

# A CRITIQUE OF INTELLECTUAL PROPERTY RIGHTS IN THE MUSIC INDUSTRY\*

## ABSTRACT:

*Intellectual properties, as a consequence of their intangible nature, are more susceptible to theft and illegal acquisition. Essentially, creators of musical works need some form of right and protection to prevent unauthorized persons from illegally acquiring their intellectual assets and this is frequently referred to as Intellectual Property Rights. To a fair extent, the copyright law has been developed and established in Nigeria. Nonetheless, the strategies that have been installed to ensure its effective implementation and the opportunities provided for the copyright owners to maximize their rights are in question. By extensively using domestic statutes, case laws, foreign conventions and empirical studies from different authors on the subject of copyright in the music industry the writer seeks to explain the basic concept of Intellectual Property as a form of protection for intellectual property-owners which invariably will encourage the spirit of creativity and productivity in the music industry. It also looks at the philosophical structure in which music law and intellectual property rights coalesce in Nigeria's music industry today to enhance the protection which the law purports to afford the owners or authors of copyrighted works in the music industry. Finally, the article gave an overview of the activities of the Nigerian Copyright Commission and submitted recommendations for effective administration of copyright laws in Nigeria.*

**Keywords:** Music Industry; Intellectual Property; Copyright.

## INTRODUCTION

The fact that Nigeria is naturally social and festive means that Nigerian music is heard openly at celebratory social gatherings, stores, barbershops, betting/games centers, radio stations etc. Music constitutes an essential part of many cultural and social activities. It is the expression of thoughts and the imagination of ideas which may be expressed in words, in form or in sound. The music industry appears to be the most broadly practiced and most accessible of all the arts in the entertainment industry.<sup>1</sup> It is a truism that the greatest heritage of a nation remains the creativity of its citizens, and therefore one of the primary functions of law is to protect the ingenuity, resourcefulness and innovation of the citizenry.<sup>2</sup> Thus, the dictum of Belgore J. in *Oladipo Yemitan v. The Daily Times Nigeria Ltd*<sup>3</sup> is very apt when he said that: *The right of a man to that which he had originally made is an incorporeal right and must be protected.*

The music industry, much like any other institution of its kind, comprises of individuals through which it operates. Its products are the works of human intelligence and the author of a work exercises the right to control the use of such works to the exclusion of others. Thus, the erudite jurist Ogbuinya, J.C.A. had this to say:

It is unconscionable to deny a musician the fruits of his intellectual efforts. Such kills ingenuity in the music artistic firmament to the detriment of all. This is because music is a

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\***Tochukwu Onyiuke** Partner, Accendo-law (Barristers & Solicitors), Lekki Phase 1, Lagos, Nigeria.

<sup>1</sup> Ojukwu, E.V.; Onyiuke, Y.S.; Esimone, C.C. (2015). *Intellectual property rights enforcement in Nigeria: A prop for Music Industry*. Last accessed on September 14, 2021 from [https://www.researchgate.net/publication/311483914\\_Intellectual\\_Property\\_Rights\\_Enforcement\\_In\\_Nigeria\\_A\\_Prop\\_For\\_Music\\_Industry](https://www.researchgate.net/publication/311483914_Intellectual_Property_Rights_Enforcement_In_Nigeria_A_Prop_For_Music_Industry)

<sup>2</sup>Faga, H. P. LLM, Ngozi, Ole LL.B, (2010), *Limits of copyright protection in comtemporary Nigeria: re-examining the relevance of the Nigerian copyright act in today's digital and computer age*. Ebony State Univeristy, Abakaliki, Ebony State.

<sup>3</sup>[1980] FHCRC (Federal High Court Reports) 186 at 190

money spinner for an artiste, his dependents, and successors. Its gains permeate all segments of the global society.<sup>4</sup>

Indubitably, a musician is a composer, who, like a spider that spins cobweb from its belly, creates something out of nothing. The product of his ingenuity is music which is the soul, lubricant and elixir of life. He acquires intellectual property over his musical work, which racks *pari passu* with other proprietary rights.<sup>5</sup>

And the rationale for intellectual property/copyright protection was expounded by Romer, J. where he put it thus that it is the law of this land that no man is entitled to carry on his business in such a way as to represent that it is the business of another, or is in any way connected with the business of another; that is the first proposition. The second proposition is, that no man is entitled so to describe... his [works] as to represent that the [works] are the [works] of another.<sup>6</sup>

Without intellectual property laws, however, the labors of these intellectuals would rapidly be exploited, frustrated and deprived of their rights as a result of the activities of ‘pirates’ i.e. copyright violators and infringers who rip off their benefits, consequently hampering the industry from experiencing fundamental financial growth and development. On the issue of infringement, the erudite jurist Jinadu J. held thus:

