

Performers' Rights in Nigeria Entertainment Industry

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Abstract: Singing, dancing, acting are part or constituents of what is described as Performance in the copyrights jurisprudence of Nigeria. This is not unconnected with the definition given by the Beijing Treat. Performers have rights to distribute, produce and reproduce, market their arts in audio, video or other documented medium. This article focused on the Performers' rights under the Nigerian Copyright Act, the Beijing Treat and other instrument which are applicable to the Nigerian Performer in the Country's entertainment industry. The methodology adopted is doctrinal relying on data sources like the Acts of the National Assembly and International Instruments on copyright. It was found that Performers in Nigeria have same rights as other performers around the globe but require copyrights laws which are befitting for the century to enjoy most of their rights in the country. Secondly, piracy which is foundational in the challenges facing entertainers and Performers in particular should be fought by entertainers and institutions of government. The recommendations are that the new Nigerian Copyright Act and other intellectual property related laws should be fully enforced against infringements on all rights accruable to Performers in the country and threats to the art by piracy should be fought by incorruptible institution.

Key words: Performers, Rights, Entertainment, Industry.



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INTRODUCTION

Performance is recognized in the Nigerian Copyright Act (NCA) 2022. In the Beijing Treaty of 1992, performer is described to be an actor, singer, musician, dancer and other persons who perform literary or artistic works including expressions and folklore. This has now been incorporated under section 63(3) of the NCA 2022 to wit: "...performer includes actors, singers, musicians, dancers, and other persons, who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore irrespective of whether the work was fixed or only fixed during performance." A Performer ought to be someone who is intentionally involved in performance. Performance in the Nigerian Copyright Act draws from dramatic performance: dance or miming; music performance, reading or presentation of literary acts or works. Performing in a performance is an intellectual property adventure with all protection afforded intellectual property (section 63 NCA).

Viewing from the legal intentions behind the protection of intellectual property, a performer should have some right; he should have right to control of recording, broadcasting (section 63(1)(d)NCA) and reproduction of the work (section 63(1)(b)NCA), and he is to be identified in connection with the performance or fixation for the rest of his life (section 66(2)NCA). This article intends to identify those rights which accrue to Performers in Nigeria and situate them within some legal instrument available in the country and insist that performers have rights under the law which can be protected in Nigeria (Oyewole, 2024). It is argued here too that piracy is one of the biggest challenge to the enjoyment of Performers rights in Nigeria.

Piracy has several meaning ranging from theft at the sea and, nowadays, theft of intellectual property like unauthorized copying, usage, duplication, imitation and the likes (Steve, 2006). The perspective Steve offers are that "The word *pirate* has its English roots in the 14th century, when the Latin word *pirata* was used to describe the Vikings. By 1688 the term *pirate* had also come to mean someone who appropriated intellectual property, including music, written works or an invention" (Steve, 2006:377-380). In recent times, piracy takes in involvement with consumers, designers, manufacturers, salespeople and

government. It is usually covered with financial gains within its goals and because of the methods applied by these intellectual thieves, individual performer is deprived of gains of his intellectualism and revenue is lost on the part of government.

Methodology

The Nigerian Copyright Act and the Beijing Treaty formed the primary source of data for this article. Secondary sources like books and articles related to intellectual property are utilized for the analysis done herein. Therefore, doctrinal research methodology is adopted in this article. It is preferred because it allows for documented data to form basis for analysis as is the case of this article and recommendations too can be implemented by documentation through appropriate authority.

Literature Review

Samuel, (2020) opined in his work "Beijing Treaty 2012-Benefits for Nigerian Creatives" referring to Article 3 of the Beijing Treaty said *performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions or folklore*(Samuel, 2020:2). It follows that creativity is in the essence of Performers' rights for the entertainment world drawing benefits from the Treaty. The Beijing Treaty, for the author, encompasses audiovisual performances in different media – television and film; it covers musical works contained in audiovisual fixations too. Economically, the performer covered in the Beijing Treaty has more commercial value to his/her literary work(s) by virtue of protection afforded his work in the treaty particularly the medium of circulation and distribution of same(Samuel, 2020). That Treaty creates balance between performers' rights to perform his literary piece and government duties to protect public morals in audiovisuals. It covers much of the desired in the digital dispensation.

Uguru & Umobong (2022) explained that Nigerian entertainers and performers have suffered greatly from the activities of copyright pirates. For the authors, this has affected the fortunes of copyright owners in the country (Uguru & Umobong, 2022). The Nigerian Copyright Act empowers the Nigerian Copyright Commission to make regulations ensuring an institutional approach to the fight against piracy(section 97, NCA). Regulations have been made to combat the sponsors of piracy and those who are caught in the act (sections 48-53, NCA). Punishment in terms of imprisonment, seizure of the pirated products, forfeiture of money and properties are some of the measures in the regulations intended to put an end to piracy(section 74, NCA). The authors concluded that the Nigerian Copyright Commission has not made regulations for internet and online piracy of performers' works especially in the music and film industry.

