

ONLINE MUSIC AND MOVIES AND NEW TECHNOLOGICAL DEVICES: CHALLENGES CONFRONTING COLLECTING SOCIETIES IN NIGERIA

By

Prof. J.M. Nasir^{*}, Dr. D.N. Jangkam^{} and Dr. A.A. Adewole^{***}**

ABSTRACT

This paper looks at the recent developments in the area of information communication technology where there is significant advancement in the types of gadgets that are to available in the market coupled with the wide use of the internet. In addition to allowing users to have greater access to the internet, these gadgets allow users to share information amongst them. In recent times, musicians and movie producers have put their music and movies on the internet. This has made them available to be downloaded and, with new devices available, music and movies on the internet could be shared amongst users of these devices. The music industry in Nigeria is a multi-million naira industry and has also grown to the extent where music by Nigerian artists is also available online and is susceptible to downloading and sharing. There is no recourse to the artists and producers of these songs and movies. This development poses a challenge to collecting societies in Nigeria. There is yet no legal framework for the control of downloading and sharing of music and movies on the internet in Nigeria as exist in the United States and Canada. Consequently, it is imperative for Collecting Societies to device means by which artists and movie producers could be compensated for downloaded and shared material. A legislative scheme requiring internet service providers to charge users who download music and videos online, and crediting proceeds to collecting societies is recommended by the authors.

1.1 Introduction

New technologies are, without a doubt, an important factor influencing the socio-economic and institutional transformation of economic sectors.¹ They can trigger changes within economic structures or organisational and business models; contribute to the constitution of new markets and market relations; shift existing constellation of cooperation and competition; expand the scope of action open to new actors; make the readjustment of regulatory frameworks necessary; or produce modifications in

^{*} Faculty of Law, University of Jos

¹ Dolata, U., "The Music Industry and the Internet: A Decade of Disruptive and Uncontrolled Sectoral Change", SOI Discussion Paper 2011-02, University of Stuttgart, Institute of Social Sciences Department of Organizational Sociology and Innovation Studies.

consumption patterns.² This is evident from the increased recognition of the importance of creativity in its different dimensions, especially in the entertainment industry, as key drivers of socio-economic development cannot be over emphasised. This is consistent with recent global trends which indicate an unprecedented dynamism in trade in goods and services of the creative industries.³

According to a 2010 UNCTAD Report, world exports of these industries reached an all high of \$592 billion in 2008, up from \$257 billion in 2002, growing at an annual rate of 14%.⁴ The Report, which underscores the emergence of a new development paradigm that links the economy and culture, and encompasses economic, cultural, technological and social aspects of development, further notes that the creative and entertainment industries are opening up new opportunities for developing countries to leapfrog into high-growth sectors of the global economy and increase their part participation in international trade.⁵ There is a need for Nigeria to fully tap into this potential. The country is richly endowed with people who are gifted with creative talents and who need a conducive environment to unleash their creative energies in the provision of works of entertainment, to enrich society, provide a means of employment and livelihood for themselves, and contribute to socio-economic and cultural development. The increasing importance of the creative and entertainment industries globally therefore provides the needed momentum to explore and expand existing potentials in Nigeria to achieve a more equitable, inclusive and sustainable development.⁶

The purpose of this paper is to give an overview of the broad and complex notion of collective management of copyright and related rights, especially as it concerns internet music and videos, and new technological devices. Here the challenges confronting collecting societies in Nigeria are identified with a view to making recommendations for overcoming them. Before discussing the issues and concepts, however, it is imperative to look briefly at what copyright and related rights themselves amount to.

1.2 Scope of Copyright⁷

When a person creates a literary, musical, scientific or artistic work, he or she is the owner of that work and is free to decide on its use. That person (called the “creator” or the “author” or “owner of rights”) can control the destiny of the work.⁸ Since by law, the work is protected by copyright from the moment it comes into being, there is no formality to be complied with, such as registration or deposit as a condition of that protection. Mere

² Ibid.

³ Oyewunmi, A., “Towards Sustainable Development of Nigeria’s Entertainment Industry in the Digital Age: Role of Copyright Law and Administration”, *NIALS Journal of Intellectual Property (NJIP)* Maiden Edition, 2011 p. 74.

