

COPYRIGHT AND COLLECTING SOCIETY: THE POSITION OF THE COURT IN *MULTICHOICE (NIG) LTD. V. M.C.S.N LTD/GTE (2020) 13 NWLR (PT. 1742) CA 415**

Abstract

*Ideally, it is the primary responsibility of owners of works of copyright to use the safeguards provided for by the law to protect such works against infringers. Artistes should be able to manage and administer the use and exploitation of their right in any song or track. Ability to know when these songs with wide coverage is broadcasted or played either in shopping malls, restaurants, stadiums, nightclubs, television and radio stations, etc., within the country is an issue. Neither is it practicable for users to easily approach copyright owners for each of the songs or sound recordings to secure the requisite licenses for use This article focuses on copyright works using the music industry as a case, and the fact that some of the exclusive rights cannot be administered individually hence the need for collecting societies. It mainly considers the decisions of the Court of Appeal in *Multichoice (Nig) Ltd. v. Musical Copyright Society of Nigeria (MCSN) Ltd/Gte (2020) 13 NWLR (Pt. 1742) p. 415*, wherein the categories of person who may sue for infringement of works of copyright was settled; that not only a collecting society, duly licensed or exempted by the Nigerian Copyright Commission can sue or demand and receive royalties on behalf of copyright owners and distribute same. That assignees of works under contracts concluded even before the enactment of copyright Act, is entitled to royalties in respect of the exploitation of the assigned works. Due consideration was given to the judgment and reasons of the Appeal court subject however to the position the Apex court may take on final appeal. The work which adopted doctrinal method of research methodology is concluded by making case that approval or exemption of licences by the Nigeria Copyright Commission should not deter stakeholders in exploiting the new position that encourages making strong cases for owners of musical works either as an assignee or exclusive licensee.*

Keywords: Copyright, Musical Works, Collecting Society, Court of Appeal

1. Introduction

In a judgment delivered on 29 May 2020 in *Multichoice Nigeria Limited v. Musical Copyright Society Nigeria Ltd/ Gte (CA/L/188/2018)* the Lagos Division of the Court of Appeal held that contracts for the licensing of any act in respect of copyright which were effective and which predate the commencement of the Copyright Act (CAP C28, LFN 2004) are valid and will continue to have effect notwithstanding the provisions of the Copyright Act. Consequently, the assignees of copyright works under such contracts are entitled to all the rights accompanying the assigned copyright and can sue for infringement thereon. It means that a body who is not licensed to operate as a collecting society by the Nigerian Copyright Commission (NCC) is still entitled to collect royalties in respect of the exploitation of its copyright works as long as it is the owner, assignee or an exclusive licensee of such copyright works. That broadcasters of musical genre, tracks and album, by extension the Appellant owe a mandatory, injunctive and statutory duty to keep the broadcast log at all times¹That the concept of notice to produce contrived by the appellant, as a defence to their non-production, was impotent to neutralise the statutory duty imposed on it as the custodian of those logs.² Indubitably, a musician is a composer, who, like a spider that spins cobweb from its belly, creates something out of nothing. The product of his ingenuity is music which is the soul, lubricant and elixir of life. He acquires copyright over it which racks pari passu with other proprietary rights. It is therefore unconscionable in whatever way to deny such a musician, author or artist the fruits of his intellectual efforts. Copyright in a work is infringed by any person who without the licence or authorization of the owner, does, or causes any other person to do an act, the doing of which is controlled by copyright; such act kills ingenuity. Music is an all-round money spinner; its gain permeates all segments of the global society. Copyright generally, and music in particular is transferable through assignment, inheritance, and testamentary dispositions. Therefore, an owner, assignee or exclusive licensee of a body of musical works through representation contracts, entered into with any association(s) of producers and/or directors of audio-visual works, over the Nigerian territory, acquires proprietary interests in such work(s). It is immaterial whether such body is a collecting society or not, or whether its operating licence is subsisting or has been revoked by the Nigerian Copyright Commission (NCC) as the appellant claimed in the instant case. Conclusively therefore, a body who is not licensed to operate as a collecting

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¹ Nigerian Broadcasting Code (NBC) 2006, Chapter 1 Para. 1.9; NBC 2012, Chapter 1 para 1.6. A broadcaster must mandatorily keep the broadcast logs.

