



# **WHAT MUSICIANS SHOULD KNOW ABOUT COPYRIGHT LAW IN NIGERIA**



## INTRODUCTION

Copyright is a legal term used to describe the rights that creatives have over their literary, musical or artistic works. It is a type of intellectual property that confers exclusive right on the copyright owner and excludes any other person from reproducing or exploiting the work without the authorization of the copyright owner. Creators of designated works, in this instance, musicians must have made sufficient effort in addition to the work being fixed in a tangible medium of expression from which it can be perceived or reproduced before they can be protected under the law. For instance, recording a song in an audio file or writing down the notation of a score amounts to fixation.

It is worth mentioning that the two works which emanate from the recording of a song that are protected by copyright are the musical works and sound recording. These works, being owned separately and made subject to different rules are protected and licensed separately.

This article shall delve into the rights accruable to the owner of a musical composition, exploitation of these rights as well as the protection of their works.

## DEFINITION OF MUSICAL WORK AND SOUND RECORDING

The interpretation section of the Nigeria Copyright Act ("**NCA**") Cap C28 Laws of Federation of Nigeria 2004 defines "musical works" to mean any musical composition, irrespective of musical quality and includes works composed for musical accompaniment.<sup>1</sup> "Sound recording" is defined to mean the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a soundtrack associated with a cinematograph film.<sup>2</sup>

Musical works are created by the songwriter or composer of a song while sound recordings are created by the performer and producer of the recording. These explain why the works are separately owned, protected and licensed.

## DURATION OF COPYRIGHT IN MUSICAL COMPOSITION

On the one hand, copyright in musical works subsists throughout the lifetime of the author and continues for a period of seventy (70) years after the end of the year in which the author of the work dies.<sup>3</sup> Where the musical work was jointly made by two (2) or more persons, the copyright lasts for seventy (70) years after the death of the last surviving author.<sup>4</sup> In the case of a government or a body corporate, copyright in musical works lasts for seventy (70) years after the end of the year in which the work was first published.<sup>5</sup> On the other hand, copyright in sound recordings lasts for fifty (50) years after the end of the year in which the recording was first published.<sup>6</sup>

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.

## RIGHTS ACCRUABLE TO OWNERS OF MUSICAL COMPOSITION

A copyright owner in a musical work has an exclusive right over acts stated in **Section 6 (1) (a) of the NCA** subject to the exceptions specified in the **Second Schedule to the NCA**. These acts include the reproduction of the work, publication of the work, performance of the work in public, public display of the work, preparation of derivative works, commercial distribution of the work by way of rental, lease, hire, loan or similar arrangement, communication of the work to the public by a loudspeaker or any

<sup>1</sup> Section 51 of NCA.

<sup>2</sup> Ibid.

<sup>3</sup> First schedule to the NCA.

<sup>4</sup> Section 2 (4) of NCA.

<sup>5</sup> First schedule to the NCA.

<sup>6</sup> Ibid.

other similar device, translation/adaptation of the work, and making a cinematograph film or a record in respect of the work. Thus, a composer of a music is given a right to record the music, sell or distribute copies of the music in different formats, stream the music, perform the music in public, make new work from the original work such as sampling one's music in order to create a new song, amongst others. Copyright in musical work also extends to preventing others from doing any of these acts without one's authorization.

A copyright owner in a sound recording has an exclusive right over acts stated in Section 7 (1) of the NCA. 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.

It is pertinent to state that 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.<sup>7</sup>

## **RIGHTS ACCRUABLE TO PERFORMERS OF MUSICAL COMPOSITION**

The entertainment industry is dominated by performers, yet the protection offered by law to this class is not as clearly ascertainable as the legal protection given to authors of copyright works. Although performers are acknowledged as major players in the creative and entertainment industry, their rights are seen as merely adjunct or close neighbours to the mainstream copyright regime. Performers' rights are therefore referred to as Neighbouring rights. These rights are complementary to copyright, that is, they have a close relationship with copyright but are distinct from it. They aim at protecting individuals who complement the efforts of creators of intellectual works by making them accessible to the public. By virtue of **Section 26 (1) of the NCA**, a performer has an exclusive right in the main performance and in the subsequent exploitation of the performance which could be through recording, reproduction, broadcast or other means of public dissemination of the performance. It could also be through a re-performance to a live audience of a performance by another performer. Thus, a performer of a musical work has a right to his live performance, that is, the right not to allow anyone fix or record his performance.

On the duration of performers' right, **Section 27 of the NCA** provides that a performer's right shall subsist until the end of fifty (50) years from the end of the year in which the performance first took place.