⁴ See UNCTAD, *Creative Economy: A Feasible Development Option*, Creative Economy Report 2010, UNCTAD/DITC/TAB/2010/3. Online at http://unctad.org/en/docs/ditctab.20103_en.pdf. viewed 16th June, 2011.

⁵ Ibid.

⁶ Ibid.

⁷ The Law on Copyright in Nigeria is the Copyright Act. Cap. C.28 LFN 2004.

⁸ World Intellectual Property Organization, *Collective Management of Copyright and Related Rights*, WIPO Publication No. L450CM/E.

ideas in themselves are not protected, only the way in which they are expressed.⁹ The economic rights in copyright are the rights of reproduction, broadcasting, public performance, adaptation, translation, public recitation, public display, distribution and so on. While the moral rights include the author's right to object to any distortion, mutilation or other modification of his work that might be prejudicial to his honour or reputation.¹⁰

Both sets of rights belong to the creator who can exercise them. The exercise of rights means that he can use the work himself, can give permission to someone else to use the work or can prohibit someone else from using the work.¹¹ The general principle is that copyright protected works cannot be used without the authorisation of the owner of rights.¹² Limited exceptions to this rule, however, are contained in national copyright laws.¹³ In principle, the term of protection is the creator's lifetime and a minimum of 50 - 70 years after his death.¹⁴ These legal aspects are specified in international conventions to which most countries are now party. Nigeria is a signatory to the following international instruments, imposing on it certain obligations, many of which find expression in the Copyright Act:¹⁵

- (a) Universal Copyright Convention (UCC);
- (b) Berne Convention for the Protection of Literary and Artistic Works (Berne Convention);
- (c) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention);
- (d) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) within the framework of the WTO Agreement.

Nigeria is signatory to three other WIPO treaties: the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty and the Convention on the Protection of Audiovisual Performances but has not ratified any of them.¹⁶

⁹ Ibid.

¹⁰ Ibid.

¹¹ See Ss. 6-8 Copyright Act Cap. C28 LFN 2004.

¹² S. 15 Copyright Act Cap C28 LFN 2004

¹³ Second Schedule (S. 6(1) Copyright Act Cap C28 LFN 2004.

¹⁴ First Schedule (S. 2) of the Copyright Act Cap C28 LFN 2004

¹⁵ Asein, J., *Nigerian Copyright: Law and Practice*, (2nd ed.) (Abuja: Books and Gavel Publishing Abuja, 2012) 381 - 388

¹⁶ Ibid. And note that no treaty has the force of law in Nigeria except to the extent to which it has been enacted into law by the National Assembly (Section 12(ii) of the 1999 Constitution). Nigeria is not party to the following international instruments in the field of copyright and neighbouring rights:

- (a) Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms;
- (b) Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite;
- (c) Treaty on the International Registration of Audiovisual Works;
- (d) Treaty on Intellectual Property in Respect of Integrated Circuits;
- (e) WIPO Copyright Treaty;
- (f) WIPO Performances and Phonograms Treaty; and
- (g) Convention on the Protection of Audiovisual Performance.

At the international level, the economic and moral rights are conferred by the Berne Convention for the Protection of Literary and Artistic Works, commonly known as the “Berne Convention”. This Convention, which was adopted in 1886, has been revised several times to take into account the impact of new technology on the level of protection that it provides. It is administered by the World Intellectual Property Organization (WIPO), one of the specialised international agencies of the United Nations system.

1.3 Recent Technologies and Internet Music and Movies

The Copyright Act¹⁷ defines a musical work as “any musical composition, irrespective of musical quality and it includes works composed for musical accompaniment”.¹⁸ The internet is a global network of computers all speaking the same language. The basic function performed by the internet is extremely simple – it transports digital information from one computer to another, and nothing more. In other words, at the functional level the internet is no more than a communication technology.¹⁹ The meaning of the information communicated via the internet is completely irrelevant to its transport; that meaning is determined by the software which receives the information. Any type of information which can be translated to digital form can be transported – the most common types of information are text, numerical data, images, sounds/music and video.²⁰

Nigeria is renowned for its musical talents. The country is home to a number of internationally renowned musicians whose works are widely enjoyed by diverse audiences. Nigerian producers constantly bemoan their fate in the hands of pirates, whose activities have jeopardized their returns on investments, thereby undermining the economic rationale for copyright protection, and serving as a disincentive to prospective investors in the sector. Beyond the sale of pirated CDs however, the industry is now further confronted with the issue of piracy on a different scale whereby musical works and films are digitised and distributed online to a global market.²¹

