

A CURSORY REVIEW OF THE KEY PROVISIONS OF THE 2022 COPYRIGHT ACT OF NIGERIA AND THEIR COMPLIANCE WITH INTERNATIONAL TREATIES AND CONVENTIONS*

Abstract

The concept of copyright is sui generis.¹ It is a property right that subsists in certain specified works, and deemed to be movable property. The 2022 Copyright Act of Nigeria signed into law on March 17, 2023; among other reasons seek to facilitate Nigeria's compliance with international copyright treaties and conventions. This work is targeted to review the key provisions of the Act, and measuring its compliance with the Global Instruments. It is also targeted to give efficacy to the protection of the rights of authors to ensure just rewards and recognition for their creative work. This is achievable by enhancing the ability of the Nigerian Copyright Commission (NCC) to effectively administer and enforce the provisions of the Act. Adopting the doctrinal method of research witting, it is our finding that to guarantee legal protection to eligible works of copyright; the Act complied with the provisions of the WIPO Internet Treaties. These treaties with focus on copyright infringement over the internet are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Unlike the repealed Act new legal remedies to assist rights holders with the enforcement of their rights was also introduced. It is our recommendation that these introductions are very significant and capable of mitigating the challenges associated with content piracy and other forms of copyright infringement. This paper therefore makes the assertion that with proper engagement, the expanded powers of the NCC under the Act will go a long way in ensuring that it delivers on its mandate for the sake of right owners.

Keywords: Cursory Review, Key Provisions, Nigeria Copyright Act, 2022, International Treaties & Conventions

1. Stages and Brief History of Copyright Enactments in Nigeria

1.1 Before 1960

The pre-colonial Nigeria had semblance of copyright protection in the sense that performers and storytellers were usually entertained and compensated with gifts and certain refreshment after each performance.² However, in 1911, the English Copyright Act of 1911 was introduced and extended to Nigeria by Order No. 12 of June 1912, which generally granted protection of work for a period of 50 years after the author's death. The Act nevertheless seemed to be a mere introduction to serve the colonial master's interests, where only works first published in England or made by an author resident in the Crown's territory could be accorded protection.

1.2 Copyright Act of 1970

The 1970 Act repealed the 1911 Act. The 1970 Act was passed as a Decree on December 24, 1970, under the then General Gowon led Military Government of Nigeria. The Act had twenty sections and three Schedules, providing for works eligible for copyright, conferment of copyright, nature of copyright in certain works, first ownership, assignment and licensing, infringement and actions for infringement. The First Schedule to the Act provided for the term of copyright and interestingly reduced the term from 50 years after the death of the author as reflected in the repealed Act of 1911 to 25 years for literary, musical and artistic works, as well as a reduction to 25 years in the case of photography

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¹ IM Olueze, *Nigerian Copyright Law* (Maglink International Limited 1998) 2

² Adebambo Adewopo, *Nigerian Copyright System: Principles and Perspectives* (Odade Publishers 2012) 13

after the end of the year in which the work was first published. The 1970 Act, as the first indigenous Act was expected to protect the Nigerian interest and be reflective of the peculiarities of the people as well as their culture and traditions, hence the reduction of the term of copyright to 25 years from 50 years. At that time the local copyright based industry in Nigeria just started growing and required a firm policy structure to support this local industry from a local and international perspectives. The agitations against the deficiency in the 1970 Act by the copyright-based industries in Nigeria, led to the introduction of the 1988 Copyright Act on December 19, 1988. According to Tony Okoroji in his work *Copyright Neighbouring Rights & the New Millionaires* had this to say;

The very weak provisions of Decree No 61 of 1970, the copyright law then in force, was identified as the major obstacle to effective confrontation of the copyright problem. The civil provisions were cumbersome and had many loopholes... The criminal sanctions... were laughable. There was no provision for any imprisonment. There was therefore very little legal deterrent against piracy... It became very clear that the most important and urgent task ... was to get an effective copyright law promulgated in Nigeria.³

1.3 Copyright Act of 1988⁴

At the end of Nigerian Civil War in 1970, oil boom brought about immense wealth to the country. With lots of money to spend and people needing to get back their lives, entertainment offered comfort and further developed into an important industry in Nigeria. Entertainment became highly demanding, the *duo* of indigenous and foreign musicians boost development in the entertainment industry. The technological development enabled the invention of the cassette player and cassettes thereby making copies among other works of copyright cheaper and easier. After series of meetings and lobbying, the 1988 Copyright legislation was passed, under a military administration as a Decree, and it became part of the Nigerian legal system. The 1988 law was amended twice in 1992 and later in 1999. In 2004, the laws were re-codified under the laws of the Federation of Nigeria. The recodification changed the numbering of the sections but the contents were the same. The Act had 41 sections but the combined effect of the recodification and the amendments moved the number of sections to 53, while maintaining same 4 parts and 5 schedules. The 1988 Act established the Nigerian Copyright Council,⁵ and provided remedies and sanctions for copyright infringements. The 1992 amendment altered section 38 of the 1988 Act, which provided for the appointment of Copyright Inspectors with authority to search infringers' premises and make arrests. Section 39 made provisions for