All these actions of the Defendants were done without the consent, authorization or license of the Plaintiff, the owner of the Copyright... under the provisions of Section 14(1)(a)(c) and 17(1) of the Copyright Act... the foregoing acts constituted a violent infringement of the Plaintiff’s Copyright and are prejudicial to the Plaintiff’s honour and reputation as the author.)<sup>7</sup>

Copyright violation is not a phenomenon that is only unique to Nigeria, as a matter of fact, its parasitic effect is being felt by the global music industry and the economy at large.<sup>8</sup> This in turn can be blamed on the widespread and uncontrolled use of the internet as a medium for data exchange.<sup>9</sup> Currently the policing of such “rogue websites” on the internet, many of which are foreign-owned and operated, is burdensome: the websites are often maintained by vast global piracy networks, and those piracy networks have been tolerated—and sometimes protected—in China, India, Russia, and even Canada.<sup>10</sup>

Consequently, the music industry has been ravaged by piracy and intellectual property violators who neither respect national borders nor geographical boundaries. Moreover, the advent of the computer age has provided a means to overcome the technical and acoustic limitations of orthodox musical instruments; and the progressively complex technology analogous to it has made it very hard for regulatory agencies to make a substantial effect.

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<sup>4</sup>See *Multichoice (Nig.) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (Pt. 1742) 415 at 535, paras. G-H

<sup>5</sup>Ibid at Pp. 535, paras. E-G.

<sup>6</sup>See the case of *Joseph Rodgers & Sons Ltd. v. W.N. Rodgers and Co.* (1942) 41 R.P.C. 277 at p. 291. Cited in *Exxon Corporation v. Exxon Nominees Industries Ltd.* (1989) 2, I.P.L.R. 417 at pp. 434-435, paras. H-A.

<sup>7</sup>See the case of *Maurice Ukaoha v. Broad-Based Mortgage Finance Limited & Anor* (1997) 4 I.P.L.R. 48, at p. 59 paras. G-H; p. 62 paras. F-G.

<sup>8</sup>Daniel, G. (2010). *Agencies intensify efforts to “export” Nigerian entertainment industry*. Last accessed on September 14, 2021, from <https://nigeriansabroadlive.com/agencies-intensify-efforts-to-export--nigerian-entertainment-industry>

<sup>9</sup>Ojukwu, E.V.; Onyike, Y.S.; Esimone, C.C. (2015). See n. 1.

<sup>10</sup>Cieply, M., *Digital piracy spreads, and defies a fix*. N.Y. TIMES, April 7, 2009, at B1; see also Kruger, C.D. (2006). *Passing the global test: DMCA §1201 as an international model for transitioning copyright law into the digital age*; 28 HOUS. J. INT’L L. (pp.281, 289). Last accessed on September 14, 2021 from [www.hjil.org/articles/hjil-33-1-burke.pdf](http://www.hjil.org/articles/hjil-33-1-burke.pdf). (“Most [measures taken to minimize illegal file-sharing] have proven ineffective in curbing digital piracy because of practical limitations and their failure to realize the international dimension of digital policy.”)

## INTERNATIONAL AGREEMENTS AND TREATIES

The Nigerian Copyright Commission (the NCC) is the agency responsible for the administration of all copyright matters in Nigeria. The agency is charged with the statutory responsibility for monitoring and supervising positions in relation to international agreements and advising the government thereon; to advise and regulate conditions for the conclusion of bilateral and multi-lateral agreements between Nigeria and any other country.<sup>11</sup>

In the United States and a few other countries, with advances in technology and international trade, there has been a commensurate increase in awareness of the urgency to protect the intellectual property rights of authors of literary and artistic works. Aiming to reverse the situation of porous copyright restrictions on the commercial use of copyrighted works, most nations of the world, including Nigeria as a party State, signed the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994. Administered by the World Trade Organization (WTO), TRIPS strengthened legal protection for intellectual property around the world by providing that all members must comply with the substantive articles (1-21) of the Berne Convention,<sup>12</sup> other than provision on moral rights. The substantive provisions of the above convention articles, as they relate to musical works, clearly stipulate that, the countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works. The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as dramatic or dramatico-musical works; musical compositions with or without words. It is also stated that, it shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work. It is also provided that authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Another notable treaty Nigeria is a signatory to is the Rome Convention, which requires that each member state applies national treatment in respect of the rights which it accords to performers, record producers and broadcasting organizations.<sup>13</sup> In addition member states must offer those from other states who are protected by the convention certain minimum rights.

