

Developing Copyright Law in Ghana: The Role of the Courts

Kujo E. McDave

Pentecost University College, Accra, Ghana

Alexander Hackman-Aidoo

University of Cape Coast, Cape Coast, Ghana

This paper considers how the Ghanaian courts have, over the years, dealt with copyright law cases in Ghana. It argues that though this area of law is at its inception stage in Ghana, its development depends, to a large extent, on the attitude of the Ghanaian courts. Thus, using an interpretive paradigm mainly through an examination of some Ghanaian cases on the subject, the paper concludes that the future of copyright law lies in the hands of the Ghanaian courts.

Keywords: copyrights, creative works, Intellectual Property Law

Introduction

Copyright protection and cultural development are undeniably close. Indeed, it has been argued that a “country’s development depends, to a great extent, on the creativity of its people, and encouragement of individual creativity and its dissemination is a *sine qua non* for progress” (World Intellectual Property Organization [WIPO], 2004). It has also been shown that “the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works” (WIPO, 2004). There is, therefore, a sense in which works of intellectual creators must receive protection against economic and moral exploitation. Copyright therefore constitutes an essential element in the development process of a nation. Sadly, this branch of Intellectual Property Law remains undeveloped in many third world countries. Legal scholarship in Africa has over the years been concerned about other areas of law which are perceived to be more intellectually engaging, notably Contract Law, Criminal Law, Immovable Property Law, and lately Commercial Law. The obvious justification for the high concentration in these areas is both academic and economic. African scholars find it academically gratifying and economically rewarding to work in the above mentioned areas of law. In Ghana, for example, the issue of intellectual property and for that matter copyright is almost silent if not all together a non-existent area of law. Literature is almost silent on this area of law. In this paper, we take a look at how the courts are developing or have served to develop copyright law in Ghana. Using the interpretivist paradigm mainly through the analysis of decided cases, this paper explores the overall contribution of the Ghanaian courts to Intellectual Property Law. This paper is significant, not only because of its rudimentary contribution to scholarship but also because it provides a framework against which to measure the progress Ghana has made in this area of law. It also inspires confidence as it assures creators of intellectual work some guaranteed protection.

Kujo E. McDave, LLB (Hons) BL, LLM, associate dean, Faculty of Law, Pentecost University College, Accra, Ghana.

Alexander Hackman-Aidoo, B.Ed (ARTS), MPhil, LLB, teaching associate, Department of Religion and Human Values, University of Cape Coast, Cape Coast, Ghana.

Background

Discourse on copyright dates back to the 1709 when the Statute of Anne introduced for the first time a codification of authors' rights in law in order to encourage learning (Sarpong, 2013; Cohen, 2005).¹ As pointed by Patterson (1968), the first copyright statute of England did not have, as its primary goal, the protection of the rights of authors. Instead, the statute focused on neutralizing the amount of control book publishers had in the book trade (Sarpong, 2013). Specifically, it vested the copies of printed books in the authors of the books for a limited period while making them freely available for all to access without monopoly after the copyright period had expired (Sarpong, 2013). The statute of Anne's introduction of copyright protection for authors therefore provided an incentive for people who were interested in investing in the manufacture of hardware in the book industry.

In essence, the first copyright statute sought to promote industrialization in the book industry. The emphasis was on "copies", rather than on the authors' work itself (Wilkinson & Gerolami, 2009; Sarpong, 2013). Thus, even though copyright was understood as a branch of law that aimed at rewarding authors for their creativity and promote learning through the dissemination of intellectual works, those reasons were merely attempts to promote industrialization and monopoly control (Patterson, 1968; Sarpong, 2013). This way, other investors other than the author(s) made economic gains from copies of creative works. Authors of intellectual works had little control on the economic benefits of their works because the law was concerned about making the creative works accessible to encourage learning. This continued to hold sway until the period of the second industrial revolution in the late 19th and 20th centuries.² Two significant changes occurred during this epoch: The first is improved technology allowed for mass production of literary works; and secondly, there was a conscious migration from hieroglyphics to typography (Sarpong, 2013). Typography made it possible for works to be reproduced on a large scale at lower cost within the shortest possible time. One of the excesses of this industrial revolution was that piracy was at its peak and economic as well as moral rights of authors were violated. Individuals could print and sell copies of any author's works on a large scale. It therefore became necessary to protect publishers who were the owners of literary works from pirate activities (Sarpong, 2013). Copyright protection was therefore introduced as a tool for managing competition in the booming trade of the book industry by keeping printing under the control of the industrial elites. In short, copyright law was developed as a legal response to piracy and to safeguard the rights of owners in their intellectual works.

Basis of Copyright

Copyright law is a branch of law which concerns itself with the rights of intellectual creators (WIPO, 2004). It deals with particular forms of creativity, concerned primarily with mass communication. Thus, all forms and methods of public communication, whether print, sound and television broadcasting, films for public exhibition in cinemas, or computerized systems for the storage and retrieval of information fall within the scope of copyright protection (WIPO, 2004). In essence, copyright deals with the rights of intellectual creators whether or not they are in physical form. For example, works such as books, paintings, or drawings exist in physical forms. However, some works exist without embodiment in any physical form, such as music or poems (WIPO, 2004; Sarpong, 2013).

¹ See Sarpong (2013); The Copyright Act was titled, An Act for the Encouragement of Learning and for Securing the Properties of Copies of Books to the Rightful Owners Thereof (United Kingdom, 1709); and Cohen (2005).

