



COPYRIGHTS AND THE MUSIC BUSINESS

The Nigerian music industry is arguably the most vibrant in Africa, with a reported total revenue of US\$39 million in 2016, projected to rise at a 13.4% Compound Annual Growth Rate to US\$73 million by the year 2021¹. Although this revenue figure is relatively small compared to more developed markets outside Africa, the potential for growth is significant. This singular fact has piqued the interest of major international music conglomerates² around the world, some of whom have taken unprecedented strides towards securing a strong market presence in Nigeria's music industry by partnering with local record labels and entering recording contracts with a number of popular local talents³.

With Nigerian music permeating playlists across the world, and the incursion of savvy international music merchants into Nigeria's music marketplace, the production values in the local industry have significantly improved, to the benefit of music consumers; but so as the cost of production, to the disadvantage of the creatives. With this increased cost of production, the need for an effective

monetization strategy has become even more pressing for market players, and so has the need to counteract infringing practices which undermine the profitability of the music business.

Music is the stock-in-trade of the music business, and in this paper, we look at musical works in the context of copyright protection;

¹ PwC, The Business of Entertainment – Harnessing growth opportunities in entertainment, media, arts and lifestyle, October 2017

² Notably, Universal Music Group and Sony Corporation

³ Notable examples include 'Odunsi the Engine' who is signed to Universal Music Nigeria (a subsidiary of Universal Music Group), 'Wizkid' signed to RCA Records (a subsidiary of Sony Music) in 2017, 'Davido' signed a two-album deal with Sony Music in 2016, Tiwa Savage and Mr. Eazi both signed to Universal Music Nigeria

we highlight the rights of the author(s) of a musical work; and we discuss key issues to consider before litigating a case of copyright infringement.

THE ANATOMY OF A MUSICAL WORK

The Copyrights Act⁴ defines a musical work as any musical composition, irrespective of musical quality and includes works composed for musical accompaniment⁵. Following this definition, it may very well be assumed that any structured sound would automatically qualify for protection under the Copyrights Act, however, this is not the case. Section 1(2) of the Copyrights Act goes further to require that sufficient effort be expended towards the creation of the work to bestow upon it an original character. Furthermore, the work must be fixated or recorded on a medium of storage from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of an appropriate machine or device.

Therefore, for a musical work to enjoy protection under the Copyrights Act, the process of its creation must have been deliberate, the musical work must be original, and the work must be recorded on a medium of storage such as compact discs, DVDs, Blu-ray discs, or even cloud storage solutions. The recording itself is considered a separate copyright work entitled to protection as a sound recording under the Copyrights Act⁶. Thus, two species of copyright may inhere in a single musical work, that is, copyright in the musical composition on the one hand, and copyright in the sound recording on the other.

The Author of the Musical Work

The copyrights in a musical work may be owned by just one author⁷, in which case, the author must have been the lyricist, the instrumentalist,

as well as the sound recorder. However, this is rarely the case; more often than not, copyright in a musical work would be attributable to different authors based on the nature of their respective contributions to the final product. So, the lyricist will own the copyright in the lyrics of the song as a literary work⁸, the instrumentalist will own the copyright in the melody accompanying the lyrics as a musical work⁹, while the record label or the recording studio would own the copyright in the sound recording¹⁰. It is also possible for more than one author to jointly own a single specie of copyright where the work is collaboratively produced in circumstances where the contribution of each author is inseparable from the contribution of the other author or authors¹¹.

By implication of the delineation of copyrights in a musical work, two revenue streams can be explored by the authors involved. The artists or creatives may assign or license the work to a publisher for profit, while the record label or recording studio may distribute copies of the recording or authorise its public performance, also for profit. These revenue streams are made possible by virtue of the exclusive rights of the author.

THE EXCLUSIVE RIGHTS OF THE AUTHOR

The concept of exclusivity is at the core of the author's bundle of rights. Exclusivity allows the author to exercise particular rights reserved by the Copyrights Act for the author's sole benefit. However, the author may choose to license the work, thereby permitting a licensee to exercise some of the author's exclusive rights within the precincts

⁴ Chapter 68, Laws of the Federation of Nigeria, 2004

⁵ Section 51 of the Copyrights Act

⁶ A sound recording is defined by Section 51 of the Copyrights Act as the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a soundtrack associated with a cinematograph film

⁷ Defined by Section 39(1) of the Copyrights Act as the creator of the work

⁸ Section 1(a) of the Copyrights Act

⁹ Section 1(b) of the Copyrights Act

¹⁰ Section 1(e) of the Copyrights Act

¹¹ Section 39(1) of the Copyrights Act

of the licence. Alternatively, the author may transfer the proprietary interest in the musical work by assignment, which would effectively terminate the author's exclusive rights in favour of the assignee of the copyright. This system of licensing and assignment is integral to any monetization strategy, and the Copyrights Act facilitates a spectrum of commercial arrangements by according statutory recognition to the author's exclusive rights.

