
CHAPTER SIXTEEN

THE MUSIC INDUSTRY THROUGH THE LAWS: THE NEED FOR APPROPRIATE REGULATION

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Abstract

Having an effective legal and institutional framework for the regulation of the entertainment industry especially the music industry has been a burning issue for some time now. The music industry has long been attended with piracy, monopoly and even godfatherism. Musically talented individuals are now apprehensive of getting into the industry professionally and when they do, they are often denied the benefits accruing to them as a consequence of their musical creations and compositions. This attendant disorganization, insecurity of musical composition and financial uncertainty inspire the need for a proper, more effective, robust and appropriate regulatory framework for the music industry. The purpose of this research is to assess and examine the extent to which the extant laws regulate and regiment the operations in the music industry with particular reference to Nigeria. The paper also sought to examine the effectiveness of the extant legal framework in the regulation of the activities of the music industry and whether there is a need for review. The research found that the legal and institutional framework saddled with the regulation of the music industry is inadequate and made recommendations like the need to create new institutions and prescribe enforcement procedures to sanction defaulters of existing laws. The ultimate aim is the better and more effective regulation of the music industry.

Keywords: Music industry, Nigeria, Intellectual property right and Legal, Regulations

Introduction

The music industry encapsulates record labels, music publishers, merchandisers, the live event sector and of course performers and artists. All these sectors require regulation in order to better the lives and of a lot the players and actors. Over the years, what has been obtainable in the music industry has been a feudal system. It is a system where the players apply a "survival of the fittest mentality" in an attempt to keep afloat. It is time for the music industry to hit the reset button. This is so because there is often conflict and disconnect between law and innovation, and in the music industry, this conflict has created the perfect storm. The innovators who had the vision to know how future generations would want to listen to and share music and did not intentionally set out to rip people off. A number of legal issues often occur during the execution of deals in the music industry which require proper and effective regulation through law. These issues include recording contracts, copyright issues, royalties, compulsory cover licensing, music publishing agreements and more. It is therefore imperative that law is made to effectively regulate the business of creating, selling, performing and listening to music. This will invariably positively impact the people who write music and the distributors who purchase the rights to perform and sell the music. It will also impact the performers who must have a legal right.

Music Law and Music Industry

Nigeria is unrivalled in Africa in terms of cultural output;⁷ music being identified as it's best of mechanism to accomplish such profound cultural expression and relevance. Music in the Nigerian society is so dynamic and vast that it is known worldwide, from the days of Juju music to Fuji music to highlife and Afro beat, the impact of music has shown to extend beyond cultural expression and appreciation to provide economic benefits, societal change and national development.⁸

The consumption of art and expression in the music scene has metamorphosed over the last decade. Globally and nationwide, music sales and distribution has moved from physical retail stores to online outlets, providing live streaming options, digital sales, amongst others.⁹ This came with an increase in economy arising from this market. A major chunk of the Nigerian figure in the music industry comes from digital consumption, an area of the market that significantly boosted the industry in Nigeria and paved the way for more local artistes to operate. Digital music consumption and revenue overtook physical music revenue in Nigeria as far back as 2013, and its growth forecast remains healthy and steady.¹⁰

The supply chain has undergone a major shift, globally as well as in Nigeria. Prior to the digital era, channels to the market were typically physical retailers, analogue radio, public performance, films and TV.¹¹ The delivery channels have now expanded to include digital downloads, on-demand streaming and digital radio.¹² The Nigerian music industry, though dynamic has experienced major shortcomings as very little has been done by way of regulations to standardize the industry and create modern rules of engagement.¹³

When popular Nigerian-UK based Singer and Songwriter, Asa while speaking to Reuters expressed the need for government intervention in the industry by way of regulation, the singer also made a valid point while making this recommendation.¹⁴ She stated, "Once the government understands that they can make money, they can generate revenues from this, I think they will help to protect (the industry)".