² Also, the defence of their immovability, which the appellant set up under section 89(d) of Evidence Act 2011, was not available to the trial court. (Pp. 542, paras. E-F; 543, paras. A-C).

society by NCC is still entitled to collect royalties in respect of the exploitation of its copyright works as long as it is either the owner, assignee or an exclusive licensee of such copyright works.

2. The Genesis of the Case under Review

The subject matter states ‘whether, in view of the provision of sections 16(1) and 52(3) of the Copyright Act, the respondent not being a collecting society had the necessary locus standi to institute the counter-claim against the appellant.’ The matter in question was an appeal lodged at the Lagos state Division of Court of Appeal, with Appeal No.: CA/L/188/2018.³ The appeal is an offspring of the decision of the Federal High Court, Lagos Division, in Suit No. FHC/L/CS/1091/2011.⁴ The Court of Appeal, in a unanimous decision, dismissed the appeal and granted the respondent's notice, which prayer bothered on

1. An order allowing this appeal and setting aside the C judgment and others of the Honourable Justice M.B. Idris of the Federal High Court, Lagos Judicial Division in Suit No. FHC/L/CS/109/2011, delivered on the 19th day of January 2018 against the appellant.
2. An order striking out or dismissing the respondent's counter-claim with substantial costs.⁵

Background of the Matter under Review

The Facts of the case under review, deploying brevity and simplicity strategy, is that the appellant, Multichoice (Nig) Ltd., a subscription management company, grants its service subscribers access to programming and content on Digital Satellite Television (DSTV) bouquet via an enabled decoder. The programming is transnational and obtainable from BBC, Cable Network News (CNN), Al Jazeera, Nigerian Television Authority (NTA), African Independent Television (AIT), et cetera. The appellant asserted that only licenced collecting society, by Nigerian Copyright Commission (NCC), demands and receives royalties on behalf of copyright owners. It claimed that the respondent, whose licence has been revoked by the NCC, had been demanding outrageous sums as payment for licencing musical works contained and broadcast in different channels and programming carried on DSTV bouquet. It alleged that the respondent accompanied the demands with threats to pay the sums, as royalties on behalf of the copyright owners it represents, or face unstated repercussions. It further asserted that the respondent was intent on harassing, intimidating or using threats to disturb its operations and business and those of its affiliates to ensure that the demands were met. Sequel to that, the appellant, via a writ of summons filed on 20th September, 2011, at the Federal High Court, Lagos, in suit No. FHC/L/CS/1091/2011, instituted an action against the respondent, claiming that only licenced collecting society, by Nigerian Copyright Commission (NCC), demands and receives royalties on behalf of copyright owners, tabled against the respondent the following reliefs:

- a. A declaration that the plaintiff is not obliged, under the laws of Nigeria, to pay any monies or otherwise to the defendant, as royalties or other payment for material used in programming or content on the DSTV bouquet, unless the defendant is licensed a collecting society for that purpose by the Nigerian Copyright Commission, under the aforesaid laws.
- b. A declaration that the defendant cannot demand, collect and/or receive monies from the plaintiff, being payments for the use of material on programming and content on the DSTV bouquet, as a collecting society or otherwise, unless the defendant is licensed as a collecting society by the Nigerian Copyright Commission under the enabling laws of Nigeria.
- c. A declaration that any demand now made to the plaintiff by the defendant, not being a licensed collecting society, under the laws of Nigeria, for the payment of royalties, in any manner or under any guise, for material used in programming or content on the DSTV bouquet is illegal, ultra vires and fraudulent.
- d. A perpetual injunction restraining the defendant by herself, her agents, privies, assigns, affiliates, successors in title from demanding, collecting and/or receiving from the plaintiff, her agents, privies, assigns and affiliates, monies or any other form of payment for the use of material on programming and content on the DSTV bouquet.

In reaction, the respondent, Musical Copyright Society of Nigeria Ltd/Gte, joined issue with the appellant and denied liability by filing a defence. It asserted that it was the owner, assignee and exclusive licensee of body of some musical works and attendant neighbouring rights, in the territory of Nigeria. The musical works were assigned to it by two international organisations, Performing Rights Society (PRS), and Mechanical Copyright

³Presided over by Obande Festus Ogbuinya, JCA, with Gabriel Omoniyi Kolawole, JCA JCA and Balkisu Bello Aliyu, JCA sitting, judgment delivered on Friday, 29th May 2020

⁴Entered on Friday, 19th January 2018, and presided over by M.B. Idris, J. (now JCA). The trial court struck out the claims of the appellant, represented by M.I. Igbokwe, SAN (with him were, Sir A. Nwachukwu, A. Ajamobi, Esq.; V. Okotie, Esq. and E. Bassey, Esq.), for, in the main, failure to sign the writ of summons and granted the respondent's counter-claim who were represented by N.I. Quakers, SAN (with him, O. Ekisola, Esq., B. Daramola, Esq., S. Fashanu, Esq. and G. Adelaja, Esq.).

⁵ Before the lower court, the appellant and the respondent were the plaintiff and the respondent respectively.

Protection Society (MCPS), by dint of two reciprocal representation agreements, exhibits G and G1. It alleged that the appellant infringed/exploited the musical works, which made up its repertoire, by communicating them to the public, upon a fee, through Satellite and Pay TV broadcasting, without licence from nor payment of royalties to it. As a result, the respondent counter-claimed for special, general and aggravated damages for the plaintiff's various and flagrant use of works forming part of its repertoire between 06/01/2006 to 05/01/2012. In its considered judgment delivered on 19th January 2018, the trial court struck out the appellant's suit for being incompetent as the writ of summons was not signed. It however granted the respondent's counter-claim and awarded it special, general and aggravated damages for infringement of copyrights. It is instructive to note that, one of the nine issues raised by the appellant in his further amended brief of argument, for determination, was, whether the respondent not having obtained the approval or licence or exemption from the Nigerian Copyright Commission to operate the business of a Collecting Society or a Collecting Management Organization and so operating the business of Collecting Society unlawfully, the learned trial Judge was right in holding that the respondent's copyright were infringed by the appellant and the respondent was entitled to damages for same. In the same vein and identical in substance, the respondent in his further amended brief of argument distilled issues for determination, prime among which was: whether the learned trial Judge is right to hold that the respondent could sue and enforce her right as owner, assignee and exclusive licensee of the body of works reposed in her irrespective of her not having a licence to carry on as a collecting society? The appeal filed by the appellant was however unanimously dismissed by the Court of Appeal. The following provisions of the Nigerian Copyright Act, replicated below were instructive in arriving at the decision of the Court of Appeal, these provisions were sections 16(1), 17, 39, 52(3), and Paragraph 3 of the Act:

Section 16(1) provides:

Subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee as the case may be in the Federal High Court exercising jurisdiction in the place where the infringement occurred, and in any action for such infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as it is available in any corresponding proceedings in respect of infringement of other proprietary rights.

Section 17 states that:

Notwithstanding the provisions of this Act or any other law, no action for infringement of copyright or any, right under this Act shall be commenced or maintained by any person -

- (a) Carrying on the business of negotiating and granting of licence;
- (b) Collecting and distributing royalties in respect of copyright works or representing more than fifty owners of copyright in any category or works protected by this Act; Unless it is approved under section 39 of this Act to operate as a collecting society or is otherwise issued a certificate of exemption by the commission'.

Section 39 then provides:

39(1) A collecting society may be formed in respect of anyone or more rights of copyright owners for the benefit of such owners and the society may apply to the Commission for approval to operate as a collecting society for the purpose of this Act.

(2) The commission may approve of a society if it is satisfied that:

- a. It is incorporated as a Company Limited by Guarantee;
- b. Its objectives are to carry out the general duty of negotiating and granting copyright licence and collecting royalties on behalf of copyright owners and distributing same to them;
- c. It represents the substantial numbers of owners of copyright in any category of works protected by this Act, in this paragraph of this subsection. 'Owners of Copyright includes owners of performer's rights;
- d. It complies with the terms and conditions prescribed by regulations made by the commission under this section.

Section 52(3) states that 'The Transitional and Savings Provisions in the Fifth Schedule to this Act shall have effect notwithstanding subsection (1) of this section or any other provisions of this Act.' Whereas Paragraph 3(1) of the Fifth Schedule to the Act provides that: 'Subject to sub-paragraph (2) of this paragraph, contracts for the licensing of any act in respect of copyright which were effective immediately before the commencement of this Act, shall continue in force as if they related to corresponding copyright under this Act'. What is the potency of act(s) licenced in respect of copyright remaining in force after the commencement of the Copyright Act? Subject to sub-paragraph (2) of paragraph 3, contracts for the licensing of any act in respect of copyright which were

effective immediately before the commencement of the Act shall continue in force as if they are related to corresponding copyright under the Act.⁶

3. Nigerian Law

At the time of its promulgation in 1988, there was no provision in the Act for collection societies. It was in the first amendment in 1992⁷ that provision and requirements were made for the establishment of collection societies⁸. For the purposes of this chapter, there are two key provisions to highlight:

- a. Approval from NCC is required before a body corporate can operate as a collection society. It is a pre-condition before operations can begin.
- b. NCC shall not approve another collection society in respect of any class of copyright owners if it is satisfied that an existing approved society adequately protects the interests of that class of owners⁹.

By the second amendment in 1999¹⁰, the right of action of collection societies was effectively limited¹¹. Accordingly, an entity acting as a collection society does not have locus standi i.e. the right to institute a cause of action/law suit in respect of infringement or any other right it purports to be assigned or licensed¹² unless it has been approved by NCC¹³. This has become the subject of much litigation some of which is narrated below.

Nigeria's copyright law, Copyright Works and the music industry

Copyright in Nigeria is governed by the Copyright Act¹⁴. By virtue of the Act¹⁵, works¹⁶ relevant to 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)¹⁷

Copyright Owner/Author

The identity of the author of the work is important for several reasons:

- a. Usually, the author is the first owner of the copyright¹⁸ or if he is employed, his employer may be¹⁹;
- b. Duration of the copyright is usually measured by reference to author's life²⁰;
- c. Author is entitled to moral rights²¹ (i.e. the right to claim authorship of the work) in his work and this is perpetual, inalienable and imprescriptible; and
- d. Author is usually the creator of the works.

The author in respect of each work eligible for copyright protection is defined²² 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.

⁶ Copyright Act, Fifth Schedule, paragraph 3(1) Transitional and Savings Provisions; *Multichoice (Nig) Ltd. v. Musical Copyright Society Of Nigeria (M.C.S.N) Ltd/Gte* (2020) 13 NWLR (PT. 1742) (P. 523. paras. B-C).

⁷ the Copyright (Amendment) Decree (No. 98) of 1992

⁸ s.39

⁹ Copinger & Skone, *James on Copyright* (Vol 1, 15th edn, Sweet & Maxwell 2005) 1540; See position in the US re ASCAP and BM. ASCAP and BMI exist side by side representing the same class/category of rights holders

¹⁰ the Copyright (Amendment) Decree of 1999

¹¹ S.17

¹² In the light of the current Supreme Court decisions in *MCSN (Ltd./Gte) v C.D.T Ltd.* (2019) 4 NWLR (Pt. 1661) p. 23, discussed later in this work, the position has changed.

¹³ *Ibid*

¹⁴ 1988, Cap 28 Laws of the Federal Republic of Nigeria; Every reference to the sections in this Act in this chapter shall be in respect of this statute

¹⁵ S.1 (1)

¹⁶ Eligibility for copyright in the listed works is provided for in sub-sections 2 - 4; formal definitions of these works is provided for in S.51

¹⁷ S. 51 contains the full definition of these terms

¹⁸ S 10 (1)

¹⁹ S 10 (3)

²⁰ First Schedule

²¹ S 12

²² S 51 provides full details of these definitions

These distinctions help one get a better sense and understanding of the different classes of authors/owners.

4. The Exclusive Rights of the Owner

Copyright is a statutory property/interest which allows the owner the exclusive right to undertake and authorise others to 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 the most basic right and this is known as the reproduction right. The Act expressly provides for the exclusive rights⁴³ in respect of the different works and there are certain exceptions⁴⁴. There is no real need to delve into the details of these rights at this time. Ideally these rights are exercised on an individual basis by agreement between the copyright owner and the individual user of the work and there are many cases in which the rights continue to be exercised individually⁴⁵. It should be further noted that it is these individual rights that are assigned and or licensed to collection societies. As noted earlier, the evolution of technology in the exploitation of music over the years has made it difficult, if not impossible, for users and owners of the musical works to contract as required under law, hence the need for collection societies.

