

BRINGING THE WIPO INTERNET, AUDIOVISUAL PERFORMANCES AND MARRAKESH VIP TREATIES IN TUNE WITH THE ACCESS TO KNOWLEDGE AND DEVELOPMENT DEMANDS IN NIGERIA

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Forthcoming in the ABUAD Journal of Public and International Law, 2018 (Afe Babalola University Ado Ekiti, Nigeria)

Abstract

Nigeria recently ratified the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. Efforts are already geared towards domesticating the treaties through the Draft Copyright Bill recently approved by the Federal Executive Council. When domesticated, the treaties will form part of the copyright legal framework in Nigeria. This comment summarises some key aspects of the treaties and highlights the implication of their domestication on creativity, innovation and access to information for educational purposes in Nigeria. While making a case for hastened domestication of the Marrakesh treaty, the comment advocates for circumspection on the domestication of the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, and the Beijing Treaty on Audiovisual Performances.

1. Introduction

On 4 October 2017, Nigeria deposited four ratification instruments at the World Intellectual Property Organisation's (WIPO) headquarters in Geneva, Switzerland. The instruments, which were signed by the Nigerian President on 24 August 2017, relate to the WIPO Copyright Treaty, 1996 (WCT) and WIPO Performances and Phonograms Treaty, 1996 (WPPT); the WIPO Beijing Treaty for Protection of Audiovisual Performances, 2012 (BTAP); and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013 (Marrakesh VIP treaty).¹

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I am grateful to the IP Unit, Law Faculty and the Postgraduate Funding Office of the University of Cape Town for assisting with funding for this research. I also thank the anonymous review for valuable and helpful comments that contribute in improving the quality of the research. All opinions and errors in the paper are mine. This paper builds on and expands an earlier blog posted in IP Unit's website as follows: D Oriakhogba 'As we celebrate Nigeria's ratification of the WCT, WPPT, the Beijing Treaty and Marrakesh Treaty' (2017) available at <http://ip-unit.org/2017/as-we-celebrate-nigerias-ratification-of-the-wct-wppt-the-beijing-treaty-and-marrakesh-treaty/#more-1726>, accessed 18 December 2018.

¹ I Egbunik 'Copyright Commission makes giant strides in IP Protection Policy as Nigeria deposits 4 Treaty Ratification Instruments at the Assembly of WIPO Member States' (2017), available at <http://www.copyright.gov.ng/index.php/news-events/item/413-copyright-commission-makes-giant-strides-in-ip->

By this action, Nigeria joins the countries that have ratified the treaties. Consequently, Nigeria has accepted and undertaken to respect and implement its obligations under the treaties. However, the treaties do not have any force of law within the Nigerian territory unless domesticated² either by an enforcement and domestication Act or by including its provisions in the Copyright Act 1988,³ (Copyright Act) through an amendment.

In a celebratory tone, the Nigerian Copyright Commission (NCC) stated that “[w]ith the ratification of the four treaties, Nigeria is about to witness a new era in its intellectual property [IP] protection policy and legislation. The development again underscores the urgent need to enact a new Copyright legislation that will implement the standards stipulated in the treaties.”⁴ Still in the festive garment, stakeholders in the creative industry are being enthused to mount pressure on the National Assembly, through public advocacy, to hasten the passage of the Draft Copyright Bill (DCB).⁵ The process for enacting a new copyright Act in Nigeria was earlier ignited by the NCC leading to the production and revision of the DCB. As will be shown shortly, the DCB already incorporated major provisions of the treaties. The DCB was recently approved by the Federal Executive Council (FEC) to be forwarded to the National Assembly for consideration.⁶ Its enactment into law will signal the domestication of the treaties.

This comment briefly reviews key provisions of the treaties and highlights the implications of their domestication on the knowledge economy and development in Nigeria. The comment is divided into six parts, the first being this introduction. The second part contains summaries of the treaties, while the third part highlights the proposals in the DCB aimed at domesticating the treaties. The fourth part forms the crux of the comment. Amongst others, it highlights why Nigeria should be cautious in domesticating the WCT, WPPT and BTAP and why the Marrakesh VIP treaty should be domesticated as soon as possible. The sixth and fifth parts are the recommendation and conclusion respectively.

[protection-policy-as-nigeria-deposits-4-treaty-ratification-instruments-at-the-assembly-of-wipo-member-states](#), accessed 21 October 2018.

