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Intellectual Property and Content Distribution[1]

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Abstract

The last three decades witnessed a flurry of activities in the film, television or audio-visual sector. Several disputes have arisen with various parties contending that ingredients constituting their content have been used without their authorisation. Some of these disputes have involved local and foreign persons with the latter being increasingly affected in the online era. Most of these ingredients are protectable under the rubric of law generally known as intellectual property (IP) law. Irrespective of the gaps in Nigeria's IP laws, most content owners may find some solace under the law. Within the context of time and space, this paper highlights how some of the IP regimes in Nigeria relate to film content. It explains how some of the right holders can rely on and use IP in ensuring that their content is not produced, distributed or exploited without their consent. It offers a short x-ray of content distribution and the protection regime of IP rights in Nigeria.

Keywords: Intellectual Property, Film, Content Distribution, Protection, Trademark, Infringement.

1 Introduction

This paper highlights how some of the intellectual property (IP) regimes in Nigeria relate to film content. It explains how some of the right holders can rely on and use IP in ensuring that their content is not produced, distributed or exploited without their consent. The paper offers a short x-ray of content distribution and the protection regime of IP rights in Nigeria. It discusses what IP is, offers some explanation of what content distribution is, highlights the IP that protects content, identifies who the law treats as the owner of requisite content and examines the rights exercisable by content owners.

2 What is IP?

It is possible in law to protect a wide range of content that is embedded in films. Intellectual property (IP) law protects most film content. Intellectual property law comprises of the laws dealing with trademarks, patents, designs, copyright, trade secrets, confidential information, plant and animal variety and traditional knowledge. IP vests the owners of IP rights with a plenitude of privileges that enables them to stop third parties from copying or exploiting their creations, works or inventions or colourable imitations thereof without the permission of the owners. Intellectual property is a category of property that includes intangible creations of the human intellect. The World Intellectual Property Organization (WIPO) defines IP to include creations of

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the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.[2]

IP seeks to encourage creativity/inventiveness and branding with a view to offering a system that guarantees that owners can control the exclusive exploitation of the creations, works or inventions hoping this will offer an opportunity to recoup their investments. IP can play significant roles in maximising the return on investments in films as some films earn more revenue through licensing than box office.[3] IP ensures that film and television content cannot be produced, distributed or exploited without the permission of the owners of the IP rights in the content. The economic importance of the distribution of Intellectual Property (IP) contents cannot be overemphasized, hence content distribution protection is germane to forestall unauthorized usage of contents and sharing of legally protected and copyright materials without the consent of the owners. Such protection also ensures that content owners are not short-changed from reaping the economic benefits of their work, by pirates and infringers.

The advent of the internet has raised a new and unexpected challenge in content distribution as digital technologies allow perfect, inexpensive and unlimited copying and dissemination of content. The intellectual property rights rules need to be adapted to our digital times. The arrival of the new distribution systems is forcing suppliers to undergo an inevitable metamorphosis towards a decentralization and disintermediation in content management systems. Content intermediaries alarmed by the inevitable process of elimination of their role in the transaction process are resorting to very strict copyright protection measures.[4]

Nigeria is not alone in this dilemma as nations have always sought to protect creative rights from infringement and unlawful exploitation; this is evident from the Paris Conference of 1971 to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention)[5], the WTO/GATT Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994, the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

The World Intellectual Property Organization (WIPO), an arm of the United Nations, created to deal with international intellectual property issues, adopted both WCT and WPPT treaties on December 20, 1996; these deal with copyright law. The treaties were created in response to the arrival of the digital age which has made information a key business asset, expanded international commerce and enabled faster and easier copying of copyrighted work. The value of harmonising global copyright law has grown accordingly. The WCT was formed both to harmonize global copyright law and to extend that law into the digital domain. The WCT builds on the Berne Convention which set out some international copyright standards in 1886. Aside the

[2]https://www.wipo.int/about-ip/en/ accessed 20th November 2020.

[3] Jacob Shelton, "Movies That Made More Money On Merchandising Than At The Box Office" https://www.ranker.com/list/movies-that-made-money-merchandising/jacob-shelton mentioned the following movies: Minions, Jurassic World, Ninja Turtles, Harry Porter, Frozen, Cars, Fifty Shades Of Grey.

[4] See Michael D. Smith et al., Understanding Digital Markets: Review and Assessment, in UNDERSTANDING THE DIGITAL ECONOMY 99, 121 (Erik Brynjolfsson & Brian Kahin eds., 2000); George M. Giaglis et al., Disintermediation, Reintermediation, or Cybermediation? The Future of Intermediaries in Electronic Marketplaces.

[5] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 as revised at Paris on July 24, 1971, and amended on September 29, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221, art 20 (hereinafter Berne Convention).

international treaties, there are domestic laws which govern the use and distribution of content, as well as the intellectual property rights thereto.

3 What is Content and Content Distribution?

Content distribution is the art of hosting, marketing, promoting and dissemination of content via multiple formats and platforms to non-traditional audiences online. Content is often data or information expressed through audio-visual works. It is generally agreed that the channels for content distribution can be classified into three: These channels can be categorized into three groups: Owned, Earned, and Paid. Owned Content Distribution includes distributing content to web properties that belong to you, like your blog, email newsletter, social media, or microsite. Earned Content Distribution is when third-parties distribute your content or content about you through press coverage, guest article contributions, retweets or shares, or product reviews. Whilst Paid Content Distribution occurs when you explicitly pay for content distribution. Payment could take many forms, but often works on a cost-per-click (CPC) model where the owner of the content pays a certain amount every time someone clicks through to view the content.[6]

In the context of films and television, the following items may constitute part of the content:

a. title, the names, logos, insignias used in films, and sometimes names of characters;

b. music, underlying story or book, film script, or screenplay, photos, videos, sounds, costumes, and stage sets;

c. new textiles specially designed for the content,

d. new equipment, games, toys etc, developed for the film or television programme;

e. products or processes invented during the course of producing content;

f. concept or ideas for content.

It is imperative for content producers and distributors to ensure that they have requisite authorisations to host the content they deal with. The economic importance of the distribution of Intellectual Property (IP) contents cannot be overemphasized, hence content distribution protection is germane to forestall unauthorized usage of contents and sharing of legally protected and copyright materials without the consent of the owners. Such protection also ensures that content owners are not short-changed from reaping the economic benefits of their work, by pirates and infringers.

4.1 Trade Marks and Content

Film or television content such as the title, the names, logos, insignias used in films, and sometimes names of characters can be protected by trade mark law. A mark "includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof" In Nigeria as in most English-speaking countries, trademarks are registrable. They can be registered at the Registry of Trade Marks Ministry of Trade and Investments, in Abuja. Unregistered trademarks can be protected under the common law action for passing off. We will come to this shortly. Trademarks are only registrable if they are distinct in that they do not describe a product or service. A descriptive trade mark may become distinctive through use.

[6]Content Distribution: A Basic Primer: https://www.outbrain.com/blog/content-distribution

Titles of events or films such as MISS WORLD, JURASSIC PARK, DA VINCI CODE are registered trademarks. Trademarks are registered in classes or categories of goods or services. The owners of the marks can use them or license third parties to use or associate the marks with goods or services offered. This is not limited to films or television series.

JURASSIC PARK is registered for the following goods: toys, games and playthings, namely, action figures and accessories therefore, bathtub toys, kites; building toys in the nature of building blocks; board games, action skill games, manipulative games, target games, bubble making wand and solution sets, children's multiple activity toys, costume masks, mechanical toys, toy vehicles, toy vehicle accessories, dolls, doll accessories, doll clothing, bean bag dolls, toy figures, toy figure accessories, play figures, inflatable toys, flying discs, jigsaw puzzles, marbles, plush toys, puppets, ride- on toys, skateboards, balloons, roller skates, toy banks, water squirting toys, stuffed toys, and toy vehicles; Christmas tree ornaments; water globes; pinball machines; playing cards; hand-held unit for playing electronic games adapted for use with an external display screen or monitor; hand-held unit for playing electronic games other than those adapted for use with an external display screen or monitor; and golf and sports balls, stress relief exercise balls.

4.2 Trade Marks and Rights Exercisable

Trademarks are protected and registrable under the Trade Marks Act, 1965.[7] The Act makes provisions with respect to trademarks and prescribes that there shall continue to be kept the record called the register of trademarks, in which shall be entered all registered trademarks with the names and addresses of their proprietors, the date on which applications were made for the registration, notifications of assignments and transmissions, the names and addresses of all registered users and such other matters relating to registered trademarks as may be prescribed.[8]

The persons who coins or creates a distinctive title, name, logo, or insignia used in films, and sometimes names of characters can register them as trademarks. This will usually be done by the content production company if they are the proprietors of the names or logos,[9] but these rights may be transferred to third parties under agreements. For content that is registrable, the registered owners of the relevant trademark or design or the patentee own the requisite rights. The test for the infringement of trademarks is both aural and visual.[10] The courts ask questions such as: Does the offending mark sound or look like the registered mark? Are they identical or a colourable imitation that is confusingly similar?

The right to the use of a trademark shall be deemed to be infringed by any person who, not being the proprietor of the trademark, or a registered user thereof, using it by way of the permitted use, uses a mark identical with it or nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of mark likely to be taken either –

[7]Cap. T13, 2004 Laws of the Federation of Nigeria.
[8] Section 2(1) of the Trade Marks Act
[9]S.18, Trade Marks Act.
[10]*Bell Sons & Co. v. Aka &Ors* (1972) VILR Vol.3 Pt 1 Pg. 43, *Alban Pharmacy Ltd v. Sterling Products* (1968) All NLR 112; *Feredo Ltd. V. Ibeto Ind. Ltd*. 2004 5 NWLR (Pt. 866) SC 317*; Virgin Enterprises Ltd V. Richday Beverages (Nig) Ltd* (2009) LPELR-8187(CA).

(a) as being used as a trademark; or

(b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.[11]

The right to the use of a trademark given by such registration as aforesaid shall be subject to any conditions or limitations entered on the register, any the use of any such mark as aforesaid in any circumstances to which, having regard to such limitations, the registration does not extend, shall not constitute an infringement of that right.[12] However, the use of a registered trademark, being one of two or more registered trademarks that are identical or nearly resemble each other, in the exercise of the right to the use of that trademark given by such registration as aforesaid, shall not constitute an infringement of the right to the use of any other of those trademarks given by such registration.[13] A registered trademark shall be assignable and transmissible either in connection with the goodwill of a business or not, and in respect of all the goods of which it is registered, or was registered, as the case may be, or of some (but not all) of the goods.[14]

5 Copyright and Content

Copyright is governed in Nigeria by the Copyright Act, 1988[15] as amended in 1992 and 1999. This Act makes provisions for the definition, protection, transfer, infringement of and remedy and penalty thereof of the copyright in literary works, musical works, artistic works, cinematographic films, sound recordings, broadcasts, rights to performances and other ancillary matters.[16]

As such, the music, underlying story or book, film script, or screenplay, photos, videos, sounds, costumes, and stage sets may be protected under copyright law. Copyright is a bundle of exclusively and distinctively divisible rights vested on certain persons who create certain works or who by law or contract, those bundle of rights are transferred to. Copyright are exclusive rights to control any dealing with the bundle of rights exercisable by the copyright owner in Nigeria, by virtue of the Copyright Act and by virtue of other national laws enabling the rights to be exercisable in those nations by virtue of the treaties those nations and Nigeria are party to. For copyright content is owned either by the creator of the relevant content or anyone to whom the right has been transferred.

5.1 Rights in Literary works (Scripts, Software, Choreographic Notations)

Copyright in a work shall be exclusive right to control the doing in Nigeria of any of the following acts, that is (a) in the case of a literary or musical work, to do and authorise the doing of any of the following acts[17]-

[11] Section 5(2) of the Trade Marks Act
[12] Section 5(3) of the Trade Marks Act
[13] Section 5(4) of the Trade Marks Act.
[14] Section 26(1) and (2) of the Trade Marks Act.
[15] Cap C28, LFN, 2004
[16] Long title to the Copyright Act
[17] S.6, Copyright Act.

(i) reproduce the work any material form

(ii) publish the work;

(iii) perform the work in public;

(iv) produce, reproduce, perform or publish any translation of the work;

(v) make any cinematograph film or a record in respect of the work;

(vi) distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement;

(vii) broadcast or communicate the work to the public by a loud speaker or any other similar device;

(viii) make an adaptation of the work

(ix) do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in subparagraphs (i) to (vii) of this paragraph;

5.2 Rights in Artistic Works

Owners of copyright in artistic works have the right to do or authorise the doing of any of the following acts, that is- s.6(1)(b)

(i) reproduce the work in any material form,

(ii) publish the work.

(iii) include the work in any cinematograph film,

(iv) make an adaptation of the work,

(v) do in relation to an adaptation of the work in subparagraphs (i) to (iii) of this paragraph;

5.3 Rights in Cinematographic Films

Owners of rights in cinematograph film have the rights to do or authorise the doing of any of the following acts, that is- s.6(1)(c)

(i) make a copy of the film,

(ii) cause the film, in so far as it consists of visual images to be seen in public and, in so far as it consists of sounds, to be heard in public,

(iii) make any record embodying the recording in any part of the soundtrack associated with the film by utilising such soundtrack,

(iv) distribute to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.[18]

[18] Section 6 of the Copyright Act

5.4 Some Copyright Issues and Content

A few issues that may trouble content producers and distributors must be noted. The first is the ownership of works made by employees (in the course of their employment) and works made by independent persons who are commissioned to create such works vests in the employees or commissioned persons unless there is a written contract to the contrary.[19] This is unlike the principle of the American work for hire that vests copyright in the employer. The Nigerian Copyright Act vests the ownership in the employee in the employer or the person commissioned. Producers of content must be mindful of this. They are enjoined to insert a clause transferring copyright to the producer or distributor in the contract engaging the author as reference to works for hire may be insufficient.

Second, the Act defines "reproduction" to mean "the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording". "Copy" means a reproduction in written form, in the form of a recording or cinematograph film, or in any other material form.[20] This suggests that online transmissions like streaming may not amount to infringement because they often do not amount to reproduction in material form like the examples given by the statute such as written form, sound recording or a film. The Copyright Act has been criticized for this gap but the Copyright Bill 2015 if passed, will plug this gap.

However, content producers who are concerned about online streaming may find solace in the broad definition of "communication to the public" which includes, in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or re-broadcast. This definition may protect the content from third party streaming without the permission of the content owner.

The right of the copyright owner in content includes adaptation rights. "Adaptation" has been defined to mean the modification of pre-existing work from one genre of work to another and consists in altering work within the same genre to make it suitable for different conditions of exploitation, and may also involve altering the composition of the work. This offers requisite protection to content producers.

Under the Act, a work is deemed published if copies have been made available in a manner sufficient to render the work accessible to the public.[21] A "work" is defined to include translations, adaptation, new versions or arrangements of pre-existing works, and anthologies or collection of works which, by reason of the selection and arrangement of their content, present an original character.

Another challenge is the extent to which new works can be created as a result of inspiration from other works. Generally, copyright may prevent the use of a substantial part of a work but the offending work must be seen to have been recognizably derived from the original. One of the challenges today is exemplified by the fil depicting what happens to two or more persons who misplace their phones. Copyright does not protect the concept per se, but your own story line. Another person may have his story line that has absolutely no bearing to yours.

[19]Section 10 of the Copyright Act.
[20] S.51(1)
[21] S.51(2)(a) Copyright Act

5.5 Dealings with Copyright Content

Copyright is transferable by assignment, by testamentary disposition or by operation of law, as movable property[22].Any dealing with content must be cleared and authorisation obtained from the copyright owner.

The author of a work in which copyright subsists has the right- (a) to claim authorship of his work, in particular that his authorship be indicated in connection with any of the acts referred to in section 6 of this Act except when the work is included incidentally or accidentally when reporting current events by means of broadcasting. (b) to object and to 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.[23]

The rights referred to in the foregoing paragraph, are perpetual, inalienable and imprescriptible.[24]

5.6 Infringement of Copyright

Copyright is infringed by any person who without the licence or authorisation of the owner of the copyright-[25]

(a) does, or cause any other person to do an act, the doing of which is controlled by copyright;

(b) imports into Nigeria, otherwise than for his private or domestic use, any article in respect of which copyright is infringed under paragraph (a) of this subsection; (c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection;

(c) distributes by way of trade, offer for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed under paragraph(a)of this subsection;

makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work;

(d) permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringed of the copyright in the work, unless the person permitting the place to be used is not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright;

(g) performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business or as supporting facility to a trade or business, any work in which copyright subsists.