² See <https://study.com/.../the-second-industrial-revolution-timeline-inventions-html>.

What often becomes a challenge to many is whether or not the protection offered by copyright law extends to cover ideas and concepts? The answer is to be found in the Ghanaian case of *George Bosompim and Nii Lante Kumi-Bruce vs. Tv3 Network Limited and Evans Kumi Wadewor*³ in which the court held that copyright law protects only the form of expression of ideas, not the ideas themselves. In Section 2 of the Copyright Act, 2005 (Act 690), “copyright shall not extend to ideas, concepts, procedures, methods or other things of a similar nature”. Thus, copyright law “protects the creativity in the choice and arrangement of words, musical notes, colors, shapes and so on”. Copyright law protects the owner of rights in artistic works against those who “copy”, that is to say, those who take and use the form in which the original work was expressed by the author (Sarpong, 2013; WIPO, 2004). It is therefore an offence under Ghanaian law to use another person’s literary work as though it was one’s original work.

Subject Matter of Copyright Protection

The subject-matter of copyright protection includes every production in the literary, scientific, and artistic domain, whatever the mode or form of expression. For a work to enjoy copyright protection, however, it must be an original creation of the author. The ideas in the work need not be new but the form, be it literary or artistic, in which they are expressed must be an original creation of the author. Copyright protection for a work of art is independent of the quality or the value attaching to the work—it will be protected whether it be considered, according to taste, a good or a bad literary or musical work—and even of the purpose for which it is intended, because the use to which a work may be put has nothing to do with its protection. This position of the law, in our view, may have serious implications for a society, like Ghana, which seeks to safeguard its moral tenets. We hold the view that just the law forbids acts that are against public morality, a work of art must be denied copyright protection if it threatens public morality. In other words, the purpose of the work in terms of its moral fitness must serve to determine whether a work of art merits copyright protection. However, exceptions to the general rule are made in copyright laws by specific enumeration; thus laws and official decisions or mere news of the day are generally excluded from copyright protection (WIPO, 2004).

As a rule, all original intellectual works are eligible for copyright protection. According to Section 1(1) of Act 690 works, such as literary work, artistic work, musical work, sound recording, audio-visual work, choreographic work, derivative work, and computer software or programmes are all entitled to copyright protection. To be protected by copyright law, an author or co-author or joint author’s work must originate from him; they must have their origin in the labour of the author (WIPO, 2004).

Rights Comprised in Copyright

Under copyright law, two rights are recognised—economic and moral rights of the author. The economic (or exclusive) right of the author allows him/her to reap the economic benefits of his creativity and to compensate him also for the resources invested in the work of art. The moral right refers to the author’s ability to object to and seek relief in connection with any distortion, mutilation, or other modification of the work where that act would be prejudicial to the reputation of the author.⁴ In effect, exclusive rights of the author are assignable. However, it is limited in time and scope. That is an author may assign all exclusive rights in a work

³ *George Bosompim and Nii Lante Kumi-Bruce vs. Tv3 Network Limited and Evans Kumi Wadewor* [2016] High Court (Commercial Division), Accra.

⁴ See Copyright Act, 2005 (Act 690).

of art and for a specified period of time. Moral rights, on the other hand, are not assignable. Both economic and moral rights can be the death of the copyright owner. The owner of copyright in a protected work may use the work as he pleases but with great regard to the legally recognized rights and interests of others—and may exclude others from using it without his authorization. Therefore, the rights bestowed by law on the owner of copyright in a protected work are frequently described as “exclusive rights” to authorize others to use the protected work. In the Ghanaian case of *Ransome-Kuti v. Phonogram Ltd.*,⁵ the court held that defendants had been given the exclusive right to market the music work in the whole of Africa including Ghana. The original authors of works protected by copyright also have “moral rights”, in addition to their exclusive rights of an economic character (WIPO, 2004). What is meant by “using” a work protected by copyright?

Most copyright laws define the acts in relation to a work which cannot be performed by other persons without the authorization of the copyright owner. Such acts, requiring the authorization of the copyright owner, include copying or reproducing the work; performing the work in public; making a sound recording of the work; making a motion picture of the work; broadcasting the work; translating the work; and adapting the work. In Ghana, the rights of an author to authorise the reproduction or use of his work is guaranteed in Section 5 of Act 690.⁶

Copyright Protection in Ghana

This aspect of the paper examines how the Ghanaian courts have dealt with cases of copyright. It does the basis of the relevant laws and draws a conclusion as to whether or not these judicial decisions are within the remit of international standards. The selected cases cut across musical works, video works, among others. Some also relate to copyright issues in employment situations. The first to be considered is the case of *Bright Onyina vs. Mr. Kwarteng*.⁷ The facts that gave rise to case are that the plaintiff, a music producer, averred that by an agreement executed in the year 2012, a music composer by name Anthony Owusu Ansah, assigned his copyright in his music titled *Psalm 23: “Yehowa ne Mehwefo”*, to the plaintiff for an amount of Twenty Thousand Ghana cedis (GHC 20,000.00). The plaintiff entered into a second agreement with Osuani Afrifa who also assigned his rights in his two albums titled *“Doctor Declare Wo”*, to the plaintiff. After the execution of these two contracts, the plaintiff said he entered into an oral agreement with the defendant to sponsor the production of the music for the parties to sell. Per the practice in the music industry, the plaintiff asserted that whenever someone sent musical works which are not his own for sale, the producer prints out the list of the items and a way bill to the person who sells the items. Thus, after the first production of *Psalm 23* for sale, the plaintiff contended that he sold the same and delivered the entire proceeds to the defendant. In his absence, the plaintiff alleged that the defendant produced several copies of the albums and sold same without his consent and also failed to give him his share of the proceeds. It was the case of the plaintiff that the defendant caused his arrest and that he was warned not to deal with the music he had produced even though he had exclusive rights to the albums.