Furthermore, by prohibiting “any discrimination on grounds of nationality,” the article requires that persons in a situation governed by Community law<sup>14</sup> be placed on a completely

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<sup>11</sup>Nigerian Copyright Act, 1988 (embodied in Cap C.28 Laws of the Federation, 2004). See *s.1(1)*

<sup>12</sup>Berne Convention (1886), *Arts 3-5*: the first requirement of Berne is that each member state must follow the principle of national treatment. This is organized through the concept of the “country of origin” of the work. Where feasible, this is the country of first publication. Where the country of origin is a Berne State, then other members must accord to the work the same treatment as they offer their own national, including the rights guaranteed by the Berne Convention. See also Berne Convention, *Arts 9(1)*.

<sup>13</sup>Rome Convention, *Art. 1-3*.

<sup>14</sup>The law of the European Union (as opposed to the national laws of the member states). It consists of the treaties establishing the EU (together with subsequent amending treaties), Community legislation, and decisions of the European Court of Justice. Any provision of the treaty or of community legislation that is directly

equal footing with nationals of the Member State. Where this principle applies, it precludes a Member State from making the grant of an exclusive right subject to the condition of being a national of that State.<sup>15</sup> Here, a case law review might suffice to explain the preceding article. See the foreign case of *Collins v. Imtrat*<sup>16</sup> for instance where a performance in the US by the British singer, Phil Collins was “bootlegged” and copies of the unauthorized recording were sold in Germany. Under the German Copyright Act, the right accorded to performers against such recording was given to German nationals wherever they performed. But non-nationals acquired the right only under the condition prescribed by the Rome Convention of 1961, that is, when the performance took place in a Contracting State to that convention. The US was not a Rome Convention state, and Collins’ claim to the right would have failed but for his successful plea that the German law discriminated against him on ground of nationality, contrary to the Treaty of Rome, *Article 12* (EC Treaty version, *Article 7*) in accepting this argument, the European Court of Justice<sup>17</sup> indicated that in the present state of Community law, and in the absence of Community measures or the harmonization of national law, it is for the Member States to specify the conditions and rules for the protection of [musical], literary and artistic property, subject to complying with the relevant international agreements. The Court further stated that the specific purpose of these rights, as governed by national law, is to protect the moral and economic rights of their owners. The protection of moral rights enables authors and artists to resist any distortion, mutilation or other alteration of the work which would be prejudicial to their honour or reputation. Copyright and related rights also have economic characteristics in that they provide for the possibility of commercially exploiting the marketing of the protected work, particularly in the form of licenses granted in return for the payment of royalties.<sup>18</sup>

Thirdly, Nigeria has also signed the World Intellectual Property Organization Copyright Treaty. This treaty merely adds a number of general provisions to the range of the Berne Convention; unique amongst its additions are the provisions that deal with on-line digital services principally by requiring, for works within the convention, right of communication to the public, wire or wireless means which includes the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. Furthermore, WIPO administers the treaties mentioned above in partnership with the United Nations Educational, Scientific and Cultural Organization (UNESCO).

The Federal Republic of Nigeria became a member of the Berne Union on September 14, 1993. However, these conventions are hardly enforceable in Nigeria owing to the fact that they have not been domesticated.<sup>19</sup> Thus, for instance, unlike the United States of America

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applicable in a member state forms part of the law of that state and prevails over its national law in the event of any inconsistencies between the two.

<sup>15</sup>William Cornish (2003). *Cases and materials on intellectual property*, 4<sup>th</sup>Ed. London: Sweet & Maxwell., 603  
<sup>16</sup>[1993] 1 E.C.R. 545, ECJ.

<sup>17</sup>The European Community Treaty, Article 12: Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited; and Article 234: The Court of Justice shall have jurisdiction to give preliminary rulings concerning the interpretation of this treaty, where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

<sup>18</sup>See also the case of *Musik-Vertrieb Membran GmbH v. GEMA* [1981] E.C.R. 147. Here, the court observed that, while the commercial exploitation of copyright is a source of remuneration for the owner it also constitutes a form of control on marketing exercisable by the owner, the copyright management societies acting in his name and the grantees of licences. From this viewpoint the commercial exploitation of copyright raises the same problems as that of any other industrial or commercial property right.

<sup>19</sup> In the application of international law in domestic jurisdiction, the majority of nation states require that international obligations entered into by the executive arm of government must be subjected to ratification by

which has recognized the need to accord special protection to ‘digital works’ (a new species of traditional innovation that straddle sound and picture electronic signals) by the enactment of several legislations including the Digital Millennium Act of 1998,<sup>20</sup> Nigeria has only succeeded in recopying the 1990 Copyrights Act in the 2004 version of the Laws of the Federation of Nigeria.<sup>21</sup>

In conclusion, this is a pioneering study in this area of the law. This article relies heavily on case and statutory law as well as historical and other related resource materials in analyzing the Copyright Act in an effort to protect the rights of all groups involved in enhancing the music industry in Nigeria.