³ Tony Okoroji, *Copyright Neighbouring Rights & the New Millionaires: The Twists and Turns in Nigeria* (Tops Limited, 2008)

⁴ Cap C28 Laws of Federation of Nigeria (LFN) 2004

⁵ Known today as Nigerian Copyright Commission

the establishment of Collecting Societies,⁶ with mandate to grant licences to users of work, collect royalties on behalf of owners, and distribute same in determined proportions.

1.4 Copyright Act of 2022 and Review of the Key Provisions

A lead statement issued by the Office of the Presidency provides as follows:

The principal objectives of the new law, is to protect the rights of authors and ensure just rewards and recognition for their intellectual efforts; provide adequate limitations and exceptions to guarantee access to creative works; facilitate Nigeria's compliance with obligations arising from relevant international treaties and conventions; and enhance the capacity of the Nigerian Copyright Commission for effective regulation, administration, and enforcement⁷

led President Muhammadu Buhari to sign the Copyright Bill, 2022⁸ into law on March 17, 2023. The Act known as the Copyright Act of 2022 repealed the 1988 Copyright Act. We shall from paragraph 2 below review some of the notable provisions of the 2022 Copyright Act.⁹

2. Registration of Works and Formalities

The initiative of registration of works of copyright stems from the fact that Copyright is a property, which the Act, for the purposes of Chapter 4,¹⁰ deemed it to be a movable property, which shall be transferable by way of assignment, testamentary disposition or operation of law.¹¹ The Nigeria Copyright Commission (Commission) shall therefore establish and maintain a register of works¹², and a person may apply in the prescribed manner to the Commission to register a work that is eligible for copyright under the Act.¹³ The Commission may also enter the particulars of the work in the Register, provided that the registration of a work does not confer copyright.¹⁴ The Register shall at first instance, be evidence of the work and the particulars entered in the Register, and any extract from the Register, certified by the Commission shall be admissible in evidence in all proceedings without further proof or production of the original of the matter certified.¹⁵ The Commission shall have power to reproduce and store all or any part of a registered work electronically or in any other format.¹⁶ Eligibility for copyright under the Act shall not require any formality.¹⁷ It commences when the work is created or made.¹⁸ It is

⁶ Now referred to as Collective Management Organisations (CMO) in the 2022 Act

⁷ Captured in section 1 of the Act

⁸ Cited as such in the citation provision, section 109 of the Act

⁹ <https://oal.law/notable-provisions-of-the-copyright-act-2022/> accessed on May 8, 2023

¹⁰ Constitution of the Federal Republic of Nigeria, 1999

¹¹ Section 30 (1) of the Copyright Act

¹² Referred to as 'Register' in the Act, section 87 (1)

¹³ section 87 (2)

¹⁴ section 87 (3)

¹⁵ section 87 (4)

¹⁶ section 87 (5)

¹⁷ Section 4

¹⁸ Section 18

automatic, provided the work passes eligibility test.¹⁹ However, subject to the provisions of sections 3, 5, 6, 7 and 8 of the Act, the eligibility test captured under section 2 of the Act²⁰ states thus:

- (1) Subject to this Act,²¹ the following works shall be eligible for copyright (a) literary works; (b) musical works; (c) artistic works; (d) audiovisual works;²² (e) sound recordings; and (f) broadcasts (2) - Notwithstanding the provision of subsection (1), literary, musical or artistic work shall not be eligible for copyright unless — (a) some²³ effort has been expended on making the work, to give it an original character; and (b) the work has been fixed in any medium²⁴ of expression known²⁵ 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. (3) Any work that meets the requirements set out in subsection (2) shall be eligible for copyright, notwithstanding the quality of the work or the purpose for which the work was created. (4) A work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involved an infringement of copyright in some other works. (5) The copyright in a compilation shall not confer any exclusive right in the pre-existing material or data. (6) An artistic work shall not be eligible for copyright, if at the time the work is made, it is intended by the author to be used as an industrial design, as defined under the pattern designs.²⁶

3. Domicile and Habitual Residence

The drafters of the 2022 Act in its efforts to achieve clarity of thoughts was made manifest in section 5 tagged ‘Copyright by virtue of nationality or habitual residence’.²⁷ The repealed Act in Section 2 (1), used the word ‘domiciled’ in place of ‘habitual residence’. The intention of the Act is to guarantee that where an individual is not a Nigerian citizen, at least, he should be habitually resident in Nigeria to be a partaker of that provision, which is a more precise term, than ‘domiciled’.

