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# Copyright collective rights management in Nigeria

John Onyido, SPA Ajibade & Co., considers some important issues and perspectives of collecting societies and the management of musical works and sound recordings in Nigeria, with specific reference to the recent lawsuit involving COSON and MTNN.

**T**he Copyright Society of Nigeria is the sole collecting society licensed by the Nigerian Copyright Commission (NCC) to manage the rights and the repertory of musical works belonging to its member-artistes. Even though the Copyright Act<sup>2</sup> generally accommodates the registration of more than one collecting society by the regulatory body, it limits such registration to a single body in any given class of rights unless the NCC determines that the rights of the affected artistes are not adequately managed by the existing collecting society. This restriction, introduced by the Act, has resulted in the de facto existence of a collecting society (COSON) with sole (and perhaps absolute) authority to manage musical works and sound recordings to the exclusion of any other entity in Nigeria. Whether this state of affairs is desirable and meets the needs of its members is questionable, and it is equally doubtful whether this outcome was intended by the drafters of the Copyright Act and with full knowledge of the likely consequences.

In a recent lawsuit filed by the Copyright Society of Nigeria (COSON) against MTN Nigeria Communications Ltd., at the Federal High Court Sitting in Lagos, this issue, among others, came up by way of preliminary points of law for the Court's determination prior to trial. Unfortunately, the judge declined to consider them at this early stage, thereby skipping a rare opportunity to have these legal questions resolved with some certainty. Although the parties are currently in settlement talks in the hopes of avoiding a full blown trial, a resolution of these questions one way or the other should clarify the applicable laws at issue and significantly advance the growth and practice of Copyright law in the country.

**Copyright Society of Nigeria (COSON) v. MTN Nigeria Communications Limited (MTNN) [FHC/L/CS/619/2016]:**

In an action filed at the Federal High Court in Lagos on the 9th of May 2016, COSON brought a copyright infringement action against MTNN for unlawful use and reproduction, performance, communication, broadcast, sale, and downloads of certain musical works and sound recordings belonging to a cross-section of its members without proper authorization. The subject copyrighted works were allegedly appropriated by the activities of MTNN without proper compensation to the owners. These unlawful activities were carried out by MTNN in relation to its Connect Stores and Walk-In Centers; through musical concerts, corporate events and festivals organized by MTNN, via the downloading of caller

## Résumé

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<sup>2</sup> Cap. 28 Laws of the Federation of Nigeria 2004.

ring-back tunes, and the unlawful transmission of the affected works through MTNN's Mobile Radio and MTNN's Music Plus platform. COSON is seeking declaratory, injunctive, and monetary reliefs on behalf of its members for alleged copyright infringement occurring between 2011 and 2016. MTNN's major defense to the lawsuit is that it obtained relevant user rights from the artistes directly or through their agents and representatives and paid for such use. Consequently, it should not be made to pay twice to use these rights.

The questions that MTNN raised through its attorneys for the Court's initial determination include:

- 1) the nature of the rights conferred upon COSON as a collecting society by the regulatory body (the NCC), and in the various deeds of assignment issued to it by some of its members;
- 2) whether the appointment of COSON as sole collecting society takes away the rights of the artiste-members to transfer or license their musical works and sound recordings directly;
- 3) whether COSON has the right to collect royalties and other monies on behalf of non-members and finally;
- 4) whether COSON can rightfully institute this action on behalf of its members, without a need to join such members as parties to the lawsuit<sup>3</sup>.

**The fundamental nature of collecting societies:**

Collecting Societies have become a convenient mechanism for the management of the rights of artistes and authors in various jurisdictions. They provide an effective channel that allows for a seamless business arrangement between authors and owners of copyrighted material on the one hand, and the users of these protected works on the other<sup>4</sup>. The challenges occasioned by difficulties of identifying each and every owner of a protected work, each and every user thereof, or of identifying the owner(s) of the various layers of associated rights by potential users, have all conspired to render the creation of a platform/clearing house of these rights an expedient alternative.

Consequently, the two vital justifications for the creation of collecting societies are:

- a) to assist the artistes in obtaining proper remuneration for their creative works and
- b) to facilitate easy access to these works by potential users.

In line with these objectives, both the Nigerian Copyright Act and the Regulations<sup>5</sup> provide for the creation of collecting societies to negotiate and secure the licensing of copyrighted material belonging to its members and then to distribute all royalties and other payments resulting from these licensing arrangements to the owners. Apart from these stated objectives and the authority to withhold all associated management fees and charges for such services, collecting societies have no other lawful objective(s) or even a claim to any proprietary rights of its members<sup>6</sup>.

