

COLLECTING SOCIETIES IN MUSICAL WORKS OF COPYRIGHT: AN ANALYSIS*

Abstract

Collecting societies or Collection Management Organisation (CMO) have existed since 1852 though triggered in 1847 with the birth of Société des auteurs, compositeurs et éditeurs de musique (SACEM), the French Performing Right Society. Its administrative idea was conceived in musical works when individual collection of royalties by copyright holders from hotels, clubs, TV and radio stations, malls, transport facilities, etc, is not practicable. Copyright holders then began assigning their rights to CMO to function in their stead. Generally, Nigeria, has about four of such, duly licensed by the Nigeria Copyright Commission (NCC) to operate and collect royalties on behalf of their members, viz; Performing and Mechanical Rights Society (PMRS), Reprographic Rights Organisation of Nigeria (REPRONIG), Audio Visual Rights Society (AVRS) and the Musical Copyright Society of Nigeria (MCSN). The issue of revocation, expiration and non-renewal of licence granted Copyright Society of Nigeria Ltd/Gte (COSON) who operated in like manner as MCSN, is still subject of litigation. On whether there shall be more than one CMO for any particular class of right, a cumulative reading of the Copyright Act, Cap C28, LFN 2004, section 39 (3) 'The Commission shall not approve another Society in respect of any class of copyright owners if it is satisfied that an existing society adequately protects the interest of that class of copyright owners', and the Copyright (Collective Management Organizations) Regulations 2007, Chpt 4 para 18 (e) (f) on unethical practices, will suggest a discretionary power donated to the Commission. Meanwhile same Regulations in Chapt 1, para 2 captures the conditions necessary for the application and grant of CMO licence. This work is targeted to examine the concept and the roles of CMO in the administration, protection and regulation of musical works of copyright in our contemporary Nigeria, taking into cognizance the overriding administrative supervision of the NCC in ensuring adequate statutory compliance. It also made a compilation of notable collecting societies across the continents as a proof of its viability and wide global acceptability.

Keyword: Concept, Collecting Societies, Works, Musical Works, Copyright

1. Introduction

The fact that a copyright holder may have to face countless users of his work makes it impossible for individual collection of royalties, and this propels, in the face of contemporary economic realities, assignment of such rights to administrative system of approved collecting societies also known as Collective Management Organisation (CMO), to bridge the gap, with the sole aim of distributing earned royalties to affected members/owners of the copyright. This led to the approval of Performing Mechanical Rights Society [PMRS] in 1995 to operate as a CMO in respect of musical works. With its demise, COSON in May 2010 came onboard, but later got suspended in 2018 till date, over internal management issues and for her refusal to comply with the NCC's lawful directives. Moreover, in 2017, MCSN with similar jurisdiction like COSON was finally approved by NCC as a collecting society vide a letter by the Attorney-General of the Federation. The dust on whether approval and licensing of CMO for any particular class be limited to just one as the enabling statute and subsidiary regulations appears to provides, or be more than one, to discourage monopoly in a free market economy is yet to settle. Switzerland has five approved CMO and one clearing center for multimedia and internet (SMCC). The USA has three main CMO (namely ASCAP, BMI and SESAC). The United Kingdom has over twenty CMO spread over different genres of intellectual property, as well as Brazil, with many CMO including those representing newspaper writers and authors, literary artists and many more. Therefore, unlike the US, it is not proper for enabling statute to attempt limiting individual right holder's choice of CMO to identify with, being that generally, it is accepted that management of right to collect royalties from users of work in most of musical fields can best be achieved through the administration of CMO.

2. Overview of the Term Copyright and Copyright Law

Copyright is the term used to describe the bundle of rights granted by statute for limited periods of time and subject to certain permitted exceptions, in respect of literary, musical or artistic works, such as novels, plays, poems, musical compositions, paintings, sculptures, as well as of sound recordings, films and broadcasts¹. These are proprietary rights, giving the owner the right to do and to authorize other persons to do the acts restricted by the copyright law. The law of copyright, originally conceived to provide protection against unauthorized reproduction of books, faces unprecedented challenges from the accelerating pace of technological innovation. Now, the law of copyright provides the legal framework not only for the protection of traditional beneficiaries of copyright, the individual author, composer or artist but also for the investment required for the creation of works by the major cultural industries, the publishing, film, broadcasting and recording industries, and the computer software industry. Since copyright gives the owner the exclusive right to authorize or prohibit certain uses for his

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¹ It is the eligibility and copyright protection of works in the music industry that really concerns us

work by others, it is central to providing right owners with some element of control over the exploitation of their works in the new global networks of the present information age.