The Exclusive Rights of the Author of a Musical Work

Section 6(1)(a) of the Copyrights Act recognises the exclusive right of the author to; reproduce the musical work; publish the musical work; perform the musical work in public; produce, reproduce, perform or publish any translation of the musical work; distribute copies of the musical work by way of rental, lease, hire, loan or similar arrangement; broadcast or communicate the musical work to the public by a loudspeaker or any other similar device; and make any adaptation of the musical work.

As the first owner of the copyright in a musical work, the music artist or author is in a position to determine how the musical work would be initially commercialized. Thus, the author may for instance assign all rights in the work to a commercial music purveyor, or the author may choose to only grant limited licences, thereby retaining control over the musical work. However, where the author grants a mechanical license to a record company, the copyright in the resulting sound recording would belong to the record company and the author may or may not have limited control over the resulting sound recording depending on the terms of the recording contract.

To retain full control of the musical work, the artist would, in addition to authoring the musical work, also record the same. The artist may then negotiate a distribution deal with an established record label who would take on the responsibility of marketing and promoting the work in return for a share of whatever profit is derived from the work.

The Exclusive Rights of the Author of a Sound Recording

The author of a sound recording enjoys the exclusive rights stipulated by Section 7(1)(a-b) of the Copyrights Act, that is; the right to control in Nigeria the direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognisably derived from the original; and the right to control the distribution to the public, for commercial purposes, of copies of the work by way of rental, lease, hire, loan or similar arrangement.

The record company derives its authority to make a mechanical recording of the musical work either directly from the artist or from the publisher authorised by the artist. The initial or first recording of the musical work is known as the Master Recording¹², and it is from this first recording that all other copies trace their origin. That said, the Master Recording only retains a symbolic value after the first copy of the recording is made, as all other copies would be made from copies of the recording already in circulation.

Usually, the license agreement between the sound recorder and the publisher or artist would guarantee

¹² For instance, the Master Copy can be transferred to symbolize a future assignment of the copyright in the sound recording

the artist or publisher a percentage of the profit made from the sound recording. However, the artist would lose control over future distribution the recording, and for this reason, it is advisable for the artist to not only agree a lucrative deal, but to also agree an option to purchase the Master Recording in future at a fairly negotiated price.

The Music Publishing Contract

The exclusive rights enjoyed by the author of a musical work and the author of the resulting sound recording cohesively form the foundation for commercialization of the musical work. This is because the concept of exclusivity forbids the use of a musical work without the permission of the author first being sought and obtained. This permission or authorisation may take the form of an assignment or a licence whether exclusive or non-exclusive, limited or unlimited. Music publishing contracts are one of such licences.

Music publishing contracts regulate the relationship between the authors or creatives and the music publisher. These contracts deal with the copyrights in the lyrics of the musical work and the melody accompanying same which together constitutes the musical composition. The publishing contract allows the publisher to exploit the musical work, by for example, sublicensing cover versions, granting mechanical licenses to record companies, or granting synchronization licenses (or sync licenses) for use of the musical work with visual content such as movies or video games. In so doing, the publisher derives revenue in the form of license fees, and the author of the musical work receives an agreed percentage of the revenue generated.

Many times, the publisher would engage the services of a copyrights collecting society to effectively monetize all public performance of the musical work, however where there is no music publishing contract in place, the author may deal with the copyrights collecting society directly. Copyrights collecting societies undertake a form of collective administration of copyrights licensed or assigned to them by their members (authors and publishers). They do this by negotiating licenses with persons interested in publicly performing the work such as radio or TV stations, restaurants, or webcasters and they collect and distribute royalties to the owners of the copyright.