Successive Governments have failed to understand the critical role that the protection and enhancement of Intellectual Property play in the achievement of the industrial and commercial development of a country,¹⁵ especially as regards the music industry. Recent statistics had pegged the revenue from recorded music in Nigeria to have been projected to hit \$50 million (N18 billion) by 2020, a 34 per cent increase from the \$33 million revenue in 2015; N11.8 billion using the current exchange rate of 360.¹⁶

Like most industries, proper regulation of the music industry and creation of an effective legal and institutional framework will do great good to ensuring that the gold present in such industry is greatly explored, mined and harnessed. The last two decades have seen the Nigerian music scene evolve exponentially, giving rise to a number of salient issues. Though, still in its formative years, I am of the firm belief that the advantages present in the

industry are enough to stare the minds of the government to greatly invest in the industry.

a. The Concept of Music law

The concept of Music law is not relatively new. Although as a consequence of limited academic exposition, it imports is not properly construed nor its context sufficiently distinguished. Music law is often used interchangeably with entertainment law.¹⁷ To better understand the difference between both laws, It is noteworthy to point out that the former is only a subset of the latter. The entertainment law encompasses various sectors such as the movie industry, comedy world and very loosely the fashion industry.¹⁸

b. Definition of Music law

Music law is essentially a subset of entertainment law that guides specific issues in the music industry. Such issues being but not limited to music publishing, music licensing, copyright ownership, contracts amongst others. Indeed, music law covers a range of traditional legal subjects including intellectual property law (copyright law, trademarks, image publicity rights, and design rights), competition law, bankruptcy law, contract law, defamation and, for the live events industry, immigration law, health and safety law, and licensing.¹⁹

Music law is a highly significant aspect of law because it guides the affairs of the stakeholders in the industry and it regulates their conducts accordingly.²⁰

c. Definition of Music Industry

The music industry consists of the companies and independent artists that earn money by creating new songs and pieces and organising live concerts and shows, audio and video recordings, compositions and sheet music, and the organizations and associations that aid and represent music creators. As succinctly defined by Wikipedia.²¹ The industry is all-encompassing, allowing independent artists, companies and business, professionals and the likes to contribute their quota in making it a viable business.

Key Stakeholders and Industry Players

- a. Artists: Composer, Singer, Songwriter.
- b. Record Labels and Publishing Houses: Managers, Producers, Publishers, Retail and Online Music stores
- c. Professionals: Talent Managers, Agents, Entertainment Lawyers, Journalists
- d. Collecting Societies
- e. Government
- f. General Public

All of these individuals and bodies are key persons who serve as determinants and recipients of any and all regulatory framework of the industry. Policies should be made with them in mind, seeking to create a balance between economic rights and benefits of the music and the moral rights of the artists.

Legal and Institutional Frameworks

As a spectrum, various laws are circumscribed to address some issues in the Nigerian music industry. Though not specifically created to serve the music industry alone, these laws alongside created institutions help to address some very salient issues in the industry.

Some of the laws that very often guide and guard the industry are governing IP rights and protection in Nigeria.²² They include very loosely,

- a. Copyright Act (as amended), Cap. C28, Laws of the Federation of Nigeria 2004
- b. Patents and Designs Act, Cap. P2, Laws of the Federation of Nigeria 2004
- c. Trade Marks Act, Cap. T13, Laws of the Federation of Nigeria 2004
- d. Merchandise Marks Act, Cap. M10, Laws of the Federation of Nigeria 2004

Additionally, because the music industry is classified as a business which involves a great deal of transaction, contracts and agreement, the common laws surrounding business law also applies. Such laws include but not limited to the governing laws of contract, tax, commerce, labour and even torts.

There are also certain international IP regimes in the form of treaties that have been ratified by Nigeria such as

- i. the Berne Convention (Protection of Literary and Artistic Works - ratified in September 1963)
- ii. the Rome Convention (Performers, Producers of Phonograms and Broadcasting Organisations – ratified in October 1993);²

³

Additionally, we have a number of institutions created to help improve on the music industry. It should be noted that there is currently no special body with the mandate to generally oversee the various IP regimes in the music industry, hence certain industry-specific institutions and regulations have over the years been established to govern such. They are:

- a. Nigerian Copyright Commission
 - b. Nigerian Broadcasting Commission.
 - c. Collection Management Societies (Collecting Societies such as MCSN and COSON)²⁴
- a. The Nigerian Copyright Commission (“NCC”) – established under the Copyright Act to regulate creative activities in artistic and literary works. The Commission helps safeguard the intellectual property of musicians and their producers and ensures that credit is given to the right owners.
 - b. The Nigerian Broadcasting Commission (“NBC”) – established under the National Broadcasting Commission Act (Cap. NII, LFN 2004) and vested with the responsibilities of regulating and controlling broadcasting rights, licenses and assignments in Nigeria;
 - c. Various Collection Management Societies- Most notably the Musical Copyright Society of Nigeria (MCSN) and Copyright Society of Nigeria (COSON). They help to collect royalties for registered member artists.²⁵