⁵ *Ransome-Kuti v. Phonogram Ltd.* [1976] 1 GLR 220-223.

⁶ Section 5 provides: The author of any protected copyright work has the exclusive economic right in respect of the work to do or authorise the doing of any of the following: (a) the reproduction of the work in any manner or form; (b) the translation, adaptation, arrangement, or any other transformation of the work; (c) the public performance, broadcasting and communication of the work to the public; (d) the distribution to the public of originals or copies of the work by way of first sales or other first transfer of ownership; and (e) the commercial rental to the public of originals or copies of the work.

⁷ *Bright Onyina vs. Mr. Kwarteng* [2018], High Court (Commercial Court), Kumasi.

The defendant, on his part, denied the plaintiff's claims to the copyrights in issue. His position was that he engaged the plaintiff as a salesman on commission basis and even purchased a Kia Pregio vehicle which the plaintiff was to use for the sales of the defendant's products. The defendant said he negotiated with his relative, Anthony Owusu Ansah, who owned the *Psalm 23* Album; Osuani Katakylie Afrifa, owner of "*Montintim and Doctor A declare Wo Albums*" and one Agyare, owner of "*Adom bi Apue Album*", to acquire their rights for a period of two years. As a result of this agreement, the defendant said he paid Anthony Owusu Ansah and Agyare GHC 2,000.00 each and paid Osuani Katakylie Afrifa GHC 3,000.00. Later, the defendant said he received a telephone call from Osuani Katakylie Afrifa that he should come for a deed of assignment to be signed because he was travelling outside the country. The defendant alleged that due to a medical challenge, he agreed that the plaintiff should execute the deed of assignment on his behalf and keep copies in the defendant's shop. After recovering from his ailment, the defendant stated that he went to the shop and upon a perusal of the agreements; he noticed that the plaintiff had rather used his name as the assignee. His immediate reaction was to have the documents rectified, but he stated that Osuani Katakylie Afrifa and Anthony Owusu Ansah told him that since there were witnesses to the fact that the defendant was the assignee, there was no need to incur further expenditure in preparing fresh documents. He therefore abandoned the idea of rectification and commenced the production of the albums. As customary successor of the late Anthony Owusu Ansah, the defendant alleged that he is the registered copyright holder of all the copyright works of the said Anthony Owusu Ansah, but the plaintiff has pirated and sold thousands of his copyright works which led to the plaintiff's arrest and trial. The defendant also pleaded fraud with the particulars that the plaintiff replaced his name with that of the defendant in the deed of assignment or contract with Osuani Katakylie Afrifa and Anthony Owusu Ansah as assignee knowing same to be false.

This narrative is necessary, so that one can appreciate the court's decision and reasoning. However, it is important to state beforehand that court's decision was technical rather than on the merits of the facts. The defendant's assertions are in two categories. First, he claimed to have signed a valid contract for the assignment of the copyright in the music in dispute. Secondly, he averred that he was appointed customary successor of the deceased copyright owner and therefore his conduct was right in law.

On the preponderance of the evidence, the court found that the plaintiff entered into contracts with Anthony Owusu Ansah and Osuani Katakylie Afrifa in which the copyright in their music was assigned to the plaintiff. However, the court held that at the time the plaintiff commenced his action on 24/02/2015, the copyrights in the musical works in issue assigned to him by Anthony Owusu Ansah (now deceased) and Osuani Katakylie Afrifa had expired on 01/05/2014 and 01/04/2014, respectively. Therefore, the plaintiff's claim that he was a copyright owner had no basis in law and he was not entitled to a declaratory relief for a musical right which he did not own.

The defendant testified that after the death of Anthony Owusu Ansah, he was appointed as customary successor by his family, and therefore upon the death of Anthony Owusu Ansah, the copyright in the deceased's *Psalm 23* has been transferred to the defendant as customary successor with the consent of the family, and confirmed by the Copyright Office. The court held that it is not the law that immediately a person is appointed a customary successor, he automatically becomes the copyright owner of a deceased person's protected works. The court held that for as long as the rights are protected for 70 years after the death of the author or copyright owner, by operation of law, it is the beneficiaries of the deceased who are entitled to the economic rights, and not the customary successor. But to enjoy these rights, Letters of Administration must

first be obtained after which the administrators will vest the rights in the beneficiaries of the intestate. The defendant, as customary successor, cannot enjoy the economic rights in the works of Anthony Owusu Ansah in perpetuity. He only holds the works of Anthony Owusu Ansah in trust for his beneficiaries.