Olagunju (2020) in the work "A Precis on Intellectual Property Rights: Challenges and Prospects for Nigeria's Economy" contends that acknowledging the huge inflow of income into government as revenue and individuals as fame and connection to the outer world as a result of intellectual property like the films and movie industry. The author indicates that piracy is to the intellectual industry what insecurity is to the economy of any nation. The author concludes that government is yet to establish a comprehensive legislation which would domestic innovations and patents.

Baten & Bianchi & Moser,(2017) argue that intellectual property rights protection is putting mechanisms which deter imposters from deriving unauthorized advantage from various innovations or inventions belonging to someone else. Remedies are therefore provided in instances of proven infringement. For the author, intellectual property vest authors with special rights to a range of intangible assets including discoveries, artistic works, literary works, inventions, symbols, and designs. This may not be the same with Nigeria, which according to the author is yet to bring its intellectual property legislation to align with digital understanding of intellectual property. This is not to say that the country has not made illegal unauthorized utilization of another patented work.

Nwabueze (2018) explained in the work "Beijing Treaty on Audiovisual Performances: A Panacea for Traditional Rights Holders?" that Performers are better placed in the intellectual property fight with the adoption of the Beijing Treaty on Audiovisual Performances in 2012. The author views the Beijing Treaty as a panacea to the troubles many Performers have faced in the 21st century. It was added that the Treaty will strengthen many precarious positions performers face in the audiovisual industry by making firm legal basis for the international use of audiovisual productions.

Research Analysis & Results

Performer's Rights to Reproduce, Distribute and Rent

The Beijing Treaty and Nigeria Copyrights Act provides for some rights accruable to Performers (section 1, NCA). Rights are donated by law to enable certain persons enjoy certain privileges exclusively for a time when they come within a defined event or circumstances. A Performer has right to his literary work (section 9, NCA), if he authored it or added new innovation to existing work which put a unique feature different from the first work. The right to produce literary work, for example, carries with it the right to reproduce same. The right to distribute, rent and market Performers' intellectual property is calculated to reward the author's hard labour(section 63, NCA). These rights are called economic rights(WIPO, 2016). Some of the rights discussed include: the right of reproduction(Article 7, WIPO), the right of distribution(Article 8, WIPO), the right of rental(Article 9, WIPO), and the right of making same available(Article 10, WIPO).

The Performers' right to reproduce ensues from the right to produce or create(sections 1,2&63(1)(b&d) NCA); ones there is a production, then the right to authorize direct or indirect reproduction of the performance accrues in the manner so prescribed by the performer bequeathing such rights. This may extend to whatever levels of rights the performer has on the literary work(sections 2&9, NCA). The right of distribution is the right to authorize the making available to the public of the original and copies of the performance in whatever manner through sale or other transfer of ownership(section 17, NCA). The right of rental is the right to authorize the commercial rental to the public of the original and copies of the performance. The right of making available is the right to authorize the making available to the public, by wire or wireless means, of any performance in such a way that members of the public may access the performance from a place and at a time individually chosen by them. This right covered, in particular, on-demand, interactive making available through the internet(sections 54-58, NCA).

The Treaty provides, as to the transfer of rights, that Contracting Parties may stipulate in their national laws that once a performer has consented to the audiovisual fixation of a performance, the exclusive rights mentioned above are transferred to the producer of the audiovisual fixation - unless a contract between the performer and producer states otherwise (section 69(2), NCA). Independent of such a transfer of rights, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under the Treaty (section 69(3), NCA).

There are rights to claim authorship (sections 9-14, NCA) and right to share in proceeds of sales (section 17, NCA) under the Nigeria Copyrights Act. Performer's rights can be infringed by a person who without the performer's consent or authorisation in writing, makes a recording of the whole or a substantial part of a live performance without the requisite consent or authorisation of the performer (section 71, NCA). On proven cases of use of performer's work without authority, the Court may order the proceeds of sales be shared between the performer and the producer or award damages or make injunctive declarations (section 72(1), NCA). This is particularly so where the producer has some form of contractual relationship with the performer on the said literary work (section 68, NCA). The producer may have invested in the production of the performer's work, such producer is entitled to a fair share of the proceeds of sales even though requisite consent of the performer was not sought and obtained. Infringement of right may not be imputed in such circumstances because the producer has some form of relationship with the performer. The producer not being a total stranger to the literary work and having invested into the packaging of the work should benefit from the labour (section 68, NCA).