3. The Law and Copyright Works

Copyright in Nigeria is governed by the Copyright Act². By virtue of section 1(1) the Act, works³ relevant to collectible responsibility that is, basically the music industry and listed as being eligible for copyright, include: (a) literary works (lyrics and compositions for songs); (b) musical works (musical notes/instrumental accompaniment); (c) sound recordings (the masters); and (d) Broadcasts (the actual transmission)⁴.

4. Copyright Owner/Author

The identity of the author of a work is important for several and obvious reasons: (a) Usually, the author is the first owner of the copyright,⁵ if employed, his employer may be⁶; (b) Duration of the copyright is usually measured by reference to author's life⁷; (c) Author is entitled to moral rights⁸ in his work; and (d) Author is usually the creator of the works. The author in respect of each work eligible for copyright protection is defined⁹ by how the work is actually created. Thus, author in: (a) Literary and musical works: which are lyrics and notes is usually the composer or producer; (b) Broadcast: which in this sense is the transmission is usually the radio or television station; (c) Sound recording: which are the masters on which the song is recorded is usually the record label unless there is an agreement to the contrary with the artist.

5. The Exclusive Rights of the Owner of Work of Copyright (Musical)

Copyright no doubt is a statutory property or interest which allows exclusivity right of the owner to undertake and authorise others to so undertake a number of activities in relation to his work. The rights of the owner may be described as exclusive rights to authorise others to use the protected works. The right of the copyright owner to exclude others from making copies is a fundamental and most basic right known as the reproduction right, expressly provided for in the Act¹⁰. However, it does not go without certain exceptions¹¹ with respect to certain types of works. Ideally, these rights are exercised on individual basis by agreement between the owner and potential user of the work. It should however be noted that it is these individual rights of varying owners of works that are assigned and/or licensed to collection societies. The evolution of technology in the exploitation of music over the years has made it difficult and impracticable, for users and owners of works to contract as required by law, hence the need for collection societies.

6. Collecting Societies or Collection Management Organisation (CMO) and Its Operations

The CMOs have the power to license (on behalf of copyright owners) rights in copyright works to users. The revenues generated from these licenses are, in turn, distributed to the members of the CMOs, who are the copyright owners. The copyright owners usually assign or licence their rights in the works to the CMOs, who will administer such rights, on their behalf, to users. In the light of the fact that CMOs have control over huge repertoire¹² of copyright works, they weigh enormous power in the music industry, and are usually in a good position to negotiate acceptable license terms and fees (on behalf of their members) with record labels and publishing industries. Ordinarily, creators of music should personally manage and administer the use or exploitation of the rights in the music. Copyright is the right of an individual and in most cases that right should be exercised as the creator decides or authorises¹³. It is fact though, that the owner of copyright in a song or sound recording may not be able to know where and when his work is being exploited. It is difficult to indeed know whenever such song is being played around the country, at shopping malls, restaurants and stadiums, nightclubs, on radio and television stations and the rest. This simply shows that exercise of rights in respect of works which are intended for wide scale public use and performance such as plays and musical works, on individual basis is nearly not possible. When one considers the volume of songs played on radio stations on annual basis, or what is played at the venues mentioned above, it is neither practicable nor feasible for owners of the venues to have personal contact with the copyright

² Cap 28 Laws of the Federal Republic of Nigeria, 1988; in this work, references to sections of the Act refer to it.

³ See s. 1 (2)-(4) for eligibility for copyright in the listed works; see also s.51 for formal definitions of these works.

⁴ S. 51 contains the full definition of these terms

⁵ S 10 (1)

⁶ S 10 (3)

⁷ First Schedule

⁸ S 12, i.e. the right to claim authorship of the work, which is perpetual, inalienable and imprescriptible.

⁹ S 51 provides full details of these definitions

¹⁰ Sections 6, 7 and 8 provide for all the rights

¹¹ Second Schedule to the Act.

¹² Regu Para 22, Interpretation paragraph, it means catalogue of copyrighted works which is administered by a CMO.

¹³ Ann Harrison, *Music the Business* (7th edn, Virgin Books 2017)

owners for each of the songs or sound recordings to be able to reach an agreement to secure requisite licenses for their usage, cost implications inclusive.