The fundamental questions that emerged from the case were whether or not copyright is assignable and if it is, for how long? What is the duration of copyright? Can a customary successor take over the rights of a copyright owner? To start with, Section 9(3) of Act 690 provides that copyright may be transferred by assignment, testamentary disposition, or operation of law. By assignment, reference is made to the transfer of rights or property (Garner, 2009). Assignment can be absolute or for a limited period. Absolute assignment leaves the assignor with no interest in the assigned property or right (Garner, 2009). Assignment of right by operation of law denotes transfer of a right or obligation as a necessary consequence of a change in legal status, regardless of the affected party's intent (Garner, 2009). Disposition itself means the act of transferring something to another's care or possession especially by deed or will. Testamentary disposition is a disposition to take effect upon the death of the person making it, who retains substantially entire control of the property until death (Garner, 2009). However, Section 9(4) of Act 690 indicates that the said assignment shall be in writing and signed by the owner of the copyright by a person authorised by him to do so. Section 9(9) of Act 690 states that the assignment, a licence, or a testamentary disposition may be made or granted in respect of an existing work or future works. Section 12 of Act 690 deals with the duration of copyright in individuals. It provides that the rights of the author are protected during the life of the author and 70 years after the death of the author. Where there are joint authors, the duration of the copyright is during the life of the last surviving author and 70 years after the death of that author. The point has been made that it is only economic rights in a work of art that are assignable or transferrable. This is provided for in Section 9(1) of Act 690. Moral rights, however, remain unassignable and are held in perpetuity.

In *Charles Uche Ayika Chinedu Samuel Uguchukwu vs. Mr. Kwesi Twum and Multimedia Group Limited*,⁸ the plaintiffs through the first plaintiff state that the first plaintiff is the producer of the cinematograph titled "Arrows of Love" Parts 1 and 2 and the second plaintiff is the creator and owner of the copyright in the film. The first plaintiff says second plaintiff has granted him power to produce and market the said film. The plaintiffs say they granted the right to market the film in Nigeria to *Chiddo Productions Ltd.* of Lagos and then in a contract worth 200 million Naira, they granted *Rich Investment Company Ltd.* exclusive licence to market and distribute the English version of the film on DVD and VCD in the rest of Africa. The plaintiffs further say before they could commence performance, the defendants started transmitting the film to the whole world via their free-to-air multi-channel digital television service, *Multi Tv Ghana* on its Cine Afrik channel. This act by the defendants, the plaintiffs say has infringed their copyright in the film and thereby making it impossible for them to find another marketer for the Africa market. This act of transmission by the defendants the plaintiffs said was received on different television stations in Nigeria including Channel 37 of My TV Africa in Abuja on different days.

The case for the defendants has basically been that the work in issue was shown once on the second defendant's network on account of a *Television Programme Joint Broadcasting/Business Agreement* between the second defendant and O'hara Productions acting through one Victor Emeghara. That per said agreement

⁸ Charles Uche Ayika Chinedu Samuel Uguchukwu vs. Mr. Kwesi Twum and Multimedia Group Limited [2017] High Court (Commercial Division), Accra.

O'Hara Productions was to supply the second defendant with Nigerian films for transmission on the network of the second defendant. In the said agreement, the defendants say O'Hara Productions undertook to acquire all performance rights and or copyrights in respect of works to be supplied by them to the defendants. Defendants say they therefore could not have known O'Hara had not sought the requisite permissions from the plaintiffs before supplying the work in issue to the defendants and that when this got to their notice they withdrew the said work and returned the master copy to O'Hara Productions. The defendants say its network did not broadcast to the whole world as its network is not free to air.

On the face of the facts, the defendant company pleaded ignorance of fact as a defence to the copyright infringement. However, by the evidence adduced, it was clear that the second plaintiff had transferred his rights in the work to the first plaintiff and to that extent the first plaintiff had the capacity to maintain the action against all users of the work in question. The court held that the transmission without the prior consent and approval of the plaintiff constituted an infringement. Further, the court held and we agree that since Section 26 of the Copyright Act 690 prohibits the importation of copyright work without written clearance from the right owner of the work and the Copyright Office, if O'Hara failed to present copies of these requirements to the defendant then at best O'Hara did not acquire nor transfer good title (right) to the defendants. Having so considered the totality of the evidence adduced, the court entered judgment in favour of the plaintiff and awarded damages against the defendant.

Another area of interest in copyright discourse is in employment situations. In a case where a person is employed to create a work of art, does the employee retain the copyright or it belongs to the employer? The case of *George Bosompim and Nii Lante Kumi-Bruce vs. Tv3 Network Limited and Evans Kumi Wadewor*⁹ provides some answers. In this case, the first plaintiff was an employee of the Gama Film Company (GFC) Limited which had produced a television series known as *Barber and the Shoeshine Boy (BNS)*. This television series was being shown on the first defendant's television network known as TV3. It so happened that when Gama was divested in the year 2013, the first defendant needed the continuous production of the television series *BNS*, so, according to the plaintiffs, the first defendant entered into an arrangement with the plaintiffs to continue with the production of the series for a fee of GHC 7,000 per episode that was produced. After a while, the first defendant abrogated the contract with the plaintiffs for the production of the television series *BNS* and then engaged the second defendant to produce the series. The second defendant who then started producing the series did not acknowledge the plaintiffs in the television series subsequently produced. The plaintiffs claim that the concept, content, and the music of *Barber and the Shoeshine Boy* was created and developed by them and that the actions of the defendants amounted to an infringement of their copyright and a plagiarism of their work. The defendants deny the plaintiffs' allegations. In proof of his assertion the first plaintiff stated in his evidence in chief, given on the 18th day of May 2015, that he created *Barber and the Shoeshine Boy*, a TV series and that it was initially produced by Gama and shown on TV3 network every Friday evening. The first plaintiff tendered Exhibit A, a certificate of registration of copyright. According to the first plaintiff "my role in there was the originator of the program by virtue of creating the concept, developing it, by creating the characters and the character paths and the roles of all the characters and everything that comes together within the content is derived".