4. Duration of Copyright

The Act moved the provisions on terms of copyright (duration) from the first schedule under section 2 of the old Act to section 19 of the new Act. The old Act provided that Copyright in works of government or a body corporate shall be 70 years after the end of

¹⁹ Section 2

²⁰ In pari material with section 1 of the repealed or old Act, save for few variations

²¹ Underlined word mine (Uwm). Section 1 of the old Act has ‘section’ instead

²² Underlined words mine. The Act expunged the words “cinematograph films” in ‘paragraph d’ of the old Act, and replaces same with ‘audiovisual works’

²³ ‘some’ replaces the word ‘sufficient’ used in the old Act, to describe degree of effort

²⁴ ‘medium’ suffices, whereas the qualifying word ‘definite’ in the old Act expunged

²⁵ The word ‘known’ suffices, whereas the prefix ‘now’ in the old Act expunged, to remove any ambiguity

²⁶ In pari material with sub section (3) of the old Act, save for few modifications to give it a precise interpretation

²⁷ The term was used in place of the expunged word ‘domiciled’

the year in which the work was first published. The 2022 Act however varied it by providing that works deriving copyright from section 7 of this Act (works of government, state authorities and international bodies), shall be for 50 years after the end of the year in which the work was first made available to the public, or was created if not made available to the public within that time. This is with intent to place it in tandem with the objectives of the law, outlined in section 1 particularly subsection (a) that is: “to protect the rights of authors and ensure just rewards and recognition for their intellectual efforts”. ‘Consent of the author(s) for work made available to the public’ is emphatic and a recurring decimal in all the subsections,²⁸ which was missing in the repealed Act.

Section 19 state as follows:

(1) the duration of copyright conferred under this Act shall be, in the case of — (a) literary, musical or artistic works other than photographs, 70 years after the end of the year in which the author dies; (b) works deriving copyrights from section 7 of this Act, 50 years after the end of the year in which the work was first made available to the public or 50 years after the work was created, if not made available to the public within that time; (c) audiovisual works and photographs, 50 years after the end of the year in which the work was first made available to the public with the consent of the author or 50 years after the work was created, if not made available to the public within that time; (d) sound recordings, 50 years after the end of the year in which the recording was first made available to the public with the consent of the author or 50 years after the work was created, if not made available to the public within that time; and (e) broadcasts, 50 years after the end of the year in which the broadcast first took place. (2) Copyright in anonymous or pseudonymous literary, musical or artistic works shall subsist until 70 years after the year in which the work was first made available to the public with the consent of the author or 70 years after the work was created, if not made available to the public within that time, provided that when the author becomes known, the duration of copyright shall be in accordance with the provisions of subsection (1). (3) In joint authorship work, reference to the death of the author shall be to the author who dies last.

5. Explicit Protection for Audiovisual Works

‘Audiovisual work’ quite different from the meaning ascribed to the replaced and expunged ‘cinematograph film’²⁹ means “the aggregate of a series of related visual images with or without sound, which is capable of being shown as a moving picture by means of a mechanical, electronic or other device and irrespective of the nature of the material on which the visual images and sounds are carried and includes the sound track, but does not

²⁸ Save for literary, musical or artistic works other than photographs, and works made by or under the direction or control of a government, an agency of government or a prescribed international body

²⁹ Stated to mean in the old Act, as “includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film”

include a broadcast”³⁰ Section 11 of the Act expressly states that the consent of the owner of an audiovisual work must be obtained before it is reproduced, broadcasted or distributed to the public for commercial purposes through sale or other transfer of ownership. It also extends the nature of broadcast to include making an audiovisual work available to the public by wire or wireless means, in such a way that it is accessible to members of the public from a place and at a time independently chosen by them. It further provides for remuneration for the broadcasting of sound recordings and audiovisual work, to owners of such work.³¹ To emphasize on the necessity of consent of author(s) of works made available to the public, the preceding paragraph on duration of copyright is a pointer to that fact.³²

6. Explicit Protection for Performer’s Rights

The sections under performer’s rights have been well developed and expanded to 10 sections.³³ They are sections 63 to 73. Section 63 of the Act provides that Performer’s rights are the exclusive legal rights performers have in relation to their performances:- These includes the performing, recording, broadcasting, reproduction and adaptation of their performance for a period of fifty (50) years, commencing from the end of the year when their first performance(s) took place or was fixed.³⁴ A performer under the Act shall have an exclusive right to control the fixation of his unfixed performance, reproduction of a fixation of his performance³⁵ in any manner or form..., and broadcasting of his unfixed performance to the public. He or she also has exclusive rights to make available to the public, fixed performances by wire or wireless means in a way that members of the public may access them from a place or at a time individually chosen by them.³⁶