It was the development of the MP3 technology that revolutionised digital music industry.²² MP3 Standard (Motion Picture Experts Group Standard 3) – is basically a powerful logarithm that shrinks digital audio by a factor of between 12-96 times, depending on quality. Digital MP3 files are created through a process colloquially called “ripping”. Ripping software allows a computer owner to copy an audio compact disc (“audio CD”) directly onto a computer’s hard drive by compressing the audio information on the CD into the MP3 format.²³ The MP3’s compressed format allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol.²⁴ The challenges presented by digitisation and the advent of

¹⁷ Copyright Act Cap C28 LFN 2004

¹⁸ S. 51

¹⁹ Reed, C., *Internet Law: Text and Materials* (2nd ed.) (New Delhi: Universal Law Publishing, 2010) 13

²⁰ Oyewunmi, Op. Cit., p. 79.

²¹ Ibid.

²² Sharma, v. *Information Technology: Law and Practice* (3rd ed.) (New Delhi: Universal Law Publishing Co., 2012) 27

²³ Ibid.

²⁴ Ibid.

the Internet for players in developed countries is now available in Nigeria, particularly as regards the production and dissemination of music works.

1.4 Online Music and Movies

The Internet is a platform for the dissemination of information by way of uploading content online, which can be downloaded by other users of the internet. The content that can be uploaded online, which can also be downloaded from the Internet includes music and movies, and the trend globally was for music and movies to be uploaded online for entertainment or promotional purposes, but mostly for sale. Nigerians were not left behind as they also began to make use of the Internet for similar purposes. Consequently, there are a number of websites that make Nigerian music and movies available for downloading.²⁵ the music and the videos on most of these sites can be downloaded for free.

1.5 New Technological Devices and their Impact on Online Content Sharing

The growth of mobile telephone technology has witnessed the introduction of devices such as mobile phones with 3G capabilities, Blackberry and Android phones into the Nigerian market. Coupled with faster and relatively cheaper internet connectivity than was hitherto unavailable, these devices enable users to access the Internet at low cost and to download music, music video and movie content that is available on the Internet. After the music or movie is downloaded, these devices also allow users of these devices to share downloaded content amongst themselves by activating the Bluetooth device on either their phones or laptops, and then pairing and exchanging the downloaded material.

Besides this, there are also what are referred to "peer-to-peer" networks which are computer systems that are connected to each other via the internet. Files on these computers can be shared directly between systems on the network without the need for a central server.²⁶ The only requirements for a computer to join a peer-to-peer network are an internet connection and a P2P software. The common P2P software programs available include KaZaa, Limewire, BearShare, Morpheus, and Acquisition. These programs connect to a P2P network such as "Gnutella" which allows the computer to access thousands of other systems on the network.²⁷ Once connected to the network, P2P software allows a user to search for files on other users' computers, just as the other users can do the same on the users' computer. This is limited however, to folders that has been designated for sharing purposes. While P2P networking ordinarily makes file sharing easy and convenient, it has also led to a lot of software piracy and illegal music downloads an sharing.²⁸ These methods of downloading and sharing music and movies calls for concern amongst artists and movie producers. This is even more so when we

²⁵ These sites include iRoking.com, which has Nigerian music and music videos. There is also iROKO.com, which has Nigerian movies online

²⁶ See definition of peer-to-peer networks at techterms.com/definition/p2p

²⁷ Ibid

²⁸ Ibid

consider the sizes of the music and movie market that is currently online, and that which is expected to be online in the near future.

1.6 The Music Market in Nigeria

Nigerian music is a mix of different genres. however, in the late 1980s and 1990s, hip-hop became the most popular genre in the country, both in its Americanised form and through re-interpretation of Western standards by Nigerian musicians.²⁹ The latter strand is what eventually led to the emergence of what is referred to as "Naija hip-hop", which, according to Rutschman, is the top selling and top playing genre in the country.³⁰ The music market in Nigeria reportedly generated revenues of \$53 million in 2012, up from revenues of \$47 million in 2009. This figure is expected to grow at 9.3% rate annually to reach \$81 million in 2018.³¹ It has been observed that retail spending on physical formats i.e. CD sales, has been on the decline and will continue to do so to a level of about \$11 million in 2018, which is equivalent to half of its value in 2009.³² Retail spending on digital music will overtake spending on physical formats and would rise by 6.7% between 2013-2017 totaling \$28.4 million in 2017.³³ It is expected that digital music's share of total spending on recorded music will rise to 67% by 2017.³⁴ This shows that online music is the future of the industry in Nigeria.

