LEGAL FRAMEWORK FOR COPYRIGHT MANAGEMENT IN NIGERIA: A REVIEW OF THE FUNCTIONS OF COLLECTIVE MANAGEMENT ORGANISATIONS

Abstract

The essence of copyright management is to plummet infringements and establish a structure for copyright owners to enjoy maximum benefits from the exploitation of their works. However, despite efforts in creating an efficient copyright management, much has not been achieved as the advancement of technology has challenged the efforts as infringement is now easier and with global nature. With the above, an efficient copyright management in the present technological age will naturally be complex and flexible to take care of developing technologies. This work made a study of the legal framework for the management of copyright in Nigeria, considering the duties and powers of the Nigerian Copyright Commission as the sole administrative/regulatory body with responsibility of ensuring proper administration of copyright in Nigeria. Nigerian Copyright Commission has powers to approve Collective Management Organisations which directly manages the rights of copyright owners on their behalf. Under normal circumstance, the law is supposed to keep pace with changes in society. However, the rapid technological changes creating new channels and modes of copyright infringement is clearly threatening to leave the Nigerian law behind and obsolete against copyright management. The study adopted the doctrinal research methodology using analytical approach with the aid of statutory enactments, case laws, text books. It is the finding in the paper that Nigerian Copyright Commission and Collective Management Organisations as approved by Nigerian Copyright Commission are laid back and need to catch up with technological trend for effective management of copyright.

Keywords: Copyrights, Collective Management Organisation (CMO), Nigerian Copyright Commission (NCC)

(g) Introduction

Copyright is the exclusive right to control the doing of certain acts in relation to work which by reason of selection and arrangement of their contents, present an original character.[567] It is the property right which subsists in various work, for example literary works, artistic works, musical works, sound recordings, films and broadcast.[568]Copyright seek to protect proprietary rights over creative products of mind.A good copyright system entails a well-established and widely respected copyright organization which undertakes to safeguard the rights and interests of copyright owners, the collection and distribution of their royalties and which can distribute also to the promotion of education and culture, as well as the participation in international cultural exchange.[569] Collective administration through such organization is widely applied and it is now more important than before following the advancement of technology in the area of communication.

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[567] Copyright Act,Ss. 6 & 51

[568]David Brainbridge, "Intellectiual Property" (6th Ed., Essex: Pearson, 2007)

[569]Bunu Mallam Abubakar, Mohammad Amin Umar, Mohammed Alhaji Audu, "An Appraisal of Copyright Administration in Nigeria towards a Sustainable Development', *IOSR Journal of Business and Management* Volume 16, Issue 11.Ver. II (Nov. 2014), PP 08-13

With the advent of technology in communication, copyright has become easily and more frequently infringed. Ordinarily, infringement of copyright would involve physical acts but with technology, infringement may occur without physical transaction with a known second party. For instance, a person can infringe the copyright of another from the comfort of his room by offering another a link to digital download of music created by an artist.Owing to the ease of infringement with the advancement of technology, administration of copyright has become more complex and demanding as more channels of infringement has been created. These new channels created by technology has made it imperative for creativity in approach towards copyright administrations and management, in order to ensure that owners of copyright reap the fruits of their mental creativity.

(h) Legal Framework for Administration of Copyright in Nigeria.

By virtue of Section 34 of the Copyright Act[570], Copyright in Nigeria is solely administered by the Nigerian Copyright Commission[571]. The NCC is a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name.[572]The Commission was established on the 19thAugust 1989 as Nigerian Copyright Council. It became a Commission in April 1996 but was confirmed three years later by the Copyright (Amendment) Decree in 1999.
The Commission has a Governing Board consisting of a Chairman, Director General of the Commission, one representative of the Federal Ministry of Justice, Federal Ministry of Education, one representative of the Nigerian Police Force, the Nigerian Customs Service and six other persons to be appointed by the Minister[573] representing authors in the areas of literary works, artistic works, musical works, cinematographic films, sound recordings and broadcasts.[574]

The Act specifically outlines the duties of the NCC. By the Act, the Commission shall[575]

5 be responsible for all matters affecting copyright in Nigeria
6 monitor and supervise Nigeria's position in relation to international conventions and advise the Government thereon
7 advise and regulate conditions for the conclusion of bilateral and multilateral agreements between Nigeria and any other country
8 enlighten and inform the public on matters relating to copyright
9 maintain an effective data bank on authors and their works
10 be responsible for such other matters as they relate to copyright in Nigeria.

