

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY THE 4TH OF JULY 1986
BEFORE THEIR LORDSHIPS**

**KAYODE ESO
MUHAMMADU LAWAL UWAI
DAHUNSI OLUGBEMI COKER
ADOLPHUS GODWIN KARIBI-WHYTE
SAIDU KAWU**

**JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
JUSTICE, SUPREME COURT
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JUSTICE, SUPREME COURT**

SC.131/1985

BETWEEN

**1.PLATEAU PUBLISHING COMPANY LTD.
2.ALHAJI YEHAUZA MAKONGINI
3.YIMA SEN**

APPELLANTS

V.

CHIEF CHUKS ADOPHY

RESPONDENT

JUDGMENT

(Delivered by **SAIDU KAWU**, JSC)

ISSUE

Whether a person who is not the author of a work which is the subject of a copyright can plead innocence of the copyright on the work as provided in Section 12(2) of the Copyright Act, 1970.

FACTS:

The plaintiff/respondent in an action filed at the Federal High Court, Sokoto holden at Jos; claimed against the defendants N200,000 damages for the infringement of his copyright, N50,000 as special damages for the same infringement of copyright, an account of all profits made in the publication of the plaintiff's work and a perpetual injunction against the defendants from any further sale, use or dealings in plaintiff's work.

The work which was allegedly infringed is an article titled "After Tarka, what Next. Special Tribute" written by the plaintiff. Plaintiff alleged that he sent the Article to the 1st appellant, Plateau Publishing Company for publication but that it was not published. Subsequently, the article was published by the 1st appellant under a different name of one Yima Sen as the author and without any licence or authority from him at all. The publication was in the Sunday Standard of 4th May 1980, and it was headed "LESSONS FROM TARKAISM: A TRIBUTE FEATURE FROM YIMA SEN". The defendants were sued jointly by the plaintiff/respondent. The 1st appellant, Plateau Publishing Company Ltd. pleaded in the statement of defence that the publication was not a reproduction of the article written by the plaintiff and that the publication was not the work of the plaintiff and that it did not publish the plaintiff's work. The third defendant did not enter appearance and did not file pleadings. At the trial, the 1st appellant led evidence to show that at the time of the publication of the said article it did not know that copyright in the article existed in the plaintiff/respondent. It sought refuge under Section 12 of the Copyright Act, 1970.

The trial court found for the plaintiff, awarded him N25,000 damages and N10,000 as additional damages. The perpetual injunction sought was also granted.

On appeal, the award of the additional damage of N10,000 under Section 12(3) of the Copyright Act, 1970 was set aside. The Court of Appeal did not interfere with the award of N25,000 damages as there was no complaint against that award.

On further appeal to the Supreme Court, several grounds of appeal were filed but 5 of the 6 grounds of appeal were of mixed law and fact and since no leave of court was obtained as required by Section 213(3) of the 1979 Constitution, 5 of the grounds of appeal were struck out.

The only ground of appeal left was the complaint that the Court of Appeal was in error in confirming the award of N25,000 general damages awarded by the trial Judge when;

(a) the appellant was entitled to the Protection under Section 12(2) of the Copyright Act, 1970

(b) the Justices of the Court of Appeal ought to have considered the arguments on grounds 5 and 6 at the Court of Appeal and

(c) that the Court of Appeal was in as much a position to award adequate damages having held that the sum awarded N25,000 by the trial court was "rather high".

Held (Unanimously dismissing the appeal):

1. For a defendant in a copyright action to plead innocence of ownership of the copyright under section 12(2) of the Copyright Act, 1970, the defendant must allege and prove that at the time of the infringement of the copyright he was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work.

2. Generally, any invasion of a right of property gives a cause of action to the owner against the person responsible for the invasion whether it is intentional or not.

3. Innocence is no defence to an action for infringement of copyright or for the conversion or detention of an infringing copy or a plate.

4. Where however it is proved or admitted in an action for infringement that an infringement was committed but that at the time of the infringement, the defendant was not aware and had no reasonable grounds for suspecting that copyright existed in the work; the plaintiff is not entitled to damages but to an account of profits whether any other relief is granted or not.

5. A person who knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner is liable under an action for the infringement of copyright.

6. A defendant does not establish that he had no reasonable grounds for suspecting the existence of copyright by showing that:-

(a) he held an honest but erroneous view of the law or;

(b) by showing that he reasonably believed that the work he had published was an original work.

7. A defendant in a copyright action cannot plead that he had no reasonable grounds for suspecting the existence of copyright in a work if he made no inquiry whatever as to the source from which the work was derived.

8. On the evidence before the trial court in the case, the appellants have failed to prove that at the time of the infringement of the copyright, they were not aware and had no reasonable grounds for suspecting that copyright subsisted in the respondent's article.

9. In the circumstances of this case, the appellant could not be protected under Section 12(2) of the Copyright Act, 1970.

10. The Supreme Court will not entertain a point not raised at the Court of Appeal unless

(a) the point raised is substantial.

(b) no further evidence could be adduced which will affect the new point.

(c) the refusal of leave to argue the appeal will occasion a miscarriage of justice.

11. An account of profits awarded to a plaintiff in an action for infringement of copyright was originally an equitable remedy.

12. The court does not by an order for account measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright.

13. In a copyright action, where the court orders an account of profits, the court by that order takes from the wrong doer all the profits he has made by his piracy; and gives them to the party who has been wronged as the nearest approximation which it can make to justice.

14. Although it is a question of law that account for profits will be awarded once the provisions of subsection 2 of Section 12 of the Copyright Act, 1970 are satisfied. It is a matter of evidence therefore whether at the time of the infringement the appellants were not aware or had no reasonable ground to suspect that the respondent's copyright was attached to the article published.

15. In an action for infringement of copyright, damages are at large, and it is not necessary to prove actual or specific damage.

16. The defence of innocent infringement of a copyright is a defence for the protection of the author of the infringing article and not a defence for the publisher of the infringing article.

17. It is not necessary to allege that the defendant in an action for infringement of copyright knew that he was infringing the copyright of someone, because such knowledge is unnecessary.

18. The right of action for infringement of copyright exists whether the invasion is intentional, malicious, or innocent or whether the right to property is real or personal, corporeal, or incorporeal.

19. It is settled law that the right of an author to his literary publication in respect of which he claims copyright is incorporeal.

20. The right of an author to a literary publication gives the author the fullest right to exclude all other persons and the right to the actual enjoyment of the benefits of the production.

21. The relief available to the owner of a copyright for an infringement of the copyright under Section 12 of the Copyright Act, 1970 is not damages but an account of profits in respect of the infringement whether any other relief is granted under the Section or not.

22. The object of Section 12(2) of the Copyright Act 1970 is to take innocent infringers of copyright out of the general principles of the common law liability for copyright of unpublished manuscripts which did not recopies innocent infringement.

23. When it is established that the right claimed by the plaintiff is a proprietary right element of motive or intention on the part of the defendant is wholly irrelevant.

24. Any averment in the statement of claim not controverted by the defendant is deemed to have been admitted.

25. Parties are only entitled to rely on a defence or defences consistent with the case in their statement of defence. Where it is otherwise the court will be justified in disregarding it.

26. Where the claim against the defendants is joint, they are bound by the case of one of the defendants and also liable for the default of any one of them.

27. Per UWAI, J.S.C.:

"What is important is not merely the appraisal of counsel's argument or submission, but the resolution of the point raised by the argument or submission. If counsel speaks trash or his argument makes no sense the court is not under my obligation to spend even one moment appraising what is nonsensical or unintelligible."

Nigerian Case Referred to In the Judgment:

Abinabina v. Enyimadu 12 WACA 171
Agaba v. Otubusin (1983)2 SC. 14
Ariori v. Elemo (1983)1 SC 13
Dumbo v. Idugboe (1983) SC 14
Egri v. Uperi (1974) NMLR 22
Ejiofodomi v. Okonkwo (1982) 11 SC 74
Ekpenyong v. Ayi (1973) 1 NMLR 372
Ekpeyong v. Effiong (1975) 2 SC 71
Fadiora v. Gbadebo (1978) 3 SC 219
Mohammed v. Kano NA. (1968)1 All N.L.R. 424
Ogunleye v. Arewa (1960) WRNLR 9
Okoroji v. Ezwanan (1961) All NLR 183
Oweye v. Iyomahan (1983) SCNLR 135
Y. Boshali & Co. Ltd. v. Arikpo (1961)1 All N.L.R. 161
Zik's Press Ltd. v. Ikoiku 13 WACA 188

Foreign Cases Referred to in the Judgment:

Caird v. Sime (1877) 12 App. Ch. 326
Chase more v. Richards (1859) 7 H.L.C. 349
Colburn v. Simms (1843) Ha. 543
F. Day & Hunter v. Bron (1963) 2 A.E.R. 16
Lane, The Bodley Head Ltd. v. Associated Newspapers Ltd. (1963) 1 A .E. R. 379
Macmillan & Co. v. Dent (1907) 1 Ch. 107
Mansell v. Valley Printing Company (1908) 2 Ch. 441
Millar v. Taylor 4 Burr. 2303

Tate v. Thomas (1921) 1 Ch. 508

WEA Records Ltd. v. Benson King (Sales) Ltd. (1974) 3 A.E.R. 81

Nigerian Statutes Referred to in the Judgment:

Constitution of Nigeria, 1979, S. 213(3)

Copyright Act, 1970, Ss. 1(1), (2)(a), 2(l)(a), 3(l)(a), 12(3); 12(2).

Evidence Act, S.138

Book Referred to in the Judgment:

Cobbetts: Parliamentary History Vol. XVII pp. 954-1003

APPEAL:

This was an appeal by the defendant/appellant against the judgment of the Court of Appeal which confirmed the award of N25,000 by the trial court in favour of the plaintiff/respondent for an infringement of his copyright in an article titled "After Tarka, What Next. A Special Tribute."

The Supreme Court unanimously dismissed the appeal.

KAWU, J.S.C. (Delivering the Lead Judgment): In this appeal, the respondent was the plaintiff in an action which he brought against the appellants, in the Federal High Court, Sokoto Division, sitting at Jos. His claim as per the writ of summons, reads as follows:

"The plaintiff's claim against the defendants jointly and severally is for the sum of N250,000.00 (two hundred and fifty thousand naira) as general and special damages for the infringement of Plaintiffs copyright in a literary work entitled "After Tarka, what next? Special Tribute" and substantially reproduced in material form in the edition of Sunday Standard of 4th May 1980 (p.5) without the Licence and/or approval of the plaintiff.

PARTICULARS OF CLAIM

(1) General Damages for the infringement of the plaintiff's copyright in the said article "After Tarka, what next? Special Tribute" reproduced by the Defendants under another name of Yima Sen as the author ... N200,000.00.

(2) Special Damages for the infringement of the plaintiffs Copyright in the said work N50,000.00."

Pleadings were filed and exchanged. At the trial, the respondent gave evidence and called four other witnesses in support of his claim. For the defence, the 2nd appellant gave evidence, and two other witnesses were called. It is pertinent to mention here that throughout the trial, the third defendant, Yima Sen, though served with the writ of summons, never took any part in the proceedings.

After the conclusion of the hearing, the learned trial Judge carefully considered the evidence adduced and concluded that the respondent had proved to his satisfaction, that the copyright in the said article had been infringed. With regard to the award of damages, he concluded as follows:

"Taking the whole circumstances of this case and the various cases cited relating to damages into consideration, I award plaintiff twenty-five thousand naira (N25,000.00) for infringement of his copyright. Furthermore, taking into account the flagrancy of the infringement and profit benefit to the defendant arising from the infringement and as additional damages referred to by section 12(3) of the Copyright Act, 1970, I award plaintiff additional damages of ten thousand naira (N10,000.00), I also grant a perpetual injunction against the defendant from sale, use or dealings in plaintiffs work."

The defendants, being dissatisfied with the decision of the trial Judge, appealed to the Court of Appeal, Jos Division, on several grounds of appeal. After hearing all submissions in support of the appeal, that Court unanimously dismissed the appeal with regard to the issue of liability and the award of general damages against the appellant, but allowed the appeal against the award of N10,000.00 which the trial court said was awarded under S. 12(3) of the Copyright Act. It was the view of the Court of Appeal, and I agree with them, that in the circumstances of the case, the award was unjustified.

Again, being dissatisfied with this decision the appellants have appealed to this court. The appellants filed seven grounds of appeal and at the hearing, the first ground was abandoned. Of the remaining six grounds, five of them raised issues of facts or of mixed law and facts, and since no leave of either the Court of Appeal or this court had been obtained in accordance with the provisions of S. 213(3) of the Constitution, the grounds were incompetent, and will therefore be disregarded in this appeal.

The only competent ground of appeal argued is ground four. It reads as follows:

"The learned Justices of Court of Appeal erred in law in confirming the award of N25,000.00 as general damages, when the learned trial Judge awarded such excessive damages:

PARTICULARS OF ERROR

(a)The complaint by the appellant was that pursuant to Section 12(2) Copyright Act, 1970, the respondent was not entitled to any damages at all, in the circumstances of the case, and based on pleadings.

(b)The learned Justices of the Court of Appeal ought to have considered the arguments on grounds 5 and 6 at the Court of Appeal separately.

(c)If any damages ought to be awarded, the Court of Appeal was in as much a position to award adequate damages, having said "If anything at all. I consider the sum of N25,000.00

general damages as being rather high for the publication of a tribute which if it were published in the plaintiff's name, will only fetch him a paltry "licence fee".

I think before proceeding further in this judgment. I should deal with the point raised in paragraph (c), if what is meant is that the Court of Appeal should have awarded what it considered reasonable damages, since the court had expressed the views in the passage quoted that the award of N25,000.00 damages was rather high. The simple answer is that the Court of Appeal could do nothing of the sort since the record shows clearly that there was no appeal before that court against the quantum of damages.

What then, exactly is the complaint of the appellant in this ground of appeal?

From the brief of argument filed in this case and also from the oral submissions of Mr. Oyetunde at the hearing, it would appear that the complaint of the appellant in this ground of appeal is that in the circumstances of this case, damages should not have been awarded against the appellants.

The contention is that the appellants ought to have been protected by the provisions of section 12(2) of the Copyright Act, 1970. This is stated at p. 5 of the appellants' briefs as follows: -

"My Lords will recall that what we are arguing under third ground of appeal is that the respondent adduced no evidence to show that the appellants received his article and/or rebut their denial. We admit that the learned Justices of the Court of Appeal should as a result have accepted the appellants' defence of innocent infringement and afforded them the defence available under Section 12(2) of the Copyright Act, 1970. In view of the provisions of Section 12(2) Copyright Act, the learned Justices of the lower court should not have awarded any damages against the appellants. Since the respondent was only entitled to an amount of profits even if there was an infringement of his copyright. The respondent offered no evidence as to profits and was not entitled to award of profits either. See *Ekpeyong v. Effiong* (1975) 2 SC 71 at 81."

We therefore humbly urge your Lordships to cure this omission by holding that the appellants are entitled to avail themselves of Section 12(2) of the Copyright Act and that since the respondent failed to prove that the appellants made profits, he was not entitled to an account of profits or any damages at all."

In his own reply, it was the submission of Mr. Namseh Eno for the respondent, that the relief provided in Section 12(2) could not be claimed by the appellants. He contended that since the plaintiff was able to prove that it was the 3rd defendant who had committed the infringement of his copyright, it was the 3rd defendant who could claim relief under S.12(2) by satisfying the court that at the time of publishing Exhibit 1, he was not aware, and had no

reasonable grounds for suspecting that the copyright subsisted in the plaintiff. He concluded that since the appellants were not the authors of Exhibit 1, the defence of innocence pleaded by them could not hold.

Now S. 12(2) of the Copyright Act, 1970 reads as follow:

"12(2) Where in an action for infringement of copyright it is proved or admitted -

(a) that an infringement was committed, but

(b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendants in respect of the infringement but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this section."

Now, what must a defendant prove in order to enable him take advantage of the provisions of the sub-section? It is plain that such a defendant must allege and prove that at the time of the infringement he was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work.

On the subject of plea of innocence as a defence in an action for infringement of copyright, the learned authors of Volume 9 of the 4th edition of Halsbury's Laws of England, at paragraph 938, state as follows: "

"Innocence as a defence. In general, any invasion of a right of property gives a cause of action to the owner against the person responsible for the invasion, whether it is intentional or not. Consequently, innocence is no defence to an action for infringement of copyright or for the conversion or detention of an infringing copy or a plate."

Where, however, it is proved or admitted in an action for infringement that an infringement was committed, but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work or other subject matter to which the action relates, the plaintiff is not entitled to damages, but is entitled to an account of profits whether any other relief is granted or not.

The foregoing provisions are no protection to a person who, knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner. A defendant does not establish that he had no reasonable grounds suspecting the existence of copyright by showing that he held an honest but erroneous view of the law or by showing that he reasonably believed that the work he had published was an original work, nor can he plead that he had no reasonable grounds for suspecting the existence of copyright in a work if he made no inquiry whatever as to the source from which the work was derived."

Now on the evidence adduced before the learned trial Judge, could it be said that the appellants had proved that at the time of the infringement, they were not aware, and had no reasonable grounds for suspecting that copyright subsisted in the respondent's article? I do not think so. While it is true that in para. 8(ii) of the statement of claim, the appellants pleaded S.12(2) of Copyright Act, 1970, it is plain on the record that there was not a scrap of evidence adduced at the trial to substantiate the averments. The portion of the 2nd appellant's evidence relating to the publication of the article, is as follows:

"...When Yima Sen was in the United States he used to send us articles by post, and I became Editor of the Sunday Standard. I published one or two of such articles before page 5 of Exhibit No. 1. Late April 1980, I received an article from Yima Sen by post, I went through the article, and I authorised it for publication in Sunday Standard of 4th May 1980. After I go (sic) through the article, I passed it to my assistant who locates pages, and this is Mrs. Shilong. She allocated a page to Yima Sen's article, and she passed it to sub-editor who sent it for setting and publication. I see Exhibit No. 3 and I say I never saw it and I never received or like it before. Style of writing of Exhibit No. 1 and No. 3 are not the same. I am used to Yima Sen's material and Exhibit No. 1 page 5 is his style of writing. Later I got a letter from one Chief Chuks saying that we used his article and put somebody's name. I see Exhibit No. 3; I never saw it and I could not say it is the article Chief Chuks is complaining about. If Exhibit No. 3 is his article, I had no reason to know about it or its existence. I see Exhibit No, 3 and say I did not see an article or book in this title. I did not repeat the article of Yima Sen in Exhibit No. 1. I have no reason. We have no reason to believe that we infringed on his copyright and because of that, I want the court to strike out the case. I ask court to dismiss Chief Chuks claim for an account in the article."

In my view, there is nothing in the testimony of the 2nd appellant reproduced above which can be regarded as establishing the fact that at the time of the infringement the appellants were not aware and had no reasonable grounds for suspecting that copyright subsisted in the respondent's article. The man who could have led such evidence was the 3rd defendant - Yima Sen, who had refrained from taking any part in the case. I have accordingly come to the conclusion that in the circumstances the appellants could not have been entitled to the protection of Section 12(2) Copyright Act, 1970. The appeal therefore fails, and it is hereby dismissed with N300.00 costs to the respondent.

ESO, J.S.C. (Presiding): I do not intend to go over the facts of this case as they are well set out in the judgment of my learned brother Kawu, J.S.C. a preview of which judgment I was privileged to have and with which I am in entire agreement.

The plaintiff in the Sokoto Federal High Court had taken a summons against the Respondents - the Plateau Publishing Company Ltd. claiming a quarter of a million Naira as general and special damages for infringement of plaintiff's copyright of a literary work, "After Tarka, What Next? Special Tribute".

The complaint was that the Plateau Publishing Company had published this work under the name of one Yima Sen as the author.

The learned trial Judge carefully considered the evidence in the case and found for the Plaintiff, Chuks Adophy and awarded damages of N25,000.00 and an additional 10,000.00 under section 12(3) of the Copyright Act, 1970. The Publishing Company appealed to the Court of Appeal and the court in a considered judgment dismissed the appeal of the defendants on liability but while confirming the award of N25,000.00 the court dismissed the award of N10,000.00.

The defendants have again appealed against the award of N25,000.00 but as my learned brother, Kawu, J.S.C. has said in his judgment only one ground of appeal to wit complaint against section 12(2) of the Copyright Act subsisted as the other grounds, not being grounds of law and leave not having been obtained had been struck out. The subsisting ground reads-

That learned Justices of the Court of Appeal erred in law in confirming the award of N25,000.00 as general damages, when the learned trial Judge awarded such excessive damages.

PARTICULARS OF ERROR

(a)The complaint by the Appellant was that pursuant to section 12(2) of the Copyright Act, 1970, the respondent was not entitled to any damages at all, in the circumstances of the case, and based on pleadings.

(b)The learned Justices of the Court of Appeal ought to have considered the arguments on grounds 5 and 6 at the Court of Appeal separately.

(c)If any damages ought to be awarded the Court of Appeal was in as much a position to award adequate damages ..."

The real question is to enquire as to the provisions of S. 12(2) of the Copyright Act 1970. It provides.

"12(2) Where in any action for infringement of copyright it is proved or admitted.

(a)that an infringement was committed, but

(b)that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates".

the plaintiff shall not be entitled under this section to any damages against the defendants in respect of the infringement but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this section.

Could the appellant prove in this case they were not aware, nor did they have reasonable grounds for suspecting that copyrights did subsist in the works of Chuks Adophy? The evidence herein and my learned brother had set this out has not examined these. And it is for this reason and for the fuller reasons given in the judgment of my learned brother Kawu, J.S.C. that I too will dismiss the appeal which is hereby dismissed with costs as contained in the lead judgment delivered by Kawu, J.S.C.

UWAIS, J.S.C: I have had a preview in draft of the judgment read by my learned brother Kawu, J.S.C. and I agree that this appeal should be dismissed.

The facts of this case may be narrated as follows. The respondent, as plaintiff, brought an action in the Federal High Court, Sokoto, which sat at Jos, against the respondents as 1st and 2nd defendants respectively and a third defendant, one Yima Sen, who is not party to this appeal. The plaintiff's claims were stated in his statement of claim as follows:

AND the plaintiff therefore claims:

(a)N200,000.00 (two hundred thousand naira) as general damages for the infringement of his copyright.

(b)N50,000.00 (fifty thousand naira) as the special damages for the same infringement of copyright.

(c)An account of all profits made in the publication of the plaintiff's work.

d)Perpetual injunction against defendants from any further sale, use or dealings in plaintiff's work."

The plaintiff's case was best stated in his statement of claim which averred thus -

"1. The plaintiff, Chief Chuks Adophy who resides at 10 Johnson Street, Apapa, Lagos is the author of and the owner of the copyright in an article entitled "After Tarka, what next. Special Tribute".

2.The plaintiff's article was forwarded to the first defendant through their Lagos Office but was not published.

3.The first defendant, Plateau Publishing Company Limited is a Newspaper and Magazine Publishing Company and publishes a weekly newspaper called "Sunday Standard".

4.The second defendant was at the material time the editor of the weekly newspaper called "Sunday Standard".

5.The third defendant was the said writer of the plaintiff's work.

6.On Sunday 4th May 1980, on page 5 of the said "Sunday Standard", the first and second and third defendants reproduced in verbatim the plaintiffs work by respectively writing and printing and publishing the plaintiffs work without the license and/or approval of the plaintiff under the name of one Yima Sen of United State, (sic)

7.The plaintiff as evidence of copying will rely upon the general similarity of identity of the said article in Sunday Standard to the original text forwarded through Lagos Office.

8.The defendants were at all material times aware that they have infringed the plaintiff's copyright.

9.All copies of the defendant's work are infringing copies of the plaintiffs work and the defendant by selling or disposing of the same have converted the same to their own use unjustifiably.

10.The plaintiff shall put in evidence at the hearing of this matter copy of the said article as contained in the Sunday Standard of 4th May 1980.

11.The plaintiff would rely *inter-alia* on all the relevant provisions of the Copyright Act No. 61 of 1970 as well as other relevant provisions of law at the trial of this action.

12. The plaintiff has therefore been deprived of the licence/fee he would have charged and the profits he would have made by the reproduction and sale of the plaintiff's work."

The 1st and 2nd defendants filed a joint statement of defence in which they denied the plaintiff's claims and pleaded that the plaintiff was not the author of the article in question nor was he the owner of the copyright in the article. They also denied that the plaintiff was a writer or journalist and averred that the plaintiff sent his article to the 1st defendant through its office in Lagos. They set up a defence under the provisions of the Copyright Act, 1970 and in particular section 12 subsection (2) thereof. In respect of paragraph 6 of the statement of claim, the 1st and 2nd defendants made the following averments -

"6. In answer to paragraph (6) of the statement of claim the 1st and 2nd defendants say as follows:

(i) "SUNDAY STANDARD" of 4th May 1980 published an article headed:

"LESSONS FROM TARKAISM" A TRIBUTE FEATURE FROM TIM SEN, USS

(ii) that publication was not a reproduction in verbatim as alleged or at all.

(iii) the publication was not the plaintiff's work as alleged or at all and they did not publish the plaintiff's work:"

The 3rd defendant did not enter appearance nor file any pleadings. He failed to take any action in the suit and the trial proceeded without his participation. The plaintiff gave evidence and called four witnesses who testified on his behalf. The 1st and 2nd defendants called three witnesses. In a well-considered judgment, the learned trial Judge (Saleh, J. as he then was) made the following findings-

"In this case there is no evidence before me to show the part played by the third defendant; he did not come and second defendant who gave evidence did not bring to court the article sent to him by third defendant as the article he published in Exhibit No. 1. This will also be necessary to be adduced by defendant in showing that at time of print they were printing third defendant's article and not plaintiff's article. The defendants have failed to bring third defendant's article and they had a duty to prove that under section 135, Evidence Act and in view of this it remains that the defendant must have printed plaintiff's work. The defendants have by this failure deprived themselves of benefits of section 12(2) of the Copyright Act as advocated by learned counsel for the plaintiff. I therefore hold there is infringement of plaintiff's copyright."

On the question of damages, the learned trial Judge concluded as follows:

"Taking the whole circumstances of this case and the various cases cited relating to damages into consideration, I award plaintiff twenty-five thousand naira (N25,000.00) for infringement of his copyright. Furthermore, taking into account the flagrancy of

the infringement and profit benefit to the defendant arising from the infringement and as additional damages referred to by section 12(3) of the Copyright Act 1970, I award plaintiff additional damages of ten thousand naira (10,000.00). I also grant a perpetual injunction against the defendant from sale, use or dealings in plaintiff's work."

The 1st and 2nd defendants appealed from the decision of the trial court to the Court of Appeal. In the course of arguing the appeal, counsel for the 1st and 2nd appellants sought to advance argument on the quantum of damages but the Court of Appeal drew his attention to the fact that the defendants did not appeal against the quantum. And counsel conceded that he did not do so. Eventually, the appeal was dismissed.

Before us, the following grounds of appeal were filed by the 1st and 2nd defendants as 1st and 2nd appellants respectively –

"(i) That learned Justices of the Court of Appeal erred in law in holding on page 9 of the judgment that "I see no reason to hold that the weight given to it (i.e., Exhibit 2) was unjustified in the circumstances".

PARTICULARS OF ERROR

(a) The Court of Appeal did not have adequate regard to the circumstances of making of Exhibit 2.

(b) Exhibit 2, the original script in the handwriting of the plaintiff/respondent had no date and was not tendered on the 6th of July 1981 when trial started but was tendered almost a year later on the 14th of June 1982.

(c) Exhibit 2 emerged in June 1982 after a stencilled copy was rejected in July 1981.

(ii) The learned Justices of the Court of Appeal erred in law in respect of the burden of proof placed on the plaintiff/respondent by virtue of Section 1(2) of the Copyright Act, 1970.

PARTICULARS OF ERROR

Considering that Exhibit 2, the original handwritten script of the respondent does not deserve any weight whatsoever, it is difficult to see how the plaintiff could have proved that Exhibit 2 had original character as required by Section 1(2)(a) and (b) Copyright Act, 1970 and having regard to the circumstances of its tendering on the 14th of June 1982.

(iii) The learned Justices of the Court of Appeal erred in law as regards the burden of proof on the respondent to prove that it was his work that the appellant published.

PARTICULARS OF ERROR

(a) The respondent in his evidence said he delivered his article to the Lagos office of the appellants.

(b)The appellants adduced evidence that they never received the plaintiff's article either directly or through Lagos office.

(c)The burden consequently shifted back to the respondent under S. 138 of Evidence Act to produce evidence in rebuttal to show that the appellants received and published his article, since it was the respondent who asserted that the appellants received his article.

(d)The doctrine of "causal connection", as stated in *Day & Hunter v. Bran* (1963) 2 All E.R. 16, then became paramount, and it was for the plaintiff/respondent to establish that the 3rd defendant had access to his article and gave it to the appellants for publication.

(iv)The learned Justices of the Court of Appeal erred in law in confirming award of N25,000.00 as damages, when the trial Judge erred in law in awarding damages in clear breach of Section 12(2) of Copyright Act, 1970.

PARTICULARS OF ERROR

(a)It was the appellants' ease at the trial that they did not receive the plaintiff's article and consequently were not aware and had no reasonable grounds for suspecting that copyright existed to the said work published.

(b)The respondent did not adduce evidence in rebuttal to prove the receipt and knowledge of his article by the appellants.

(c)In the circumstances, the respondent was only entitled to an account of profits.

(d)That ground of appeal was not adequately considered.

(v)The learned Justices of Court of Appeal erred in law in confirming the award of N25,000.00 as general damages, when the learned trial Judge awarded such excessive damages:

PARTICULARS OF ERROR

(a)The complaint by the appellant was that pursuant to Section 12(2) Copyright Act, 1970, the respondent was not entitled to any damages at all, in the circumstances of the case, and based on pleadings.

(b)The learned Justices of the Court of Appeal ought to have considered the arguments on grounds 5 and 6 at the Court of Appeal separately.

(c)If any damages ought to be awarded the Court of Appeal was in as much a position to award adequate damages, having said "If anything at all, I consider the sum of N25,000.00 general damages as being rather high for the publication of a tribute which if it were published in the plaintiff's own name, will only fetch him a paltry "licence fee".

(vi)The learned Justices of the Court of Appeal erred in law by not giving adequate consideration to the appellant's case, and thereby occasioned a breach of "fair hearing" within the meaning of Section 33(1) Constitution of the Federal Republic of Nigeria, 1979.

PARTICULARS OF ERROR

(a)The plaintiff's statement in paragraph 2 of the statement of claim was that his article was forwarded to the 1st defendant in Lagos.

(b)At the trial of the action, the plaintiff had the burden of proving that his article reached the 1st defendant, but he failed to discharge that burden.

(c)At the hearing of the appeal at the lower court ground 6 of the appellants' grounds of appeal, was not adequately praised in terms of infringement of copyright and damages when the article never reached the 1st defendant/appellant, and the respondent did not prove access to his article by YIMA SEN.

(vii)The learned Justices of the Court of Appeal erred in law by saying "there is no appeal against quantum of damages. It was never submitted that the general damages awarded in this case was excessive".

PARTICULARS OF ERROR

(a)The questioning of the award of damages under section 12(2) Copyright Act 1970, includes the issue of quantum of damages.

(b)The learned Justices of Appeal had the general powers under section 16 Court of Appeal Act, 1976 on the issue of quantum of damages."

asking for the -

"Reversal of the judgments (sic) of the Court of Appeal in respect of award of N25,000.00 damages and dismissal of plaintiffs suit."

In the appellants' brief, the issues for determination in this court have been formulated as follows -

(i)Whether damages should have been awarded against the appellants when the respondent failed to rebut the appellant's defence of innocence of infringement.

(ii)Whether the award of N25,000.00 as damages for infringement of copyright was not excessive in the circumstances of this case and

(iii)Whether there was fair hearing when the lower court did not sufficiently consider one of the grounds of appeal.

From the foregoing, it is clear that the contention of the appellants rests on two props, namely the award of damages for the infringement of the copyright of the respondent and the failure of the Court of Appeal to give sufficient consideration to one of the appellants' grounds of appeal before it.

In both his brief of argument and address, Mr. Oyetunde, counsel for the appellants, abandoned ground 1 of the appeal. He argued that both the trial court and the Court of Appeal did not direct their attention to the provisions of Section 12 subsection (2) of the Copyright Act, 1970 and submitted that if they had done so they could not have awarded damages to the respondent. Counsel argued further that since the respondent was not entitled to damages, all that could have been properly awarded to him was "licence fee", which is a paltry sum paid to authors or writers for the publication of their articles by the 1st

appellant. Therefore, reliance was placed on *Dumbo & Ors. v. Idugboe* (1983) 2 S.C. 14 at p. 53 and *Ekpeyong v. Effiong* (1975) 2 S.C. 71 at p. 81.

In reply, Mr. Eno for the respondent submitted that the learned trial Judge was right in awarding damages to the respondent because, the appellants do not come under the ambit of section 12 subsection (2) of the Copyright Act. He referred to section 12 subsection (1) of the Act and paragraph 577 at p. 250 of the 11th Edition of Copinger and Skone Jones on Copyright, and cited *Jane Lane, The Bodley Head Ltd. v. Associated-Newspapers Ltd.* (1936) 1 All E.R. 379.

It is pertinent to observe again for emphasis that the appellants did not in the Court of Appeal complain that the quantum of damages was excessive and as Akanbi, J.C.A. put it in his lead judgment –

"In the instant case, I have already shown that the claim for account of profit, as head of claim was not proved. I have also tried to show that having regard to the provisions of section 12(3) of the (Copyright) Act, the award of N10,000.00 is unjustified. Already, a colossal sum of N25,000.00 had been awarded as general damages to the plaintiff. Besides an order of perpetual injunction was also issued. Clearly, those two reliefs are more than effective. If anything at all, I consider the sum of N25,000.00 general damages as rather high for the publication of a tribute which if it were published in the plaintiff's own name, will (sic) only fetch him a paltry "Licence fee". *But as was contended by Mr. Ajibola (for the plaintiff) and Mr. Oyetunde (for the defendants) there is no appeal against the quantum of damages. It was never submitted that the general damages awarded in this case was excessive.*

There is no doubt that the Court of Appeal may interfere with an award of damages if the trial Judge acted upon wrong principle of law in making assessment or where the award was extremely high or patently excessive or so very small as to make the award an entirely erroneous estimate of the damages suffered. *But an appeal court will not intervene simply because it does not agree with the amount awarded as a sum which it might itself have assessed.* See *Agaba v. Otubusin* (1961) All NLR 299; *Okoroji v. Ezuman* (1961) All NLR 183; *Zik's Press Ltd. v. Alvan Ikoku* 13 WACA 188.

Furthermore, this court cannot and will not interfere with an award of damages which did not form the subject matter of the complaint before it. Consequently, the award in respect of general damages must stand." (Parenthesis and emphasis mine).

Now could the appellants be heard to complain before us about the quantum of the general damages awarded the respondent for the infringement of his copyright when the same complaint was not raised before the Court of Appeal? The answer is that the point could be raised but on condition that the requirements laid down in a long line of authorities are met - see *Samuel Fadiora & Anor. v. Festus Gbadebo & Anor.* (1978) 3 SC 219 at p.248; *Abinabina v. Enyimadu* 12 WACA 171, *Ejiofodomi v. Okonkwo* (1982) 11 S.C. 74 at pp .93-98 and *Oweye v. Iyomahan* (1983) S.C.N.L.R. 135 at p. 138.

The requirements include - the point of law raised must be substantial, no further evidence could be adduced which will affect the new point, the refusal of leave to argue the appeal will occasion miscarriage of justice or other exceptional circumstances. In the present case, it is clear that no further evidence could be called by either of the parties to the appeal that can affect the award of damages made by the trial court. Furthermore, the new point is substantial and exceptional in view of the area of the law being grey since there have been no previous decision that I know of on the particular point. In addition, the point had already been argued before us both in the briefs and orally. I am therefore inclined to entertain the argument on the new point.

Now, the provisions of section 12 subsections (1), (2) and (3) of the Copyright Act, 1970 which the issue of damages can be resolved reads -

12 -(1) Subject to this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright in the High Court exercising jurisdiction in the place where the infringement occurs; *and in any action for such an infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff* as is available in any corresponding proceedings in respect of infringement of other proprietary rights.

(2) Where in an action for infringement of copyright it is proved or admitted -

(a) that an infringement was committed, but

(b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that the copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this section.

(3) Where in an action under this section an infringement of copyright is proved or admitted, and the court in which the action is brought, having regard (apart from all other material considerations) to -

(a) for flagrancy of the infringement, and

(b) any benefit shown to have accrued to the defendant by reason of the infringement, is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances."

It is clear from these provisions that damages can generally be awarded for the infringement of a copyright. But where it is shown that the defendant was not aware or had no reason to believe that the copyright infringed had in fact existed before the infringement, damages will not accrue to the holder of the copyright. Instead, the plaintiff will only be awarded account of profits, which in its origin was an equitable remedy. In *Colburn v. Simms* (1843) Ha. 543 at p. 560 the principle upon which account for profits is awarded is stated as follows -

"It is true that the court does not, by an account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright ... The court, by the

account, as the nearest approximation which it can make to justice, *takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged*. In doing this, the court may often give the injured party more, in fact, than he is entitled to ... The court of equity, however, does not give anything beyond the account." Now, although it is question of law that account for profits will be awarded.

Once the provisions of subsection (2) of section 12 of the Copyright Acts, 1970 are satisfied, it is a matter of evidence and therefore facts, whether at the time of the infringement the appellants were not aware or had no reasonable ground to suspect that the respondents copyright was attached to the article published. Both the lower courts, as seen earlier in this judgment, had found that the appellants had infringed the respondent's copyright and that they could not avail themselves of the defence provided by the subsection. Thus, there has been two concurrent findings of fact on the issue. It is trite law that this court will not interfere with such findings. It is no longer necessary to cite authorities in support of the principle.

Consequently, the respondent is not to be awarded account for profits but damages.

In action for infringement of copyright, damages are at large and it is not necessary to prove actual or specific damage. See *Exchange Telegraph Co. v. Gregory & Co.* (1896)1 Q.B. 147 at p.153. The principles upon which an appeal court will *interfere* with the award of damages made by a lower court are well established by a plethora of authority, some of which have already been stated by Akanbi, J.C.A. in the passage of his judgment quoted above. It is not therefore necessary to cite them here. Learned counsel for the appellant has complained that the amount of N25,000.00 damages awarded to the respondent is excessive, but he has failed to show that the award is such that satisfy any of the principles upon which an appeal court will interfere. His argument for saying that the amount is excessive has been based on the application of section 12 subsection (2) of the Copyright Act, 1970 to the case. But I have already held and so did the lower courts that the said provisions of the section do not apply. In my opinion therefore there is no ground upon which we can interfere with the award of damages granted the respondent by the learned trial Judge.

Finally, the appellant canvassed the point that the Court of Appeal did not adequately consider his submissions on sections 1(2) and 12(2) of the Copyright Act, 1970 which relate, on one hand, to the proof of the original character of the article in question and the causal connection of the infringed work with the appellants. And on the other hand to the failure of the Court of Appeal to appraise the appellants' argument on section 12 subsection (2), Counsel, relying on *Ariori v. Elemo* (1983) 1 SC 13 at p. 59 and *Isiaku Mohammed v. Kano N.A.* (1968) 1 All NLR 424 submitted that the appellants' right to fair hearing under section 33 subsection (1) of the 1979 Constitution had been infringed.

By section 1 subsection (2) of the 1970 Act -

"A literary, musical or artistic work shall not be eligible for copyright unless -

(a)sufficient effort has been expended on making the work to give it an original character, and

(b)the work has been written down, recorded or otherwise reduced to material form whether with or without consent."

Now section 19 (1) of the Act has defined "literary work" *inter alia* as including, "irrespective of literary quality, any of the following work or works similar thereto - (c) textbooks, treatises, histories, biographies, essays and articles,"

The learned trial Judge carefully examined the article published by the 1st appellant (exhibit 1) and the respondent's article (exhibit 2) and extensively compared and contrasted exhibit 1 with exhibit 2 before concluding thus -

"... I have no hesitation in my mind with these two prerequisites of similarity and causal connection that plaintiff had by virtue of section 1(1) (a), 2(a), 2(l)(a) and 3(l)(a) of the Copyright Act, 1970, a copyright. The causal connection is not between plaintiff and defendant but between plaintiff's work and defendants' work and it is my view that the causal connection need not be affected by either plaintiff himself or defendant himself but also by other independent parties."

The grounds of appeal in respect of this finding were grounds 2 and 3 in the Court of Appeal, which state -

"2. The learned trial Judge erred in law in respect of burden of proof placed on the plaintiff by virtue of *Section 1(2) of the Copyright Act, 1970*.

PARTICULARS OF ERROR

Considering that Exhibit 2, the original hand-written script of the plaintiff does not deserve any weight whatsoever, it is difficult to see how it could have "original character" as required by *Section 1(2)(a) and (b) Copyright Act 1970* and having regard to the circumstances of its tendering in June 1982.

3. The learned trial Judge erred in law when he said on page 67 of the Record as follows: -
"I therefore hold there is infringement of plaintiff's copyright."

PARTICULARS OF ERROR

(i) The combined effect of *Sections 1(1) (a), 1(2) (a), 2(1)(a) and 3(1)(a) of Copyright Act, 1970* is that the primary burden never shifts to the defendant/appellants.

(ii) The failure of 1st and 2nd appellants to call 3rd defendant as witness does not shift the burden to the appellants, even under *Section 135 Evidence Act*.

(iii) A plaintiff (such as the respondent) succeeds on the strength of his case, and not on the weakness of the defendant's (now appellants) case."

Both grounds were argued together by the appellants' counsel. The consideration of the argument advanced in respect of the grounds covers more than three pages of small type-letters of the judgment of the Court of Appeal. In part thereof, the Court of Appeal observed as follows -

"Put in another way, the copyright work must be shown to be a causal *sine qua non* of the infringing work." The trial Judge in this case appreciated the trite legal position when in the opening sentence of the passage to which I had earlier referred, he said: "The causal

connection is not between plaintiff and defendant but between plaintiff's work and defendant's work."

It remains for me on this point to re-state that the trial Judge found the infringing work to be almost a verbatim copy of the infringed work; that is to say there was between the two works, "sufficient objective similarity" to justify his conclusion that the plaintiff's copyright work had been infringed. I have no reason to disturb that finding and the contention that the burden of proof in that regard was shifted on the defendant, clearly is not borne out by the observation of the trial Judge. Accordingly, grounds 2 and 3 must also fail."

It follows that there is no basis whatsoever for the appellants' complaint in this regard. On the second point that the Court of Appeal failed to appraise the appellants' argument on section 12(2) of the Copyright Act, 1970, what is important is not merely the appraisal of counsel's argument or submission, but the resolution of the point raised by the argument or submission. If counsel speaks trash or his argument makes no sense, the court is not under any obligation to spend even one moment appraising what is nonsensical or unintelligible. The appellants' contention on section 12(2) were contained in ground 6 before the court below. The argument of appellants' counsel was fully considered by the Court of Appeal, and it was on that basis that it disallowed the additional damages of N10,000.00 awarded by the trial court to the respondent. I am satisfied that adequate consideration had been given to the appellants' complaint by the Court of Appeal. Consequently, the appellants had fair hearing before the lower court and there is nothing whatsoever to show that their right under section 33(1) of the Constitution had been impinged.

Accordingly, I too will dismiss the appeal in its entirety, and it is hereby dismissed with N300.00 costs to the respondent.

COKER, J.S.C.: I agree that this appeal should be dismissed for the reasons set out in the lead judgment of Kawu, J.S.C., which draft I have seen before now.

The appellants were the first and second defendants in the Federal High Court sitting at Jos and were the publisher of a weekly newspaper called the "Sunday Standard" while the second defendant was its editor. The plaintiff claimed to be the author and owner of the copyright of an article entitled "After Tarka, what next? Special Tribute", the said article was published verbatim on page 5 of the said "Sunday Standard" and the third defendant Yima Sen was stated to be the author; without the licence and or approval of the plaintiff. The plaintiff therefore claimed damages, account and perpetual injunction against the defendants restraining them from further sale, use or dealings in the plaintiff's work.

The 1st and 2nd defendants deny that the plaintiff was the author of the said article and averred that the third defendant was its author, and that he was not the owner of the copyright of the article and that what was published was not a production of the plaintiff's article nor was there similarity or identity between the publication and the plaintiff's alleged article. In the alternative, it was particularly pleaded that although not admitting, if the plaintiff was the author of the article, the two defendants were not aware and had no reasonable ground for suspecting that copyright subsisted in the said work. They deny liability in respect

of any such infringement and will be relying on section 12(2) and other provisions of the Copyright Act, 1970.

The third defendant did not appear at the trial and filed no defence. The learned trial Judge heard evidence and found in favour of the plaintiff and awarded N25,000 damages for infringement of his copyright and N 10,000 additional damages under section 12(3) of the Copyright Act, 1970. He also made an order granting perpetual injunction. The appeal of the 1st and 2nd defendants to the Court of Appeal was allowed only in respect of the additional damages of N10,000 purportedly awarded under S. 12(3) of the Act, otherwise, the appeal was dismissed.

In dismissing the appeal, all the findings of facts were affirmed. Before this court, appellants attacked the findings of fact which were affirmed by the court below. It is pertinent to recall these findings of the trial Judge in connection with the article which the plaintiff claimed copyright and that published by the defendants: He said:

"... In this regard I believe the plaintiff. In view of this I have no hesitation in my mind with these two pre-requisites of similarity and causal connection that plaintiff had by virtue of Section 1(1)(a), (2)(a) and 2(1)(a) and 3(l)(a) of the Copyright Act, 1970 a copyright. The causal connection is not between plaintiff and defendant but between plaintiff's work and defendants' work and it is my view the causal connection need not be effected by either plaintiff himself or defendant himself but also by other independent parties. In this case there is no evidence before me to show the part played by third defendant. He did not come and second defendant who gave evidence did not bring to court the article sent to him by third defendant as the article he published in Exhibit No. 1. This will also be necessary to be adduced by defendant in showing that at time of print they were printing third defendant's article and not plaintiff's article. The defendants have failed to bring third defendant's article and they had a duty to prove that under Section 135 Evidence Act and in view of this, it remains that defendant must have printed plaintiff's works. They defendants have by this failure deprived themselves of benefits of section 12(2) of the Copyright Act as advocated by learned counsel for the plaintiffs. I therefore hold there is infringement of plaintiffs copyright." The Court of Appeal agreed with these findings when Akanbi, J.C.A. in the lead judgment found:-

"I accordingly agree with the learned trial Judge that 2nd and 3rd defendants had a duty to either produce the work they said third defendant gave them or produce such evidence as would establish that the work published by them was written by the third defendant."

The learned justice of appeal finally said he had no reason to disturb the findings and that with the positive evidence of the respondent and in the absence of any evidence to the contrary, the plaintiff discharged the burden of proof of the infringing work to be almost a verbatim copy of the infringed work. That is to say, there was between the two works, "sufficient objective similarity" to justify the conclusion that the plaintiff's copyright work has been infringed."

Mr. Oyetunde made a half-hearted attempt to attack the findings of fact, but later abandoned the contention. In fact, he did not obtain leave of the court as required in S.213(3) of the Constitution.

In the court below, Mr. Oyetunde having conceded that he abandoned the appeal against the question of damages of N25,000 awarded against the appellant, cannot be allowed to take the point in this court. However, the appeal court in fact set aside the award of N 10,000 as not justified having regard to the provision of section 12(3) of the Act. This was because no evidence was adduced to prove additional damages arising from flagrancy of the infringement and the benefit which accrued to the defendants. Mr. Eno for the respondent pointed out and rightly in my view that protection provided in sub-section 2 of section 12 of the Copyright Act does not enure to the defendants.

I agree that on the whole the appellants have failed to prove that the judgments of the two lower courts should be disturbed. I will accordingly dismiss the appeal and affirm the judgment of the lower courts, I award N300.00 costs to the respondent.

KARIBI-WHYTE, J.S.C.: I have had the privilege of reading before now, the judgment of my learned brother Kawu, J.S.C. just read. I agree entirely with the reasoning and conclusions. I am in complete agreement that this appeal ought to be dismissed. I however wish to make some comments of my own in support.

The claim in the writ of summons, the particulars of claim and the only surviving and competent ground of appeal in this court (namely, ground 4) relevant for the determination of this appeal have been set out in the judgment of my learned brother Kawu, J.S.C. I need not repeat them. I adopt them for the purposes of this judgment.

It is clear from the ground of appeal argued before us that *the issue which appellant is challenging is whether in view of the provisions of Section 12(2) of the Copyright Act 1970, the respondent was entitled to any damages, at all, and consequently, whether the Court of Appeal was right in affirming the judgment of the learned trial Judge that the respondent was entitled to the damages awarded by the trial Judge?* It is pertinent to mention that the trial Judge having held that the appellants infringed the copyright of the respondent awarded the sum of N25,000 against them.

Grounds 5 and 6 of the grounds of appeal in the Court of Appeal have been referred to as intended to cover the same ground as has been argued before us. The grounds are reproduced immediately.

5. "The learned trial Judge erred in law in awarding damages twice in respect of one infringement of copyright.

PARTICULARS OF ERROR

(i) Where a tort victim such as the respondent has been compensated under one head of damages for a specific injury, it is improper to award him damages in respect of the same injury under another head.

(ii) It was grossly erroneous for the learned trial Judge to have said on page 68 of the Record as follows: -

"I award plaintiff N25,000 for infringement of copyright. Furthermore, taking into account the flagrancy of the infringement and profit benefit to the defendant arising from the infringement and as additional damages referred to by *Section 12 of the Copyright Act 1970*. I award plaintiff additional damages of N10,000."

(iii) There was not the slightest evidence of profit due to the publication.

6. The learned trial Judge erred in law in awarding damages in clear breach of the provisions of *Section 12(2) Copyright Act, 1970*.

PARTICULARS OF ERROR

(i) It was the appellants' case at the trial (paragraph 8 of the statement of defence, page 10 of the Record) that they were not aware and had no reasonable grounds for suspecting that copyright subsisted in the said work.

(ii) The "damages" awarded could, in the premises only relate to account of profits, but since the respondent offered no evidence on issue of profits, the learned trial Judge should not have been generous to award what was not proved at the trial, since the court is not a charitable organisation, and can only award what is claimed and proved."

After a careful analysis of the principles applied by the trial Judge in awarding the damages, and after rejecting the N10,000 awarded as additional damages in the exercise of his powers under Section 12(2) of the Copyright Act as unjustified on the ground that it should not have been made where there is another relief available to compensate the respondent, the court refused to disturb the N25,000 awarded as damages, and said, at pp. 113-119, as follows:-

"It was never submitted that the general damages awarded was excessive. There is no doubt that a Court of Appeal may interfere with an award of damages if the trial Judge acted upon wrong principles of law in making assessment or where the award was extremely high or patently low or so very small as to make the award an entirely erroneous estimate of the damage suffered. But an appellate court will not intervene simply because it does not agree with the amount awarded as a sum which it might itself have assessed - see *Agaba v. Otubusin* (1961) 1 All NLR 299; *Okoroje v. Ezumah* (1961) A.N.L.R. 183; *Zik's Press Ltd. v. Alvan Ikoku* 13 WACA. 188."

The Court of Appeal went on to state specifically as follows at p. 119

"Furthermore, this court cannot and will not interfere with an award of damages which did not form the subject matter of the complaint before it."

It is clear from the two grounds of appeal considered by the Court of Appeal that the complaint was not that the damages awarded was excessive, but that damages have been

awarded twice for the same infringement in clear breach of the provisions of Section 12(2) of the Copyright Act, 1970.

In his brief of argument counsel for the appellants submitted that the contention in the court of trial was that respondent did not adduce evidence that appellant received his notice to rebut their defence of innocent infringement which afforded appellants a defence under Section 12(2) of the Copyright Act 1970.

With due respect to the learned counsel for the appellants, it seems to me that there is a complete misapprehension of the contentions and findings of the court below. It is clearly not correct that the court below did not consider the issue of innocent infringement, and that there was no evidence that appellant received the article. In considering the contention, the court below stated at p. 112.

"He contended that the evidence of P.W. 1 Alhaji Yauza Makongiji, the Editor of the Sunday Standard (Exhibit 1) and that of Mrs. Philomina Shilong, the Assistant Editor at the material time, who said the plaintiff's work or article was not received by the defendants should have been believed and preferred to that of the plaintiff who failed to summon as his witness the person in Lagos Office of the 1st defendant company to whom he said, he handed his work. True enough the plaintiff did not summon this person to whom his article was said to have been given. But it is no less true that his evidence that he delivered the infringing work at the Lagos Office of the defendants was not rejected. The trial Judge it would appear, believed that it was the plaintiff's work that eventually got published in Exhibit 1 not in plaintiff's name but in the name of the 3rd defendant. The trial Judge had the advantage of seeing and hearing the witnesses who testified at the trial - (and) STC (an) advantage which this court never had. He preferred the evidence of the plaintiff and his witnesses to that of the defendants. I think it was within his province to do so, for it is trite to say that the duty of ascribing probative value to the evidence of witnesses is pre-eminently that of the trial court. - See *Ogbero Egri v. Ededho Uperi* (1974) NMLR 22 at 26. Consequently, I am unable in the circumstance to accede to the request of Appellant's Counsel in ground 7."

There is no doubt that the issue whether the article, subject matter of the infringement was received by the appellant or not is a question of fact to be determined primarily by the court of trial. The trial Judge found that it was received by the appellants and the Court of Appeal accepted the finding. The passage quoted above obviously demonstrates the contrary of appellants' counsel's contention. The question of innocent infringement is undoubtedly a defence of the 3rd appellant who it is claimed is the author of the infringed article. 1st and 2nd appellants are only concerned with the receipt of respondent's article subject matter of the infringement. Counsel for the appellants is therefore wrong to contend that the Court of Appeal should have accepted the defence of innocent infringement because there was no evidence in rebuttal.

The general principle is that innocence is not a defence to an action for infringement of copyright. - See *Mansell v. Valley Printing Company* (1908) 2 Ch. 441; Section 12(2)(b) Copyright Act, 1970. It seems that the liability in respect of unpublished literary production which was created at common law was not altered by statute. In *WEA Records Ltd. v. Benson King (Sales) Ltd.* (1974) 3 All ER. 81, it was held that it was not necessary to allege that defendant knew that he was infringing the copyright of someone, such knowledge being unnecessary.

The law is founded on the principle that every invasion of a right of property gives a cause of action for damages to the owner against the invader. This right of action exists whether the invasion is intentional, malicious, or innocent. The rule applies to all rights to property, real or personal, corporeal, or incorporeal. It is well settled that the right of an author to his literary publication in respect of which he claims copyright is incorporeal - See *Caird v. Sime* (1877) 12 App. Ch. 326, *Millar v. Taylor* 4 Burr. 2303 and *MacMillan & Co. v. Dent* (1907) 1 Ch. 107,120. It gives to him the fullest right to exclude all other persons and to the actual enjoyment of the benefits of the production - see *Chasemore v. Richards* (1859)7 H.L.C 349, 379.

It is therefore necessary in the instant case, to consider whether the Court of Appeal was wrong to hold that appellants had not shown that at the time of the infringement they (appellants) were not aware of and had no reasonable grounds for suspecting that copyright subsisted in the respondent's article. In answer to this contention, counsel for the respondent supported the finding of the Court of Appeal. He argued that respondent having established as a fact that the infringement was committed by 3rd appellant, it was only the 3rd appellant who could claim the relief under S. 12(2) by satisfying the court that he was not aware of and had no reasonable grounds for suspecting that the copyright subsisted in the plaintiff. The defence of innocent infringement was therefore not available to 1st and 2nd appellants. I entirely agree with this submission.

It is undoubtedly true that 1st and 2nd appellants who are the publishers of the infringing article were not and did not at any time claim to be in any other manner responsible for the infringement. They claim that the article was the literary production of 3rd appellant. Their evidence was that they had the authority of 3rd appellant to publish the article. The evidence was not intended to demonstrate, and they did not succeed in establishing that they were not aware of and had no reasonable grounds for suspecting that the copyright of the article they were publishing was in someone else and not 3rd appellant. They believed that the copyright was in 3rd appellant. - See *John Lane, The Bodley Head Ltd. v. Associated Newspapers Ltd.* (1936) 1 K.B., at p. 721. In this, the court held they were in error and were nevertheless liable. Section 8 of the Copyright Act of 1911 of England relied upon by the defendants is in *pari materia* with our Section 12(2) of the Copyrights Act, 1970 relied upon by the appellants in this case. The question whether there was an infringement, that is, whether the article claimed to be the original work of 3rd appellant by 1st and 2nd appellants, is an infringement of the original literary production of the plaintiff, or whether it is an innocent infringement can only be effectively answered by 3rd appellant who claims to be the writer of

the infringing article. Regrettably, as was correctly pointed out to us by counsel for the respondent, 3rd appellant did not put in any defence to the claim and did not answer the allegations. 3rd appellant is therefore deemed to have admitted the allegations.

See *Ogunleye v. Arewa* (1960) W.R.N.L.R. 9. 3rd appellant having not pleaded the defence of innocent infringement, that defence relied upon by the 1st and 2nd appellants to whom it is not available is clearly incompetent and invalid. Parties are only entitled to rely on a defence or defences consistent with the case in their statement of defence. Where it is otherwise, the court will be justified in disregarding it. See *Ekpenyong & Ors. v. Ayi* (1973) 1 NMLR372. Finally on this point, the claim against the appellants is joint. They are therefore bound by the case of and liable for the default of the 3rd appellant -

See *Ogunleye v. Arewa* (1960) WRNLR. 9, *Y. Boshali & Co. Ltd. v. Arikpo* (1961) 1 All NLR. 161. It is not an acceptable defence by 1st and 2nd appellants to say that the article they published was in their opinion an original work - this is an error which does not absolve them if the publication turns out to be infringement of another article, as in this case, - see *Tate v. Thomas* (1921) 1 Ch. 508, 513.

Section 12(2) of the Copyright Act 1970 relied upon provides as follows:

"(2) Where in an action for infringement of copyright it is proved or admitted -

(a) that an infringement was committed, but

(b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this Section."

Section 12 of the Copyright Act, 1970 clearly specifies the remedies available in an action against an infringer and limits the pecuniary relief which could be had against an infringement shown to have been innocent. *The relief is that the owner of the copyright will not in such cases be entitled to damages, but shall be entitled to an account of profits in respect of the infringement, whether any other relief is granted under the section or not*, it is clear that section 12(1) provides for all such relief by way of "... damages, injunction, accounts, or otherwise shall be available to the plaintiff as is available in any corresponding in respect of infringement of other proprietary rights."

Thus, where a defendant pleads and proves innocent infringement in the manner prescribed in Section 12(2)(a)(b) of the Copyright Act 1970, the plaintiff will only be entitled and defendant liable to an account of profits. This is because innocent infringement is an admission of an invasion of plaintiff's proprietary incorporeal right in the literary production which in any event ought to be requited by the payment of damages. The object of Section 12(2) is to take innocent infringers out of general principles of the common law liability for copyright of unpublished manuscripts which did not recognise innocent infringement - see *Donaldsons v. Beckett* (1774) 4 Burr. 2408, see *Cobben's Parliamentary History*, Vol.

XVII pp. 954-1003 cited in *Mansell v. Valley Printing Co. (supra)*. In *Mansell v. Valley Printing Co. (supra)*, Cozens-Hanly MR, said.

"... when it is established that the right is a proprietary right, it is plain that element of motive or intention on the part of the defendant is wholly irrelevant."

It is clear from the analysis of the evidence that appellants did not establish the defence of innocent infringement. They are therefore not entitled to the benefit of the provisions of Section 12(2) of the Copyright Act 1970, - see *John Lane, The Bodley Head Ltd. v. Associated Newspapers Ltd.* (1936) 1 KB 719,723. The court below was therefore right to have rejected the defence of innocent infringement which on the facts was clearly not available to the appellants.

This appeal therefore fails and is dismissed. The judgment of the Court of Appeal dated 19th November 1984 is accordingly affirmed.

Respondent shall pay costs assessed at N300 to the appellants.

Appeal dismissed.

Names of Counsel:

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