² The Constitution of the Federal Republic of Nigeria, 1999, section 12.

³ Cap C20, Laws of the Federation, 2004.

⁴ Egbunike op cit note 1.

⁵ See K Agari ‘We Have Signed the WIPO Treaties, now What?’ available at: <http://punchng.com/we-have-signed-the-wipo-treaties-now-what/>, accessed 21 October 2018.

⁶ A Abutu ‘Federal Executive Council Approves Draft Copyright Bill 2017’ (29 June 2018) available at <http://www.copyright.gov.ng/index.php/news-events/item/433-federal-executive-council-approves-draft-copyright-bill-2017>, accessed 21 October 2018.

2. Summaries of the treaties

The WCT, WPPT and BTAP are meant to promote and protect copyright in the digital space. The treaties were negotiated in response to the growth of the digital technology and its impact on copyright and related rights. The WCT relates to copyright, while the WPPT and BTAP cover the related rights of performers and producers of sound recordings, and rights in audio-visual performances respectively. The WCT and WPPT are already in force at the multilateral level,⁷ while the BTAP is not. The BTAP will come into force three months after being ratified or acceded to by 30 eligible parties.⁸

Under these treaties, the main exclusive rights that are relevant in the digital environment are the reproduction rights and the rights of communication to the public including the right of making available to the public.⁹ The BTAP includes the broadcasting and communication to the public rights as exclusive rights, but allows state parties the liberty to reduce such rights to equitable remuneration rights.¹⁰ Performers and producers of phonograms are also entitled, in addition to the exclusive rights, to equitable remuneration rights in respect of direct or indirect commercial broadcasting or communication to the public of phonograms. State parties may choose whether to include these rights as exclusive or mere remuneration rights in their national legislation.¹¹

The WCT, WPPT and BTAP further attempt to answer the question of rights protection in the digital sphere by making provisions relating to technological protection measures (TPM) and rights management information (RMI). RMI help to identify a work and its owner, track usages of the work and assist in distribution of collected revenues. On the other hand, TPM aids prevention of unauthorised uses of works through access control mechanism (passwords or encryption) or copy control mechanisms (limiting number of authorised copies).¹²

⁷ The WIPO Copyright Treaty, 1996 (hereafter, WCT) and the WIPO Performances and Phonograms Treaty, 1996 (hereafter WPPT) came into force in 2002.

⁸ The BTAP was adopted in 2012. It will come into force three months after 30 member states of have deposited their instruments of ratification or accession with WIPO: see the Beijing Treaty on Audiovisual Performances, 2012, article 26 (hereafter, BTAP). Only 21 countries have ratified or acceded the treaty at the time of writing.

⁹WCT, article 8; WPPT, articles 7, 10, 11 and 14; BTAP, articles 7, 10 and 11.

¹⁰BTAP, article 11.

¹¹WPPT, article 15.

¹²WCT, articles 11 and 12; WPPT, articles 18 and 19; BTAP, articles 15 and 16.

The Marrakesh VIP treaty came into force June 2016. It was envisioned to align with the human rights principles stipulated in the United Nations Declaration on Human Rights (UNDHR) and the Convention on the Rights of Persons with Disabilities (UNCRPD).¹³ These human rights principles include civil and socio-economic rights, such as the right to education and information, the right to freedom from discrimination, among others. The Marrakesh VIP treaty requires member states to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of literary and artistic works in formats designed to be accessible to the blind, visually impaired and otherwise print disabled persons (VIPs), and to permit exchange of these works across borders by organisations that serve the interest of VIPs.¹⁴

3. Proposals in the DCB to domesticate the WCT, WPPT, BTAP and Marrakesh VIP Treaty

The DCB¹⁵ contains proposals aimed at domesticating provisions of the treaties. For instance, it seeks to define communication to the public to include live performance or delivery, in any mode of visual or acoustic presentation, and making available the work or copies thereof to the public, including by digital transmission over computer networks.¹⁶ Broadcast is defined to mean sound or television broadcast by wireless telegraphy or wire or both, or by satellite or cable programmes and includes re-broadcast.¹⁷ Further, a work will be deemed published if copies of it are made available in a manner sufficient to render the work accessible to the public.¹⁸

Also, the DCB seeks to introduce some general and special exceptions to copyright.¹⁹ The proposed general exceptions are substantially a rehash of those contained in the second schedule to the Copyright Act. However, in clause 20(1)(a), the DCB proposes some factors

¹³ WIPO 'Main Provisions and Benefits of the Marrakesh Treaty (2013)' (2016) 2 available at http://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_flyer.pdf, accessed 21 October 2018.