Where several performers as a group, that is collective performances, take part in the same performance, consent is given by any person in charge of the group and any payment for the use of the performance, unless otherwise stipulated by the contract of the parties, be made to such person and, subject to any contract between parties be divided equally among all the performers.³⁷

The performer’s right applies to citizens and habitual residents in Nigeria and performances that take place or is first fixed in Nigeria.³⁸ It further extends to

³⁰ Section 108, interpretational section

³¹ Nature of copyright in audiovisual works, section 11 (a) to (j)

³² Duration of copyright on audiovisual works and photographs, as provided in section 19 (1) (c) is 50 years after the end of the year in which the work was first made available to the public with the consent of the author or 50 years after the work was created, if not made available to the public within that time

³³ Unlike the 5 sections in the old Act

³⁴ Section 70

³⁵ Performance according to section 63(2) includes a (a) dramatic performance, which includes dance and mime; (b) musical performance; and (c) reading or recitation of literary act or any similar presentation which is a live performance given by one or more individuals

³⁶ Section 63(1) (f)

³⁷ Section 67

³⁸ Section 64 (1). This great initiative a new introduction targeted to confer performers with opportunity for more rights, is an extension of ‘Copyright by virtue of nationality or habitual residence’ provision of section 5, applicable to the more pronounced ‘Works eligible for copyright’ listed out under section 2.

performances that take place in countries which are parties to treaties or international agreements to which Nigeria is a party. Where a question arises as to whether a country is a party to an obligation in a treaty or other international agreement to which Nigeria is also a party, a certification from the Commission to that effect shall be conclusive proof of that fact.³⁹ The rights conferred to a performer under the act shall not be transmissible during the life of the said performer, but upon his death, the rights shall be transmissible by testamentary disposition or by operation of law.⁴⁰

7. Copyright Offences

The Act expressly prohibits online infringement.⁴¹ It provides that a person who communicates to the public or makes the work available to the public by wire or wireless means in such a way that members of the public are able to access the work from a place and at a time individually chosen by them for commercial purposes without the consent of the owner of the work in which copyright subsists commits an offence under the Act and is liable on conviction to a fine of at least N1,000,000 or imprisonment for a term of at least five years or both.⁴² Moreover, the Commission shall have power to compound any offence under this Act by accepting such sums of money as it deems fit in the circumstance but not exceeding double of the minimum fine to which the offender would have been liable if he had been convicted of the offence.⁴³ However, for conventional criminal liability, section 44 (3) of the Act states that a person is not guilty of an offence under subsections (1) and (2) if, he proves to the satisfaction of the court that he did not know and had no reason to believe that the copy was an infringing copy of any work or that the plate, master tape, machine, equipment or contrivance was for the purpose of making infringing copies of any such work.

8. Prohibition of Online Infringement⁴⁴

This allows owners of copyrighted works to compel Internet Service Providers (ISP) to block user access to infringing content. However, notice to take down⁴⁵ and taking down of infringing content⁴⁶ must have taken place. Section 54 provides for notice to take down and state thus:

(1) The owner of copyright in a work, in respect of which copyright has been infringed, may issue notice of the infringement to the relevant ISP requesting the ISP to take down or disable access to any infringing content or link to the content, hosted on its system or network.

(2) A notification under subsection (1), shall be in writing and may be transmitted electronically, or by any other means, to the service provider or his designated agent and shall include —

³⁹ Section 64

⁴⁰ Section 66 (2)

⁴¹ Section 44

⁴² Section 44 (7); same sentencing applies to any person who without the permission of the Commission (a) imports into Nigeria, or (b) has in his possession, any machine, instrument or other contrivance intended to be used for the production of anti-piracy device, as provided in section 49 (3).

⁴³ Section 44 (9)

⁴⁴ Sections 54 to 62 is quite instructive on this

⁴⁵ Section 54

⁴⁶ Section 55

(a) a physical or electronic signature of a person authorised to act on behalf of the owner of the right allegedly infringed; (b) identification of each work claimed to have been infringed; (c) identification of the infringing material or the subject of infringing activity that is to be removed or access to which is to be disabled, including information sufficient to enable the ISP to locate the material; (d) information sufficient to enable the service provider to contact the complaining party, such as an electronic mail address, telephone number, or a location address at which the complaining party may be contacted; (e) a declaration on oath that the complainant believes that the use of the material in the manner complained of is not authorised by the owner of copyright, his agent or the law; and (f) a statement that the information in the notification is accurate and that the complainant is authorised to act on behalf of the owner of the right allegedly infringed.