⁹ *George Bosompim and Nii Lante Kumi-Bruce vs. Tv3 Network Limited and Evans Kumi Wadewor* [2016] High Court (Commercial Division), Accra.

From the answers given by the first plaintiff under cross examination, the court finds that the concept and the development of the drama series *BNS* was not done by the first plaintiff alone and that it was done by so many people including the first plaintiff. Indeed, the answers given by the first plaintiff, which have been quoted above, corroborates the evidence given by the first defendant's representative Samuel Xevu. Samuel Xevu testified to the effect that the management of the first defendant decided to create a programs bank and so employees from first defendant and Gama Film Company were selected to attend a brainstorming programme at Sogakope where they were divided into groups to brainstorm and come up with concepts in various fields for development and subsequent production for television programs. According to Samuel Xevu, it was at Sogakope that he came up with the concept of *Barber and the Shoeshine Boy* which was accepted for further development by the group. The first plaintiff gave the name of the group—the A4 Group because according to the first plaintiff all concepts and contents start on an A4 sheet. The first defendant tendered in evidence Exhibits 1 and 2 in support. Exhibit 1 shows that the first plaintiff and Samuel Xevu together with others were members of Group 3. Exhibit 2 is the programme concept of *Barber and the Shoeshine Boy*. The first plaintiff, according to Samuel Xevu, came up with the characterization for the concept whiles Gama Film Company was tasked with the production of the series.

From the evidence on record, the court has no reason to doubt the testimony of Samuel Xevu in respect of the conception and development of the television drama series *Barber and the Shoeshine Boy*. No wonder therefore that the concept was credited to the A4 Group and the first plaintiff credited with characterization. This fact, as already noted, was admitted by the first plaintiff under cross examination. The court holds therefore that the first plaintiff cannot turn round and lay claim to the copyright of the series *Barber and the Shoeshine Boy*. Again, there was evidence on record that Gama Film Company produced as many as 63 episodes. It is admitted by the first plaintiff that on all the 63 episodes, Gama was credited with the copyright. This happened at a time the first plaintiff was an employee of Gama. If it is true that copyright in *Barber and the Shoeshine Boy* vests in the first plaintiff, one would have expected the first plaintiff to raise that issue at the first opportunity and not wait till Gama had been divested.

Again the first plaintiff had admitted that at the time of production he was the director and producer of the drama series who directed same in his capacity as an employee of Gama. It follows therefore that the task of giving credit to those who contributed to the overall creation and production of the series was discharged with the input and or supervision of the first plaintiff. It therefore does not lie in his rights to turn round and claim copyright in the series after the divestiture of Gama. The conduct of the first plaintiff as stated herein is a direct acknowledgment that the copyright in the *Barber and the Shoeshine Boy* television series belong to his former employer Gama Film Company Limited and therefore the first plaintiff is estopped from laying claim thereto as stated in Section 26 of the Evidence Act 1975, NRCD 323.¹⁰

The first plaintiff does not deny that the conception of *BNS* took place at Sogakope when staffs of Gama Film Company and TV3 were put together for a brainstorming exercise. The first plaintiff has admitted that all those who took part in the exercise at Sogakope were either staff of Gama Film Company Limited or TV3

¹⁰ Section 26 of the Evidence Act 1975, NRCD 323 provides: Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act, or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between (a) that party or the successors in interest of that party, and (b) the relying person or successors in interest of that person.

Network Limited. The members of the A4 Group were present at Sogakope in their capacities as employees of either Gama Film Company Limited or the first defendant company. The first plaintiff made admission to the fact that he was at Sogakope as an employee of Gama. There is evidence on record that all expenses at Sogakope was borne by the first defendant and none of those present including the first plaintiff paid for his own expenses. It is therefore reasonable to conclude that while at Sogakope the group members including the first plaintiff were working for their employers. Therefore, as an employee, he cannot turn round to claim copyright over what he was paid to do.

The first plaintiff also admitted that he produced the drama series *Barber and the Shoeshine Boy* whilst in the employment of Gama Films and that his work as producer was part of his job description as producer/director. The position of the common law is that unless there is an agreement between an employer and his employee to the contrary, works prepared by an employee in the course of his employment belongs to his employer and that the copyright in such works belong to the employer. This position of the common law is re-stated by Section 7 of the Copyright Act, 2005, Act 690.¹¹ In the case of *Community for Creative Non-Violence vs. Reid*,¹² the Supreme Court of the United States stated that as far as the determination of authorship of works made for hire is concerned, the term “employee” must be interpreted having regard to general common law principles of agency. If the author of the works is an employee under the common law principles of agency and the work was done within the scope of the employment then, the employer as opposed to the employee is the copyright owner of the works.