Phonogram creates right for two different groups: the performer has the right concerning the reproduction of her fixed performance; and, the producer of the phonogram has the right relating to the reproduction of the phonogram. These rights exist independently of each other; the producer's right is original, not derivative (Article 10, Rome Convention). The producer is not holden to acquire a license from the performer in order to exercise his right in the phonogram against third parties. An example, if a live performance is fixed without the performer's consent by a producer of phonogram and a third party reproduces copies of this phonogram, the producer himself is liable for infringement claims by the performer for having fixed a performance without the performer's consent. On the other hand, the performer cannot herself reproduce the phonogram of her fixed performance without the producer's consent. The performer does not have an original right in the phonogram and the producer does not have any original right in the performance, consent must be obtained at every stage. However, there is a proviso to the effect that where the consent sought is to make a recording of the work for research, private or domestic use, and such consent shall not be unnecessarily refused. It is pertinent to state here that there is no definition in the Act as to what constitute unreasonable refusal. Hence, one would ask whether the omission implied that consent would be presumed or that the other party could then go ahead and make the recording (Asien, 2012).

A copyright owner in a sound recording has an exclusive right over acts stated in *section 12 (1) of the Nigerian Copyright Act*. These include direct or indirect reproduction of the work, control of broadcasting or communication, recording of the whole or substantial part of the recording either in its original form or in any other form recognizably derived from the original, commercial distribution to the public for commercial purposes copies of the work by way of rental, lease, hire, loan or similar arrangement. Arguably, copyright owners of sound recordings do not enjoy as much control as copyright owners of musical works do. This is because originality is not a requirement for the protection of sound recordings as is required for musical works. It then follows that copyright need not be registered in order to be protected in Nigeria as such is protected automatically from the moment the work is fixed. However, Nigerian Copyright Commission has established a Voluntary Copyright Registration Scheme which is designed to enable right owners notify the Commission of the creation and existence of their work. This scheme is important and has been justified by Commission on the following grounds: the record generated by the NCC provides an independent source of verifying data relating to the work or its author to the general public; the acknowledgement certificate issued to the author provides a prima facie evidence of the facts shown on it; the scheme provides a depository for preserving original copies of works notified; and, the information and data contained in the Notification database offers reliable rights management information to members of the public and prospective licensees to the work. The essence of the notification and registration is to prevent others from copying the work and protect the owner from any form of infringement. An application can be submitted physically to any office of the Commission nationwide or by filling the online form. Such online application is accompanied by a completed registration form, two (2) copies of the work and evidence of payment of the prescribed fee.

For Beijing Convention 2012, performers are granted four kinds of economic rights for their performances fixed in audio-visual fixations, such as motion pictures: the right of reproduction (Article 7, Beijing Convention 2012), the right of distribution (Article 8, Beijing Convention), the right of rental (Article 9, Beijing Convention), and, the right of making same available (Article 10, Beijing Convention). As to unfixed (live) performances, the Treaty grants performers three kinds of economic rights: the right of broadcasting, the right of communication to the public (Article 11, Beijing Convention), the right of fixation (Article 6(ii), Beijing Convention). Additionally, these constitutes economic rights granted to performers, the treaty also grants moral rights to performers, thus, the performer shall have the right to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixation (Article 5(1), Beijing Convention).

Right to Control Recording and Broadcast

The Nigerian Copyrights Act gives Performers legal right to control recording, broadcasting, reproduction and adaption of their performances for a period of 50 years from the end of the year their first performances took place (section 19, NCA).

The rights carries with it civil and criminal liabilities on infringement by anyone or group of persons whether they be natural or body corporate(section 72&73, NCA). Copyright in musical works subsists throughout the lifetime of the author and continues for a period of seventy years after the end of the year in which the author of the work dies. Where the musical work was jointly made by two or more persons, the copyright lasts for seventy years after the death of the last surviving author. In the case of a government or a body corporate, copyright in musical works lasts for seventy years after the end of the year in which the work was first published. On the other hand, copyright in sound recordings lasts for fifty years after the end of the year in which the recording was first published. Thus, at the end of the period stated above, the work enters into the public domain and so anyone can use it freely. The Act does not provide an option for renewal.

The Non-Transferability Nature of Performer's Right and Infringement of Performers' Rights

The Act(section 73, NCA) provides that an unauthorized public performance of a live performance constitutes an infringement. Such performance could include radio and television broadcast, cable transmission and satellite retransmission(Itanyi&Nwamaka, 2017). It also includes other forms of communication through the use of machines, speakers, etc. It infringes performer's right to show or play the performance in public for commercial purposes without the consent of the performer. The Act, in section 71 provides that it is an infringement to import an infringing recording of a performer's work into the country otherwise than for private or domestic use without the consent of the performer(Hickey & Scherer, 2023). In some jurisdiction like the United States, infringement exists in dealing on infringing recording of a performer's work. Adding to civil remedies for infringement of performer's right, the Act recognizes some criminal liability(section 73, NCA). It follows that a person who infringes shall be liable to conviction unless such a person can satisfy the court that his conduct, as far as he knows, does not constitute an infringement of the performer's right. The court before which the offence under this section is tried has the discretion to order that the recording or any other part thereof be delivered to the performer(sections 63-73, NCA).

The Nigerian Copyrights Act has provisions for a performer to assign or transfer his right(section 69, NCA). This attaches the performer with the right to his performance and restricts producers and others. The merit of non-transfer of performer's right does not seem huge when negotiating for performance with a producer. A producer needs a performer as a performer needs a producer. The non-transferability of right can add to performer's advantage if the performer is established enough to hold performances and transmit same to desired market. The nontransferable feature of performance under Nigerian law may become an obstacle to the making of performances, especially when producers will want assurances of their control over intellectual property rights associated with the production. That is one of the reason a performer should be circumspect in affording consent for performance to avoid undue exploitation. Consent should specify to what extent the producer has rights and the benefits accruable to the performer; particularly in view of the law which does not recognize assignment of performer's rights. Where a performer feels his rights have been infringed, an action for injunctive reliefs and damages may lie against appropriate Defendant at the **Federal High Court within the state where the infringement alleged had or has occurred.**

Infringement on Book

Piracy on books is one of the oldest form of infringements on intellectual property from world immemorial. This has affected negatively the development of written intellectualism. Largely, this infringement on intellectual property occurs in reproduction and distribution of copyright books on a commercial quantity without the authorization of its owner(Nkiko, 2013). Book piracy impact more on publishers as well as on author: discouraging them from benefitting from their labours(Ahmadu, 2017). Education sector has first hand impact of piracy and decline in authorship of materials for scholarly development of pupil and student. The ease of photocopying vide photocopying machines and computer refurbishing of books covers have made book pirates richer than most authors. The public may be unsuspecting of book pirates as the price for each pirated book is usually cheaper creating losses and reduction in business of publishing. This has arguably forced some publishers into the unlawful enterprise. They may not publish fakes for the original but might declare fewer numbers of books than the quantity actually produced. This has discouraged goodwill and attempts at quenching the zeal of most authors.

Broadcast Infringement

Broadcast infringement may occur where unauthorized intellectual property of a broadcast company is aired without their consent; this could be radio or television broadcast whether a performer was featured or not. The use of technologies to crack or hack broadcast systems codes in other to gain unauthorized access and broadcast or air literary or musical or performance without consent of the company or the performer. In the case of *Nigerian Copyright Commission (NCC) v Godwin Kadiri*(2015), the Federal High Court convicted and sentenced the accused to six and half years imprisonment for piracy of the broadcast rights of HiTV in contravention of the Copyright Act.

Internet Infringement

Internet infringement is the use of computers with the aid of internet access and reproduces intellectual property as though it belonged to the one who is publishing same. The internet in the nowadays has global effects and transcends borders and national legal or institutional framework. Corporation of nations and international organizations are necessary to handling the menace of internet infringement on performer's rights(Robinson & Davidson, 2014). Now that the internet has made the world a global village(Dixon, 2009), various information and copyrighted works are being uploaded, stored, transferred and downloaded through the medium of the internet. The performer in Nigeria and other parts of the globe is faced with the new reality of having his work advertised or sold for money in countries he has not been yet and without any benefit to him neither his consent first sought and obtained(Xanthidis & Aleisa, 2012). The challenge is then how to interrupt this illegal activity, bring perpetrators to account and limit its spread among internet users(Heminge, 2013). National and international enforcement collaboration is then required to curb the menace.

Conclusion/Recommendations

A Performer or a performing artist has rights to production, reproduction, distribution and marketing of his literary works like music, dance, writings. Performers have right to retain ownership of their work and not transfer or assign same to producers or broadcast organizations. However, Performer's consent is required to reproduce and distribute for commercial purposes whether in the form hardcopies or electronically. It behoves on the performer to be circumspect in allocating his consent to a performance in other not to mortgage his rights. In cases of proven infringement of his right, Courts can award damages and order proceeds to be transferred to the performer. However, national and international piracy is still a constant menace in the intellectual property sector.

Recommendations are that there should be national and international collaborations to curb piracy of performer's works. Secondly, there is need for professional adviser to every Performer to guide him in contracting with producers and broadcast institutions. The Nigerian Copyright Act on Performers' rights should be enforced by the Nigerian Copyrights Commission and the Performers themselves through actions in Federal High Court.

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