In other words, the designation of collecting societies as owners/assignees of the rights of its members in Nigeria is simply a convenient way to describe the arrangement between the society and its members, rather than a strict assignment of rights in the classic sense. With this clarification in place, the issues identified above arising from the

lawsuit filed by COSON against MTNN for copyright infringement can now be briefly analyzed.

- i. **The true nature of rights conferred by the transfer of copyrights from members:** The 2007 Regulations explicitly prevents collecting societies from demanding or compelling the transfer of exclusive rights from member artistes under any circumstances<sup>7</sup>, whilst describing these societies as acting as mere 'agents'. On first consideration, it would seem that this restriction would not stop the members from voluntarily giving away exclusive rights to COSON, if they so desire. That this interpretation cannot be accurate, the Regulations goes further to confer on members the right to withdraw from membership of the collecting society and/or to withdraw their respective musical works and sound recordings from COSON's managerial control at any time upon giving proper notice to that effect<sup>8</sup>. Thus the inclusion of a clause in the Articles of Association of COSON which mandates the transfer of exclusive rights by members is at variance with the regulations and raises the further question whether the alleged assignments to COSON were volitional in the first instance.
- ii. **Can the original copyright owners license their rights directly?** Since the transfer of rights to COSON cannot be regarded as traditional assignments *stricto sensu*, and neither can these rights be deemed exclusive, it follows that the artistes retain the right to extend licenses to the users directly or through agents and intermediaries, alongside COSON<sup>9</sup>. Since one of the objectives of creating collecting societies is to ensure that artistes obtain proper remuneration for their creative works, if these artistes are able to secure suitable business arrangements with potential users of these works at a mutually agreed fee, there does not appear to be a conflict with the responsibilities given to COSON. Furthermore, there is no policy objective to be gained by restricting the source of revenue for copyright holders to the limited and sporadic payments from COSON. Allowing the artistes to identify and maximize the financial benefits accruing to them through the licensing of their creative works directly and when they feel it is in their economic interest to do so, is clearly a more viable scenario<sup>10</sup>.
- iii. **Can COSON claim to collect royalties on behalf of non-members?** One of the claims in the action instituted against MTNN is that COSON has the right to collect royalties on behalf of non-members. From a review of the current state of the law, this assertion cannot be correct. Under Regulation 18(a) and (b), collecting societies are barred from giving the impression that they have the right to grant licenses over works which they are not authorized to administer or from collecting and distributing royalties in respect of such works. Indeed, the regulations clearly indicate that a contravention of this provision would constitute an unethical practice, which can attract a sanction by the regulatory body<sup>11</sup>. Although Regulation 12 allows for the establishment of a holding account into which distributable

<sup>3</sup> This last issue although not specifically raised in the preliminary objection arises naturally from the claim as formulated by the Plaintiff.

<sup>4</sup> COPINGER AND SKONE JAMES ON COPYRIGHT (Kevin Garnet, Gillian Davies and Gwilym Harbottle eds.), Thomson Reuters 2011 p. 1791-92.

<sup>5</sup> Copyright (Collective Management Organizations) Regulations 2007.

<sup>6</sup> See section 6(1) of the Copyright Act. The statutory rights belonging to the copyright owners relating to reproduction, public display, public performance and broadcast, the right to make cinematographic films and sound recordings, the right of distribution and to make adaptations and derivative works, remain with the artistes.

<sup>7</sup> Regulation 5(2).

<sup>8</sup> Regulation 7.

<sup>9</sup> Indeed, the artiste-members can be regarded as concurrent rights holders under sections 11(6) and 16(2) of the Act.

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income belonging to non-members may be lodged, it does not confer an affirmative right to sue third parties in order to recover those monies. This interpretation is further supported by the fact that a proposed amendment to the Copyright Act now includes a provision empowering Collecting Societies to issue licenses over works belonging to non-members. If this power was already available to COSON, there would not be a need for this proposed amendment to the law<sup>12</sup>.

- iv. **Can COSON institute an action for copyright infringement without joining the members?** Section 11(3) of the Copyright Act stipulates that: “No assignment of a copyright and no exclusive license to do an act the doing of which is controlled by copyright shall have effect unless it is in writing.” COSON annexed copies of relevant deeds of assignment emanating from some of its members whose copyrighted works were allegedly appropriated by MTNN without proper authorization. However, it actually went further to lump together in the same lawsuit claims on behalf of certain artistes who do not belong to COSON and who have not assigned rights to COSON to manage their copyrighted works. Since COSON purportedly claims to be the recipient of exclusive rights over the affected works, it must produce the associated deeds of assignment in order to establish its standing to sue on their behalf. Having already argued in this short article that COSON merely received non-exclusive rights from its members despite the description of the subject contracts as ‘deeds of assignment’, a third-party user who claims to have received permission from the copyright holder or the agent/intermediaries is not estopped from making valid use of the musical works and sound recordings on payment of the agreed royalties. Apart from, perhaps, an action for breach of contract against the artistes themselves, (which is unlikely to succeed) COSON should not be able to institute an action against the recipients of valid rights from the artistes themselves, their agents, and or intermediaries<sup>13</sup>. Furthermore, the artiste-members being concurrent rights holders along with COSON, the Copyright Act stipulates that in the absence of the leave of court they must be joined in the action either as co-plaintiffs or co-defendants, to validate the action.

## Conclusion

If COSON merely received non-exclusive rights to the copyrighted works constituting the subject matter of the action, it cannot maintain an action against MTNN in connection with contractual relations to which it is not privy. A non-exclusive licensee obtains no proprietary

or beneficial interest in the licensed works and thus has no authority to bring an action for infringement<sup>14</sup>.

It is not readily explainable why the framers of the Act elected to limit the registration of only one collecting society to cater to individual genres of copyrighted works, or more so why the regulatory body (the NCC) is reluctant to license additional collecting societies up till this moment<sup>15</sup>. The accumulation of market power by collecting societies deprives potential users of an opportunity to object to onerous licensing rates by choosing less expensive alternatives. Furthermore, the aggregation of such market power not only enables them to set prohibitively high user fees, but also to discriminate between users or to insist that only certain kinds of performances can be allowed<sup>16</sup>. Since collecting societies are generally regarded as natural monopolies<sup>17</sup> with a tendency towards an abuse of their market power<sup>18</sup>, one effective way of limiting their wide-ranging authority and pervasive market control is to engender healthy competition with the registration of additional collecting societies. This would ensure that the needs of copyright owners are adequately catered to and that they are properly remunerated for their creative works.

In addition to this, the regulatory body needs to be fully awake to its responsibilities of monitoring and supervising the affairs and activities of these societies to ensure compliance; otherwise rampant abuses and arbitrariness are likely to occur. Strict compliance with the regulations and the Act are necessary in order for the Collecting Society to obtain and continue to retain an operating license in Nigeria. In a recent heartwarming development, the equivalent regulatory body in Kenya, the Kenya Copyright Board (KECOBO) has refused to renew the license of the Music Copyright Society of Kenya (MCSK) for non-compliance with reporting and other obligations required by law<sup>19</sup>. And, in another positive and related development, the Attorney General of Nigeria has recently directed the NCC to issue an operating license to The Musical Copyright Society of Nigeria, (MCSN) to operate as a second collecting society for musical works and sound recordings in the country in addition to the Copyright Society of Nigeria (COSON).

<sup>10</sup> In the United States for instance the Performing Rights Societies only manage lesser/smaller performance rights, while the more easily detectable grand rights are generally managed by the artistes themselves who are better suited to negotiate lucrative deals by themselves. See Robert Gorman and Jane C. Ginsburg, COPYRIGHT: CASES AND MATERIALS, 7th ed., Foundation Press, 2006 p. 678.

<sup>11</sup> Possible sanctions include a withdrawal of an operating license by the NCC under Reg. 3(1)(i).

<sup>12</sup> See section 74(10) of the Copyright Bill 2015.

<sup>13</sup> See COPINGER AND SKONE JAMES, supra, at 352. See also Simms v. Marryat (1851) 17 QB 281.

<sup>14</sup> Silvers v. Sony Pictures Enter. Inc., 402 F.3d 881 (9th Cir. 2005). See 17 USC § 501(b). See also John Onyido, Yetunde Okojie and Lekan Ikuomola, Who Is A Proper Plaintiff in an Action for the Enforcement of Copyrights in Nigeria.

<sup>15</sup> Section 39 of the Act gives discretionary powers to the NCC to license additional collecting societies upon making a determination that the existing sole collecting agent is not adequately meeting the needs of its members.

<sup>16</sup> Cornish, Llewelyn & Aplin, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADE MARKS AND ALLIED RIGHTS, 8th ed. Sweet & Maxwell/Thomson Reuters, 2013 para. 10-50, p. 419.

<sup>17</sup> Ariel Katz, The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights.

<sup>18</sup> In the United States, PROs are under a Department of Justice imposed obligation not to seek exclusive management rights from members. See Donald S. Passman, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 9th ed. Simon & Schuster, New York 2015 pp. 245-49.

<sup>19</sup> <https://nlipw.com/music-copyright-society-kenya-license-not-renewed/>

<sup>20</sup> <https://nlipw.com/attorney-general-resolves-ncc-mcsn-controversy/>