This is more so that the retailers of physical formats of recorded music have to compete with highly organised illegal sales of pirate CDs at a fraction of the price of legitimate versions,³⁵ thereby bringing low returns to the artist. It has been suggested, and quite rightly too, that the Internet has reduced the sale of legitimate CDs and that illegal MP3 downloads have become a substitute for CD purchases.³⁶ The reason behind this trend is not far-fetched as the ease with which downloads can be made and freely shared amongst users of mobile technology devices makes it more attractive than purchasing a CD, whether original or pirate copy. The impact that online music has on the sale of CDs is very profound. Coupled with contemporary mobile telephone technologies that are becoming even more available to millions of telecommunications users in Nigeria, online music and the way and manner that it is freely downloaded and shared should give a lot of concern to artists and collecting societies in Nigeria. There must be a framework that ensures that artistes are fairly compensated for music that is downloaded and shared using mobile telephone technologies, and peer-to-peer networks, otherwise copyright protection would be rendered ineffective as far as online music and movies, and shared

²⁹ Rutschman, A., "Weapons of Mass Construction: The Role of Intellectual Property in Nigeria's Music and Film Industries, (2015) EILR, Vol. 29, pg. 681

³⁰ Ibid. This is with reference to "Top Ten Nigerian Hip Hop Songs 2014 at BUZZNIGERIA, <http://buzznigeria.com/nigerian-hip-hop-songs>(last visited Feb. 12, 2015)

³¹ Entertainment and Media Outlook: 2014-2018 (South-Africa, Nigeria, Kenya) (A Report of PriceWaterhouseCoopers) (5th Annual Edition) September 2014, pg. 156

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Ibid, 148

³⁶ Tade, O. and Akinleye, B., 'We are Promoters not Pirates': A Qualitative Analysis of Artistes and Pirates on Music Piracy in Nigeria, UCC Vol.6, No. 2, 1014-1029, at 1017

music and movies are concerned. This becomes imperative when we consider the size of these industries in terms of current revenue profile and the projections for the near future.

1.7 The Movie Market in Nigeria

The Nigerian film industry i.e. Nollywood is currently the second largest in the world, next only to the famed Hollywood (in the United States) and ahead of Bollywood (India's film industry). Rutschman states that what is Nollywood began "as a cult phenomenon surrounding a low-budget movie shot by a Nigerian amateur in the early 1990s".³⁷ According to her, as at 2013, Nollywood generated annual revenues of approximately \$800 million, with an average movie selling around 50,000 physical copies in Nigeria, while Blockbusters could sell between 400,000 and 800,000 copies.³⁸ By any standards in the developing world, the Nigerian film industry is a big one that has the potential to compete with similar industries in the west. Unfortunately, the industry is confronted with a number of challenges, of which piracy is prime. Quite interestingly, however, Rutschman posits that piracy actually propelled the growth and popularity of the industry in a way that increased demand for both legitimate and illegitimate copies of Nollywood movies in Nigeria.³⁹ The contradiction inherent in the role played by piracy in making Nollywood popular yet undermining the right of the movie producers and artists to fully realising just remuneration for their work is very palpable. Nonetheless, we have to admit that piracy does more harm than good to the movie industry and the economy as a whole.

Recent trends in the movie industry where movies are now online⁴⁰ portend grave danger to the industry beyond what has been witnessed in terms of traditional forms of piracy, which involve copying movies on CDs and distributing them in the market. Rutschman has catalogued the growth and development of the online movie business in Nigeria which was pioneered by the founder of iROKO in 2010.⁴¹ As noted by PriceWaterhouseCoopers, mobile internet access will see more rapid growth in that 25% of Nigerians will have access to the internet via a mobile device by 2018, thus providing an opportunity for delivering Nollywood content digitally. With Nollywood movies online come the challenges of downloading and sharing them through 3G mobile phone technologies. Just as it is with online music, there are currently no initiatives to deal with online piracy of movies in Nigeria.⁴² It is against this background that we now proceed to examine the challenges confronting collecting societies in Nigeria.

³⁷ Op. Cit., 689

³⁸ Ibid., 693 citing Arewa, O., *The Rise of Nollywood: Creators, Entrepreneurs, and Pirates*, 26-27 (U.Cal.Irvine Sch. L. Working Paper No. 2012-11, 2012)

PriceWaterhouseCoopers reports that the filmed entertainment market in Nigeria is expected to surpass \$250 million in 2018. See page 120 of the Report.

³⁹ Ibid., 690

⁴⁰ Oyewunmi, Op. Cit., 80

⁴¹ Op. Cit., 696. PriceWaterhouseCoopers reports that iROKOTv is already streaming Nollywood movies to the Nigerian Diaspora around the globe while it currently focuses on DVDs within Nigeria, although this trend is expected to change. See page 121 of the Report.

⁴² The regulatory response to the digital age in Nigeria is the Copyright (Optical Discs Plants) Regulations (No.66) of 2006. This Regulation is relevant as far as piracy of physical formats of music and movies is concerned. It does not contemplate

1.8 The Role of Collecting Society in the Management of Copyright and Related Rights

It has been mentioned that the primary goal of copyright system is to give the creator of a work and performers the exclusive right to exploit or authorise the exploitation of the work or performances.⁴³ As the first beneficiary of the right, it is expected that a right owner would be responsible for ensuring that his legal rights are effectively and ministered. However, it is becoming increasingly difficult, if not impossible, for the individual to effectively administer all his rights.⁴⁴ A creator of a work is not materially capable of monitoring all uses of his works. He cannot, for instance, contact every single radio or television station to negotiate licenses and remuneration for the use of his works.⁴⁵ On the other hand, it is not practical for a broadcasting organisation to seek specific permission from every author for the use of every copyrighted work. An average of 60,000 musical works are broadcast on television every year,⁴⁶ and as such thousands of owners of rights would have to be approached for authorisation.⁴⁷ It is, therefore, practically difficult to manage these activities individually, both for the owner of rights and for the user. It is for this reason that a need has been recognized for the creation of an organisation which should have the role to bridge the gap between them. As the organisation functions collectively to assist owners of rights in managing their rights, it is called "collective management" and in Nigeria this role is performed by collecting societies. Collective management is the exercise of copyright and related rights by organisations acting in the interest and on behalf of the owners of rights.⁴⁸

This mechanism involves the copyright owner surrendering his rights to an association of right owners with a mandate to the association to act on his behalf in the negotiation of tariffs, grant of licences and the collection of agreed royalties which are subsequently distributed among the right owners.⁴⁹ Describing the nature of a collecting society, Odunowo, J. in *Musical Copyright Society of Nig. Ltd v. Details Nig. Ltd*.⁵⁰ explained it thus:

The owners of copyrights authorise collective administration organisations to administer to use of these rights by monitoring the use of their works, negotiate with prospective users of such copyrighted works, give them licenses on the basis of pre-agreed

the emerging trends of online piracy. There is a Cyber Security and Data Protection Agency Bill, which criminalises the use of computers to infringe upon IPRs protected under Nigerian law or any Treaty applicable in Nigeria. This Bill also has its limitations in that it does not contemplate other forms of online piracy using technological devices like mobile phones, iPads and other such devices that are not computers in the violation of IPRs.

⁴³ Asein, Op. Cit., 362

⁴⁴ Ibid.

⁴⁵ WIPO: Collective Management of Copyright and Related rights, Op. Cit., 3

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Asein, Op. Cit., 362 - 363

⁵⁰ Suit No. FHC/C/CS/434/95.

fees, collect such fees and apportion them among the owners of such rights... This object is achieved in one of two ways. The owners of protected works can either come together under an umbrella organisation or constitute some of their members into a committee that will assume administrative responsibility for collecting appropriate royalties on behalf of such members instead of each copyright owner suing all infringers individually.

The other alternative is for a company to be independently established, as in the instant case, with the primary object of negotiating with as many copyright owners as possible to secure the assignment of their rights on mutually agreed terms of payment.

By giving the right owner the exclusive power to authorise the doing of certain acts, it goes to reason that he is entitled to prevent others from using that right without his licence. He may also refuse to grant a licence except on his terms and conditions including the right to require payment of fees in return for a licence.⁵¹

Indeed, the collective administration of rights recognises the personal nature of the author's exclusive right and that he may choose to administer it directly or through an agent. As a practical and effective means of safeguarding these rights, they are assigned to the collecting society which in turn gives blanket authorisation to users. The assignment gives the society the authority to represent the author in the negotiation and grant of licences as well as the judicial and extra-judicial enforcement of those rights.⁵² It is common practice for the creator, upon joining a collecting society, to assign the particular rights to be administered as they relate to existing and future works belonging to him. The territory of grant generally extends to the whole world unless the creator has reason to exclude some territories. This is to enable the society, to which the creator belongs, to administer his rights in foreign lands on the basis of reciprocal representation. Allowance is also made for those rights that may have fallen into the hands of third parties.⁵³

The need for such an organisation cannot be over-emphasised as composers, writers, musicians, singers, performers and other talented individuals are among society's most valuable assets. The fabric of our cultural lives is enriched by their creative genius. In order to develop their talent and encourage them to create, we have to give those individuals incentives, namely remuneration in return for permission to make use of the works. Collective societies as management organisations are an important link between creators and users of copyrighted works (such as radio stations) because they ensure that

⁵¹ *Phonographic Performance Ltd. v. Saibal Mahtia* (1988) F.S.R. 749. (Held that it was not an abuse for the plaintiff to refuse to licence its copyright without an appropriate payment for past use and an agreement for future use).

⁵² Asein, Op. Cit., 177

⁵³ Ibid.

as owners of rights, creators receive payment for the use of their works. The commonest types of right under collective society management include:⁵⁴

- (a) The right of public performance (music played or performed in discotheques, restaurants, and other public places);
- (b) The right of broadcasting (live and recorded performances on radio and television);
- (c) The mechanical reproduction rights in musical works (the reproduction of works in CDs, tapes, vinyl records, cassettes, mini-discs, or other forms recordings);
- (d) The performing rights in dramatic works (theater plays);
- (e) The right of reprographic reproduction of literary and musical works (photocopying);
- (f) Related rights (the rights of performers and producers of phonograms to obtain remuneration for broadcasting or the communication to the public of phonograms).

1.8.1 The Workings of Collective Societies

There are various kinds of collective societies or groups of such organisations, depending on the category of works involved (music, dramatic works, “multimedia” productions, etc.) that will collectively manage different kinds of rights. Traditional collective society management organisations, acting on behalf of their members, negotiate rates and terms of use with users, issue licences authorising uses, collect and distribute royalties. The individual owner of rights does not become directly involved in any of these steps. Specifically in the field of musical works (encompassing all types of music, modern, jazz, classical, symphonic, blues and pop whether instrumental or vocal), documentation, licensing and distribution are the three pillars on which the collecting society management of the rights of public performance and broadcasting is based.⁵⁵

In furtherance of their function, the collective societies negotiate with users (such as radio stations, broadcasters, discotheques, cinemas, restaurants and the like), or groups of users and authorizes them to use copyrighted works from its repertoire against payment and on certain conditions. On the basis of its documentation (information on members and their works) and the programs submitted by users (for instance, logs of music played on the radio), the collective societies management organisation distributes copyright royalties to its members according to established distribution rules.⁵⁶ A fee to cover administrative costs, and in certain countries also socio-cultural promotion activities, is generally deducted from the copyright royalties. The fees actually paid to the copyright owners correspond to the use of the works and are accompanied by a breakdown of that use.

⁵⁴ WIPO: *Collective Management of Copyright and Related Rights*, Op. Cit., 18

⁵⁵ Ibid.

⁵⁶ Ibid.

These activities and operations are performed with the aid of computerised systems especially designed for the purpose.

1.8.2 Collective Societies Management and the Digital Environment

It has been stated that copyrighted works will be increasingly delivered in digital form via global networks such as the internet. As a result the collective societies management of copyright and related rights by public, semi-public and market sector entities will be re-engineered to take advantage of the efficiency gains offered by information technology. The ever-increasing opportunities offered to the holders of rights by the internet and the advent of “multimedia” production are affecting the conditions of protection, the exercise and management of copyright and related rights, and also the enforcement of rights.⁵⁷ In the online world that has developed in the new millennium, the management of rights is taking on a new dimension. Protected works is now digitised, compressed, uploaded, downloaded, copied and distributed on the internet to any place in the world. The expanding power of this network allows mass storage and online delivery of protected material. The possibility of downloading the contents of a book, or to listen to and record music from cyberspace is now a reality. While this presents immeasurable opportunities, there are also many challenges for owners, users and collective management organisations.⁵⁸

Many collective management organisations have developed systems for online delivery of information relating to the licensing of works and content, the monitoring of uses and collection and distribution of remuneration for various categories of works within the digital environment. These digital information systems, which depend on the development and use of unique numbering systems and codes that are embedded in digital carriers such as CDs, films, allow works, the rights owners, the digital carriers themselves to be properly identified and provide other relevant information. Adequate legal protection is needed to prevent acts intended to circumvent technical protection measures, and also to insure against the removal or alteration of any elements of the digital information systems or other such practices.

There are two international treaties were concluded in 1996, under the auspices of WIPO, to respond to the challenges of protecting and managing copyright and related rights in the digital age. These treaties are WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)⁵⁹ deal among other things with obligations concerning technological protection measures and rights management information in the digital environment; they ensure that the owners of rights are protected when their works are disseminated on the internet; they also contain provisions requiring national legislators to provide efficient protection for technological measures, by

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Nigeria is not party to these informational instruments.

prohibiting the import, manufacture and distribution of illicit circumvention tools or material and also outlawing acts detrimental to rights management information systems.⁶⁰

1.9 Challenges Confronting Collective Societies in Nigeria

Developed countries have been successfully exploiting the export potential of their musical talent for some time. And of course, the major players in the industry are multinational firms based in these countries. But many developing countries including Nigeria have world-class musical talent too, though music in these areas have brought little economic benefit and returns to the countries of origin. Artists from these developing countries such as Bob Marley, the late Fela Kuti, King Sunny Ade, Youssou N'dour, Mariam Makheba, Angelique Kidjo among others have achieved major international success and acclaim. However, their international success in high-income markets was not translated into concrete benefits to their home countries.⁶¹

An online search carried out in respect of the Nigerian music industry reveals that the works of a number of Nigerian artistes are prominently displayed on websites all over the internet. These websites, including some very well known ones like the dissemination channels of YouTube,⁶² can be seen promoting and offering for sale, works of Nigerian musicians like 2face Idibia, D'Banj, Onyeka Onwenu, King Sunny Ade, etc.⁶³ Others however, make the works freely available for downloading and it thus becomes possible to enjoy these works without furnishing any consideration.⁶⁴ Even for those offering the works for sale, it is unclear whether this is being done with the consent of right holders, and whether royalties and other proceeds from the commercial exploitation is remitted to the rights holders concerned.⁶⁵

In Nigeria, there are a number of collecting societies.⁶⁶ Unfortunately, these collecting societies are better known for their bitter struggles for supremacy in the management of copyright in the music industry.⁶⁷ In our view, the main challenge confronting collecting societies in Nigeria is how to put aside their differences and work towards the establishment of a framework that effectively ensures that the copyright of artistes in online music and movies are not infringed upon by the new wave of downloading and

⁶⁰ WIPO: Collective Management of Copyright and Related Rights, Op. Cit. and see also "from Artist to Audience" (WIPO Publication No. 922).

www.wipo.int/wipo_magazine/en/2007/01/article.0004.html;
<http://www.wipo.int/arab/en/meetings/2002/musical/forum.ip/pdf/ip/k.mct.02.16.pdf>.

⁶¹ Youth Forum Music Industry workshop organized by UNCTAD.

⁶² Oyewunmi, Op. Cit. and <http://www.youtube.com/>.

⁶³ Ibid and <http://www.120anmovies.com/>

⁶⁴ Websites showing wide variety of Nigerian entertainment works including movies, secular and religious music and comedies free of charge include <http://video.onlinenigeria.com/>; <http://www.nigeriascreen.com/>; <http://www.thestbo/yvideos.com/>; <http://www.naijapals.com> – and <http://www.nigerianentertainment.com>. See Oyewunmi, Op. Cit.

⁶⁵ Ibid.

⁶⁶ With respect to the music industry the collecting societies are the Musical Copyright Society of Nigeria (MCSN) and the Copyright Society of Nigeria (COSON), the latter of which was licensed by the Nigeria Copyright Commission as the sole Copyright Management Organisation in the year 2010. The Actors' Guild of Nigeria operates in the movie industry.