Major Challenges of the Industry

As earlier stated, the music industry is dynamic. However, with such dynamic nature and exponential growth and trends in the industry, various challenges tend to exist and arise which seek to cripple the system. The major challenges facing the music industry is basically identified as

- a. Copyright Infringement: Piracy.
- b. Contracts: Exploitative contracts and Breach

Despite the growing contribution of the music industry to Nigeria's economy as a vibrant subset of the entertainment industry, it is still much plagued with the issue of piracy, unauthorized sampling, and prevalence of exploitative contracts, amongst others. This is more so in this digital era. With the growing trend of live streaming, online downloads and file sharing, the artist is placed in a critical position where he gets little or no economic benefit for his work.²⁶

a. Copyright Infringement: Piracy

Historically, copyrights law is one of the laws with the primary function under the law to protect from annexation the fruits of a person's "work". This protection is of immense importance generally to actors, playwrights, performers and other artists; particularly it is important to musicians and composers of music...² In a country such as Nigeria, the importance of copyright law regulating the music industry can hardly be over-emphasized. This is a country where music piracy and piracy of other copyrightable materials still reign supreme, with the attendant losses of income to the authors, music producers and many other copyright owners.

i. Music Copyrights

Every original music composition/production must be copyrightable. Copy right is a form of legal protection given to many kinds of created works such as musical compositions or songs, lyrics, records (CDs, LPs, singles, 45s, cassettes, DAT, etc.) poems, books, films, TV shows, computer software and even commercials.² For a work to be protected under copyright, it must be:

1. "original" which means that it was not copied from any other source;
2. "fixed in a tangible medium of expression" which means that it exists in some reasonably permanent or stable form so that a person can perceive it and reproduce it; and
3. have a minimum degree of creativity.²

Copyright protects original creative works that are fixed in a tangible form. The "fixed" requirement means that there is no protection for a song that is only in your head. A song may be "fixed" by writing it down, recording it (even on a handheld recorder), or saving it to a hard drive on a computer. Playing a song does not meet the "fixed" requirement. But, if you record the live performance, you have now "fixed" the song. Once an original work is fixed in a tangible medium, the creator has copyright protection automatically. Though registering the work with the Copyright Office may be desirable, it is not required to obtain copyright protection.

Regulation of Copyright in Nigeria is provided for by the Copyright Act.³⁰ Following from the above, some legal rights accrue to a copyright owner exclusively:

- a. **The Right to Reproduce the Work:** The rights to make copies of the work, such as the right to manufacture compact discs containing copyrighted sound recordings.
- b. **The Right to Publish and Distribute Copies of the Work:** The right to distribute and sell copies of the work to the public.
- c. **The Right to Perform Works Publicly:** Copyright owners of songs (but not owners of sound recording copyrights) control the rights to have their song performed publicly. Performance of a song generally means playing it in a nightclub or live venue, on the radio, on television, in commercial establishments, elevators or anywhere else where music is publicly heard.
- d. **The Right to Make Derivative Works:** A derivative work is a work that is based on another work such as a remix of a previous song or a parody lyric set to a well-known song (a classic example being Weird Al Yankovic's song "Eat it" which combines Michael Jackson's copyrighted original work "Beat it" with a parody lyric "Eat it").

Springing from this right of copyright owners, or rather the lack of it is the reality of piracy. Copyright infringement (colloquially referred to as piracy) is the use of works protected by copyright law without permission for a usage where such permission is required, thereby infringing certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works. This is by far the biggest issue plaguing the music industry. Its impact on the revenue and economic benefits accruable to the artists is mind-blowing. Taking away a major chunk of the amounts, these attendant incidences of piracy in the music industry is alarming and acts as an obstacle to budding talents.

Also, Trademarks are another form of protection that is vital for artists and record labels. A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.³¹ It could be a word, letter, label, number, colour, signature, device, or any combination of such to identify and distinguish individuals and brands. The Trade Marks Act regulates and protects a brand of identity. Trademark registration protects the income that record labels and artists stand to gain from branding and merchandising, usage and ambassadorial deals. The artiste's stage name can be trademarked across giving exclusive right to use the trademark as authorized.