But what should be the scope of the relationship in order for there to be an employer-employee relationship? What is the case for an independent contractor? The court, in *Community for Creative Non-Violence vs. Reid*,¹³ identified some of the characteristics of employer/employee relationship. According to the court, the employer must exercise control over the work in respect of how the work must be done, the employer must provide equipment for the execution of the work, and the work must be done at the work place of the employer. These elements must be present to conclude that there exists an employer/employee relationship. Again, if the employer has the right to decide what work must be done by the worker, the employer determines how the worker must be paid, if the employer has the right to decide who should assist the worker in the discharge of the works then the relationship is that of employer/employee. Again the court considered the status of the employer. If the employer’s business is the production of the work in issue, if the employer deducts taxes from the worker’s remuneration and provides the worker with benefits equivalent to those received by other workers, then the relationship is that of employer/employee. The presence of these factors is suggestive of the fact that the work in issue was done for the employer and consequently, the copyright in the work vests in the employer and not the worker. However, the case is different for independent contractors. In this same matter, the second plaintiff’s claim was that he was the creator and the copyright owner of the sound track in the television drama series *Barber and the Shoeshine Boy* was upheld by the court. According to him, in the year 2013, he noticed that the defendants had, without his consent, removed his name from the credits in the drama series *Barber and the Shoeshine Boy* which they were showing on their

¹¹ Section 7 of the Copyright Act, 2005, Act 690 provides: In the absence of a contract to the contrary, the economic right of a work shall vest in an employer or a person who commissions the work where the employed or commissioned author has created the work in the course of the employment or commission.

¹² *Community for Creative Non-Violence vs. Reid* 490 U.S. 730 (1989).

¹³ *Ibid.*, p. 13.

television network. The court found from the evidence on record and held that the second plaintiff, at all times material to the instant matter, was an independent contractor and not an employee of GFC as alleged by the defendants. In the opinion of the court, the use of the second plaintiff's sound track with due credit to him was a clear case of plagiarism. Accordingly, the court held that the defendants were liable to the second plaintiff in damages.

Another case of an employment situation is to be found in *Musicians Union of Ghana v. Abraham and Another*.¹⁴ The first defendant was the managing director of an establishment, T. Ltd., which owned the *Sweet Talks Band* of which he was also the manager. The plaintiffs were engaged to play for the band though it was not discernible from the pleadings whether it was T. Ltd. or the first defendant who employed them. The first defendant, during the existence of the employment relationship, entered into an agreement with the second defendants, a recording company, granting them the sole and exclusive right of making recordings of the performance of the band, otherwise described as the "artist" in the agreement. In consideration of that right, the company undertook to pay to the first defendant royalties which represented proprietors' and artists' services, payment to the composers and writers of the musical work contained in the recordings. The plaintiffs received their normal remunerations as bandsmen and were paid part of royalties received as incentives. The plaintiffs claiming that the first defendant was their agent or manager sought an order of interim injunction to restrain the second defendants from: (1) making any further releases of their records; and (2) making any further royalty payments to the first defendant on their behalf. They also sought an order that royalties held by the first defendant from the second defendants be deposited in court pending the determination of the suit and furthermore an order for interim preservation of a set of musical instruments.

The court held, refusing the application, that by Section 9 of the then Copyright Act, 1961 (Act 85), where the work was made in the course of the author's employment, the copyright became vested in the author's employer. The plaintiffs who were mere employees of either the first defendant or T. Ltd., had no right assigned to them under the agreement between the defendants and thus they could not be owners of the copyrights of the works so as to control its release. Being mere employees, they were also not entitled to five per cent of the fee payable to owners of the copyright of a musical work under the Copyright Fee Regulations, 1969 (L.I. 620) and neither could any benefit be discerned in their favour from the contract between the two defendants so as to bring them under the Contracts Act, 1960 (Act 25). Certainly, the court would have thought otherwise if the plaintiffs had not been paid anything out of the royalties received apart from their normal remunerations agreed upon in their contract of service.

Similarly, in *Ransome-Kuti v. Phonogram Ltd.*,¹⁵ the plaintiff created and composed a musical work entitled "*Everything Scatter*" in Nigeria, and by an agreement made between the plaintiff and Phonogram Ltd. (Nigeria) the plaintiff assigned to Phonogram Ltd. (Nigeria) and their successors-in-title and assigns the sole and exclusive right to produce and reproduce the musical works on records and tapes as a single album as well as recordings on cassette tapes and cartridges all over the continent of Africa for a period of three years from 14 October 1975. Phonogram Ltd. (Nigeria) in turn licensed its sister company, the defendants, to reproduce the said musical work in Ghana for them. The plaintiff, alleging an infringement of the copyright in his musical work, applied for an order of the court restraining the defendants by itself, its agents, servants, and privies from

¹⁴ *Musicians Union of Ghana v. Abraham and Another* [1982-83] GLR 337-334.

¹⁵ *Ransome-Kuti v. Phonogram Ltd.* [1976] 1 GLR 220-223.

publishing or causing to be published for distribution, sale, or use in Ghana his musical work entitled “*Everything Scatter*”.

The court held, dismissing the application, that since the copyright in the musical work was vested not in the plaintiff but in the Nigerian company exclusively for the whole of the African continent for a period of three years, the said company had every right to license the defendant company under Act 85, s. 10 to reproduce the tapes in this country which was part of the continent of Africa. The defendants had therefore not infringed the plaintiff’s copyright and the plaintiff had no cause of action against them.

Additionally, in the case of *C.F.A.O. v. Archibold*,¹⁶ the respondent successfully sued the appellants for an infringement of his copyright in twelve musical works. At the trial, the respondent testified that he transcribed his musical works in a notebook: the lyrics in English and the tunes in solfa notation; that with the help of one W., who did the arrangements for the songs, he taught a band to play the songs for the purpose of performing and recording; and that without his permission the appellants recorded this same band playing his compositions and sold the recordings to the public. The respondent started composing the songs in 1951, he taught the band his songs between 1951 and 1954, and the alleged recordings of the respondent’s songs were sold to the public between 1956 and 1961. In their statement of defence, the appellants denied all of the allegations of fact and in an amendment contended that the action was statute-barred. The respondent did not reply to any of the allegations contained in the statement of defence, rather he relied upon the evidence he adduced at the trial and the final address in which he submitted that because the infringement was of a continuing character the action was not statute-barred.