7. True Fundamental Events of the Past¹⁴

France

The year is 1847 and Ernest Bourget, Paul Henrion and Victor Parizot, three of France's most celebrated composers were sitting in the leading café of the day, Café des Ambassadeurs, listening to their compositions being played live. The composers were angry that the live performance of their music in the Cafe helps to attract customers and patronage and increases its revenue but refused to pay them for the performances of their compositions. The technology available at the time to listen to music was live performances. The composers decide not to pay the bill and a trial ensued. This event story marked the beginning of a landmark trial of its day that resulted in: (a) a court judgment declaring the legal rights of owners in the public performance of their music; and (b) the formation of the first collection management organisation for public performance rights in non-dramatic works i.e. Société des auteurs, compositeurs et éditeurs de musique (SACEM).

United Kingdom

Performing Right Society (PRS) formed in 1914 and the Mechanical Copyright Protection Society (MCPS) formed in 1924. PRS takes an assignment from its member publishers and composers of the right to perform their works in public and the right to communicate their works to the public. MCPS also represents writers and publishers and this is in respect of what is known as the mechanical right i.e. the right to make copies of a musical work. This right is exercised when a record company makes a CD or when a TV producer makes a programme including music.

United States of America

In the U.S., there is ASCAP¹⁵ which has similar origins to that of SACEM¹⁶ and it represents the interests of its members namely composers, authors and publishers in performing rights. In 1940, in anticipation of a breakdown in negotiations with ASCAP over the rates to be charged for the following year (evidence of monopolistic behaviour) a group of broadcasters including major radio networks and nearly 500 independent radio stations established BMI,¹⁷ a credible alternative to ASCAP, and an automatic performance royalty earning machine for songwriters and publishers¹⁸.

New Technologies

With new technologies, the role of the collection societies only continued to evolve and increase. With the invention of gramophones, radios etc., it became necessary to form more collection societies to represent the owners of sound recordings (record labels) and rights in broadcasts. CMO's like the U.K.s PPL¹⁹ was formed in 1934 and represents the interests of record labels. It licenses the performances of music embodying musical compositions i.e. the public performance and broadcasting of the sound recording (a different work to that of the musical composition).

Principle of Reciprocity

From the early 19th to early 20th century, different countries began to form CMOs. Reciprocal agreements were signed by these national CMO to enable them represent each other's repertoires. Administratively, most established CMO belong to international networks, consisting of federations of societies representing the same categories of rights owners and which enter into reciprocal representation agreements for the exercise of such rights. Thus, one CMO in any given country is able to represent both foreign and national rights owners within its territory and to license practically the entire world repertoire of the rights owners it represents; at the same time a

¹⁴Olajide Oyewole: Collection Societies in Nigeria's Music Industry: The Case for Change, <https://www.mondaq.com/nigeria/music-and-the-arts/1104488/collection-societies-in-nigeria39s-music-industry-the-case-for-change> Accessed on 30/08/2022, culled with approval from http://webcache.googleusercontent.com/search?q=cache:http://olajideoyewole.com/publications/Getting_paid_for_your_music_and_CMOs.pdf. Olajide's other views were adopted in this work.

¹⁵ American Society of Composers Authors & Publishers

¹⁶ Famous songwriters of the day sitting in a famous club discussing the use of their songs in public venues and no means of collecting a royalty

¹⁷ Broadcast Music Incorporated

¹⁸ Unlike the U.K. the US allows for more than one CMO to represent the same class of owner, Nigeria is undecided.

¹⁹ Phonographic Performance Ltd

rights owner will be able to exercise his rights and receive royalties when his work is used abroad²⁰. For instance, PRS works in close association with similar bodies outside the UK both in licensing those bodies to collect royalties in respect of the works administered by the PRS when they are performed outside the UK, and also in collecting performing right royalties in respect of works performed in the UK, but which are owned by the foreign societies²¹. The Swiss Society for the Rights of Authors of Musical Works (SUISA) is the society for over 20,000 composers, writers and music publishers in Switzerland. While SUISA administers the so-called 'small rights', the 'grand rights' (operas and musicals) are administered by the Société Suisse des Auteurs (SSA). SUISSIMAGE is the society charged with the common administration of author's rights in the field of films, PROLITTERIS for works of literature, photography and fine arts. The neighbouring rights (rights of executing artists, broadcast companies, producers of phonograms and videograms) are administered by SWISSPERFORM. Remuneration claims for multimedia and internet uses are administered for all CMO's by the Swiss Multimedia Clearing Center (SMCC). Being the practice, each Swiss collecting society has signed reciprocal agreements with foreign sister societies. These agreements as hinted ensure that members receive their royalty entitlements for the use of their works abroad.²²

Public interest of Collecting Societies²³

Collective administration bodies provide the best available mechanism for licensing and administering copyrights and needs to be encouraged wherever individual licensing is not practicable. They represent the best means of protecting the rights owners' interests, enabling copyright owners to license and monitor the use of their works to collect and distribute royalties, and to bring actions for infringement. They facilitate access to copyright protected works for the consumer and minimize the number of persons with who users must negotiate licensing contracts. The convenience offered by such bodies both to the owner and user of copyright cannot be matched by any other means and, in their absence, in a totally free market, individual users and copyright owners would be at a serious disadvantage in negotiating and subsequently enforcing contractual arrangements for the exploitation of rights. CMO's make the copyright system more efficient and effective, promote the dissemination of works and tend to enlarge the choice of works made available to the public. They benefit rights owners, users alike, and in principle, the public.

Ghana and South Africa²⁴

Ghana and South Africa both have collection societies administering and managing members' rights in their respective music industries²⁵. In the two countries, the majority of owners of the works are members of the collection societies. These societies are considered licensees and administrators of the works for the duration of their members' membership. These societies have also executed reciprocal agreements with similar societies all over the world allowing them to collect royalties on behalf of their members around the world. While there may be complaints about insufficiency of royalties paid, on the whole the CMO's in these two countries, are functioning well and as intended, serving their members' needs within the regulatory framework.

8. Nigerian Law under the Enabling Statute

At the time of its promulgation in 1988, there was no provision in the Act for CMO's. It was in the first amendment in 1992²⁶ that provision and requirements were made for the establishment of collection societies²⁷. For convenience, there are two key provisions to highlight: (a) Approval from NCC is required before a body corporate who meets the requirements of the law can operate as a collection society. It is a pre-condition before operations can begin; (b) The Commission shall not approve another collection society in respect of any class of copyright owners if it is satisfied that an existing society protects adequately the interests of that class of copyright owners²⁸. The community reading of above statutory provisions, with paragraphs of Copyright (Collective Management

²⁰ Kevin Garnett, Gillian Davies & Gwilym Harbottle, *Copinger and Skone James on Copyright* (Vol 1, 15th edn, Sweet & Maxwell 2005) 1544

²¹ Michael Flint, Nick Fitzpatrick & Clive Thorne, *A User's Guide to Copyright* (6th ed, Tottel Publishing 2006) 234

²² Which CMOs are entitled and competent for which collective work exploitations? | RENTSCH PARTNER

²³ Kevin Garnett, Gillian Davies & Gwilym Harbottle, *Copinger and Skone James on Copyright* (Vol 1, 15th edn, Sweet & Maxwell 2005)

²⁴ Information on collection societies in Ghana and South Africa provided courtesy of our DLA Piper Africa members Reindorf Chambers and DLA Piper South Africa respectively. For more information go to www.olajideoyewole.com. Accessed 28/08/2022

²⁵ Ghana Music Rights Organization (GHAMRO) administers these rights in Ghana while South African Music Rights Organisation (SAMRO), South African Music Performance Rights Association (SAMPRA) and The Independent Music Performance Rights Association (IMPRA) are the three collection societies in the South African music industry.

²⁶ the Copyright (Amendment) Decree (No. 98) of 1992

²⁷ S.39

²⁸ Nigeria Copyright Act, s.39 (3); the repealed Regulations to the Act 1993, para 7 (2); See True Fundamental Events of the Past. ASCAP and BMI however exist side by side representing the same class/category of right holders

Organizations) Regulations 2007, on the question whether or not license may be granted to more than one CMO for similar class or category of copyright work appear settled. In the United States there are about three main CMO's (ASCAP, BMI and SESAC) superintending over same right. In the UK there are over twenty CMO's spread over different genres of intellectual property, including Brazil that has CMO representing different spheres, including newspaper writers and authors, literary artists and many more. It does not hold water that copyright regime of the mentioned countries are technologically miles ahead, it is merely a statutory issue. By the second amendment in 1999²⁹, the right of action of CMO's was effectively limited³⁰. Accordingly an entity acting as a CMO, except representing less than 50 memberships, does not have *locus standi*³¹ or any other right it purports to be assigned or licensed³² unless it has been approved by NCC³³. This has become the subject of much litigation some of which is narrated below. Remember in 1995, NCC approved Performing Mechanical Rights Society [PMRS] to operate as a CMO over musical works, and in May 2010, with the demise of PMRS, COSON was licensed to collect royalties for same musical works. This licence was suspended on 30th April, 2018 following the refusal of the management of COSON to comply with directives of the NCC. This was issued after an investigation into a lingering dispute in the board of COSON that led to two separate groups laying claims as the legitimate governing board. These factors made renewal of its licence subject matter of lingering judicial controversy.

The Battle for Legitimacy and Supervisory Roles of NCC over Collecting Societies

Section 39 the Copyright Act provides that any person wishing to operate as a CMO shall obtain prior approval of the NCC. In May 2010, Pursuant to that, and the provisions of Copyright (CMOs) Regulations 2007 on grant of licence and other salient paragraphs reproduced hereunder, Copyright Society of Nigeria Ltd/Gte (COSON) was granted approval to operate as a CMO for Music and Sound recording; like the Musical Copyright Society of Nigeria (MCSN) earlier granted approval on 3 April, 2017. The NCC is empowered to sanction CMO who fails to comply with the regulatory provisions regarding its operations or refusing to comply with its directives. Such sanctions may include suspension of the operating license of the CMO, and in appropriate cases, revocation of the License. It is an offence under the Copyright Act to operate or otherwise carry out the functions of a CMO without a valid licence of the NCC.³⁴ The history of CMO in Nigeria's music industry is well documented³⁵. MCSN (formerly PRS) and COSON (formerly PMRS) have been battling for legitimacy for years. Issues relating to awareness, membership, NCC approval, confusion, loss of monies, legal framework and interpretation thereof, litigation, suspension, and flouting of the law etc. have contributed to a most unfortunate state of affairs regarding these CMOs. None of this neither is in the public interest nor for the development of the total copyright ecosystem. Unlike some countries, the fundamentals of collection societies in Nigeria are still being grappled with notwithstanding the fact that the laws are bare. This has created a distinctly unpalatable situation and one has to question why it is so.

Litigation³⁶

On 13 July 2018, the Supreme Court delivered its judgment in *Adeokin Records & Anor v. MCSN*. The pre-trial issue for determination was whether MCSN had the legal capacity to sue for copyright infringement without prior licence from NCC. Adeokin case was instituted in 1996, which was: (a) After the first amendment to the Act in 1992 which made it mandatory for NCC approval before a collection society could legally operate; and (b) Before the second amendment to the Act in 1999 which imposed a limitation of action on collection societies instituting legal action in respect of infringement. It is a fact that despite the provisions of the Act and in flagrant disobedience of same, MCSN acted as a CMO without the requisite approval of NCC³⁷. Indeed, the cause of action in the case arose after it became mandatory for a CMO to secure approval from NCC before it could act as one³⁸. The judgment was to the effect that: (a) To determine the issue of locus standi, the court to restrict itself to the Plaintiff's

²⁹ the Copyright (Amendment) Decree of 1999

³⁰ Copyright Act, s.17

³¹ I.e. the right to institute a cause of action/law suit in respect of infringement.

³² The current Supreme Court decisions on this issue are discussed later on in this work

³³ *ibid*

³⁴ 39(4) and (5) of the Copyright Act

³⁵ Bankole Sodipo, *Copyright Law: Principles, Practice & Procedure* (2nd edn, SWAN Publishing 2017) Chapter 17; John Asein, *Nigerian Copyright Law & Practice* (2nd edn, Books & Gavel Publishing 2012) Chapter 12; Folarin Shyllon, *Intellectual Property Law in Nigeria* (vol 21, Verlag C.H. Beck Munchen 2003); Tony Okoroji, *Copyright Neighbouring Rights & The New Millionaires* (The Twists and Turns in Nigeria) (1st edn, Tops Ltd 2012); Desmond Oriakhogba and Job Odion, 'Copyright collective management organizations in Nigeria: resolving the locus standi conundrum' *Journal of Intellectual Property Law and Practice* (2015, Vol. 10, No. 7)

³⁶ There has been a plethora of litigation on locus standi and the judgment in the first two cases in the Supreme Court are under discussion

³⁷ MCSN operations as a collecting society began before the first amendment of 1992.

³⁸ The court thought otherwise, MCSN eventually received NCC approval via AG's order, and more on this later.

statement of claim; (b) The action arose before the amendment in the Act³⁹; (c) Locus standi is a matter of law and not one of fact; (d) The Act makes provision for the owner, assignee and exclusive licensee of copyright; (e) Defendant admitted MCSN sued as an owner, assignee and exclusive licensee of Copyright; (f) Thus, MCSN did not need the pre-condition approval from NCC to sue; (g) MCSN could validly sue as owner, assignee and exclusive licensee of copyright; and (h) The matter was referred back to the High Court and trial to start. This was followed by another judgment of the Supreme Court on 14 December 2018 in *MCSN v. Compact Disc Technology Limited & Ors*. The pre-trial issue was the same as in the Adeokin case. In this instance, the suit was instituted in 2007. In spite of the fact that the cause of action arose after both amendments to the Act, the findings of the learned justices in the CDT case were strikingly similar to that of the Adeokin judgment and to the effect that: (a) By virtue of its being an owner, assignee and absolute licensee of the copyright in the works in issue, MCSN had vested rights which included the rights to institute an action for infringement of copyright; (b) Though the cause of action arose after Copyright (Amendment) Decree No 42 of 1999 which introduced Section 15A (now 17), its application is not retrospective; (c) MCSN had the requisite locus standi to institute the suit before the trial court; and there was no admission by the defendant in the Statement of Defence. It should also be noted that at the time of this publication, the issue of the locus standi of MCSN, in other cases are making their way up to the Supreme Court.

Again, a Federal High Court, Lagos, in Suit No. FHC/L/CS/274/2010 (*MCSN Ltd/Gte. v. COSON Ltd/Gte. CAC and Attorney General of Federation (AGF)*), presided over by Hon. Justice Saliu Saidu, in a final judgment delivered on 25th March 2020, made an order restraining COSON from using or continuing to use the name 'Copyright Society of Nigeria Ltd/Gte' stated that;⁴⁰

- a. 'It's a misnomer to give the name which the plaintiff had applied to register or similar to what the plaintiff seeks to register by the defendant (COSON) on 23rd November, 2009 when the time allowed for the plaintiff to complete their registration had not expired.'
- b. 'The first defendant's name was illegally approved and hence cannot lay claim to the name Copyright Society of Nigeria Ltd/Gte.'
- c. 'the 2nd defendant (CAC) acted improperly and illegally in approving an application by the Performing and Mechanical Rights Society (PMRS) to process the change of name from PMRS to COSON at a time when the same CAC had reserved the very same Copyright Society of Nigeria for use by some members of the plaintiff (MCSN) for themselves and on behalf of the plaintiff.'
- d. 'The AGF and CAC acted improperly and illegally in granting approval to PMRS to process the change of name to COSON having regard to the pendency of the plaintiff's petition to them dated November 13th, 2009.'
- e. 'That an organisation whose genre of copyright is restricted to musical rights could not legally be permitted to use the name, 'Copyright Society of Nigeria' being a term encompassing rights arising from literature, art, music, drama, cinematography, broadcast architecture, computer programmes and so on.'
- f. 'That the 2nd and 3rd defendants (CAC & AGF) their servants, privies, agents and howsoever are restrained from using or continuing to use Copyright Society of Nigeria Ltd/Gte. That the 2nd and 3rd defendants are directed to take necessary steps to cancel, change, alter or rescind any steps it may have taken towards effecting the change and registration of defendant's name as Copyright Society of Nigeria Ltd /Gte and that the 1st defendant (COSON), its members, servants, privies, agents or howsoever are restrained from using or continuing to use Copyright Society of Nigeria Ltd/Gte.'

Being dissatisfied, COSON filed notice of appeal against the judgment and brought a motion on notice for stay of execution of the judgment, pending the hearing and determination of the appeal. The same Federal High Court, on 24th June 2020, refused to grant the application, holding that there was nothing to stay; the relief granted being essentially of a declaratory in nature.

Does the Copyright Society of Nigeria (COSON) cease to exist as an approved Collective Management Organisation (CMO) effective 19th May 2019 when her operating licence lapsed?

In a substantive matter, pending, in Suit No FHC/1/CS/425/2020, filed by COSON in the Federal High Court, Lagos in March 2020 against the Nigerian Copyright Commission (NCC), presided over by Hon. Justice A. M. Liman, the company sought a declaration among other things:

For a perpetual injunction to restrain the Commission from taking any steps purporting to revoke the operating licence/approval of COSON or in any way or manner disturbing/continuing to disturb or prevent /continuing to prevent COSON from lawfully enforcing the constitutional rights of its members, affiliates, assignees and reciprocal

³⁹ The 1999 amendment to the Act. Also referred to under the Collection Societies Under Nigerian Law section above

⁴⁰ <https://www.sunnewsonline.com/court-coson-illegally-approved/> Accessed 28/08/2022

representation partners or interfering/continuing to interfere with the internal management, operations, funds, audits or bank accounts of COSON or preventing/continuing to prevent COSON, its members, affiliates, assignees and reciprocal representation partners from earning income and sustaining themselves with their Intellectual Property, pending the determination of the suit.⁴¹

Consequent upon an application for interlocutory injunction restraining NCC from revoking its operating licence pending the hearing and determination of the suit brought by COSON, and in line with the Act and Regulations 2007, the court on 1st December 2021, held, among others, that for failure to satisfy the necessary conditions that would have enabled the Court exercise its discretionary powers in its favour, COSON was not entitled to such relief because the said licence that it sought to preserve had lapsed.

The Directive from the AGF

While the Adeokin and CDT cases were making their respective ways through the courts, the applications, appeals, arguments etc. for MCSN to be issued approval as a CMO continued unabated. One reason attributed to this lack of approval by NCC is the failure of MCSN to provide NCC with its accounts⁴². The lack of approval did not stop MCSN from wrongfully acting as one- issuance of demand letters for royalties, institution of legal proceedings for infringement etc. Given that NCC had actually issued its approval to COSON to act as a CMO for copyright owners in musical works and sound recordings, users claimed to be confused about who to pay royalties to. Evidence of this confusion reared its head in the past when it was reported that the management of Silverbird Communications, owners of the Rhythm FM station in Lagos had been unable to pay royalty to artists whose records were aired by the station, because it did not know to which collecting body, MCSN or PMRS⁴³ such dues should be remitted⁴⁴. Even before the station began to air music, a letter was addressed to it by a group claiming to be the proper body that should receive the royalties⁴⁵. This exact situation was discussed at length by notable authors of the book Copinger and Skone James on Copyright: (a) The existence of two or more organisations in the same field may diminish the advantages of collective administration for both rights owners and users; (b) For the rights owners, competing societies lead to duplication of functions and reduction in economies of scale in operation and thus unlikely to bring benefits to their members; (c) For the user, a multiplicity of societies representing a single category of rights owners would cause uncertainty, duplication of effort and extra expense. The user would have to check, for each work he wished to use, which society controlled it and whether he had the appropriate license; (d) For both parties, administration costs would be greater, reducing the revenue available for distribution to rights owners and increasing the overall costs of obtaining licenses for the user⁴⁶.

Be that as it may, by virtue of a directive⁴⁷ dated 22 March, 2017, the Attorney General of the Federation directed NCC to grant MCSN approval to act as a collection society for the same class of owners as that of COSON⁴⁸. In compliance with this directive, NCC in a letter dated 3 April, 2017 conveyed its approval to MCSN for it to act as a collection society. This literally appears not to be in tandem with the Act that NCC should not grant approval to more than one collection society representing the same class of owners.

At the Time of the AGF Directive:

- COSON had been operational as a collection society in the music industry for seven years;
- The class of copyright owners included owners of musical works and sound recordings (the same class that MCSN would represent);

⁴¹<https://thenigerialawyer.com/copyright-society-of-nigeria-is-no-longer-a-collective-management-organization-court-rules/> Accessed on 28/08/2022

⁴² Folarin Shyllon, *Intellectual Property Law in Nigeria* (vol 21, Verlag C.H. Beck Munchen 2003) 130; see also Chapt 1, para 2 (2) (x) of the Regulations, 2017

⁴³ Previous name of COSON

⁴⁴ A blogger once wrote that according to a Nigerian superstar, D'banj while speaking to the House of Representatives Committee on Information and National Orientation, that over US\$30,000 were being held up by MTV in an escrow account as royalties to Nigerian artistes but there is no collecting society in place.

⁴⁵ Folarin Shyllon as cited above 131

⁴⁶ The US situation differs from that of Nigeria and the UK. The import of this unhealthy relationship is that our local artistes bear the brunt of this development the most. After investing so much into producing their music, there is very few or nothing to show for it in terms of returns on investment. Multiplicity of collecting societies breeds defectiveness. Apparently, many of our musicians, producers and movie artists do enjoy huge successes in their popularity and fan base, but they cannot be compared with their counterparts in Hollywood and Europe on royalties received. Many even live in penury and are left with financial support from colleagues and corporate entities in terms of endorsements.

⁴⁷ The AGF issued this directive pursuant to its powers under S.50 of the Act

⁴⁸ <https://thenationonlineng.net/last-mcsn-gets-licence-collecting-society/> accessed on 20/07/2022.

- COSON had executed the necessary reciprocal agreements with PRS for the Music and other international collection societies for performing rights etc;
- There was no indication of NCC dissatisfaction of the operations of COSON; and
- MCSN had been operating as a collection society without the requisite approval.

Following the issuance of the directive, the perils highlighted by the authors of Copinger and Skone James on Copyright continued to prevail. MCSN ramped up its activities as a CMO. Having two societies administering the same category of rights owners resulted in users such as television and radio stations receiving demand letters from both. This contributed to the confusion and in instances, monies/royalties were not paid. The inefficiencies and loss of revenue particulars to the owners of the works are still being calculated. Up until 2018 when NCC in exercise of its supervisory powers suspended the approval of COSON to act as a collection society⁴⁹, Nigeria's music industry in flagrant breach of the Act had two collection societies operating.

A very Grave Status Quo

The job of the collection society is not just to represent local rights but to provide the reciprocal protection and collection of everyone's rights when they are activated in their territory. There is an integrated network where being a member of one society provides a common set of principles around the world for the protection of and collection of royalty/es⁵⁰. It is a fact that MCSN once had a reciprocal agreement with PRS but this was eventually terminated on 31st December 2010. There was no new agreement of this nature and MCSN is therefore actually unable to perform a basic function of a collection society and administer and manage the works of its foreign sister organisations. In reverse, these sister organisations cannot and will not perform a similar service to the members of MCSN. The income being lost is incalculable. COSON on the other hand does have a valid and existing reciprocal agreement with PRS and other international societies. The fact is that, COSON's reciprocal agreement with PRS means that PRS collects royalties from other performing rights societies on behalf of members of COSON. The value of such contracts cannot be underscored in the copyright ecosystem. As highlighted, on 30 April 2018, NCC having suspended the license of COSON⁵¹, and its license suspended⁵², COSON should not be able to act as a CMO. Royalties on behalf of its members and those of the foreign CMO's that it has agreements with would not be collected and even be payable. Most regrettably, in flagrant disregard for the suspension of its license, and just like MCSN did before it was issued its approval, COSON has continued to act as a collection society.⁵³ The validity of licenses issued by COSON and the renewal therefore are questioned. Demands for royalties by COSON are questioned and payment by users is being disputed. MCSN with limited membership is strictly speaking significantly handicapped. Who suffers in all of this? It is the owners of copyright works that are members of these two organisations but are not receiving their dues for the exercise of exclusive rights by users which they as owners cannot practically administer. Faith in the system has been damaged and the powers of NCC undermined.

Using United Kingdom and Nigeria⁵⁴ as case study, in 2016, the U.K. PRS for Music raked in a total revenue of GBP625.8 million⁵⁵ and distributed GBP527.6 million royalties to owners⁵⁶ of the works; whereas in 2017, total revenue stood at GBP716.8 million⁵⁷ and royalties paid to owners was GBP605 million. In Nigeria⁵⁸, in 1994, before the new amendment to the Act gave distinct status to collective societies, Musical Copyright Society of Nigeria (MCSN) collected USD88,00019 (USD36,397 from broadcasts and USD38,517 from performances), whereas, Between 2018⁵⁹ and May 2019, COSON approved a meager sum of NGN40,000,000.00 and disbursed NGN8,520,000.00.⁶⁰ The significant disparity between the revenue of both jurisdictions is obviously quite huge, however, the figures reflect the viability and potential of collection societies in the copyright ecosystem.

9. Conclusion

it is not in doubt that where applications for a licence is made, approval shall be given to the CMO who, after due investigation, will protect the interests of that class of right owners more adequately', meaning that one CMO may be appropriate for any particular class of right. However, the letter of the Hon. A.G, Federation, Abubakar Malami which directed the NCC to '*issue with immediate effect, an approval by way of licence to the MCSN to operate as a CMO for the purposes of the Act*', honoured and acted upon by the Commission without resistance, when technically there is a subsisting CMO, COSON, needs an urgent reexamination of section 39(3) by the court.

⁴⁹ Discussed later on in the chapter

⁵⁰ Helen Gammons, *The Art of Music Publishing* (1st edn, Focal Press 2011)

⁵¹ Reasons for this are documented in the NCC letter to COSON dated 30th April 2018

⁵² COSON has challenged the suspension in court but the matter is yet to be determined

⁵³ Examples of its activities include having an Extra ordinary General Meeting (EGM) in May 2018, barely a month after the issuance of the suspension of the license AND continuing to issue demand letters for payment of royalties.

⁵⁴ MCSN and COSON

⁵⁵ <https://www.prsformusic.com/about-us/track-record/2016> accessed on 17/08/2022

⁵⁶ <https://www.statista.com/statistics/281286/music-royalty-collected-and-distributed-by-prs-for-music-in-the-uk/> accessed on 18/08/2022

⁵⁷ <https://www.prsformusic.com/about-us/track-record/2017> accessed on 18/08/2022

⁵⁸ Relying on a smattering of information

⁵⁹ Folarin Shyllon, *Intellectual Property Law in Nigeria* (vol 21, Verlag C.H. Beck Munchen 2003)

⁶⁰ <http://www.cosonng.com/coson-agm-approves-40-million-naira-as-specific-distribution-to-members/> accessed on 18/08/2022