Section 55 provides for Take down of infringing content and it states thus:

- (1) The ISP, upon receiving notice of infringement under section 54 of this Act shall promptly notify the subscriber responsible for the content for which the notice relates informing him of the content of the notice, and shall expeditiously take down or disable access to the infringing content or links to such content hosted on its system or network and, thereafter, notify the owner of the copyright accordingly.
- (2) The ISP may resume access to or restore the content or link that has been removed, if he — (a) receives a written counter notice from the subscriber which he has forwarded to the owner of copyright immediately on receipt; and (b) did not receive, within seven days after forwarding the counter notice, a response from the owner of copyright, indicating that no authorisation has been granted for the subscriber to make the content available.
- (3) The ISP shall take effective steps, in accordance with high industry standards, to prevent any content taken down or removed under the provisions of this Act from being reloaded onto its system or network and if despite taking the steps, the removed content is reloaded onto its system or network, on becoming aware of such content being reloaded, shall promptly remove or disable access to the content without further notice to the subscriber.
- (4) A person dissatisfied with a determination or action by the service provider or owner of copyright under this section may refer the matter to the Commission for determination.
- (5) The ISP shall not be liable to any person for any action taken under this section in good faith.
- (6) The ISP who fails to comply with the provisions of subsections (1) and (2), shall be liable for such failure as a breach of statutory duty and for infringement of the

content which is the subject matter of the notice under section 54 to the same extent as the person responsible for placing the content on the system or network.

To further tighten the saboteurs noose, section 56 provides for procedure for suspension of accounts of repeat infringers, while Section 61 gives the Commission power to block access to online content, it states that “Notwithstanding the provisions of any other law, the Commission may, directly or with the assistance of any other person block or disable access to any content, link or website hosted on a system or network, which it reasonably believes to infringe copyright under this Act. The penalty stipulated for this offence is a fine of not less than N1, 000,000.00 or imprisonment for a term of not less than 5 years or a combination of both.

This is not an expanded power so to say, but a sweeping new power donated to NCC (or the Commission) to enable it effectively deliver on its mandate of policing the online space. Fund need not be a challenge, for the Act also establishes a fund for NCC, to be maintained by it, importantly, financed through government statutory allocation, foreign aids and assistance from bilateral and multilateral agencies, and other sources, which will be applied towards the promotion of its objectives.⁴⁷

8.1 Inclusion of Digital Copy

Section 108 of the Act⁴⁸ provides for the inclusion of digital content. It defines copy as any reproduction in any form including a digital copy. This means that online content creators are protected from copyright infringements because online content including pictures, videos, sound recordings, and other productions which are all forms of digital copy cannot be used without obtaining consent from the owner or creators of such works.

9. Introduction of more acts which Constitute Copyright Infringement and Stiffer Penalties

The Act introduced more acts which constitute an infringement of copyright. These include:

- a. The making of a copyrighted work available to the public via wire, wireless or online means without the consent of the owner and for commercial purposes;⁴⁹
- b. Refusing or omitting to pay upon demand, any royalty by virtue of a right of remuneration or agreement;⁵⁰ and
- c. Aiding or procuring another person to commit an act which constitutes an infringement under the Act, the person shall be liable on conviction to the same punishment as prescribed under the Act for the commission of the main offence.⁵¹

⁴⁷ Section 91

⁴⁸ Interpretational section

⁴⁹ Section 9, Nature of copyright in literally and artistic works; S. 10, artistic works; S. 11, audiovisual works; S. 12, sound recordings; S. 13, broadcasts

⁵⁰ Section 15, right to remuneration for broadcasting of sound recordings; s. 16, broadcasting of works incorporated in an audio- visual work; s. 17, Right to share in proceeds of sale.

⁵¹ Section 45

At this point, it is important to note that for the purposes of section 15 on right to remuneration for broadcasting of sound recordings, it is provided in sub (7), that sound recordings made available to the public by wire or wireless means in such a way that it may be accessed by members of the public from a place and at a time independently chosen by them shall be deemed as published for commercial purposes.

Also, the Act now expressly makes it a violation of copyright law to knowingly “circumvent” any technological protection measure that effectively protects access to copyright-protected works.⁵² For example, it is a violation to disable encryption software used to prevent unauthorized access to a movie or music video stored or transmitted in digital form. Even to view another’s software program without more is actionable, as in the case of *MAI System Corporation v. Peak Computer*,⁵³ where a copyright owner of an operating system successfully sued a computer repair company for copyright infringement of their OS software. The defendant was able to view the software program during assisting the plaintiff in diagnosing the problem.

More so, the Act provides for stiffer penalties to deter copyright offences as against the paltry sums in the old Act that only embolden infringers. It now provides for punishment of fines ranging from N10,000⁵⁴ to N5, 000,000 and imprisonment terms ranging from one to five years or a combination of both.⁵⁵ It makes copyright infringement actionable in both civil and criminal proceedings, simultaneously, in respect of the same infringement.⁵⁶ Civil action can result in reliefs such as injunction, forfeiture, destruction, account of profits or award of damages, or both.