Issues that usually arise in this area include the conflict as to who owns a trademark: The artist or the record label. Determining this will also decide who gets paid what amount. A great determinant of such is the nature of the document signed. There have been many instances where such conflicts arise, usually with the artist suffering a great deal because of exploitative contracts which sign off their fair usage of trademarks, brand name etc.

ii. Contracts: Exploitative Contracts, Breach and Monopoly

Contracts are the basic entities that establish a relationship between the artists and the record

label, inclusive of other related persons. Because of the multiple relationships needed to be established and the dynamics of these contracts, a number of contracts need to be created.³² These recurrence in the industry produces very key contracts which are music-specific. Notable amongst which are:

iii. Music-specific Contracts

a. Record Deal

An artist assigns and transfers ownership, whether partial or full in their sound recording copyrights to a record label, usually in return for an advance and subsequent royalty payments. The record label often agrees to market, promote, and license the recordings to music users such as streaming services and consumers.

b. Publishing Deal

An artist assigns and transfers full ownership, or partial ownership, in their compositions to a music publisher usually in return for an advance and subsequent royalty payments.³³

c. Distribution Deal

An artist gives a company the right to distribute their copyrighted sound recordings for a certain period of time. The company usually collects a fee or takes a percentage of the royalties that the song earns and the artist retains ownership in their recordings.

d. Administration Deal

A business entity agrees to handle the administrative work needed to license and/or collect royalties for one or a set of copyrighted works for a specified amount of time. The Licensor retains ownership in their copyrights. This is usually seen in the agreement signed with Collections Management Societies.

e. Producer Deal

The producer agreement usually occurs between a producer and artist, though sometimes it can be formed between a record label and a producer. The producer often negotiates fraction of the label's net receipts for a given sound recording.

f. Co-Writer Agreement

Often, songwriters compose songs in collaboration with other writers.³⁴ In the absence of a formal written agreement, the law assumes 50/50 ownership in any song known to be co-written.

g. Performance License

An agreement usually between a performing rights organization (PRO) and a music user in the form of a blanket license, allowing the licensee to publicly perform a composition in exchange for a payment.

h. Booking or Performance Deal

This is the agreement entered into by a concert promoter or venue and an artist or the artist's agent. The artist agent typically has power of attorney, meaning that they can sign the deal that binds the artist to play at the venue at the specified date and time.

i. Management or Agent Agreement

An artist signs a contract with a manager or an agent to help them with their business affairs. The managers and agents usually take a percentage (anywhere between 5%-20%) of the musician's revenue earned from record sales, concerts, etc.

iv. Important Clauses in Music Contracts³⁵

- a. Term and Duration which states the time for which the contract will be operative
- b. Exclusivity which explains that the artist cannot give similar obligations and rights to another entity
- c. The territory which explains the area to which the contract will be applicable
- d. Grant of rights states uniquely the specific rights accruable to distinct parties
- e. Termination Rights explains conditions where the contract can be terminated
- f. Advance and Royalty rates state the advances and royalty rates to be given to the artists.³⁶

This list is not exhaustive,³⁷ it is an overview of a few of the more common components in music contracts. Almost any contract drafted by an attorney will include many more ancillary provisions which can be equally important depending on the situation.

In all these areas, it is fairly easy to take advantage of artists especially if such artist is relatively new in the music scene, has little legal knowledge and just looking to land a major deal. They most often sign off a great percentage of their rights and the benefits accruable to that. We see this very often as young artists over time begin to cry out against exploitative contracts. In some cases, they usually abandon the record label which would amount to a breach of contract and make them liable. All these contribute to stiffen artists and reduce creative compositions.

v. Royalties Collection

Another issue observed in the music scene is the recurrent conflict between collecting societies. In Nigeria, two societies exist with the aim to help collect distribution benefits for their registered artists. They are the Musical Copyright Society of Nigeria (MCSN) and Copyright Society of Nigeria (COSON). They help to collect royalties for registered member artists.³⁸ The music scene has often suffered from their recurrent conflict as to who is the sole and authorized body to collect royalties for artists. While this exists in Nigeria, in other countries multiple collecting societies are allowed to operate.

Limitations of the Legal Framework

On the horizon, of the contemporary music industry is a new generation of Internet record labels, distribution of digital music from the musicians directly to the consumers, and an increase in private recording companies and media houses. Digital music is electronic bits of information distributed through Internet networks, telephone lines, cable systems, and satellite transmission.³⁹ Unfortunately, the various relevant bodies are not up to date with modern technology to standardize the industry. The legal framework in Nigeria is very limited in the sense that it doesn't encompass and appreciate international standards and follow global trends. A great majority of the laws are outdated, dating as far back as the last century. The usage of such has not been construed to fit and improve into the system of this day.