<sup>7</sup> Understanding Nigerian Copyright Law for Music and Musicians by Ese Atakpu available at <https://kurating.com/nigerian-copyright-law-music-musicians/> last accessed on 11 May 2021.



## ASSIGNMENT/LICENCE IN A MUSICAL WORK AND SOUND RECORDING

Composers of music and producers of sound recordings can exploit their economic rights by way of an Assignment or Licence in return for a fee or royalty. Assignment is the transfer of ownership rights in the work produced, while licence is the permission given to others to use one's work, while still retaining the ownership right in the work. Thus, where the creator of a musical work or producer of a sound recording assigns or license their copyright in the work to a record label or a third party, the exclusive rights granted to the owner by virtue of Section 6 of the NCA is transferred to the Assignee/Licensee. The assignee/licensee is therefore given exclusive rights over the musical work or sound recording to reproduce, distribute, publish, perform, make adaptation/translation or broadcast and further restrain any other person from exercising such rights.

**1. Assignment:** This occurs when an author disposes his copyright by way of sale/hire. Such assignment to another person or entity could result to the loss of control of one's copyright. An assignment could be total or partial for a limited period of time. An assignment cannot be legally binding on the parties if it is not in writing.<sup>8</sup> Thus, it must be in writing and signed by or on behalf of the Assignor.

Where two (2) or more persons are creators or authors of a work, an assignment granted by one copyright owner shall have effect as if granted by his co-owner, and fees received by the grantors shall be divided equitably between all the co-owners.<sup>9</sup>

**2. Licence:** This is the permission to utilize music or recordings in instances where such utilization would otherwise result in infringement if done without such permission. Where the licence is granted, the ownership of the copyright remains vested in the artist (licensor) while the other party (licensee) has the authority to exercise some or all of the artist's rights to the extent as is allowed in the licence agreement between the parties.<sup>10</sup> Licensing is usually preferable to outright sale or assignment because it gives the copyright owner a greater control over the work. A Licence could be exclusive or non-exclusive.

i. An exclusive licence is one signed by or on behalf of a copyright owner authorizing the licensee to the exclusion of all other persons (including the person granting the licence) to exercise any right which would be exercisable exclusively by the copyright owner.<sup>11</sup> Exclusive licences cannot be implied by the parties. It must therefore be in writing in order to be valid.

ii. A non-exclusive licence is one which does not pass any interest in the work to the licensee. It allows multiple licensees to exercise the same rights being transferred in the licence. It may be written or oral, or may be inferred from conduct.

<sup>8</sup> Section 11 (3) of NCA.

<sup>9</sup> Section 11 (5) of NCA.

<sup>10</sup> Innovation Law Club Africa (ILCA), "Copyright and the Nigerian Music Industry: Examining the Licensing Regime Under the Copyright Act" available at <https://ilca.africa/copyright-and-the-nigerian-music-industry-examining-the-licensing-regime-under-the-nigerian-copyright-act/> last accessed on 13 May 2021.

<sup>11</sup> Section 51 of NCA.

<sup>12</sup> Section 11 (4) of NCA.

Furthermore, in a licensing arrangement, the licensee has a duty to provide financial consideration to the licensor which could be in the form of royalties or lump sum payment, or a form of compensation (either monetary or non-monetary). A lump sum is made at once after the grant of the licence whereas royalties are paid in instalments. It includes an upfront payment as well as subsequent payments based on the sale of the work.

It needs emphasizing that any commercial exploitation of a song or sound recording without the authorization or licence from the owner amounts to copyright infringement.<sup>13</sup>

Despite the owners/authors parting with their economic right, the moral right in the work remains with them; it cannot be sold nor parted with. Moral right is the right of a creator of a work to be known as the creator and as such can prevent third parties from claiming fraudulently that they created the work. Apart from the exclusive and non-exclusive licence of a copyright work, there are other types of musical licences which may be explored by a musician or producer of a sound recording. These licences are often negotiated by the composer/songwriter, the record labels, the performer and the publishing company. They are:-

**Mechanical licence:** This is granted to the licensee to reproduce and distribute a copyrighted musical composition in an audio format. For example, on CDs, sold as a permanent digital download or played by way of streaming. The licensee pays a mechanical royalty to the copyright owner of a musical composition for the reproduction, recording and distribution of the musical work. The owner and those who seek to utilize these rights usually enter into an agreement on the fee to be paid for the licence, however, in the absence of such, collecting societies in Nigeria may fix the fee.

**Synchronization licence:** This is granted to a licensee to utilize a song in a video format. It is also granted where the composition or sound recording is to be used in another form such as in a cover, sampling or re-recording. A synchronization royalty is paid to copyright owners by those who seek to utilize these rights.