However, on limitation to the right of action, section 39⁵⁷ states,

Notwithstanding the provisions of this Act or any other law, no action for an infringement of copyright or any right under the Act shall be commenced or maintained by any person or organisation, who — (a) engages in the business of negotiating and granting of licence; (b) collects and distributes royalties in respect of copyright works; and (c) represents more than 50 owners of copyright in any category of works protected under this Act, unless it is approved under section 88 to operate as a collective management organisation or issued with a certificate of exemption by the NCC.

⁵² Section 50 (1)

⁵³ 911 F. 2d 511 (9th Cir. 1993)

⁵⁴ For each unauthorised copy of a work with copyrights

⁵⁵ Section 44, Criminal liability for copyright offences; S. 45, Aiding and procuring copyright offence; S. 46, Offence by bodies corporate; S. 73, Criminal liability in respect of infringement of performer’s right; S. 76, Criminal liability in respect of infringement of expressions of folklore; S. 86 (3) obstruction of Copyright Officers in the performance of lawful duties, or exercise of any power under section 86; s. 97 (2), contravention of any regulation order or instrument made, or non- any directive or regulation issued by the Commission

⁵⁶ Section 47

⁵⁷ In pari material with section 17 of the repealed Act

10. Collective Management Organisation

There is a quick departure from the use of the term ‘Collecting Society’ to a more formal ‘Collective Management Organisation’, which was defined by the Act for the purpose of section 88⁵⁸ to mean “an organisation representing copyright owners,⁵⁹ which has as its principal objectives the negotiating and granting of licences, collecting and distributing of royalties in respect of copyright works”.⁶⁰

Section 88 states as follows:

- (1) A Collective Management Organisation (in this Act referred to as —CMO) formed by rights owners may apply to the Commission for approval to operate in respect of any one or more categories of works.
- (2) The Commission may approve a CMO, if it is satisfied that — (a) it is incorporated as a company limited by guarantee; (b) its objects are to negotiate, grant copyright licences, collect royalties on behalf of copyright owners and distribute such royalties; (c) it represents a substantial number of owners of copyright in any category of works protected by this Act; and (d) it complies with the terms and conditions prescribed by regulations made by the Commission under this Act.
- (3) The Commission shall not approve another CMO in respect of any category of copyright works, if it is satisfied that an existing approved CMO adequately protects the interests of copyright owners in that categories of works.
- (4) A person or group of persons, however described, shall not perform the duties of a CMO without the approval of the Commission as required under this Act.
- (5) Any person who contravenes the provisions of subsection (4), commits an offence and is liable on conviction in the case of — (a) an individual, to a fine of at least N1, 000,000 or imprisonment for a term of at least five years or both; and (b) a body corporate, to a fine of at least N5, 000,000.
- (6) The Commission shall have the power to — (a) suspend or revoke the approval given under subsection (2); (b) review and approve tariffs as may be determined by a CMO; and (c) make regulations specifying the conditions necessary for the effective management of CMOs and to give effect to the purposes of this section.
- (7) For the purposes of this section — *group of persons* includes a body corporate or entity; and *owners of copyright* includes owners of performer’s rights.
- (8) The Commission may, where it finds it expedient, assist in the establishment of a CMO for any category of copyright works.

⁵⁸ In pari material with section 39 (8) of the old Act, save for the introduction words “an organisation representing copyright owners...”

⁵⁹ A quick departure from “an association of copyright owners...” used in the repealed Act.

⁶⁰ Section 88 (7)

- (9) Notwithstanding the provisions of this Act or any other law, a CMO may issue licences permitting the use of works of owners of copyright who are not members of the CMO, provided that – (a) such works are of the same category as works for which it is approved to issue licences;
- (b) the owners of copyright in such works are not otherwise represented by any other CMO; (c) there is not more than one CMO approved to operate in the particular category of works concerned;
- (d) the owners of copyright in such works have not by written notice to the CMO, opted out of collective management of their rights; and (e) the CMO does not discriminate against such owners in terms of the tariffs for the use of their works and the payment of royalties to such owners.

11. Protection for Folklore/Indigenous Cultural Expressions

The Act also protects expressions of folklore, defined to mean a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means including, (a) folklore, folk poetry, and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; and (d) productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, handicrafts, costumes, and indigenous textiles.⁶¹ Any party who wishes to make commercial use of expressions of folklore would first need to obtain permission from the relevant indigenous community concerned, and/or the NCC. Failure to do so is a breach of statutory duty, and is liable to the Commission in damages, injunctions and any other remedies,⁶² and could result in criminal sanctions being levied against the user.⁶³

12. Provision for Visually Impaired Persons

The act incorporated the Marrakesh treaty to facilitate Access to Published Works for Persons who are blind or visually-Impaired. It introduced a new exception to cater for the production and international transfer of specially adapted books for people with blindness or visual impairments, aligning with the Marrakesh Treaty to enable more virtually impaired Nigerians to access published materials.⁶⁴ It provides as follows:

Notwithstanding the provisions of any other section of this Act, an authorised entity may, without the permission of the owner of copyright in a work, make or procure an accessible format copy of a work or subject matter and supply the copy to beneficiary persons by any means, including

⁶¹ Section 74 (5)

⁶² Section 75

⁶³ Section 76

⁶⁴ Section 26

non-profit lending, or electronic communication by wire or wireless means, on the condition that the —

- (a) authorised entity desiring to undertake any of the activities under this section has lawful access to that work or subject matter or a copy of that work or subject matter;
- (b) work or subject matter is converted to an accessible format copy;
- (c) accessible format copy is supplied to be used exclusively by beneficiary person; and
- (d) activity is undertaken on a non-profit basis.⁶⁵

It went further in subsection (7) for the purposes of section 26, made necessary interpretation of certain words, as follows —

- (b) —*accessible format copy* means a copy of a work in an alternative manner or form which —
 - (i) gives a beneficiary person access to the work, as feasibly and comfortably as a person without visual impairment or other print disability, and
 - (ii) respects the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons ;
- (c) —*authorised entity* means —
 - (i) an entity that is authorised or recognized by the government, or receives financial support from the government, to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, or
 - (ii) a government institution or non-profit organisation that provides education, instructional training, adaptive reading or information access to beneficiary persons as part of its primary activities or institutional obligations ; and
- (d) —*beneficiary person* means a person who, regardless of any other disabilities
 - (i) is blind,
 - (ii) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability, or
 - (iii) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.⁶⁶

⁶⁵ Section 26 (1)

⁶⁶ Section 26 (7)

13. Fair Dealing, Exception to Copyright

The Act in Section 20 (1) provides for an open “fair dealing” exemption⁶⁷ from copyright, similar to the “fair use” clause in United States law that extends the fair dealing exceptions in the repealed Act with a non-inclusive list of permissible purposes. The “four-factor test” from the US “fair use” clause has been adopted to assist Nigerian courts in determining whether a given unauthorized use of a work protected by copyright would qualify as “fair dealing”.⁶⁸ This include the —

(i) purpose and character of its usage; (ii) nature of the work; (iii) amount and substantiality of the portion used in relation to the work as a whole, and (iv) effect of the use upon the potential market or value of the work⁶⁹

Section 74 (1) provides that expressions of folklore are protected against —

(a) reproduction; (b) communication to the public by performance, broadcasting, distribution by cable or other means ; and (c) adaptations, translations and other transformations, when such expressions are made either for commercial purpose or outside their traditional or customary context. Subsection (2) state that the right conferred by subsection (1) shall not include the right to control — (a) the doing of any of the acts by way of fair dealing for private and domestic use, subject to the condition that if, the use is public, it shall be accompanied by an acknowledgment of the title of the work and its source; (b) the utilisation for purposes of education.

14. Compulsory Licence for Public Interest

This is an innovation most probably targeted to checkmate certain excesses of copyright owner and/or, to stabilize the system where necessary, although, it may have its peculiar challenges. Section 35 states as follows:

(1) Notwithstanding the provisions of this Act, the Commission may authorise the use of a work by any person for the purpose of rectifying the abuse of a dominant market position or to promote public interest. (2) An application for a licence under this section shall be made in a manner prescribed, accompanied with evidence of payment of a prescribed fee and good cause shown for the grant of the licence by the Commission. (3) The Commission may authorise the use of a work under subsection (1) after taking into consideration that the — (a) proposed user has made reasonable effort to obtain permission from the owner of copyright on reasonable commercial terms and conditions and that the effort was not successful; (b) scope, medium and duration of the use shall be limited to the purpose for

⁶⁷ (a) private use; (b) parody, satire, pastiche, or caricature; (c) non-commercial research and private study; (d) criticism, review or the reporting of current events, subject to the condition that, if the use is public, it shall, where practicable, be accompanied by an acknowledgment of the title of the work and its author except where the work is incidentally included in a broadcast; (e) the inclusion in an audiovisual work or a broadcast of an artistic work situated in a place where it can be viewed by the public

⁶⁸ Unlike the US “fair use” clause, there are no consumptive uses that are listed as permissible purposes; <https://www.adams.africa/africa-general/nigeria-enacts-new-copyright-act/> accessed on May 9, 2023

⁶⁹ Section 20 (1)

which it was authorised; (c) use shall be non-exclusive and non-assignable; (d) use shall be exclusively for Nigeria's domestic market; and (e) copyright owner receives payment of adequate remuneration, taking into account the economic value of the work authorised to be used. (4) Subject to adequate protection of the interests of the authorised persons, the authorisation may be withdrawn where the circumstances that led to its grant has ceased to exist. (5) The Commission may waive the condition stipulated in subsection (3)(a) in the event of national emergency or other circumstances of extreme urgency and notify the owner of copyright. (6) The Commission may make regulations providing for conditions necessary to give effect to the provisions of this section. (7) A person who is dissatisfied with an authorisation granted by the Commission under this section or any remuneration required to be paid under the authorisation granted by the Commission, may apply to the Court for a review.