Very little has been done to channel new legislations to address the exponentially growing digital music trend. Presently there are still many areas that have not been tapped especially

in areas like music contracts, merchandising in the music business and industry, technology rights and the law and the media; Ownership, Control and Regulation, etc.

The current near-paralytic process of the Nigerian Copyright Commission is as a result of its outdated Copyright Act.⁴⁰ However there exists the proposed amendment of the Copyright Act sponsored by the Nigerian Copyright Commission (NCC) termed the Copyright Bill 2015 which looks promising with Part VII containing provisions relating to online content. This research is of the stern belief that adopting this amendment will help curb the issue of piracy as regards digital trend.

Conclusion

The import of this research has shown that the lack of proper regulation of the music industry poses a real challenge for some of the nation's budding talents. The music scene holds a lot of potentials. There is need for Nigeria to tap into these potentials and to do so; all that is needed is to create a conducive environment to unleash these creative energies in the provision of the works of entertainment. Copyright infringement must be adequately identified and offenders must be succinctly and decisively penalized. This will serve as an effective deterrent system to help curb the menace. Additionally, an amendment of extant laws which have been viewed to be significantly inadequate will also go a long way to improve the industry and help budding talents to thrive.⁴⁵ Having identified the need to address the issues in the industry, as well as the need to review the extant laws, it goes without saying that there is an urgent need for legal and regulatory frameworks for this industry to thrive better. In achieving this, all key stakeholders and industry personnel must work closely and efficiently to improve the industry.

Recommendations

Following an analytical look at the Nigerian Copyright Act and in order to make the provisions of the Act more beneficial to the objects of the law, this article recommends an amendment of the Copyright Act.⁴¹ Notably, the primary concern of Copywrite infringement, is the loss of revenue from selling music in the music shops, digital avenues and other outlets. The government has the solemn task to create an enabling environment for artists to thrive better in the industry. Acknowledging this fact, we call on Government to further amend the Act in the following terms:

1. The penalties provided for infringement of copyright under the Act should be stiffer. Anyone that infringes copyright is like a robber and should be treated with an increased level of punishment. They should be made to pay a very heavy fine upon conviction.⁴² Additionally, a corporate body that infringes copyright should have its operating documents suspended for a specific number of years. The copyright act should be carefully reviewed to suit international standards and opt into global trends.
2. Consultation should be made with industry players and stakeholders to ensure that vigorous machinery for the enforcement of the provisions of the Act is set into motion. As direct beneficiaries, the establishment of efficient enforcement and deterrent system for the protection of their rights will help a great deal. Such enforcement system will

involve granting relevant law enforcement agencies, like the Nigerian Police Force and the Nigeria Customs Service necessary powers to carry out their policing and prosecution functions.

3. Nigerian recordation system should be made a compulsory platform. Called the Notification Scheme,⁴³ the recordation system is a voluntary registration scheme that enables authors and artists to give notice of the existence of their work in which copyright subsists. Unlike the recordation system in the United States, failure by a copyright owner to notify the Nigerian Copyright Commission through the notification scheme on the existence of a work does not affect the right of a copyright owner to commence an action in respect of an infringement suit requiring enforcement. The Notification scheme is the mechanism through which records of authors and their works are received and through which the databank of authors and their works is maintained.
4. More so, there should be the establishment of a new National Body of Nigerian Artists or alternatively the empowerment of the existing one. Additionally, there should be an extension of their goals of which is to encourage and advocate for better contract deals between the artists and the record labels. On a daily basis, you continue to get artistes crying out against exploitative contracts and agreements hurriedly signed. These associations should play a leading role in fighting against such.
5. It is saddening to identify that not all existing and important IP related treaties have been ratified in accordance with the provisions of section 12(1) of the Constitution of the Federal Republic of Nigeria (1999) (as amended). In 1996, the Internet treaties; that is the WIPO Copyright Treaty and the WIPO Phonogram and Phonographic Treaty were created by the World Intellectual Property Organisation. The treaties were to bring international copyright issues in tandem with the growing use of the internet and technological advancements. And although Nigeria has since signed these treaties she is yet to domesticate them. If Nigeria will play a leading role in the emerging economy, there is the need to strategically domesticate these laws to enable copyright owners and the general public to maximize the opportunities created by the advancements in technology.

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