[22] Section 11 of the Copyright Act
[23] Section 12(1) of the Copyright Act
[24] Section 12(2) of the Copyright Act
[25]S.15 Copyright Act.

6 Content and Patents and Designs

New textiles designed for a film or television series may be protectable by the law of designs. The design for the new Green Eagles jersey was produced for an event that can be content for audio-visual work and being new could have been registered as an industrial design in Nigeria. New equipment, games and toys built for a film or television programme may be protected as designs or patents if it is an invention. The products or processes invented during the course of producing films may be patentable. Patentable inventions may be made during the production of films such as the James Bond movies and some other movies, For content that is registrable, the registered owners of the relevant trade mark or design or the patentee own the requisite rights.

Patents and designs are governed in Nigeria by the Patents and Designs Act, 1970. This Act makes 'provisions for the registration and proprietorship of patents and designs in Nigeria and other matters ancillary thereto'. The Act provides that the right to a patent of an invention is vested in the statutory inventor, that is to say, the person who, whether or not he is the true inventor, is the first to file, or validly to claim a foreign priority for, a patent application in respect of the invention.[26] The true inventor is entitled to be named as such in the patent, whether or not he is also the statutory inventor, and the entitlement in question shall not be modified by contract.[27]

In the same vein, the right to registration of an industrial design shall be vested in the statutory creator, that is to say, the person who, whether or not he is the true creator, is the first to file, or validly to claim a foreign priority for, an application for registration of the design.[28] The true creator shall be entitled to be named as such in the register, and the entitlement in question shall not be modifiable by contract.[29]

The rights of a patentee or design owner are infringed if another person, without the licensee or design owner, does or causes the doing of any act which that other person is precluded from doing under section 6 or 9 of this Act, as the case may be.[30] An infringement of the rights of a patentee or design owner shall be actionable at the suit of the patentee or design owner in question; and in any action for such an infringement all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of the infringement of other proprietary rights.[31]

7 Content, Confidential Information, Trade Secrets and Image Rights

Some content can be protected under the common law under the rubric confidential information.[32] In *Fraser v. Thames Television Ltd.,*[33] it was held that the duty of confidence could apply to protect an idea for a television programme that had been communicated in confidence. Hirst J. said, that "in order to be fixed with an obligation of confidence, a third party must know that the information was confidential; knowledge of a mere assertion that a breach of

[26] Section 2(1) of the Patents and Designs Act, Cap P2, LFN, 2004
[27] Section 2(2) of the Patents and Designs Act
[28] Section 14(1) of the Patents and Designs Act
[29] Section 14(2) of the Patents and Designs Act
[30] Section 25(1) of the Patents and Designs Act
[31] Section 25(1) of the Patents and Designs Act
[32] For more discussion on this, see Bankole Sodipo, *Copyright Law: Principles, Practice & Procedure* (2017), Swan Publishers Chapter 22.
[33] [1984] Q.B. 44

confidence has been committed is not sufficient ...." [34] Similarly, Nourse L. J's held that "any other third party into whose hands the confidential information comes, an injunction can be granted against them on the simple ground that equity gives relief against all the world, including the innocent, save only a bona fide purchaser for value without notice."[35]

Unlike the US, there is no Nigerian statute protecting image rights per se. Nonetheless, care must be taken in using photographs of third parties in a commercial context as part of content, without obtaining the requisite permission. This may be protected as a breach of the constitutional right to privacy. The number of cases challenging unauthorized use of photographs is on the increase.

8 Conclusion

Ignorance of the law is no excuse. Improper use or authorization of content whether in the virtual or online world can cause business bankruptcy and jail terms. No one who is involved in the media world can afford to be ignorant of his obligations. It is imperative to build capacity or seek consultation on the issues of intellectual property and content distribution. Knowledge of the law may offer enormous business opportunities for us all. Learn the law or seek legal advice.

[34] *Fraser v Thames Television Ltd. supra* at p.65

[35] *Attorney-General v. Observer Ltd*., The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986.