5. Nature of Copyright in Broadcast

Section 8 of the copyright Act, provides²³

- (1) Subject to this section, copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is:
 - a. The recording and re-broadcasting of the whole or a substantial part of a television broadcast;
 - b. The communication to the public of a whole or substantive part of a television broadcast either in its original form or in any form recognisably derived from the original; and
 - c. The distribution to the public, for commercial purposes, of copies of the work by way of rental, lease, hire, loan or similar arrangement.
- (2) The copyright in a television broadcast shall include the right to control the taking of still photographs from the broadcast.

6. Categories of Persons who can Institute Action for Infringement of Copyright

Infringement of copyright interests, like trespass, is actionable per se. Thus, in action for infringement or breach of copyright, damages are at large and it is not necessary to prove actual or specific damages.²⁴ One cardinal nature of copyright is been a classic exemplification of chose in action. A community interpretation of sections 10, 11, 16, 17 and 38 of Copyright Act acknowledges five categories or classes of persons who or which can institute an action relating to breach of copyright in Nigeria, either personally or in a representative capacity. They are:²⁵

- a. An Owner;
- b. Assignee;
- c. Exclusive licensee;²⁶
- d. A person carrying on the business of negotiating, granting of licences, collection and distribution of royalties for not more than fifty (50) owners of copyright;²⁷ and
- e. A collecting society (section 39)²⁸

Conversely, 'notwithstanding the provisions of the Copyright Act or any other law, no action for infringement of copyright or any right under the Act shall be commenced or maintained by any person:

- a. Carrying on the business of negotiating and granting of licence;
- b. Collecting and distributing royalties in respect of copyright works or representing more than fifty owners of copyright in any category or works protected by the Act;

²³ With necessary exceptions as specified in paras (a), (h), (k), (n), and (o) of the second schedule to the Act – s.8(3)

²⁴ *Plateau Publishing Co. Ltd. v. Adophy* (1986) 4 NWLR (Pt. 34) 205; *Anyanwu v. Uzowuaka* (2009) 13 NWLR (Pt. 1159) 445 referred to.) (P. 534, paras. C-D)

²⁵ *MCSN Ltd/Gte v. C.D.T. Ltd.* (2019) 4 NWLR (Pt. 1661) 1; *Adeokin Records v. MCSN (Ltd/Gte)* (2018) 15 NWLR (P t. 1643) 550 referred to.] (P. 523, paras. E-G)

²⁶ Copyright Act, s. 16; *MCSN (Ltd/Gte) v. C.D.T Ltd.* (2019) 4 NWLR (Pt. 1661) 1 referred to. p. 525, para. C

²⁷ Copyright Act, section 17, in any category of work.

²⁸ Copyright Act, section 39. Association of copyright owners which may be formed upon the satisfaction of condition precedent provided by the section under reference.

Unless it is approved under section 39 of the Act to operate as a collecting society or is otherwise issued a certificate of exemption by the commission'.²⁹

A community reading of the sections 16, 17, 39 of the copyright Act, points to the fact that being in the business of negotiating and granting of copyright licences, collection and distribution of royalties on copyright works of rights of owners, and representing between 50 and 100 owners of copyright in musical category does not automatically puts one out as a prospective collecting society. That failure of one to even seek for approval or exemption of the Nigeria Copyright Commission to act as a collecting society, and same not granted or refused where such approval or exemption was indeed sought for by the applicant, does not in the circumstance, in the face of available options to institute action for breach of copyright, denies one the legal right to perform as such.³⁰ '...it is right to say that the right to sue is exercisable either jointly or severally by any one or more of the categories of persons so listed. In the same vein, the rights conferred under sections 16, 17 and 39 of the Act created the capacity in which a person act, and so an owner, assignee, and exclusive licensee acts in a personal capacity while a person under sections 17 and 39 acts in a representative capacity. The implication is that the latter capacity requires a licence or exemption, the former is not so required in order to have the rights exercised'.³¹ It can be deduced, that the approval or exemption requirement as a condition- precedent to the constitution of an action under section 39 of the Act, is not water tight taking into consideration the provisions of sister sections. Therefore, the issue of *locus standi* to sue as a collection society due to failure to obtain an approval or exemption by the NCC tactically may have been addressed provided it falls within the requisite requirements.