¹⁴ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013, articles 1-12 (hereafter, Marrakesh VIP Treaty).

¹⁵ Available online at http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER-2015.pdf, accessed 21 October 2018.

¹⁶ See clause 85 of the Draft Copyright Bill (hereafter DCB)

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ See Part II of the DCB.

that the court must take into consideration when determining fairness under the defence of fair dealing. According to the clause,

[...] in determining whether the use made of a work in any particular case is fair dealing, the factors to be considered shall include— (i) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the work; (iii) the amount and substantiality of the portion used in relation to the work as a whole; (iv) the effect of the use upon the potential market for or value of the work; and (v) if the use does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the owner of copyright.

In addition, the DCB proposes some special exceptions which will also be applicable in the digital environment. The exceptions include the Marrakesh VIP treaty-style exceptions for the blind and VIPs proposed in clause 22 of the DCB.²⁰ Among others, Clause 22 seeks to permit, without authorisation from the author or copyright owner, the making, procurement and supply of accessible format copy of a copyright work for the benefit of the blind, visually impaired or otherwise print disabled, or persons who “are otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; regardless of any other disabilities”. Such making, procurement and supply may be done by any means, including by non-commercial lending or by electronic communication by wire or wireless means, subject to the following conditions:

- (a) the person wishing to undertake the said activity has lawful access to that work or subject matter, or a copy of that work or subject matter;
- (b) the work or subject matter is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;
- (c) such accessible format copies are supplied exclusively to be used by beneficiary persons;
- (d) the activity is undertaken on a non-profit basis; and
- (e) indication of the source and the name of the author on the copy as far as practicable, and maintaining the integrity of the original work, without prejudice to changes needed to make the work accessible in the alternative format and of the accessibility needs of the relevant disabled persons.

As gleaned from the forgoing, clause 22 of the DCB is distinguishable from the already existing exception for the disabled in the second schedule to the Copyright Act. The second schedule to the Copyright Act allows the “reproduction of published works in braille for the exclusive use of the blind, and sound recordings made by institutions and other establishments approved

²⁰ See also clauses 21 and 23 for exceptions relating to library and archives, and the reproduction of sound recordings.

by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons”.²¹

First, the proposal in clause 22 of the DCB will apply both offline and in the digital environment while the disability exception in the second schedule to the Copyright Act does not extend to the digital environment. Secondly, whereas clause 22 of the DCB is open-ended in terms of the accessible format copies that may be produced for the blind and VIPs, the second schedule to the Copyright Act specifically mentioned braille and sound recordings. Another distinction between clause 22 of the DCB and the second schedule to the Copyright Act is that while the proposal in clause 22 of the DCB will cover only the blind and VIPs, the exception in the second schedule to the Copyright Act is applicable to persons with other disabilities. However, the drafters of the DCB appear intent on making the DCB whole in terms of protection of the rights of disabled persons. This is gleaned from clause 20(1)(q) which seeks to permit, “without prejudice to [clause] 22 [...]”, the use of a work “for the benefit of people with disability, which is directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”. From its wordings, the clause may be interpreted to extend to disabilities not covered by clause 22 and it will be applicable both offline and in the digital environment unlike the extant exception in the second schedule to the Copyright Act which is only applicable online.

That being said, it is important to note that in line with the WCT, WPPT and the BTAP, the DCB makes proposals for the enforcement of copyright in the digital environment. Specifically, the DCB proposes the prohibition of circumvention of TPMs adopted by owners of copyright;²² and actions to be taken against circumvention of TPMs and RMIs.²³ In this regard, it proposes the issuance of take-down notices;²⁴ procedures for effecting a take-down as well as suspension of online accounts of repeat infringers;²⁵ limitation of liability of Internet Service Providers (ISPs);²⁶ use of information location tools;²⁷ and blocking of access to infringing content.²⁸

²¹ Copyright Act, Second Schedule, para s.

²² Clause 44 of the DCB.

²³ Clause 46 of the DCB.

²⁴ Clause 47 of the DCB.

²⁵ Clauses 48 and 49 of the DCB.

²⁶ Clause 51 of the DCB.

²⁷ Clause 52 of the DCB.

