

## Legal Alert January 2008 **Collecting Societies In Nigeria**

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An Artiste or Entertainer expends considerable time, talent and expense in producing the entertainment product that we all so love to listen to or to watch or to use in such appropriate medium as it is produced to suit the consumer of the product. The Artiste or Entertainer receives no other compensation for his or her industry other than for his or her audience to purchase the entertainment product or "lease" it at a fair price.

Most Artistes or copyright owners however do not have the national or global network, managerial and administrative expertise and resources of ensuring that their products/works are maximally distributed without the problems of (a) piracy, (b) none payment of royalty, and (c) where there is payment of royalty, the royalty payment does not get to the Artiste or copyright owner.

The negative aspect of technological advancement and trade globalisation is also not making the function of protecting the intellectual property rights of Artistes and entertainers any easier. An Artiste or copyright owner would find it a colossal and exorbitant task to individually and independently monitor his or her intellectual property work in the many countries of the world where such intellectual work is available for use.

To solve the above multi-jurisdictional protection problems for copyright owners and many other owners of intellectual proprietary rights, associations usually called Collecting Societies are formed to assist the copyright owners in administering these intellectual property rights in accordance with the laws of each country where such Collecting Society is licenced to administer third party copyrights.

What is a Collecting Society?

A Collecting Society is a representative association consisting of various copyright owners who have authorised the Collecting Society to maximally administer their intellectual proprietary rights in accordance with the statutes and authority of the country where the Collecting Society resides, for an agreed fee.

Licensing & Regulation of Collecting Societies In Nigeria

Collecting Societies hold a very important fiduciary position vis-à-vis the property right owners

they represent. Because of this, a Collecting Society is required to show, before being granted a licence under the Nigerian Copyright Law, that (a) it is registered as a company limited by guarantee - as opposed to a company limited by shares - with its primary objectives including:-

- (i) The negotiating and granting of copyright licences on behalf of the copyright owners, who are its members, to third party users at an agreed consideration; and
- (ii) Collecting royalties on behalf of its members and repatriating these royalties after deducting the Society's approved administrative fee;

(b) it represents a substantial number of the members of the society in the class that it seeks to administer their rights; and (c) it complies with the Copyright (Collecting Societies) Regulations, 1993.

It is however unlawful for any person, corporate or personal, who is neither registered under the Companies and Allied Matters Act as a company limited by guarantee nor licenced by the Nigerian Copyright Commission (NCC), to carry on any business with the objective of negotiating or granting licences for valuable consideration on behalf of its copyright owners/members, and distributing the consideration to its members.

#### Criminal Liability for Non Licenced Collecting Societies

Any association or society of copyright owners that carry on the functions or duties of a collecting society without licence from NCC contravene the provisions of the above stated Nigerian Law on copyright.

Where found guilty by a Court of Law for not possessing a Collecting Society's licence, such an association or society with its principal executives are liable on conviction, if first offenders, to a fine of N1,000 (One Thousand Naira) for individuals and N10,000 for corporate associations. For second and subsequent offenders, the fine is N2,000.00 (Two Thousand Naira) for individuals and for corporate associations, the punishment is N2,000.00 for each day in which the offence continues.

In addition to the fine for the breach of carrying on business as a collecting society without licence granted in accordance with the provisions of the Nigerian Copyright Act (as amended), this Law gives to the Courts the option to impose with the fine above stated, a term of imprisonment on the offending person or association provided that the term of imprisonment does not exceed 6 months.

A novel provision, at the time of the enactment of the Nigerian Copyright Act, is the removal of the corporate veil that was in the past enjoyed by corporate executives who used to argue that they were only acting for their company which ironically is an artificial entity with no flesh and blood of its own.

## Civil Rights & Liability of Collective Administration of Copyrights

Section 15 of the Nigerian Copyright Act confers the right to protect and bring an action for the infringement of a copyright on the owner, assignee or exclusive licensee of the copyright. This right of action is however not absolute as Section 15A provides that a collecting society shall not have such right of action or protection until it applies for and is granted a collecting society's license or, is granted an exemption from applying for and having such a licence by NCC.

### Case Law On Collecting Societies

The efforts by the two major associations in Nigeria to have exclusivity to the collective administration of copyright in musical works have resulted in disputes and litigations. There is however no final substantive decision by the highest Court in Nigeria on this subject. Also, the few interlocutory decisions that this writer is aware of, are presently on appeal awaiting final decision by the appellate courts.

Let us however consider some of the interlocutory decisions on collecting societies in Nigeria. In the matter of Musical Copyright Society of Nigeria Limited v. Adeokin Records, Suit No. FHC/L/CS/216/96 (unreported) decision delivered on July 9, 1997 by Ukeje J. (as she then was) and in the matter of Musical Copyright Society of Nigeria v. Details Nigeria Limited FHC/L/CS/434/95 decision delivered on 31st July 1996 by Odunowo J., the Federal High Court of Nigeria held that any association without a collecting society's license is in breach of the provision of Section 32B(2) of the Nigerian Copyright Act and as a result lacks the locus standi to maintain a court action.

The arguments of the Musical Copyright Society of Nigeria in the above matter that it was an owner, assignee and exclusive licensee of copyright was held to be untenable as a party can only sue if it has the legal competence/license to do so. The decisions in *Re Adetona* (1994) NWLR (part 333) 481; *Thomas v. Olufosoye* (1981) 3 NWLR (part 13) 523 were relied on by the Court. The matter of the Musical Copyright Society of Nigeria Limited v. Adeokin Records however went on appeal to the Court of Appeal in suit CA/L/498/97. The Court of Appeal held that, although the Respondent did not file any Respondent's brief in its defence to the appeal, based on the Appellant's brief alone, the 1988 Copyright Act, upon which the originating proceedings in this matter was filed, confers locus standi on the Appellant as owner, assignee and exclusive licensee authorised to prosecute the claims in this matter. The Federal High Court's retrospective application of the amendments to the 1988 Copyright Act was held by the Court of Appeal to be wrong in law as no retrospective effect was clearly intended in the Copyright (Amendment) Act, 1999. The Court of Appeal accordingly remitted this matter to the Federal High Court for re-assignment by the Chief Judge for hearing before another trial Judge.

In another matter, the Nigerian Copyright Council v. Musical Copyright Society of Nigeria Suit No. FHC/L/43c/99 (unreported) the latter collecting society was criminally charged with infringing the provisions of the Nigerian Copyright Act which bars any person or society from carrying on business as a collecting society without obtaining a collecting society's licence from the copyright regulator, NCC. The Court held, on the interlocutory application of the accused association contending that the Complainant Prosecution lacked the legal authority to sustain the charge, that the right to freely associate is not an absolute right but a restrictive one. The Court further held that the Copyright Commission is granted statutory powers similar to those of the Nigerian Police to prosecute offenders of statutory offences provided for under the Nigerian Copyright Act.

For the details of the Federal High Court judgements and other judgements on intellectual property law in Nigeria, see the book "Nigerian Copyright Law & Practice" By John O. Asein, Esq.

#### Regulator's Notice

In October 2007, following claims and counter claims by the two principal collecting rights associations in the Nigerian music industry, the Nigerian Copyright Commission issued a widely circulated public notice warning members of the public that there is presently no approved or authorised or licenced collecting society in Nigeria. Members of the public were reminded that it is a criminal offence under Section 32B(4) of the Nigerian Copyright Act (as amended) for any body or corporate association or group to perform or purport to perform the duties of a collecting society without a valid licence issued to it/them by NCC.

#### Conclusion

The essence of the Copyright Act (as amended) and collecting societies in their entirety is the protection of the rights of the owners of the copyright to an intellectual property work or works. The Nigerian copyright regulator and the various associations laying claim to copyright protection would do well to close ranks and work together in the interest of the rights owners. Without such harmonised cooperation, unauthorised users and pirates would continue to enjoy where they have not sown.

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