⁶⁷ See Adewunmi, Op. Cit., 79 citing an interview with Kanayo O. Kanayo on 18/08/09 at <http://www.nigerianfilms.com>. See also "Battle for the Soul of Music Collective Societies", Thisday Newspaper

sharing, which is projected to be on the increase in the coming years. In the United States of America, for instance, the Digital Millennium Copyright Act (DMCA) has been passed in order to deal with this emerging trend. The DMCA was enacted to implement the WIPO Digital Treaties.⁶⁸ The DMCA implements the provisions of Articles 11 and 18 of these two treaties respectively⁶⁹ by making provisions for the implementation of these obligations.⁷⁰ This is achieved by dividing technological measures into two categories i.e. measures that prevent unauthorised access to a copyrighted works, and measures that prevent unauthorised copying of copyrighted works.

The DMCA also makes provisions for the prevention of online copyright infringement, even though there are certain limitations to the liability of service providers for online copyright infringement.⁷¹ Significantly, however, the DMCA establishes a procedure by which a copyright owner may obtain a *subpoena* ordering a service provider to disclose the identity of a subscriber who is allegedly engaged in infringing activities.⁷² Just as is obtainable in the United States and some other countries such as the United Kingdom and Canada, it is necessary for Nigeria to have in place a legal framework for the regulation of online activities to ensure that the rights of owners of copyrighted works are not infringed upon without remedy. It is necessary for legislation in Nigeria to ensure that internet service providers take some responsibility in the fight against online piracy. This is because without the platform that they offer their subscribers, the recent trend of online piracy would not exist. Internet service providers must be compelled to put measures in place to monitor the activities of internet subscribers in order to ensure that owners of copyright and collecting societies can effectively value the quantum of online music and video content that is downloaded in Nigeria, and by whom. In addition to this, internet service providers (ISPs)⁷³ should be required to put measures in place that would automatically make a subscriber who is downloading online music and movies to pay a certain amount, with the technicalities involved being worked out between the collecting societies and the ISPs. The sum deducted by the ISP would then be credited to the collecting society.

The same is applicable to music and music videos and movies that are shared among mobile phone subscribers. The network operators should be required to put measures in place to monitor the sharing of music and video files among their subscribers by way of transfers from one device to another. With such measures in place, it is expected that any

⁶⁸ That is the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)

⁶⁹ These require Contracting States to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under the treaties and the Berne Convention.

⁷⁰ The new Section 1201 of the US Copyright Act.

⁷¹ This is under Title II, which adds a new Section 512 to the US Copyright Act. The limitations are based on the following categories of conduct by a service provider i.e. transitory communications, system caching, storage of information on systems or networks at the direction of users, and information location tools.

⁷² Section 512 (h)

⁷³ Rutschman states that as at 2011 there were 136 ISPs in Nigeria. See Rutschman, Op. Cit., 678. This figure is expected to have increased as at 2015 and is expected to rise going forward as the use of the Internet continues to grow and expand.

person who receives a music or video file from another person through a mobile phone device should be made to pay for the music or video that he/she receives. In this way, music and video content online and on mobile phone devices, which are very often copyrighted works, would no longer be shared between mobile phone subscribers without some benefit to the artiste who created the work or who the person who has copyright over the work.

1.10 Conclusion

The Internet has revolutionised the entertainment industry all over the world, including Nigeria. The Internet is a platform upon which music and videos can be put online and accessed by millions of users worldwide. It is also a platform for selling music and videos. This, however, is not without its challenges, which is primarily known as online piracy. There is a need to provide an effective framework for the prevention of online piracy in music and videos. This is more so that the sale of online music and video is gradually surpassing the sale of physical formats of music and videos in Nigeria and other parts of Africa. In the event that the piracy of online music and videos goes unchecked, it would have serious negative implications on the economic rights that copyright guarantees the owners of copyright. This calls for an urgent review of the existing framework for copyright protection to deal with this emerging trend. The push for this review ought to be spearheaded by collecting societies who serve as a vehicle for the protection of the economic rights of their members. This must begin with the domestication of the WCT and the WPPT in Nigeria. Indeed, even in the absence of such a development, the principles upon which these treaties are founded could be applied in Nigeria without necessarily domesticating them through legislation passed by the National Assembly. However, this must be with the active cooperation of internet service providers and mobile phone operators. This is not impossible if collecting societies bury their differences and work together for the common good of Nigerian musicians and actors and movie producers.