²⁸ Clause 54 of the DCB.

4. Any need for caution?

As the creative industry in Nigeria celebrates the ratification of the treaties, there is a great need to pause and ponder on the effect of implementing the standards stipulated in the treaties in Nigeria. What impact will the standards in the treaties have on creativity, innovation and access to information for educational purposes in Nigeria? Put differently, what effect will they have on the knowledge economy and the overall development in Nigeria? This question is germane considering that Nigeria is a developing nation facing challenges of access to information for educational purposes, as shown by a 2014 report.²⁹

The Marrakesh VIP treaty is very friendly to a developing nation like Nigeria. The only authoritative report on the rate of visual impairment and blindness in Nigeria is based on a collaborative survey conducted from 2005-2007.³⁰ The report, which has been subject to some academic review,³¹ shows that at least 4.25 million adults aged 40 years are visually impaired or blind in Nigeria. The statistics do not include people under the age of 40. However, it is strongly arguable that – in recent times – more persons than the above number are visually impaired or blind in Nigeria, especially given the fact of Nigeria’s increasing population.³² Nonetheless, the results of the survey are a confirmation of the usefulness of the Marrakesh VIP treaty to the social and economic development of Nigeria.

According to WIPO, the Marrakesh VIP treaty has a clear humanitarian and social development dimension since it will “increase access to books, magazines and other printed materials”.³³ WIPO identified other benefits of the treaty to include improved public awareness of the challenges faced by the blind, VIPs’ and persons with disabilities; greater access to education for the blind and VIPs; enhanced social integration and cultural participation for the blind and VIPs; and poverty alleviation for, and increased contributions to the national

²⁹International Organisation for Migration *Needs Assessment of Nigerian Education Sector* (Abuja, 2014) available at

<https://nigeria.iom.int/sites/default/files/newsletter/ANNEX%20XXIV%20REPORT%20OF%20NEEDS%20ASSESSMENT%20IN%20EDUCATION%20SECTOR%202014.pdf>, accessed 21 October 2018.

³⁰ See ‘The Nigeria National Blindness and Visual Impairment Survey 2005-2007’ available at http://pbunion.org/Countriesurveyresults/Nigeria/Nigeria_survey_Summary_report.pdf, accessed 21 October 2018.

³¹ For instance, see OF Akano ‘Vision health disparities in blindness and visual impairment in Nigeria: A review of the Nigerian National Blindness and Visual Impairment Survey’ (2017) 76(1) *African Vision Eye Health* available at <http://avehjournal.org/index.php/aveh/article/view/345/html>, accessed on 21 October 2018.

³² At the time of writing, the National Population Commission indicated the Nigerian population as a little bit over 198 million people. See <http://population.gov.ng/>, accessed 21 October 2018

³³ WIPO op cit note 12, 5.

economy by, the blind and VIPs.³⁴ In van Wiele's view, domestication of the treaty "has an important development dimension since a severe shortage of accessible format books, newspapers, magazines and the likes aggravates the social and economic problems faced by [visually impaired persons] in developing countries".³⁵

Moreover, the Marrakesh VIP treaty will enhance the right of such persons to education by allowing them access to relevant information. Also, its domestication will extend the right to the digital sphere and further create awareness of the concept of 'user right' for disabled persons within the copyright legal framework in Nigeria. There is a growing body of literature conceptualising copyright exceptions as user rights included into the copyright legal regime to ensure equitable balance of the interest of copyright owners and the public interest in the promotion of creativity and innovation.³⁶ Indeed, the Marrakesh treaty is shaped by the conceptualisation of copyright exceptions as 'user right' and it is essentially dedicated to the promotion of this right for the blind and VIPs.³⁷

In addition, the domestication of the Marrakesh VIP treaty will align with the current legislative efforts at promoting the rights of the disabled – particularly the blind– persons in Nigeria. The Senate and the House of Representatives of Nigeria recently passed their respective versions of their bills seeking to prohibit discrimination against persons with disability.³⁸ Both Bills now await harmonisation by both chambers of the National Assembly before being forwarded for assent by the Nigerian President for it to become law. Summarised, the Bills seeks to

³⁴ Ibid, 5-6.

³⁵ B van Wiele 'Comments on the Marrakesh Treaty Considering South African Law and Policy' (2014) 2 *South African Intellectual Property Law Journal* 66-74, 66.

³⁶ For instance, see LR Patterson and SW Lindberg *The Nature of Copyright: A Law of Users' Rights* (1991); LP Loren 'The nature of copyright: a law of users' rights by L. Ray Patterson and Stanley W. Lindberg' (1992) 90(6) *MLR* 1624-1633; S Flynn 'Copyright legal and practical reform for the South African film industry' (2015) 16 *The AJIC*; D Vaver 'Copyright defences as user rights' (2013) 60(4) *JCSU* 661-672; DJ Gervais 'Making copyright whole: A principled approach to copyright exceptions and limitations' (2008) 5(1&2) *UOLTJ* 1-41; JE Cohen 'The place of the user in copyright law' (2005) 74 *FLR* 347-374; C Craig 'The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform' in M Geist (ed) *In the Public Interest: The Future of Canadian Copyright Law* (2005) 437-461; A Drassinower 'Taking User Rights Seriously' in M Geist (ed) *In the Public Interest: The Future of Canadian Copyright Law* (2005), 462-479; N Elkin-Koren 'Copyright in a Digital Ecosystem: A User-Rights Approach' in RL Okediji (ed.) *Copyright Law in an Age of Limitations and Exceptions* (2016) 132-167; MJ Tawfik 'International copyright law and fair dealing as a "user right"' (2005) *UNESCO e-Copyright Bulletin* 1-15

³⁷ C Oppenheim 'The Marrakesh Copyright Treaty for those with visual disabilities and its implications in the European Union and in the United Kingdom' (2017) 27(1) *The Journal of National and International Library and Information Issues* 4-9.

³⁸ Policy and Legal Advocacy Centre 'Senate Passes Discrimination Against Persons with Disability Bill, 2016' (2016) available at <http://placng.org/wp/2016/07/senate-passes-discrimination-against-persons-with-disabilities-bill-2016/>, accessed 21 October 2018

provide social protection to persons with disabilities and provide safeguards against any discrimination that they may suffer from. The Bills also seek to establish a National Commission that will ensure that their right to education, healthcare and other social and economic rights are attained.³⁹

The same cannot readily be said of the WCT, WPPT and the BTAP. In an earlier draft intellectual property (IP) policy, South Africa expressed its reluctance to ratify the WCT and WPPT because of their restrictiveness.⁴⁰ Indeed, like most international IP treaties, the WCT, WPPT and the BTAP are based on protectionist ideology. They are aimed at locking up knowledge in the digital sphere and they lean more in favour of rights owners dominated by large corporations from developed countries. They are examples of strong international IP regimes.

Although research tending to show the contrary exist,⁴¹ a preponderance of literature establish that strong IP regimes favours the economic interest of developed countries, while disfavouring developing ones.⁴² Thus, developed countries push for such regimes at the international level, with promises to developing nations that a globally harmonised strong IP regime “promotes predictability and [...] foreign direct investment and international trade”.⁴³ Again, research has dispelled such assurances as unfounded.⁴⁴

For instance, the Open African Innovation Research (open AIR)⁴⁵ working paper based on a survey of 130-years international IP treaties negotiations and the involvement of African (developing) countries, concludes that

³⁹ The Senate Bill is available at <http://placng.org/wp/wp-content/uploads/2016/07/SB22.pdf>, accessed 21 October 2018. The House of Representatives Bill is available at <http://placng.org/wp/wp-content/uploads/2016/07/HB476.pdf>, accessed 21 October 2018.

⁴⁰ Department of Trade and Industry, Draft National Policy on IP, 2013 GG No. 36816.

⁴¹ For instance, see JT Gathii ‘Strength in Intellectual Property Protection and Foreign Direct Investment Flows in Least Developed Countries’ (2015) *Loyola University Chicago School of Law Research Paper No. 2015-011*.

⁴² For instance, see C Forero-Pineda ‘The Impact of Stronger Intellectual Property Rights on Science and Technology in Developing Countries’ (2006) 35 *Research Policy* 808; PH Schneider ‘International Trade, Economic Growth and Intellectual Property Rights: A Panel Data Study of Developed and Developing Countries’ (2005) 78 *Journal of Development Economics* 529.

⁴³ J deBeer, et al ‘The Intellectual Property Treaty Landscape in Africa, 1885 to 2015’ (2017) *Open AIR Working Paper No.4*, 2 available at <http://www.openair.org.za/wp-content/uploads/2017/05/WP-4-IP-Treaty-Landscape-in-Africa.pdf>, accessed 21 October 2018.