## PHILOSOPHICAL STRUCTURE

**Intellectual Property Right/Copyright:** Intellectual property was not always recognized as a single field of law and the intellectual property right is a cover phrase for several legal entitlements, which ascribe to certain names, written and recorded media, and inventions. Historically, the fields patent, copyright, and trademark developed independently. In the late 20<sup>th</sup> century, notwithstanding, jurists began to appreciate that these several fields of law had a great deal in common since they all pertained to intangible products of the mind. While there is a close relationship between intangible property and the tangible objects in which they are embodied, intellectual property rights are distinct and separate from property rights in tangible goods.<sup>22</sup>

Copyright is the bedrock of the music industry. It enables music owners, creators and entrepreneurs to make a living, and gives an author or owner of musical works the right to copy (that is, reproduce, perform, adapt, re-work) their own music. Long-time music lawyer, consultant and author, Harrison, sums up Copyright perfectly:

the right to authorize the reproduction of a musical or literary work with or without visual images... the right to authorize the distribution of the work; to rent or lend the work to members of the public; the right to authorize the public performance of the work, or its making available to the public, and the right to make an adaptation of the work, or to do any of the above in relation to an adaptation. As the copyright owner, you can allow or prevent someone from doing all or any of these things either throughout the world or in a particular country.<sup>23</sup>

This does not encapsulate all the exercisable rights.

Anybody who plays any musical instrument knows it is a very common expression to say, such a piece is very well arranged, such a piece is ill arranged; this is a very difficult arrangement, that is an easy arrangement. A song can be a musical work for the purpose of copyright legislation. The definition of that expression being at large, it must be given its natural and ordinary meaning. This article has, therefore, referred to several musical authors, textbook and dictionary definitions. It may suffice to also refer to the English case of *Wood v. Boosey*<sup>24</sup> the facts of which are—Nicolai’s opera, “Die lustigen Weiber von Windsor”, was

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the popular will of the people through the legislative arm of government. In Nigeria, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides for this position in s.12(1).

<sup>20</sup>See Detail solicitors “Newsletter” April 2009 Edition (WWW document), available at <http://www.detailsolicitors.com/newsletter> last accessed on September 14, 2021.

<sup>21</sup>See n.2

<sup>22</sup>Bently, L. & Sherman, B. (2014) *Intellectual Property Law*. 4<sup>th</sup> ed. Oxford University Press, London. (As cited in **Garner, B. A., & Black, H. C.** (2004). **Black's law dictionary**. 8<sup>th</sup> ed. St. Paul, MN: Thomson/West)

<sup>23</sup>Harrison, A & Rigg, T. (2021). *The present and future of music law*, 1<sup>st</sup> Ed., Bloomsbury Academic.

<sup>24</sup>[1868] L.R. 3 Q.B. 223, Exchequer Chamber.

first performed in March, 1849, the composer dying two months later. Brissler then made a reduction for pianoforte of the orchestral score. Under the then existing arrangements (International Copyright Act 1844), in order for an author from a country with which there was a bi-lateral arrangement to acquire British copyright, he had to register his work giving the author's name. A registration for the Brissler arrangement of the opera was obtained in 1851, naming Nicolai as composer. The plaintiffs, claiming to be assignees of this copyright, sued the defendants for infringement. The defence denied that the registration had been properly made in Nicolai's name. It was indicated by Bramwell B., in his lead judgment that, the truth is, an opera is originally written for the voice and for the different instruments. In this pianoforte score, as it is called, the parts written for the voice are identically preserved, and there can be no doubt that if a man had a copyright in the original opera, such a score would be an infringement of his copyright. But when we come to the part, not for the voices, but for the pianoforte, which is not an identical repetition of what the author wrote, it is the business of the adapter, the person who arranges it for the pianoforte, to preserve the harmony and, as far as he can, the notes and all the effects of the original composer, but he cannot produce upon the pianoforte everything that the author wrote, as he wrote it.<sup>25</sup> Further, it is clear, therefore, that there is something in the nature of authorship in *Brissler's* case, and his name not having been stated as the author in the register, it seems to me manifest the plaintiff has not a copyright of the pianoforte score, as it is called, and consequently cannot complain of this infringement.<sup>26</sup>

In the words of Adeleye, Copyright deals primarily with literary, musical and artistic creations while industrial property right deals with patents, trademarks and industrial designs. He further noted that intellectual property "is an intangible asset because it has no physical form; it is a category of intangible right protecting commercially valuable works, products and services of human intellect."<sup>27</sup>

Flowing from the above authorities, what is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any musical work or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act<sup>28</sup> cannot be defined in precise terms. In every case it must be very much a question of degree.