It is generally better for the author to grant an exclusive license to a copyrights collecting society as opposed to assigning the copyrights in the musical work. By only granting the copyrights collecting society an exclusive licence, the author retains a fair degree of control over distribution and use of the musical work. However, where the copyright is assigned to the collecting society, the collecting society becomes the copyright owner and is thereby entitled to exercise all the exclusive rights of the author including the right to sue for copyright infringement. Take for instance, the case of **Adeokin Records & Alhaji Saka Alagbada Vs. Musical Copyright Society of Nigeria (Ltd/GTE) (MCSN)**¹³ which was a suit for infringement of the copyright in the music title “Ojumo Re” performed by the Nigerian artist, Alhaji Fatai Olowonyo. MCSN sued by virtue of a deed of assignment executed in its favour by the artist. The appellants challenged the jurisdiction of the court on the allegation that MCSN was an unlicensed collecting society and therefore had no *locus standi* (Legal

¹³ Supreme Court Civil Appeal No. 336/2008 (unreported)

Standing)¹⁴ to maintain the action. The defence of MCSN was apposite; the society did not sue as a collecting society but as the owner of the copyright by assignment.

LITIGATING COPYRIGHT INFRINGEMENT

The breach of the exclusive rights of the author of a musical work or sound recording is forbidden by the Copyright Act and may therefore form the basis of a cause of action for copyrights infringement. The incidences of infringement are listed in Section 15 of the Copyrights Act, and they are:

- I. Unauthorised use and/or commercial distribution of a protected musical work;
- II. Importation of a copy or copies of a musical work which if made in Nigeria would constitute infringement;
- III. Exhibition in public of any article of infringement, such as pirated copies of sound recordings;
- IV. Making or being in possession of plates, master tapes, machines, equipment or contrivances used for the purpose of making infringing copies of a musical work;
- V. Permitting a place of public entertainment or of business to be used for a performance of the musical work, where such performance would constitute an infringement; and
- VI. Performing or causing to be performed, for the purpose of trade or business or as a supporting facility to a trade or

business, any protected musical work¹⁵.

Once one or more incidences of copyright infringement has been identified then it's time to consider litigating a case of copyright infringement. But there are limitations to consider before embarking on this journey.

Limitations to Consider

The Federal High Court has exclusive jurisdiction to adjudicate matters of copyright infringement, and any such infringement is only actionable at the instance of the owner, assignee, or an exclusive licensee of the musical work¹⁶. Thus, any person purporting to litigate a case of copyright infringement in any other capacity (such as a non-exclusive licensee) would lack the *locus standi* to maintain the action, and without *locus standi*, the court would lack the requisite jurisdiction to adjudicate the suit.

In addition, where an action for infringement brought by the copyright owner or exclusive licensee relates to an infringement in respect of which **they have concurrent rights of action**, the copyright owner or the exclusive licensee may not, without the leave of court, proceed with the action unless the other is either joined as a plaintiff or added as a defendant¹⁷.

A further limitation is placed on suits by persons carrying on the business of negotiating and granting of licenses; or collecting and distributing royalties in respect of copyright works, or representing more than fifty owners of copyright in any category of works protected by the Copyrights Act. Such persons are prohibited from suing for copyright infringement unless they are approved to operate as a

¹⁴ The right or capacity to bring an action or to appear in a court.

¹⁵ Section 15 of the Copyrights Act

¹⁶ Section 16 of the Copyrights Act

¹⁷ Section 16(2) of the Copyrights Act

collecting society or have been exempted by the Nigerian Copyrights Commission¹⁸. This was the gist of the ill-fated preliminary objection in the case of **Adeokin Records & Alhaji Saka Alagbada Vs. Musical Copyright Society of Nigeria (Ltd/GTE)** (*supra*).

Remedies For Copyright Infringement

Just like in any other civil suit, in a suit for copyright infringement, the claimant may seek declaratory reliefs, perpetual injunctions, and/or general damages. However, it should be noted that declaratory reliefs simply determine the rights of the parties without more, hence the need to couple a prayer for declaratory reliefs with a prayer for injunction to restrain further infringement, and damages to compensate for past infringement.

Furthermore, where it is proved or admitted that an infringement was committed but at the time of the infringement the defendant was not aware and had no reasonable grounds

for suspecting that the work was protected under the Copyrights Act, only an account of profits would be ordered against the defendant¹⁹.

CONCLUSION

The Nigerian music industry is fast growing and this rate of growth calls for a paradigm shift in the way music is commercialized in Nigeria. Thus, there is need to move away from informal transaction structures that inadequately define the rights and obligations of the parties to a music deal, in favour of modern transaction structures, which although admittedly complex, are a better aid to the effective monetization of music as a creative form expression. In the same vein, there is need to curtail infringing practices through competent litigation to ensure that only authors or persons duly authorised by them, profit from exploitation of a copyright protected musical work.

At Templars, we offer practical legal services to help our clients effectively navigate Nigeria's unique music marketplace.

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¹⁸ Section 17 of the Copyrights Act

¹⁹ Section 16(3) of the Copyrights Act