⁴⁴ D Baker, et al *Innovation, Intellectual Property and Development: A Better set of Approaches for the 21st Century* (2017) available at: <http://ip-unit.org/wp-content/uploads/2017/07/IP-for-21st-Century-EN.pdf>, accessed 21 October 2018.

⁴⁵ Information about the Open African Innovation Research Network, is available at <http://www.openair.org.za/>, accessed 21 October 2018.

[t]he 130-year history of IP treaty adoption across Africa tells a colonial and neo-colonial story of the creation of a globalized IP system. The developed world imposed IP policies that benefited Western rights holders while limiting African participation in negotiating new treaties. As a result, IP policies do not reflect the realities in many African countries, contributing to poor performance on global metrics of innovation.⁴⁶

A recent publication on innovation, IP and development, which align with the above conclusion, identified some demerits of strong IP regimes.⁴⁷ First, it will “entail the transfer of more money in the form of royalty payments from developing to developed countries”. Secondly, even if it promotes innovation within a developing country, it will constitute a barrier to the capacity of local firms to bridge the knowledge and innovation gap existing between the developed and developing nations. According to the authors, apart from the gap in resources, developed countries are distinguished from developing countries in the knowledge and innovation gap.⁴⁸

Thus, from the literature, it appears an open and more flexible IP regime would best suit the developmental needs of a developing country like Nigeria. Indeed, the experiences of countries like India,⁴⁹ China, Japan and Korea – as gleaned from the literature – give credence to the advantages of such IP regime to developing nations.⁵⁰ Moreover, research also shows that some of the developed nations had such IP regimes at their early stages of development.⁵¹ Essentially, open and flexible IP regimes allow some form of imitation to build up local capacity. Furthermore, it should be noted that with IP, one size does not fit all.⁵² Thus, national IP laws should be tailored in such a way as to enhance local developmental goals.

Although the literature speaks to IP generally, they are nonetheless relevant to this comment because copyright falls within the IP landscape. The goal here is not to canvass for a rejection of the WCT, WPPT and the BTAP. Their ratification and the planned domestication may be regarded as laudable because of the benefits it portends for Nigeria’s booming creative industry. However, it is important for lawmakers to be mindful of the gap existing between

⁴⁶ deBeer, et al op cit, note 43, 25.

⁴⁷ Baker, et al op cit, note 44.

⁴⁸ Ibid, 28-30.

⁴⁹ B Maister, et al *Harnessing Intellectual Property Rights for Development Objectives: The Double Role of IPRs in the Context of Facilitating MDGs Nos 1 and 6* (Netherlands, Wolf publishers, 2011) 35.

⁵⁰ Baker, et al op cit, note 44, 30.

⁵¹ Ibid.

⁵² C Ncube, et al ‘Intellectual Property Rights and Innovation: Assessing Regional Integration in Africa (ARIA VIII)’ (2017) *Open Air Working Paper No.5* available at <http://www.openair.org.za/wp-content/uploads/2017/05/WP-5-IPRs-and-Innovation-Assessing-ARIA-VIII.pdf>, accessed 21 October 2018.

Nigeria and other developed countries, especially in the area of access to information for educational purposes. This gap may be filled if unnecessary barriers to access to information in the digital environment are removed. According to the 2002 report of the UK Commission on IP Rights, the Internet

offers enormous opportunities for access to information required by developing countries, in particular scientists and researchers, whose access to printed media may be limited by lack of resources. But there is a concern that forms of encryption (or “digital rights management”), designed to counter widespread copying, will make material less accessible than is now the case with printed media. Such trends endanger the concept of [fair dealing] as it applies now to printed works, and at the extreme may provide the equivalent of perpetual copyright protection, by technological rather than legal means.⁵³

Further, lawmakers should be concerned about not creating unnecessary rent in favour of foreign (developed countries) rights holders to the detriment of local ones. In particular, they should strive to tailor the DCB to promote access to educational materials especially in the digital environment, while ensuring that local creators benefit from their creative efforts. After all, one of the core objectives of copyright law (IP law in general) is about creating a balance between the interest of rights owners and that of the public in the promotion of social welfare.⁵⁴

5. Recommendation

In view of the foregoing, it is advocated that the general and specific exceptions to copyright proposed in part II of the DCB as highlighted in (3) above should not be jettisoned. Rather, they should be made more user friendly. For instance, the fair dealing provision proposed in clause 20(1)(a) of the DCB should be made more open and flexible to look like the US fair use provision contained in s107 US Copyright Act.⁵⁵

The fair use provision has been adjudged by scholars as an exception that can be extended to uses of copyright works in the digital environment. Further, fair use has been regarded as a flexible provision which will enable a country to satisfy its local access to knowledge demands

⁵³Commission on Intellectual Property Rights *Integrating Intellectual Property Rights and Development Policy* (London, 2002) 7 available at http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf, accessed 21 October 2018.

⁵⁴W Fisher ‘Theories of intellectual Property’ available at <https://cyber.harvard.edu/people/ffisher/iptheory.pdf>, accessed 21 September 2018.

⁵⁵For in-depth discussion, see P Samuelson and K Hashimoto ‘Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?’ (2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052##, accessed 21 October 2018; DO Oriakhogba and FO Osadolor ‘Musings on the Fair use/Fair Dealing Exception to Copyright: Nigeria and South Africa in Focus’ (2017) 8(1) *Ebonyi State University Law Journal* 141-153.

while complying with its international obligations.⁵⁶ Indeed, the US fair use provision shaped the fair use provision contained in the Copyright Amendment Bill,⁵⁷ recently passed by the South African Parliament. The Bill awaits passage by the South African National Council of Provinces (NCOP) before presidential assent.⁵⁸ The fair use provision in the South African Bill has been described by renowned IP scholars as a model open and flexible provision, not just to developing countries, but to the world.⁵⁹

Like Nigeria, South Africa is a developing country with similar challenges of access to information for education and development.⁶⁰ These challenges were strong considerations that shaped the outcome of the voting during consideration of the Bill by the South African parliament.⁶¹ Thus, the fair use provision in South African Bill will be very suitable within the Nigerian context and it is hereby recommended as useful guide. The fair use provision is contained in the proposed section 12A under clause 13 of the South African Bill as follows:

(a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, *for purposes such as the following*,⁶² does not infringe copyright in that work:

(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; (ii) criticism or review of that work or of another work; (iii) reporting current events; (iv) scholarship, teaching and education; (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche; (vi) preservation of and access to the collections of libraries, archives and museums; and (vii) ensuring proper performance of public administration.

(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—

(i) the nature of the work in question; (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work; (iii) the purpose and character of the use, including whether— (aa) such use serves a purpose different from that of the work

affected; and (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and (iv) the substitution effect of the act upon the potential market for the work in question.

⁵⁶ Samuelson and Hashimoto, *ibid.*

⁵⁷ Copyright Amendment Bill B13B 2017, available at https://libguides.wits.ac.za/ld.php?content_id=45613747, accessed 18 December 2018.

⁵⁸ S Flynn 'Drama in South Africa leads to passing fair use' (6 December 2018) available at <http://infojustice.org/archives/40677>, accessed 18 December 2018.

⁵⁹ IP Watch 'Inside views: South Africa's proposed copyright fair use right should be a model to the world' (24 July 2018) available at <http://www.ip-watch.org/2018/07/24/south-africas-proposed-copyright-fair-use-right-model-world/>, accessed 18 December 2018.

⁶⁰ D Oriakhogba 'Delhi University Photocopy Case from the Nigerian and South African Perspectives' (2018) 3 *Journal of Intellectual Property Laws* 21-30.

⁶¹ Flynn, *op cit*, note 58; E Gray and D Oriakhogba 'Inside view: promoting education rights in South African copyright reform' (4 December 2018) available at <http://www.ip-watch.org/2018/12/04/putting-balance-back-copyright-fair-use-south-african-copyright-reform/>, accessed 18 December 2018.

⁶² Emphasis mine.

(c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.

6. Conclusion

The WCT, WPPT, BTAP and Marrakesh VIP treaty were recently ratified by Nigeria. Plans are already underway to domesticate them. While there is a great need to hasten the domestication of the Marrakesh VIP treaty, some circumspection is advocated in respect of the WCT, WPPT, and BTAP. This is so because the WCT, WPPT and BTAP are capable of restricting access to information for educational purposes. If at all, these treaties should be domesticated with due care and consideration of the local circumstances in Nigeria. To this end, the fair dealing exception proposed in clause 20(1)(a) of the DCB should be made more open and flexible and applicable in the digital environment. As guide, the fair use variant of the exception recently adopted by the South African parliament is recommended.