**Broadcast or Performance Licence:** This is granted to the licensee to stream, perform, play or record sound recordings in public such as television, radio stations, in parks, concerts, hotels, restaurants or at parties. It is worth noting that Collective Management Organizations (“CMO”) like COSON<sup>14</sup> or MCSN<sup>15</sup> are usually employed to negotiate, administer, grant and recover performance licences and their royalties.

<sup>13</sup> Section 15 (1) of NCA.

<sup>14</sup> Copyright Society of Nigeria (‘COSON’). COSON is a CMO approved by the Nigerian Copyright Commission (‘NCC’) to act on behalf of the authors, composers, performers, publishers of musical works and owners of sound recording in Nigeria.

<sup>15</sup> Musical Copyright Society of Nigeria (‘MCSN’). The MCSN is an incorporated collective association of authors, composers, arrangers and publisher of music. Available at <https://mcsnnigeria.org/> last accessed on 13 May 2021.





Although the Nigerian Copyright Commission (“NCC” or “the Commission”) on May 2010 approved COSON as the only entity which complied with the statutory requirement for a CMO, their licence was however suspended on April 30, 2018 following a lingering factional dispute in the governing board of COSON as to its legitimate leadership. Thus, COSON is no longer authorized under the law to collect royalties on behalf of and for musicians and other performing artists in Nigeria. In the case of **NCC v. Tony Okoroji & Ors**,<sup>16</sup> NCC proceeded against key personnel of COSON for demanding royalties despite its suspension as a CMO, which action is punishable under **Section 39(4), (5) & (6) of NCA**. The Court held that no action can be taken to disrupt the status quo, that is, COSON cannot demand royalties until its suspension is either lifted by the NCC or through the final judgment of a court of competent jurisdiction.

In April 2017, the Attorney General of the Federation, Abubakar Malami issued a directive mandating the approval of MCSON as a CMO, having met all the criteria under **Article 2 of the Copyright (Collective Management Organizations) Regulations 2007 (CMO Regulation)**. COSON however contended this development by filing an action in the case of **COSON v. MCSON & NCC**<sup>17</sup> and prayed the Federal High Court (“FHC”) to withdraw the approval. The Suit was dismissed and MCSON’s appointment was validated. This approval was further upheld in the landmark case of **MCSON v. Compact Disc Technology Ltd & 2 Ors**,<sup>18</sup> where the issue for determination was whether the Appellant had the locus standi and if it required a licence to operate as a CMO. The Supreme Court reversed the decision of the Court of Appeal and held that by virtue of the Appellant being the owner, assignee and absolute licensee of the copyright in the works in issue, it had been vested with the locus standi to institute the action. Presently, MCSON remains the only entity vested with the right to act as a CMO in Nigeria.

In all, copyright owners in music and sound recordings always employ the services of music publishing company such as CD Baby, TuneCore to assist in the management, exploitation, administration, distribution and granting of licences to other parties on behalf of the copyright owner. They also assist music copyright owners to recoup royalties for their works on streaming platforms like Boom Play, Apple Music, Audiomack, Spotify etc.

<sup>16</sup> (Unreported) Suit No: FHC/L/338C/2018

<sup>17</sup> (Unreported) Suit No FHC/L/CS/1259/2017

<sup>18</sup> 30 (2018) LPELR-46353 (SC)



## WAYS OF PROTECTING THE RIGHTS IN MUSICAL COMPOSITIONS

It is apt to mention 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, NCC 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 NCC on the following grounds:

- i. The record generated by the NCC provides an independent source of verifying data relating to the work or its author to the general public;
- ii. The acknowledgement certificate issued to the author provides a prima facie evidence of the facts shown on it;
- iii. The scheme provides a depository for preserving original copies of works notified;
- iv. 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.<sup>19</sup>

The essence of the notification and registration is to prevent others from copying the work and protect the owner from any form of infringement.

Additionally, an application can be submitted physically to any office of the Commission nationwide or by filling the online form. Such online application shall be accompanied by a completed registration form, two (2) copies of the work and evidence of payment of the prescribed fee.

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<sup>19</sup> Available at <http://www.registration.copyright.gov.ng/ncc/faq> last accessed on 13 May 2021.





## CONCLUSION

There has been a general lack of awareness among artists as to their copyright, how it can be protected from infringement and effectively utilized to generate a sustained stream of income. It is therefore imperative that music composers, songwriters, producers of sound recordings and performers of music understand the concept of copyright as it relates to their works. This would enable them maximize their economic rights as well as preserve their moral rights while also preventing any form of future dispute. The service of a lawyer is indispensable at every stage of the process including but not limited to entering a licensing arrangement or assignment with another party.



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