The Commission was given certain powers such as powers to grant compulsory licenses[576], approval of organisations desirous of operating as collecting societies[577], powers to make

[570] Cap C28, Laws of the Federation of Nigeria, 2004
[571] Nigerian Copyright Commission shall be referred to as 'NCC' in this study
[572]Copyright Act,S. 47
[573] Minister charged with responsibility for culture, S. 51 Copyright Act
[574]Copyright Act,S. 35
[575] Copyright Act,S. 34
576Copyright Act, Section 37
577*Ibid*, Section 39(1)

regulations subject to the approval of the Minister[578] and powers to appoint Copyright Inspector inclusive of all police powers.[579]
The NCC in order to achieve their objectives of administering copyright in the country have adopted several mechanisms following the empowerment by the Act. These mechanisms include the making of the following regulations pursuant to S. 45(4) Copyright Act.

9. Copyright (Reciprocal Extension) Regulation 1972

This regulation was issued to enable the extension of copyright protection in works protected under the Act to countries to which Nigeria shares treaty obligations. The regulation was issued on the 1st of February 1972.[580]

10. Copyright (Security Devices) Regulation 1999

Section 21 Copyright Act empowers the NCC to prescribe the use of any anti-piracy device for use on any work in which copyright subsists. This apparently serves two purposes; first of which is to help in identification of genuine products and secondly to curb the menace of piracy thereby providing copyright owners an additional incentive for further creativity and for copyright owners to recoup their investments. It was issued on the 7th of September 1999.[581]

11. Copyright (Video Rental) Regulations 1999

This regulation was issued on the 7th of September 1999 at a period the business of hiring and renting video cassettes, Compact Discs and Digital Video Discs became very popular and the practice amongst those involved in video rentals was to buy one video cassette, Compact Discs or Digital Video Discs, reproduce the single copy into multiple copies and then rent them out to as many people as were willing to rent or hire them. These actions are illegal and constitute infringement of copyright.[582]In order to contain the menace of piracy of copyrighted films as mentioned above, the Commission came up with the Copyright (Video Rental) Regulation. It prescribes the issuance of a rental copy, which copy was meant to be produced by the copyright owners and would be purchased by the rental shops.[583] The intention was that hiring, rentals, leasing or distributing in the public for commercial purposes would be regulated by the use of rental copies. A task force to monitor the rental shops was set up to ensure compliance.[584]

578*Ibid*, at. Section 45(4)
579*Ibid*, at. Section 38. This section was introduced into the Act through the 1992 Amendment to the Act as Section 32A.
[580] S. 35 Part IV Copyright Act. Nigerian Copyright Commission NCC, Copyright (Reciprocal Extension) Regulation 1972. A*vailable at* http://www.copyright.gov.ng/images/downloads/Copyright%20Reciprocal %20Extension%20Order%201972.pdf. accessed 15th February 2021
[581] Nigerian Copyright Commission, Copyright (Security Devices) Regulation 1999.
[582]Copyright Act,S. 20 (2) a, b, c & d..
[583] Regulation 5(1&2) Nigerian Copyright Commission NCC, Copyright (Video Rental) Regulation 1999(1999)
[584]*Ibid*, Kunle Ola

12. Copyright Notification Scheme, 2005

The notification scheme of the Commission is the mechanism through which a national copyright databank of copyright owners and their works are kept.[585] This scheme is not a mandatory registration system and does not confer any additional right than what copyright already confers. The scheme operates by encouraging authors to notify the Commission of the existence of copyright in their creative endeavors or the transfer of such copyright. The advantage of the scheme is that when one's work is in the databank of the commission and in the event of litigation or uncertainty, it could constitute prima-facie proof of the date of the existence of the work.[586]

13. Copyright (Collective Management Organisation) Regulations,2007

Creative works enjoy copyright protection and except use of such works fall under some form of limitation and exception, the current legal regime for copyright requires that authorization be obtained from the copyright owner prior to use. However, considering the vast number of copyright owners and users, it is impracticable to expect every user to track down every copyright owner and obtain the requisite authorization. In order to address the above challenge, CMO exist to negotiate on behalf of copyright owners and grant licenses to users as well as to collect payments from users and distribute royalties on an agreed rate to copyright owners. CMO's could therefore be considered as a one-stop shop for clearing copyright contents in the interest of both copyright owners and the users of copyright works.[587] In 1993, the first regulation in this regard was issued and subsequently, the Copyright (Collective Management Organization) Regulations 2007 was issued which repealed the earlier regulation. The Regulation, which contains 23 paragraphs, makes provisions for application, revocation and renewal of licenses for CMOs;[588] membership and management of CMOs;[589] licensing and distribution of royalties by CMOs[590] and other issues tagged miscellaneous.[591]

(i) Copyright Management in Nigeria

S. 16 Copyright Act vests the management of copyright on the owner, assignee or an exclusive licensee of the copyright. By S. 17 of the Act, the Act made provision for creation of collecting society (CMOs) for an effective management of the rights.[592]S. 16(1) Copyright Act provides thus:

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[585]Copyright Act,S.34 (2)

[586]Nigerian Copyright Commission NCC, Copyright Notification Scheme (2005). A*vailable at*http://www.copyright.gov.ng/index.php/regulatory-schemes/copyrightnotification. Accessed 14th July 2021

[587]OlakunleOla, "Copyright Collective Administration in Nigeria: Lessons for Africa" SpringerBriefs in Law, 2013. available at SSRN: https://ssrn.com/abstract=2382559

[588] Regulations 1-3

[589] Regulations 4-12

[590] Regulations 13-15

[591] Regulations 16-23

[592] Historically, S. 15 of the Copyright Act 1988, and S. 15A introduced by the Copyright Amendment Act 1999 governed *locus standi* in copyright claims in Nigeria. Those Ss. has respectively been re-enacted as Ss. 16 and 17 of the Copyright Act

> Subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of the right, as the case may be, in the Federal High Court exercising jurisdiction in the place where the infringement occurred; …" (underling mine for emphasis)

Flowing from the above, an owner, assignee or exclusive licensee of copyright has been conferred with the right to institute and maintain action for infringement at the Federal High Court in the first instance, against any party that infringes on the right. In other words, it grants the mentioned persons the right to protect the works. This position received judicial support by the Supreme Court in *Adeokin Records &Anor*v. *Musical Copyright Society of Nigeria (Ltd/GTE)*[593] where the Court per EjembiEko JSCheld that a person who wishes to sue for infringement may do so as owner as defined in S. 10 Copyright Act, as Assignee as defined in S. 11 Copyright Act and as exclusive licensee as defined in S. 39 Copyright Act. The *locus standi* to sue for infringement in these instances are statutory as the provisions of the Copyright Act is well defined in terms of the person that has the right to sue.

In addition to the management of copyright by an owner, assignee or exclusive licensee of right, the Copyright Act recognizes the right of CMO to manage the collective rights of its members.[594]By the provision, no person can manage the copyright works or represent more than 50 owners of copyright works, unless it is approved to operate as CMO. *Section 17 Copyright Act* provides thus:

> Notwithstanding the provisions of this Act or any other law, no action for the infringement of copyright or any right under this Act shall be commenced or maintained by any person
>
> a. Carrying on the business of negotiating and granting of licenses;
> b. Collecting and distributing royalties in respect of copyright works or representing more than fifty owners of copyright in any category of works protected by this Act,
> c.

Unless it is approved under S. 39 of this Act to operate as a CMO or is otherwise issued with a certificate of exemption by the Commission.The Act made provision for registration of CMO as a vehicle for bringing together owners of copyright under a body to enhance their value and negotiating power, hence a consequent higher income (royalty) will be available to the right owners.[595] This intent is clear from the definition of CMO by the Act.CMO[596]was defined to mean an association of copyright owners which has as its principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works.[597] While this definition seems to capture the basic functions of CMOs, it is too restrictive in defining its scope thus

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[593](SC.336/2008) judgment delivered on 13th July 2018 at page 29 of lead judgment; Also see judgment in the case of *MCSN vs Compact Disc Technology Ltd* (SC. 425/2010) which was delivered on 14th December 2018

[594]*Copyright Act*, S. 17

[595]Somto Ojukwu, 'Locus Standi of Unapproved CMO: A Review of the Supreme Court Decisions in Adeokin Records v MCSN and MCSN v Compact Disc Technologies', (Vol. 6 2019), *NIALS Journal of Intellectual Property*

596 The Act adopts the term "Collecting Societies" in its definition.

597*Copyright Act*, S. 39(8)

limiting it to "association of copyright owners."[598] This is so because CMOs may function as agents of right holders who voluntarily entrusted the licensing of one or more uses of their works to a collective society.[599]The general principles by which CMO operate are underpinned by an authorization given to CMO by owners of copyright, in terms of which the CMO is authorized to negotiate with prospective users, give them licenses against appropriate fees and under appropriate conditions, collect such fees and distribute them among the owners of rights.With the explanations above, it is clear that CMO is formed to build a formidable force to protect the interest of copyright owners collectively instead of each right owner individually managing his rights and wading off infringers in small capacity.

(j) Formation of CMO

According to S. 39 Copyright Act, the Nigerian Copyright Commission may approve a Collecting Society if it is satisfied that:

vii. It is incorporated as a company limited by guarantee
viii. Its object is to carry out the general duty of negotiating and granting copyright licenses and collecting royalties on behalf of copyright owners and distributing same to them.
ix. It represents a substantial number of owners of copyright in any category of works protected by the act. (This includes owners of performing rights)
x. It complies with the terms and conditions prescribed by regulation made by the commission under this section.

By S. 17 Copyright Act, CMO that has not been approved by the NCC cannot exercise the duties and powers of a collecting society. That is, the CMO cannot function to manage copyright in its repertoire, including suing for infringement of the rights on behalf of its members.[600]This position is strengthened by S. 39(4) Copyright Act which makes it unlawful for any group of person to purport to perform the duty of CMO without the approval of NCC as required by Ss. 17 and 39(1) Copyright Act

It is worthy to note that CMOs in practice has made efforts to circumvent the requirement of approval by NCC and the efforts have received what may be judicial seal by the Supreme Court in the case of *Musical Copyright Society of Nigeria*[601] *v. Compact Disc Technology Ltd.*[602] In that case, Musical Copyright Society of Nigeria[603] as Plaintiff at the Federal High Court commenced the action against the Respondent as defendant at the court. The Respondent filed a

598 O. S. Opadere, 'Complexities of Copyright Collective Management in Nigeria Vis-à-vis the Desire for Economic Development' in E. Azinge and H. Chuma-Okoro (ed.),Intellectual Property and development: Perspective of African Countries (Lagos,NIALS 2013) 287.

599 D. Gervais, 'Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective' Report Prepared for the Department of Canadian Heritage, August 2001.

600*Adeokin Records* v. *MCSN*(*supra*) decided on 13th July 2018; *MCSN* v.*Compact Disc Technology Ltd*(*supra*) decided on 14 December 2018

601 (MCSN)

602 Judgment delivered on 14th December 2019

603 (COSON)

preliminary objection challenging the *locus standi* of the appellant to maintain the matter. The trial court[604] dismissed the preliminary objection. Thereafter, the Respondent filed an appeal and Court of Appeal found the preliminary objection meritorious and consequently set aside the decision of the trial court on the preliminary objection. The Appellant in the case went to the Supreme Court. The Supreme Court relied heavily and made the case of *Adeokin v. MCSN*[605] the basis for its judgment in holding that the Appellant has *locusstandi* in the matter, having presented itself as the an assignee, owner and exclusive licensee of the right in the works and not as a CMO.

Following the decision above, S. 17 Copyright Act can be totally circumvented and an organisation, person or company can manage the right of more than 50 persons without being approved as CMO. What is required is that the person or company obtain the exclusive licence or assignment of the copyright to him. With it, it can manage the copyright as the owner, assignee or an exclusive licensee with powers to maintain action in case there is infringement.
Furthermore, by *S. 39(3) Copyright Act*, NCC is required to approve only one CMO in any class of copyright owners, unless it is satisfied that the existing society does not adequately protect the interest if that class of copyright owners. The court per Odonowo J in *Musical Copyright Society (Nig.) Ltd v Details (Nig.) Ltd*[606] reiterated this position, stating that only one collecting society may be registered in respect of a class of copyright. However, as the Act implies, where the Commission is not satisfied with the performance of the existing society, it may approve another[607]. A prospective CMO must satisfy the preconditions provided in Part 1 of the CMO Regulation with respect to application before it can be granted a license. All licenses to operate as CMO are valid for three years and renewable every two years.[608] The regulation encourages that applications for renewal be made anytime within six months before the expiration of its license. Renewal of a license is however subject to the discretion of NCC. It may revoke a license on its own or upon the application of an interested person where an organisation fails to comply with the regulation or any provision of the Act, or where the organisation no longer represents the interest of its members.[609]

(k) The Challenges of Copyright Management in Nigeria

The efforts towards creating an effective copyright management system for the benefit of copyright owners in the Nigeria and the general development of intellectual property, has been fraught with many challenges. These challenges arise in many aspect, including technology advancement, ease of exploitation of copyright works, deficiency of infrastructure for copyright management and many others.

The invention of peer-to-peer (P2P) software, also known as 'file-sharing', has radically altered the copyright landscape.The high-speed rate and ease with which these copyrighted files can be uploaded or downloaded over the internet has increased exponentially over the years. In fact,

[604] per J. E. Shekarho J
[605] decided on 13th July 2018
[606] Suit No FHC/L/CS/434/95
607*Ibid.*
608CMO Regulations,1(9)
[609]CMO Regulation, 2

exploitation of copyright through internet is of widespread use and has almost rendered other forms of music distribution like CD's, DVDs and cassettes obsolete. With internet being everywhere and nowhere[610], the role of CMO in the management of copyright has become not only complex, but almost impossible to have a very effective management of copyright. Technology is now required for an ear efficient management of the copyright as exploitation of the copyright are more than ever before done on the internet. So also does the infringement and other malpractices against copyright done on the internet or through the use of technology like peer to peer sharing of files.

Another challenge to an effective copyright management is the statutory constraints such as the restriction of the operation of multiple collecting societies. The Copyright Act[611]specifies that only a single collecting society will be approved by NCC at a time for a class of right. This has heightened issues in management of copyright and with particular reference to the unending feud between Musical Copyright society of Nigeria and Collective Society of Nigeria on which one of them should be in operation and which the other's license is to be revoked by the NCC. Despite the ultimatum issued by the Attorney General of the Federation in 2017 to the NCC to register MCSN as a collecting society, the COSON still raised objections and took the matter to Court.[612] This does not only cause unnecessary feud that slows down the growth of the industry, it also leads to instability, in that copyright owners are torn between options because where the NCC keeps revoking and granting licenses to these societies, copyright owners are not now sure where to pitch their tent. In the midst of all that and while trying to settle the costs of litigation, money is being expended and it is of no doubt that the major source of financing for CMO are royalties collected from users of copyrighted works. When the bulk of that money goes to litigation to fight an unnecessary cause, the copyright owners bear the brunt. This alone discourages the practice of collective management in the country.

Aside the above, there are other challenges of copyright management such as poor financing, insecurity, corruption, multi-cultural nature of Nigeria and lack of technological expertise/infrastructure.

Conclusion

Copyright Collective management is an aspect within the copyright system that requires or allows rights holders to administer their rights through CMO approved by the NCC in exercise of powers conferred on NCC by the Copyright Act. The establishment of CMO and the provision of legal framework for its operation by the Copyright Act was imperative and thoughtful as managing copyright and related rights individually by the copyright owners may not always be realistic. For instance an author, performer or producer cannot contact every single radio station to negotiate licenses and remuneration for the use of his works neither is it practical for a radio station seek specific permission from every author, performer and producer

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[610]J. P Barlow, "A Declaration of Independence of Cyberspace" Davos, Switzerland, 1996. Available at https://www.eff.org/cyberspace-independence. Accessed 16th July 1988

[611] S. 17

[612]COSON filed an action *COSON v. MCSN & NCC(Suit No: FHC/L/CS/1259/2017)* praying the FHC to withdraw the approval. The suit was dismissed and MCSN's appointment was validated.

for the use of their work. CMO facilitates rights clearance in the interest of both parties and economic reward for the right holders.

Having established the functions of CMO and the fact that the Copyright Act provides for management of copyright through CMO, the question is whether the legal and institutional framework for collective management in Nigeria is adequate and capable of catering for the rights of copyright owners in the country. Having considered the provisions of our extant laws and the state of our jurisprudence currently, given the advancement in technology and the digital age, suffice it to say that the current framework of the Nigerian Collective management in Nigeria is obviously inadequate for the management of those rights of copyright owners and as well, incapable of protecting the their rights.
Nigeria has be flexible towards changes in its copyright management strategy in the adoption of better collective management system. In order to achieve that, the writer makes the following recommendations to salvage the dilapidating system of copyright management in Nigeria;

6.0 Amendment of the Copyright Act to meet the standards of the current and foreseeable future technological advancement in the world.

7.0 Provision of competition in management of copyright. The law as it is provides that only one CMO may be approved for a class of right at each time. This obviously removes competition and result to mismanagement and ineffective management of the copyright by the CMO. Therefore, copyright owners are forced to condone the excesses of the CMO and rely only on legal recourse which may take good time for an aggrieved right holder to find redress. Also, due the many works that will be in the portfolio of the CMO as a monopolized management of copyright, these CMOs become unaccountable as they attend to many copyright owners.

8.0 Active participation of Nigeria in international organization that promotes copyright. As mentioned in this study, the world is going global, so is the nature of copyright infringement traversing many countries of the world. Therefore, there should be legal framework forcooperation between Nigeria and other countries through conventions, treaties etc to enable CMO seek redress on infringement that transcends the shores of Nigeria.