On appeal, the main issues for determination were: Whether the respondent’s transcription in his notebook constituted a “musical work” within the Copyright Act, 1911; and whether the additional matters raised by the respondent in his final address should have been considered by the trial judge since they were not raised in a formal reply to the amended statement of defence? The court held, allowing the appeal, that with respect to a musical work, copyright implies the subsistence of a manuscript of written matter which sets out the distinctive combination of melody and harmony or either of them. Since the respondent’s notebook contained just words or verses but no intelligible musical notation to indicate the melody, then the trial judge erred in holding that mere verses constituted a musical work.¹⁷

In as much as we agree that court exercised caution in determining whether mere verses could constitute musical work, in our view, this is to extreme a position to take. This is because not every composer would have the skill to reduce his composition into a manuscript which sets out the distinctive combination of melody and harmony or either of them. It is important not to make the law liberal so as to empower some persons to lay claim over works which are not theirs or to make it too technical such that composers without technical skills would not lose their works to technicalities of procedure.

What is the position of the law on derivative works?¹⁸ In *Ellis v Donkoh and Another*,¹⁹ the plaintiff, a pianist, sued the defendants, a music publisher and his publishing company respectively, for, *inter alia*, damages for copyright infringement and perpetual injunction to restrain them from the continued infringement

¹⁶ *C.F.A.O. v. Archibold* [1964] SCGLR 718-738.

¹⁷ See Copyright Act, 2005 (Act 690): It defines “musical work” to include any musical work irrespective of its musical quality and words composed for musical accompaniment.

¹⁸ See Copyright Act, 2005 (Act 690): It defines “derivative work” to mean a work resulting from adaptation, translation or other transformation of an original work in so far as it constitutes an independent creation.

¹⁹ *Ellis v Donkoh and Another* [1993-1994] 2 GLR 17-35.

of his copyright. In support of his case, the plaintiff claimed that he created piano music by substituting the vocals in some five songs which had been composed and recorded by others and added one song, “*Aketesia*”, which he had composed. He contended that his piano rendition of the vocals in the five songs constituted an adaptation which was a totally different musical work from the original songs as to amount to derivative work under Sections 1(a), 2(4), and 55 of the Copyright Law, 1985 (PNDCL 110) and therefore the copyright in the album was vested in him. He also claimed that on the basis of an oral agreement he entered into with the defendants in 1975 under which they were to share the profits in equal proportions, the defendants published the music in an album entitled “Keyboard Africa” (Exhibit A), but they reneged from the agreement and he therefore terminated it that same year. Nonetheless, the defendants had continued to produce and sell the record locally and abroad without accounting to him. Even though the defendants admitted that the plaintiff played the piano on the album, they denied his claims. In their defence, they contended that the plaintiff was one of a number of musicians they commissioned to make the instrumental album and that all of them were paid for their work and therefore the copyright in Exhibit A was vested in them as the producers and not the plaintiff. The court found on the evidence that: (a) apart from the substitution of the voices in the five original songs with the sound of the piano all the other musical equipment played on the exhibit were the same as those used in the voice versions of the songs; (b) the versions of the original songs the plaintiff used in his evidence to demonstrate that his creation was distinctive were not the versions played by their composers; (c) it was the first defendant who organised all the musicians who played on the album; and (d) the plaintiff was adequately remunerated by the defendants for the work he did on the album.

The court held that although the Copyright Act, 1961 (Act 85) provided for copyright in musical works, it did not contain any specific provision on “derivative works”. However, Section 2(1)(h) of the Copyright Law, 1985 (PNDCL 110) made derivative works eligible for copyright. Section 53 of PNDCL 110 defined “derivative work” to include adaptation of an original work which constituted an independent creation and under Section 2(2)(a) of PNDCL 110 only work original in character was eligible for copyright. Accordingly, under the combined thrust of Sections 2(2) and 53 of PNDCL 110 it was only an adaptation or derivative work which was an independent creation and was original in character which would be eligible for copyright. Consequently, proof of the similarity or difference between the original work and the adapted work was a question of fact and the plaintiff had to lead sufficient evidence to establish it. In the instant case, therefore, the plaintiff had to establish the type of adaptation he made and the manner in which his adapted music in Exhibit A was similar or different from the original music. Accordingly, his failure to produce the original songs to be compared with the recorded music on Exhibit A disabled the court from determining whether Exhibit A constituted any modification, alteration, or adjustment of those original songs to amount to adaptation or derivative work under Section 2(1)(h) of PNDCL 110.