## THE MUSIC INDUSTRY IN NIGERIA

**Copyright Eligibility in Nigeria:** Eligible works, simply put, means "works" of copyright which the law will protect.<sup>29</sup> The term "work" under the law embraces literary, musical and artistic works, cinematograph films, sound recordings and broadcasts. The Act<sup>30</sup> further clarifies musical works as any work, irrespective of musical quality, and includes works composed for musical accomplishment. Where there is a musical work that is eligible for Copyright and thus subject to protection by the Copyright Act, it is this Act that must be examined to determine whether indeed such works are eligible or ineligible. The Act does not define what a copyright is, but rather, what works are subject to Copyright. However once a work is subject to Copyright, it gives the owner the exclusive right to authorize or prohibit

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<sup>25</sup>William Cornish (2003) See n.15 (P. 260)

<sup>26</sup>William Cornish (2003) See n.15 (P. 260)

<sup>27</sup>Adeleye, A.I. (2013). Intellectual property rights enforcement in Nigeria: Regulatory agencies to the rescue. Available at <https://www.nlipw.com> last accessed on September 14, 2021.

<sup>28</sup>See n.11

<sup>29</sup>Babafemi, F.O. (2007). Intellectual property: the law and practice of copyright, trademarks, patents and industrial designs in Nigeria 1<sup>st</sup> Ed., Justinian Books Limited.

<sup>30</sup>See n. 11, section 51 of the Copyright Act.

certain uses of his work by others.<sup>31</sup> Copyright is meant to provide the author of a work with control over the use of his works by others.

The Copyright Act provides that musical works and sound recordings are eligible for Copyright, however, a literary, musical or artistic work shall not be eligible for Copyright unless sufficient effort has been expended on making the work to give it an original character; and the work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.<sup>32</sup> The section is to the effect that to be subject to Copyright, a musical work must originate from its author who has expended special skill, and labour in producing it. The section also requires that the work must take some material form, from which it could be perceived, or reproduced. The reason for this is obvious, as the existence of the work is a necessity in determining whether or not it has been copied.<sup>33</sup>

**Copyright Infringement in the Music Industry:** ‘Industry’ exists where there is commercial capitalization on a product which often go through the chain of production, marketing, distribution and consumption of the product that can also include services. In the words of Asein:

Creativity remains a major vehicle of economic development in today’s knowledge driven economy. Fortunately, Nigeria is well endowed with creative talents and it has distinguished itself in the film, music, literary works and the arts... unless the delicate balance between the rights of the copyright owners and the need for access is well managed, the fortunes of the practitioners in the creative industry and the sustainability of the creative industry would be in jeopardy.<sup>34</sup>

The Director-General’s remarks alluded to above indicate that copyright protection against infringement on the owners of intellectual property rightly serves to be the best known method to secure this untapped wealth in the industry. However, in Nigeria, the unfortunate incidence of piracy in the music industry has led to a collapse in musical structure for artists and authors. This collapse can be linked to the decline in the economy which has also created piracy and abuse of intellectual property. Belgore, C.J. lamented thus:

This is more true in this Country [where] imitation... is in vogue, but the tribute the mediocre can pay to the genius by imitation has a limit. He does not extend to the boundary of injuring the name, the reputation or the business of the genius; not at least when the genius has protected himself by the provisions of the law.<sup>35</sup>

The confusion created by violators, of course, occurs in the mind of the public or the [industry] so as to produce an impression that the commercialization of the [musical works] are indeed authorized by the author when in fact the perpetrators of copyright infringement reap the rewards of the author.<sup>36</sup> It can be inferred that the trading and creative aspects of the music industry are inextricably linked—no matter how proficient one is creatively, a creator of musical or artistic work needs to think and operate like a business in order to achieve

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<sup>31</sup>See the case of *Yeni Anikulapo-Kuti & 2 ors v. T.M. Iseli & 2 ors* (2003) 5 I.P.L.R. 53@ 69-70, paras. G-B.

<sup>32</sup>See n. 11., section 1(1) (b) and (e) of the Copyright Act.

<sup>33</sup>*Yeni Anikulapo-Kuti & 2 ors v. T.M. Iseli & 2 ors supra.*, note 25 at p. 70, paras. F-I

<sup>34</sup>Nigerian Copyright Commission (NCC). *Director-General’s welcome: From the Director-General*. Last accessed on September 14, 2021 from <https://www.copyright.gov.ng>

<sup>35</sup>See the case of *Exxon Corporation v. Exxon Nominees Industries Ltd.* (1989) 2, I.P.L.R. 417, p. 435, paras. B-C.

<sup>36</sup>See the case of *Barlow and Jones, Jabez and Company* (1890) 7 R.P.C. 395, 411 C.A. cited in *The Singer Company v. Pius Asuzu* (1967) 1, I.P.L.R. p. 157, paras. C-D.

success.<sup>37</sup> Music industry, therefore, is the totality of the several groups involved in music production that work together towards a common objective of making money through music distribution.<sup>38</sup> There is no doubt, therefore, that every member of the music organization has a role to play in tackling the menace of copyright infringement which for a long time has caused injury to the trade and creative reputation and benefits accruable to artists of musical works, and as a result are entitled to damages. The authority for this is the case of *Spalding v. Gamage*,<sup>39</sup> where Lord Palmoor remarked as follows:

No person has a right to sell or offer for sale, [works] of another trader of an inferior or different class or quality under conditions calculated to represent such [works] as [works] of that trader or a superior and distinctive class. If this is done, an actual wrong is committed, irrespective of motive or fraud. A Plaintiff who establishes a case of this character is entitled to an injunction and if necessary, to damages.

There is no gainsaying the fact that *section 16* of the Copyright Act denotes to an author of musical works or their licensee the right of access to court, and ventilates any violation of its copyright works.<sup>40</sup> The said provision will now be extracted, *verbatim ac literatim*, from where they are domiciled in the law book, thus:

16(1) Subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee as the case may be in the Federal High Court exercising jurisdiction in the place where the infringement occurred, and in any action for such infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as it is available in any corresponding proceedings in respect of infringement of other proprietary rights.

The above provision is submissive to clarity in its connotations. On this score, the law compels the court to accord them their ordinary grammatical meanings without any embellishments.<sup>41</sup> It can also be observed from the above provision that Copyright is a classical exemplification of chose in action—a proprietary right *in personam*, [which] denotes “all personal rights of property, which can, only be claimed or enforced by action, and not by taking physical possession”.<sup>42</sup> By the tenor and phraseology of the Copyright Act, an exclusive licensee wields lots of litigable power in the sense that: “An exclusive licensee means a licence in writing signed by or on behalf of the copyright owner, authorizing the licensee to the exclusion of all other persons including the person granting the license to exercise a right which would otherwise be exercised exclusively by the copyright owner. An exclusive licensee may bring proceedings for infringement in the same way as an assignee”<sup>43</sup> By virtue of *sections 16, 17 and 39* of the Copyright Act, there are five classes of persons who or which can institute an action, either personally or in a representative capacity, in respect of breach of copyright in Nigeria. They are:

- a) Owner;
- b) Assignee;
- c) Exclusive licensee (*section 16*);

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<sup>37</sup>Ojukwu, E.V.; Onyiuke, Y.S.; Esimone, C.C. (2015). See n. 1

<sup>38</sup>*Ibid*

<sup>39</sup>(1915) 84 L.J. Ch. 449 in *Clerk and Lindsel*, 12<sup>th</sup> Edition p. 2036.

<sup>40</sup>As observed by Ogbuinya J.C.A. in *Multichoice (Nig.) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (Pt. 1742) 415 (Pp. 522 - 525, paras. G-H).

<sup>41</sup>*Ibid*. [See the cases of *Bakare v. NRC* (2007) 17 NWLR (Pt. 1064) 606; and *Ecobank v. Honeywell Flour* (2019) 2 NWLR (Pt. 1655) 55].

<sup>42</sup> *Ibid*. [See the cases of *Torkington v. Magee* (1902) 2 KB 47; and *A.T.S. & Sons v. B.E.C. (Nig.) Ltd.* (2018) 17 NWLR (Pt. 1647) 1].

<sup>43</sup>*Ibid*. [See the case of *MCSN (Ltd./Gte) v. C.D.T. Ltd.* (2019) 4 NWLR (Pt. 1661) 1 per Peter-Odili, JSC.



- d) A person carrying on the business of negotiating, granting licences, collection and distribution of royalties for not more than fifty (50) owners of copyright (*section 17*); and
- e) A collecting society (*section 39*).

Furthermore, by virtue of *section 39(8)* of the Copyright Act, a collecting society is an association of copyright owners which has its principal objectives as the negotiating and granting of licences, collecting and distributing of royalties in respect of copyright works.<sup>44</sup>

Flowing from the forgoing, it admits of no argument that a copyright owner or the holder of a licence acquires, in the assigned copyright musical works, vested right—“a right held by somebody in something to his advantage and interest. A vested right accrues to the owner or holder who has it for keeps as the allodial owner”<sup>45</sup>

Further, an accrued vested interest is completely and definitely settled on its beneficiary and cannot be defeated by a private person save in accordance with the law and for public purpose.<sup>46</sup> The notion that an author of musical works should have an exclusive copyright in his creation i.e. the ‘sole right and liberty to do and authorize’ the doing in Nigeria of any of the acts mentioned in section 6 of which the Copyright Act<sup>47</sup> confers on the author ought to be accompanied with effective laws to combat these copyright problems and are therefore very imperative. Then, the nagging question, begging/itching for an answer, is: has any law destroyed the copyright owner’s/licencee’s vested right?

#### **ADMINISTRATION OF COPYRIGHT IN NIGERIA**

Prior to the copyright law which was enacted in 1988, there was no effective administrative infrastructure of copyright practice in Nigeria. The Copyright Decree of 1970 was in disarray as the then Federal Ministry of Trade, on whom the responsibility of administering copyright was vested, did not establish a competent authority to administer copyright. However, with the establishment of the Nigerian Copyright Commission by the Copyright Act, the administration of copyright in Nigeria has been more effective.<sup>48</sup>

**The Agency:** The administration of copyright law is carried out majorly by the Nigerian Copyright Commission in conjunction with Copyright Societies, specialized legal practitioners and the judiciary.<sup>49</sup> There are also other stakeholders such as the Nigerian Police and the Customs and Excise Department who assists in the implementation of the mandate of the NCC.

The Act specifically enumerates the functions of the NCC. In addition to the functions, the Copyright Commission also has the powers to receive and grant applications for Compulsory Licence.<sup>50</sup> The NCC is also vested with the powers of approving and registering for operation a Collecting Society.<sup>51</sup>

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<sup>44</sup>See the case of *Multichoice (Nig.) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (Pt. 1742) 415, 523, paras. E-H.

<sup>45</sup>*Ibid.* [See the case of *Adesanoye v. Adewole* (2006) 14 NWLR (Pt. 1000) 242 at 277 per Tobi, JSC]

<sup>46</sup>*Ibid.* [See the case of *Gana v. S.D.P.* (2019) 11 NWLR (Pt. 1684) 510]

<sup>47</sup>See n.11

<sup>48</sup>*Ibid.*, sections 34-40, Part III of the Copyright Act 2004 provide for the administration of copyright in Nigeria.

<sup>49</sup>*Ibid.*, section 16 of the Copyright confers on the Federal High Court exclusive jurisdiction to entertain copyright matters.

<sup>50</sup>*Ibid.* Fourth Schedule paragraph 2(1).

<sup>51</sup>See n. 43. A Collecting Society may be formed in respect of any one or more rights of copyright owners for the benefit of such owners and the society may apply to the Commission for approval to operate as a collecting society for the purpose of the Act.

The Commission is a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.<sup>52</sup> There are however limitations on suit against the commission.<sup>53</sup> Thus, the Act provides that no suit against the Commission for an act done in pursuance or execution of their duties under the Act or any other enactment or law or in respect of any alleged neglect or default in the execution of this Act or any other enactment, shall lie or be instituted in any court unless the suit is commenced within twelve months next after the act, neglect or default complained of or where the damage or injury continues within twelve months next after the damage or injury ceases.

Formerly, the relevant law which legislated and enforced copyright infringement was the Copyright Act, 1988.<sup>54</sup> However, the law neither made any specific provisions that addressed the digital exploitation of works nor were there any separate or subsidiary statutory provisions that sought to do so. Moreover, the law also lacked extraterritorial application to deal with foreign-owned or foreign-operated websites that infringed copyright. However, with the promulgation of the Copyright Act, 2021, passed into law on April 6, 2022 by the National Assembly, the Act seeks to provide, among other things, the use of digital and information technology measures in protecting copyrighted works; and prohibitive measures against infringement over the internet.<sup>55</sup> The introduction of this Act was necessitated by the need to repeal the outdated Copyright Act of 1988<sup>56</sup> and to upgrade the Copyright legislation in Nigeria to catch up with the constant development of digital technologies and current needs of copyright protection in the world. According to the introductory note to the Act, the main objective of the reform is to reposition Nigeria's creative industries for greater growth; strengthen their capacity to compete more effectively in the global market place, and enable Nigeria to fully satisfy its obligations under the various international Copyright instruments, which it has earlier ratified or indicated interest to ratify.

Perhaps the major important innovative provisions included in the Copyright Act, 2021 are the provisions relating to online content. For the first time, the Nigerian copyright legislation not only caters for the protection of works produced and exchanged over the internet, it also recognizes the menace of online infringement of copyrights and consequently makes provision for remedies such as the removal of infringing content from wherever it is uploaded. The law further entitles the owner of an infringed copyright work to issue a notice in writing of such infringement to the appropriate internet service provider (ISP) requesting for the take down or removal or to disable access to the infringing content or link to such content hosted on its system.<sup>57</sup> Upon receipt of such notice, the ISP shall promptly notify the subscriber responsible for the infringing content of such notice. If after 10 days, the subscriber fails to provide justifiable reasons for continuing to keep the infringing content, the ISP is empowered to take down or disable access to such infringing content and thereafter notify the copyright owner. Conversely, where the subscriber provides a justifiable reason for not removing the infringing content, or where the ISP is convinced that the complaint of the

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<sup>52</sup>Ibid., section 47(1) as amended.

<sup>53</sup>Ibid

<sup>54</sup>(Supra) note 11

<sup>55</sup> The Act empowers internet service providers (ISPs) to disconnect internet services that infringe on copyrighted works; and also it creates liability for ISPs that default in the curb of the use of their services for copyright infringement.

<sup>56</sup>(Supra) note 9

<sup>57</sup>Section 47 of the Act. Note similar provisions contained in the Nigerian Communications Commission, "Guidelines for the provision of internet services" published pursuant to section 70(2) of the Nigerian Communications Act, 2003 available at <https://www.ncc.gov.ng/docman-main/legal-regulatory/guidelines/62-guidelines-for-the-provision-of-internet-service/file>, last accessed September 14, 2021.

alleged copyright owner is without merit, the ISP shall promptly inform the copyright owner of his decision not to take down the content.<sup>58</sup> Another remedy provided in the Copyright Act, 2021 is the suspension of accounts of repeated infringers. The ISP, upon receipt of notice of repeated infringement of a copyright work, shall suspend the account of the alleged repeat infringer for at least one month after sending the infringer(s) warnings to that effect. A subscriber receiving such a warning may challenge the notice on grounds of mistake or misidentification.<sup>59</sup> Finally, another remedy is the blocking of access to online content. Under the Copyright Act, 2021, the Nigerian Copyright Commission has the power to block or disable access to any content or link, hosted on a system or network, which it reasonably believes to infringe the rights of copyright owners.<sup>60</sup>

It can be gleaned from the afore stated facts that the enactment certainly aims to bring the Nigerian law on copyright protection and enforcement in conformity with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty which Nigeria is a party state and signatory to.

## **CONCLUSION**

Having looked at the copyright problem from all facets, the fight to stop it should be fought on a rather moral ground. In all branches of intellectual property, the legal system seeks to balance two competing concerns. On the one hand, protection must be strong enough to encourage authors and inventors to invest the necessary effort in innovation. On the other hand, the law must also allow people some freedom to use the intellectual property of others. This is because artistic, technological, and commercial progress always requires building on the work of others. To strike this balance, all branches of intellectual property law confer general rights on creators but also limit those rights with a variety of exceptions. For example, the doctrine of ‘fair dealing’ exists under the Copyright Act. Although there is no statutory definition of what constitutes ‘fair dealing’ under the Copyright Act, purposes that may qualify as ‘fair dealing’ are listed in the second schedule of the Act and include the following: research, private use, criticism or review, reporting of current events and public use, provided such public use is accompanied by acknowledgement of the title of the work and its authorship. ‘Fair dealing’ is provided for under the second schedule of the Act as an exception to the general rule that the exclusive right to control the doing of any of the acts listed in section 6 of the Act i.e. in respect of literary or musical works, is vested in the copyright owner.

## **RECOMMENDATIONS**

It is important to note that for Nigeria to enjoy the economic benefits of Intellectual Property Rights, it should update its national copyrights laws in order to implement World Intellectual Property Organization WIPO obligations and create strong enforcement mechanism as required by the World Trade Organization. Strict anti-piracy laws also should be introduced and the government should dedicate its resources to the challenges of Copyright infringement.

As the sole agency under the law to supervise and administer the copyrights system in Nigeria, the NCC should continue to devise fresh strategies for fighting piracy. Nigeria is a very large country and it is believed that violators of copyright are found in all parts of the country. The NCC Should set up, where it has not done so, offices in all states of the

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<sup>58</sup>Section 48 of the Act.

<sup>59</sup>Section 49 of the Act.

<sup>60</sup>Section 54 of the Act.

federation to enable it co-ordinate the fight against piracy and other infringements. There is also a need for the government to introduce intellectual property enforcement unit, cross border co-operation and more training for law enforcement agents. Other measures should also include improvement in public education and awareness.

In light of the above, considering the impact which copyrights industries such as publishing, music, communications, artifacts, films, broadcasting can make or are making on the economy, there should be increased efforts to attract investments in these sectors through a most conducive investment climate in the country. Government should provide what would attract the investors. Nigeria has a large market for the products of copyrights industries which can sustain the economy and provide employment to more than 45 percent of the population and above all contribute enormously towards the nation's revenue including foreign earnings.

The writer is convinced that if the recommendations produced in this article would translate into actions and results, the music industry in Nigeria will reap its harvest if we do not give up.