15. Author's Moral Rights

Subject to Part II of this Act, the author of a work in which copyright subsists has the right to — (a) claim authorship of his work, in particular that his authorship be indicated in connection with any of the acts referred to in sections 9, 10 and 11 of this Act, except when the work is incidentally or accidentally included in a broadcast when reporting current events; and (b) object and seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work, where such action would be or is prejudicial to his honour or reputation;⁷⁰ and a person has the right to object to a work being falsely attributed to him as the author.⁷¹ Of note, the rights referred to in subsection (1) shall — (a) not be transmissible during the life of the author; and (b) upon the death of the author, be transmissible by testamentary disposition or by operation of law.⁷² Finally, the rights conferred by this section shall subsist for the duration of the copyright in the work.⁷³

16. Potential problematic provisions of the Copyright Act 2022, with few comments

- a. A “contract override” which renders void any contractual term which purports to restrict or prevent the doing of an act permitted under any of the copyright general exceptions.⁷⁴ This provision may pose practical difficulties for licensing and out-of-court settlement agreements in some infringement cases. To give room for elasticity, it is highly recommended that the word ‘void’ should have been replaced with ‘voidable’.
- b. The NCC is granted sweeping new powers under the Act, including the right to authorise the use of a work by any person for the purpose of rectifying the abuse of a

⁷⁰ Section 14 (1)

⁷¹ Section 14 (2)

⁷² Section 14 (3)

⁷³ Section 14 (4)

⁷⁴ Section 20 (3)

dominant market position or to promote the public interest.⁷⁵ However, where judiciously applied, the conditions precedent attached to the grant of such compulsory licence for public interest under section 35 is enough check, including the leave for a dissatisfied owner of work to apply to the court for review,⁷⁶ among others.

- c. A copyright levy under section 89 is introduced which will be payable on all materials used or capable of being used to infringe copyright in a work. This includes any object, equipment, machine, or other device, including electronic or digital systems. The levy is to be paid into a fund that would be administered by the NCC and disbursed to approved collective management organizations or other representatives of copyright owners. Although this provision is likely to weaken the criminal responsibilities of infringers, the parameter to determine the exact amount to be levied and mode of even distribution of the funds to CMO in real practice appears blurred.
- d. The NCC is also empowered under section 97, subject to Ministerial consent, to make regulations under the Act, specifying conditions necessary for the operation of any business involving the production, publication, public exhibition, distribution, sale, hiring, rental, storage, warehousing or any other dealings in works protected by copyright, among other powers. The earlier the regulations is made the swifter the implementation of certain provisions of the Act.

Conclusion

The rationale underlying the protection of Copyright was stated by the U.S. Supreme Court in *Mazer v. Stein*⁷⁷, thus: “the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare”. Content piracy has been a critical challenge since the inception of the digital age, particularly for Nigeria’s music, film, and television production industries. The introduction of the new Act is a significant advancement in this fight against content piracy and other forms of copyright infringement. The act has mitigated these challenges by introducing new legal remedies to assist copyright holders with the enforcement of their rights. The Act also protects expressions of folklore, which include folklore, poetry, folk songs and dances, folk arts, drawings, carvings, sculptures, costumes and other works or imitations thereof. Any party who wishes to make commercial use of expressions of folklore would first need to obtain permission from the relevant indigenous community concerned, and/or the NCC. A failure to do so could expose the user to criminal sanctions, a boost to various indigenous communities. The Act is a good take off and a departure from the conventional method, to align with important international treaties and conventions which Nigeria acceded to, in order to proactively protect the rights of authors and ensure just rewards and recognition for their intellectual efforts; provide adequate limitations and exceptions to guarantee access to creative work; and enhance the capacity of the NCC for effective regulation, administration, and enforcement.

⁷⁵ Section 35 (1)

⁷⁶ Section 35 (7)

⁷⁷ 347 U.S. 201, 219 (1954)

For the records, The WCT and WPPT contains obligations concerning technological measures, rights management information and enforcement which the 2022 Copyright Act represents. The WCT and WPPT were the push by copyright bodies against Intellectual Property (IP) problems presented by the Internet. It is the response of international IP community to the challenges of copyright protection in this digital technology driven environment. Nigeria was among the member countries of WIPO that signed the WCT and the WPPT in 1996 when both instruments were adopted in a Diplomatic Conference held in Geneva. It is a welcome development that the provisions of the Internet treaties have been domesticated by way of 2022 copyright Act of Nigeria. The provisions were deliberately refused to be replicated in this work, to reduce verbosity.