The court further held and we agree that merely taking another person’s original music and substituting the vocals with one instrument, such as the piano as the plaintiff did in Exhibit A, in the instant case, did not sufficiently amount to an independent creation which was original in character so as to constitute derivative work under PNDCL 110. In order for a musical work to constitute derivative work under PNDCL 110, it should on analysis and comparison be conspicuously different from the original work and should reveal originality or innovation by the musician in adapting the original work. In any case, to describe the playing of any music in a different form, such as the playing by a brass band group of an existing guitar band music in brass and music as an independent creation merely because it was played in a musical form different from the

original, would not merely discourage and stifle initiative and creativity in Ghana music but would set in motion a spate of criminal activities by condoning pirating and plagiarising of other people's music. That would surely be against public policy. Accordingly, Exhibit A could not give rise to copyright since it could not constitute an independent creation or adaptation to amount to derivative work under Sections 2(2) and 53 of PNDCL 110. Under Section 1(2)(b) of Act 85, copyright in a musical work implied the subsistence of a manuscript of written matter which set out the distinctive combination of melody or harmony or both. Since in the instant case, the plaintiff did not produce any transcript in a notebook or any written material, he could not be said to have produced any musical work as was decided in *CFAO v Archibold*.²⁰ But more importantly, under both the common law and Section 27 of PNDCL 110, the copying of an existing work without the consent of the author of the original work or the person in whom copyright was vested constituted an infringement of the copyright. Since in the instant case, the plaintiff had not obtained the permission or consent of any of the musicians whose names were acknowledged on Exhibit A, his version of the music which was the product of his own non-observance of established copyright in other musicians could not be used as the basis for the founding of copyright in Exhibit A.

Conclusion

The courts, like many other institutions, contribute in significant ways to the development of copyright law. From the period of the second industrial revolution to the fourth industrial revolution, the rights of authors have been of major concern to the courts. Indeed the courts, in addition to its core mandate of delivering justice, shape the debate and help to create the healthy environments and systems which will ensure that society remains guided by law and equity. This role is peculiar to the courts and anything short of justice is likely to undermine public confidence. The Ghanaian courts, like European courts, have been instrumental in safeguarding copyright law. From the cases examined, one would note that the courts have worked to protect works of copyright from being exploited without authors' authorisation and to ensure that the appropriate rewards are earned by authors. There is a general public confidence in the courts as institutions which are keeping the gates for copyright owners. Generally, the courts have contributed to the development of copyright law in Ghana through some of their landmark decisions. This, in our view, would encourage creativity to ensure the realisation of due rewards and contribute to our development. The overall benefit is that since creativity inspires cultural development, Ghana stands to reap the developmental benefits emanating from creativity.

Nonetheless, the courts are faced with challenges associated with the digital age. As copyright moves into the digital age (Cohen, 2005), the courts must keep abreast with the times to appropriately deal with the contemporary challenges. This may necessitate a review of the copyright law in certain regards. For example, the debate on whether manufacturers of photocopying machines should pay fines for works which are photocopied without authorisation using their photocopiers shows clearly that the law must be reviewed to cater for the digital age. The existing law requires a thorough review. For example, the principle that a work of art is eligible for copyright protection regardless of its quality and the use to which it may be put, may pose some challenges to Ghana and her society. This is because such a principle may have serious implications for a society, like Ghana, which seeks to jealously safeguard certain moral tenets. We hold the view that just as the law forbids acts, such as prostitution as one against public morality, a work of art must be denied copyright

²⁰ Ibid.

protection if it threatens and undermines public morality. In other words, the purpose of the work in terms of its moral fitness must serve to determine whether or not a work of art merits copyright protection.

In a world where everyone, every group and every society continually claims certain rights to be their god-given right or that such a right is guaranteed by the constitution of its country, we appreciate the enormous challenges which must be overcome to effect some of the changes that may appear necessary to our copyright laws. In going forward, we advocate broad consultation and engagement of all, taking into consideration the influence and demands of best practices across the globe.

References

- Cohen, J. E. (2005). The place of the user in copyright law. *Fordham Law Review*, 74(2), 347-374.
- Garner, B. A. (2009). *Black law dictionary* (9th ed.). St. Paul, MN: West.
- Ginsburg, J. C. (1997). Authors and users in copyright. *Journal of the Copyright Society of the USA*, 45(1), 1-20.
- Gold, A. S. (2011). A moral rights theory of private law. *William & Mary Law Review*, 52(6). Retrieved from <http://scholarship.law.wm.edu/wmlr/vol52/iss6/4>
- Landes W. M., & Posner, R. A. (1989). An economic analysis of copyright law. *Journal of Legal Studies*, 18(2), 325-363.
- Landes, W. M., & Lichtman, D. G. (2003). Indirect liability for copyright infringement: An economic perspective. *John M. Olin Program in Law and Economics Working Paper No. 179*. University of Chicago Law School. Retrieved from https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1263&context=law_and_economics
- Ouma, M. (2005). Copyright and the music industry in Africa. *The Journal of World Intellectual Property*, 7(6), 919-932.
- Patterson, L. (1968). *Copyright in historical perspective*. Nashville, TN: Vanderbilt University Press.
- Patterson, L. R., & Lindberg, S. W. (1991). *The nature of copyright: A law of users' rights*. Athens, Georgia: University of Georgia Press.
- Samuelson, P., & Wheatland, T. (2009). Statutory damages in copyright law: A remedy in need of reform. *William & Mary Law Review*, 51, 439-511.
- Sarpong, E. O. (2013). The dilemma of copyright in Sub-Saharan Africa: Ghana in focus (Unpublished MA thesis, University of Ottawa).
- Wilkinson, M. A., & Gerolami, N. (2009). The author as agent of information policy: The relationship between economic and moral rights in copyright. *Government Information Quarterly*, 26(2), 321-332.
- World Intellectual Property Organization (WIPO). (2004). *WIPO Intellectual property handbook: Policy, law and use* (2nd ed.). Retrieved from https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf