the provisions of Copyright (Reciprocal Extension) Order 1972 is still very much in force by virtue of paragraph 3(2) of schedule 5 of the Copyright Act 1988'.⁴¹ This unreported case escaped the attention of Igodo and other commentators who agree that the Order is still applicable law.⁴²

It is submitted that the 1972 Order will continue to be valid until the Minister makes a new Order pursuant to section 41 of the 1988 Act extending the protection of the Act to some other countries. The Order will be valid even if a new Order is made unless the new Order repeals the 1972 Order.

Further, the 1972 Order remains valid despite the repeal of the 1970 Act irrespective of the savings provisions of the 1988 Act. This is because of a general rule under section 4 of the Interpretation Act that preserves subsidiary instruments made under

foreign works emanating from one of the countries mentioned therein are protected. See MJ Umaru, 'Nature, Subsistence and Scope of Copyright' in JO Asein and ES Nwauche (eds), *A Decade of Copyright Law in Nigeria* (Nigerian Copyright Commission, Abuja 2002) 103.

36. Oyewunmi (n 6) *supra* at 47–8.

37. Olubiyi (n 6) *supra* at 98–108.

38. Asein (n 6) *supra* at 33–4.

39. Bankole Sodipo, 'The Nigerian Copyright Act, 1988 as it Affects the Entertainment Industries' [1993] Ent.LR 17, at 19. See para 3(3) of the Fifth Schedule to the Copyright Act 1988.

40. Igodo (n 6) *supra* and Ekisola (n 6) *supra* alluded to this.

41. Unreported Suit No. FHC/L/116/86 delivered on Friday 16th of March 1990.

42. See Igodo (n 6) *supra*, Ekisola (n 6) *supra* and Ayodele (n 6) *supra*, who argued that the Order is still valid but did not refer to this case.

repealed legislation. This statutory provision escaped the attention of Igodo.⁴³ Section 4(2)(c) of the Interpretation Act provides that

Where an enactment is repealed and another enactment is substituted for it, then any subsidiary instrument in force by virtue of the repealed enactment shall, so far as the instrument is not inconsistent with the substituted enactment, continue in force as if made in pursuance of the substituted enactment.

The Evidence Act provides that courts shall take judicial notice of all laws or enactments and any subsidiary legislation made thereunder having the force of law.⁴⁴ The Courts in the *Microsoft*, *Island Records*, *Societe Bic* and *Gabriel* cases would have taken judicial notice of the 1972 Order that was gazetted in 1972. Indeed, the court in *Microsoft*⁴⁵ and *Gabriel*⁴⁶ alluded to the fact that there was no gazette before them that they could have taken judicial notice of. Contrary to the views expressed by Igodo and others,⁴⁷ the courts could not have taken judicial notice of the Order as the lawyers in these cases failed to direct the courts properly by drawing the attention of the courts to the existence and validity of the 1972 Order despite the repeal of the 1970 Act.

2.4 New regime for the protection of 'Foreign works'

It will be recalled that two points arose from the three cases giving some leeway for courts to depart from the three cases. The first is the availability of a gazette extending Nigeria's copyright law to 'foreign works'. The second is the possibility of a certificate issued by the Nigerian Copyright Commission stating that Nigeria protects the foreign work by virtue of a treaty.

The 1988 Act created a new regime for the protection of foreign works by virtue of a 1999 amendment to the 1988 Act. Section 5 of the Act confers copyright on three categories of eligible works of 'foreign origin'.⁴⁸

- A. The first set of section 5(1) foreign works, are works where at least one of the authors is a qualified person at the date of first publication of the work. That is, one of the authors is on the date of its first publication of the work either a citizen of or domiciled in, or a body corporate established by or under the laws of, a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party.⁴⁹

43. Igodo (n 6) supra.

44. Section 74, Evidence Act.

45. Per Pemu JCA, who held that 'the Minister can only order extension to the Appellant through a Federal Gazette as required by section 41, of the Copyright Act which has not been done in this case. ... All that the Appellant needed to do was to bring before the Court a copy of the Federal Gazette, if indeed it exists'.

46. Ojukwu J held that 'I have not seen any Federal gazette produced before this court, or referred to, for the court to take Judicial Notice of, in order to establish that the Minister has extended the application of this Act in respect of the works listed in the charge to the particular country and evidence that the owner[s] of the work listed are citizens of the country'.

47. See the works cited in note 6 supra.

48. Section 5 was introduced to the Copyright Act by the Act No. 42 1999 amendment.

49. Section 5(1)(a) Copyright Act.

- B. The second set of eligible foreign works are those first published in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is party.⁵⁰
- C. The third set of eligible foreign works, are those made by the United Nations or any of its specialized agencies, or by the Organization of African Unity,⁵¹ or by the Economic Community of West African States.⁵²

The Act also recognizes that Nigeria may sign new treaties and that the number of countries that are party to treaties signed by Nigeria may change from time to time. The Act provides that 'Where the question arises as to whether a country is a party to an obligation in a treaty or other international agreement to which Nigeria is also a party, a certificate from the Commission to that effect shall be conclusive proof of that fact'.⁵³ The Evidence Act provides that 'When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it'.⁵⁴

In reviewing *Microsoft*, Olubiyi argues that 'Since the US is also a signatory to the Berne Convention, the Universal Copyright Convention (UCC) and the TRIPS agreement, this means that the US copyright should generally be recognised and protected in Nigeria by virtue of s.5(1)(a) and (b)(i) of the Copyright Act'.⁵⁵ But these facts were not placed before the court. Asein opines that the Court in *Microsoft* should have reached a different decision if it had properly evaluated section 5(1). This line of argument will only be unassailable if the issue of eligibility was not in contention in *Microsoft*. But it was!

With respect, the better view is that where the issue of eligibility is in contention, or where a defendant contends that a foreign work is not protected in Nigeria, the presentation of either a certificate from the Copyright Commission, or the 1972 Order is a must.⁵⁶ *Microsoft* could not proceed when the defendant joined issues on eligibility without the Copyright Commission's certificate or the 1972 Order.

What then is the duty of a court before whom a Copyright Act section 5(2) certificate from the Commission is submitted stating that a country is a party to an obligation in a treaty or other international agreement to which Nigeria is also a party? It is submitted that such a court must regard the fact that Nigeria protects the copyright in such foreign works or from such foreign corporations or persons from the countries in the certificate. No court should allow evidence to be given for the purpose of disproving the fact of this protection of foreign persons, foreign corporations or foreign works. Conclusive proof suggests that the facts in the Commissions' certificate are taken as having been proven.⁵⁷ Contrary to arguments such as Igodo's,⁵⁸ courts cannot ignore the certificate of the Commission.

50. Section 5(1)(b)(i) *ibid*.

51. This presumably has been replaced by the African Union.

52. Section 5(1)(b)(ii–iv) Copyright Act.

53. Section 5(2) *ibid*. Thus, Igodo (n 6) *supra* is incorrect when she argued 'However, the certificate from the NCC merely resolves the question of whether a country is a party to a treaty or other international agreement to which Nigeria is also a party'.

54. Section 4(3), Evidence Act 2011.

55. Olubiyi (n 6) *supra* at 101.

56. *Ibid* 101.

57. Section 74, Evidence Act.

Either the 1970 Order or a certificate from the Copyright Commission will suffice,⁵⁹ as observed by the Court of Appeal in *Microsoft*:

The Respondent has argued (rightly in my view) that there is nothing from the records of the Court to show any certificate which was either Presented to or exhibited by the Appellant. Nor was any certificate pleaded to show that a certificate must be presented from the Nigeria Copyright Commission (as required by Section 5(2) of the Copyright Act) for the Purpose of conferring it with the status of eligibility. Therefore, learned counsel for the Respondent A.T. Omaghomi Esq. contends that failure on the part of the Appellant to show proof of the existence of such certificate clearly robbed the lower court of the jurisdiction to entertain the matter.

He argues that by virtue of Section 41(3) of the Copyright Act, the Minister can only order extension to the Appellant through a Federal Gazette as required by section 41, of the Copyright Act which has not been done in this case. ... All that the Appellant needed to do was to bring before the Court a copy of the Federal Gazette, if indeed it exists.

The law is elementary that in granting ex-parte applications for Injunction all the Facts must be laid before the Court and nothing suppressed,

It therefore becomes necessary, indeed imperative for the necessary 'extension' to be extended to the Appellant via a Federal Gazette. In the absence of this, the learned trial judge was wrong in entertaining the matter and *ipso facto* Shuaibu J was right in discharging the order of injunction made ex-parte and dismissing the entire suit for want of jurisdiction as he did.

PART 3

3.1 Why the *Microsoft* line of cases should be overturned or should not be followed

As argued earlier, *Microsoft*, *Island Records*, *Societe Bic* and *Gabriel* were decided *per incuriam*. *Per incuriam* in law means the judge giving a judgment in ignorance or forgetfulness of an enabling statute or some binding authority on the court. A case decided *per incuriam* includes a situation where the court forgot to take into consideration a previous decision to which the doctrine of *stare decisis* applies. It also includes a situation where a statute or rule having statutory effect or other binding authority, which would have affected the decision, had not been brought to the attention of the court.⁶⁰ A decision can only be said to be *per incuriam* if it is possible to point to a step in the reasoning and show that it was faulty because of a failure to mention a statute, a rule having statutory effect, or an authoritative case which might have made the decision different from what it was.⁶¹

I make bold to make this submission because of the direction taken by the Supreme Court, as expressed by Oputa JSC: 'When therefore it appears to learned counsel that

58. Igodo (n 6) supra, wrongly concluded that 'Consequently, the Supreme Court should rethink the decision of the court in *Franike* by striking out the requirement for certification to recognize the reciprocal application of copyright protection. The existence of the Order ought to be enough as the Evidence Act requires the courts to take judicial notice of the provisions of existing laws'.

59. The view expressed by Igodo (n 6) supra.

60. *Buhari v INEC* (2008) 19 NWLR pt. 1120, 246 at 372; *Rossek v ACB Ltd* (1993) 8 NWLR pt. 312, 382; *African Newspaper v Federal Republic of Nigeria* (1985) 2 NWLR pt. 6, 137.

61. *Adisa v Oyinwola* (2000) 6 SC (Pt. 11), 47 at 48.

any decision of this Court has been given *per incuriam*, such counsel should have the boldness and courage to ask that such a decision be overruled'.⁶² Fortunately, Oputa JSC has also held that

This Court does not show any antipathy towards any submission that its previous decision or decisions were wrong and should be over-ruled. In fact, the Court welcomes any opportunity to review any decisions given *per incuriam*. It is far better to admit an established mistake or and [sic] correct same rather than persevere in error. Justices of the Supreme Court are human-beings capable of erring. It will be short-sighted arrogance not to accept this obvious truth.⁶³

It is doubtful if the courts would have reached those decisions if the Counsel had directed the courts properly.

Aderemi JSC pointed out that *per incuriam* decisions are one of the conditions for setting aside previous judgments in order to guard against instability crippling the corpus of our laws.⁶⁴ When a decision is impugned on the ground that it has been arrived at by the court only because the court had acted in ignorance or concealment of an authority, statutory or otherwise, which is binding on the court, the decision is said to have been given *per incuriam* and constitutes a special case where the court is not bound to apply the principle of *stare decisis*.⁶⁵ Where a decision is given *per incuriam* it does not possess any binding effect and can be disregarded.⁶⁶ The Supreme Court will depart from or overrule its previous decision if the decision was made *per incuriam*.⁶⁷

Ezejirofor argued forcefully that lower courts should be able to refuse to follow courts of superior jurisdiction where that court failed to consider a statute with provisions that could have affected the decision.⁶⁸ Courts cannot ignore subsidiary legislation such as the 1972 Order. *Microsoft, Island Records, Societe Bic and Gabriel* were decided without any reference to the 1972 Order extending the protection of Nigeria's copyright statute to foreign corporations and foreign works. The cases should be distinguished but not followed pursuant to the principles of *stare decisis*. The cases should be reversed on appeal.

3.2 The issue can be referred to the Court of Appeal or Supreme Court as a case stated

Alternatively, a court before whom the issue of protection of foreign copyright owners in Nigeria is raised may refer this vexed issue to the Court of Appeal or the Supreme Court for a case stated. This is a procedure where a court, in a situation where a substantial issue that has either not been previously adjudicated or is unsettled because of

62. *Adegoke Motors Ltd. v Adesanya* (1989) 3NWLR (Pt. 109), 250 at 274–5, paras H–A.

63. *F.C.S.C. v Laoye* (1989) 2 NWLR (Pt. 106) 652, (1989) All N.L.R 350, (1989) 4 SC (Pt. 11) 1.

64. *Aminu Tanko v The State* (2009) 4 NWLR (Pt. 1131) 430 SC, (2009) 14 W.R.N. 1 SC, (2009) 14 W.R.N. 1 SC.

65. See Lord Evershed, M.R. in *Moraue Ltd. v Wakeling* [1955] 2 Q.B. 379. See also *Ngwo & Ors v Monye & Ors* (1970) LPELR-1991(SC), (1970) All N.L.R 94.

66. *Ngwo & Ors v Monye & Ors* (1970) LPELR-1991(SC), (1970) All N.L.R 94.

67. *Eragua & Ors. v The AG Bendel State* (1994) LPELR-1153(SC).

68. Gaius Ezejirofor, 'Stare Decisis in the Nigerian Court' (1975) 9 Nigerian Law Journal 1 at 13–15.

conflicting or doubtful decisions that have been raised, tried or argued, refers the substantial issue to a higher court for interpretation, guidance or decision. This is recognized practice in Nigeria.⁶⁹ That way, the appellate courts may reconsider and repeal the *Microsoft* line of cases and properly evaluate the implications of section 5 of the Copyright Act and the 1972 Order in protecting the copyright works of foreigners.

There is no exhaustive guide on what is substantial and therefore can be submitted as a case stated. The issue must be such that there may be some doubt or difference of opinion as to what the law is. When no such doubt exists, or the law is well established by a final Court of Appeal, or by an overwhelming consensus of judicial decisions where the application of it to a particular set of facts does not constitute a substantial question of law, however important, the issue may be for the decision of the particular case.⁷⁰ The proper test for determining whether a question of law is substantial to merit reference entails consideration of certain guidelines, which include: (1) whether the question is of general public importance; (2) whether it directly and substantially affects the rights of the parties in litigation; and if so, (3) whether it is either an open question, or it is not finally resolved or is not free from difficulty, or calls for discussion of alternative views. (4) It must be one in which argument in favour of more than one interpretation might reasonably be adduced. (5) The question must also be capable of being formulated with precision.⁷¹

It is submitted that given that at least four trial courts and the Court of Appeal have made pronouncements suggesting that foreign copyright owners are protected under Nigerian law, this issue is a substantial point of law for a case stated. The issue is of general public importance; it affects the rights of foreign parties in litigation; it has not been finally resolved and is not free from difficulty; it has been given more than one interpretation; and it can be formulated with precision. The question is thus: whether in the light of section 5 of the Copyright Act and the 1972 Order, foreign copyright owners are protected under the Nigerian Copyright Act?

3.3 Can *Microsoft* be appealed out of time?

Although the Microsoft Corporation has a constitutional right to appeal to the Supreme Court,⁷² the right of appeal is subject to the rules of court prescribing the period within which to appeal.⁷³ Having lost the appeal in 2011, *Microsoft* is out of time by over eight years. The grant of an application for an extension of time to appeal or seek leave to appeal is not a mere matter of course.⁷⁴ Two conjunctive conditions must be satisfied before the Supreme Court can exercise its discretion to extend the time on *Microsoft*. Firstly, its affidavit must set forth good and substantial reasons for

69. See s 295 Nigerian Constitution, Order 4, Rule 1 of the Supreme Court Rules and relevant provisions in the rules of other courts.

70. *Bamaiyi v A.G. Federation* (2001) 12 NWLR (Pt. 727) 468. See also Nimpar and Abubakar JJCA in the unreported case of *Mainstreet Bank Registrars Limited v Evukowhiroro Eleyeme Promise*, APPEAL NO: CA/L/1157/2014.

71. Abubakar JJCA in the unreported case of *Mainstreet Bank Registrars Limited v Evukowhiroro Eleyeme Promise*, Appeal No: CA/L/1157/2014.

72. See ss 241–5, 1999 Constitution.

73. S 233(6), 1999 Constitution. Per IT Muhammad, JSC in *Sebastian Adigwe v Federal Republic of Nigeria* LER[2015]SC.115/2013.

74. *Ibodo v Enarofia* (1988) 5–6 SC 43; *Nigeria Laboratory Co. v Pacific Merchant Bank Ltd* (2012) 6 SC (Pt. 1) 1.

failure to appeal or apply for leave to appeal within the prescribed period, and, secondly, the grounds of appeal filed must *prima facie* show good cause why the appeal should be heard.⁷⁵ *Microsoft* may show that it has just come to know that the 1972 Order was in existence and that it is still subsisting and that it was the fault of Counsel that *Microsoft* did not realize this earlier. The Supreme Court has extended time to appeal time and again on this ground as clients should not be blamed for the error of Counsel.⁷⁶

Microsoft may also couch its appeal based on jurisdiction. The decision in the lower court derived from the error of law that the court did not have jurisdiction to adjudicate on the matter because of the court's ignorance or failure to rely on applicable law regarding the application of the Nigerian copyright statute to foreign works. It is settled that if an appeal touches on the jurisdiction of the court, it is never too late to seek redress from a higher court, as jurisdiction, being fundamental, obviates any need to consider the delay occasioned.⁷⁷ Once jurisdiction is a ground of appeal, the application should be granted on that point alone;⁷⁸ it will no longer be necessary to enquire into the reasons for the delay in bringing the application.⁷⁹ It is submitted that if the *Microsoft Corporation* appeals, the Supreme Court will extend the time within which to appeal.

Whilst the Supreme Court hardly reverses concurrent decisions of the High Court and the Court of Appeal, the Supreme Court can and will interfere to set aside the concurrent decisions of the lower courts where such decisions are arrived at by a misinterpretation of the relevant statutes. Nwuta JSC has held that:

[T]he apex Court, cannot afford to hide under the canopy of concurrent findings of the two lower Courts to give its sacred sanction to decisions arrived at by misinterpretation of the relevant statutes. It is manifest that the concurrent findings were predicated on wrong premises and this Court has a right and a duty to interfere with the decisions.⁸⁰

If the *Microsoft Corporation* appeals, it is certain that the Supreme Court will extend the time within which to appeal and reverse *Microsoft* and save the Nigerian legal community from a most embarrassingly insupportable position.

CONCLUSION

It is submitted that the argument that *Island Records*, *Societe Bic*, *Gabriel* and *Microsoft* serve as authorities for the proposition that Nigerian copyright law does not protect foreign corporations or 'foreign works' is idle⁸¹ and not supportable by law. None of the cases made a categorical statement that Nigerian copyright law does not protect any foreign corporation or 'foreign work'. The courts in those cases only declined jurisdiction over the plaintiffs who were foreign corporations

75. Order 2 Rule 31(2) of the Supreme Court Rules. *Yiborku v Republic* (1968) SCNLR 470.

76. *Sebastian Adigwe v Federal Republic of Nigeria* LER[2015]SC.115/2013.

77. *The Minister v Expo-Shipping* (2010) 4 SCNJ, 155; *Amadi v Okoli* (1977) 7SC 57; *Ukwu v Biange* (1977) 8 NWLR (Pt. 518) 635.

78. *FHA & Anor v Kalejaiye* (2010) 19 NWLR (Pt 1226) 147.

79. *Bronik Motors Ltd & Anor v WEMA Bank Ltd* (1983) 1 SCNLR 296; *Madukolu v Nkemdilin* (1962) 1 ANLR 587.

80. *Ports and Cargo Handlings Services Company Limited & Ors v Migfo Nigeria Limited & Anor* (2012) LPELR-9725(SC); see also *Ebba v Ogodu* (1984) 4 SC 84.

81. See, for example, Babafemi (n 5) *supra*.

as there was no document or statute placed before the courts to show that the Nigerian copyright statute protected the plaintiffs. Being decisions made *per incuriam*, they should not be followed.⁸²

Nigerian courts should exercise jurisdiction in copyright matters involving foreign corporations and foreign works if a certificate from the Nigerian Copyright Commission is tendered in court showing that Nigeria has a reciprocal agreement protecting works emanating from the country of origin of the works or the corporations. Unless the 1972 Order is annulled, Nigerian courts should also exercise jurisdiction where the work emanates from foreign corporations or persons from any of the 57 listed countries in the 1972 Order.⁸³ Foreign investors and foreign copyright owners should realize that they are protected in Nigeria if their works emanate from countries party to treaties Nigeria is party to.

82. *Aminu Tanko v The State* (n 64) *supra*; *Eragua & Ors. v The AG Bendel State* (n 67) *supra*.

83. At least until the Order is revoked or replaced.