7. What is a Collecting Society?³²

Conceptually, a collecting society is an association of Copyright owners which has its principal objectives the negotiating and granting of licences, collecting and distributing of royalties in respect of copyright works.³³ In relation to copyright, collecting society means an association of copyright owners which has its principal objectives as the negotiating and granting of licences, collecting and distributing of royalties in respect of copyright works.³⁴

An owner of copyright is one who holds an exclusive right or rights to copyrighted material.³⁵

When shall a collecting society be formed?

A collecting society may be formed in respect of anyone or more rights of copyright owners for the benefit of such owners and the society may apply to the Commission for approval to operate as a collecting society.³⁶

What are the purposes of forming a collecting society?

The Commission may approve the formation of a collecting society if it is satisfied that;³⁷

- a. It is incorporated as a Company Limited by Guarantee;
- b. Its objectives are to carry out the general duty of negotiating and granting copyright licence and collecting royalties on behalf of copyright owners and distributing same to them;
- c. It represents the substantial numbers of owners of copyright in any category of works protected by the Act, in this paragraph of this subsection, owners of copyright includes owners of performer's rights;
- d. It complies with the terms and conditions prescribed by regulations made by the commission under the section.

²⁹ Copyright Act, section 17; *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (PT. 1742) p. 521-522, paras. G-B; Copyright Regulations 2007, section 1; *NCC v. MCSN Ltd/Gte* (2016) LPELR - 42264 (CA); *Compact Disc Technology Ltd. v. MCSN Ltd/Gte* (2010) LPELR -40006 (CA).

³⁰ *MCSN v Adeokin Records* (2007) 13 NWLR (Pt. 1052) 616; *PMRS Ltd/Gte v. Skye Bank Plc* (unreported) Appeal No. CA/L/846/2009, delivered on 2th October, 2017; *Adeokin Records v. MCSN* (2018) 15 NWLR (Pt.1643) 550; *MCSN Ltd/Gte v Compact Disc Technology Ltd.* (unreported) Appeal No. SC.425/2010.

³¹ *MCSN (Ltd./Gte) v C.D.T Ltd.* (2019) 4 NWLR (Pt. 1661) p. 23, para. C per, Peter-Odili, JSC

³² The term collection society is used interchangeably with collection management organisation

³³ Copyright Act, Cap C28 Law of the Federation of Nigeria (LFN), 2004, section 39(8).

³⁴ *Ibid*; *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (PT. 1742) p. 523, Paras. G-H.

³⁵ *MCSN (Ltd./Gte) v. C.D.T. Ltd.* (2019) 4 NWLR (Pt. 1661) 1.

³⁶ Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004, Section 39(1)

³⁷ *Ibid*, section 39(2); *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (PT. 1742) p. 523, Paras. C-F

8. Publishing revenue from collection societies³⁸

The world of music publishing operates to a large extent with an interwoven network of collection societies. You have collection societies that collect different parts of the income stream due to composers and publishers. The income is from performing rights (radio, television, film, touring) and income from mechanical rights payable by record labels from the sale of recordings (digital, physical, streaming) containing the copyrighted works of songwriters and publishers. Collection societies have existed since 1852 with the birth of SACEM, the French Performing Right Society. The importance and revenue generation of the collection societies can be quite significant. For instance, the United Kingdom Performing Right Society (PRS) for Music in 2016 raked a total revenue of GBP625.8 million,³⁹ royalties paid to owners⁴⁰ of the works was GBP527.6 million. In 2017, the revenue stood at GBP716.8 million⁴¹ while distributed royalties to owners was GBP605 million. In Nigeria, in 1994, the Musical Copyright Society of Nigeria (MCSN) collected USD88,00019 (USD36,397 from broadcasts and USD38,517 from performances), while between 2018⁴² and May 2019, COSON disbursed NGN8,520,000.00 and approved the sum of NGN40,000,000.00 respectively.⁴³ While there is a significant disparity between the revenue of the UK collection society and that of Nigeria, the figures reflect the viability and potential of collection societies in the copyright ecosystem.⁴⁴

France, United Kingdom and United States of America and true stories⁴⁵

France

The year is 1847 and Ernest Bourget, Paul Henrion and Victor Parizot⁴⁶, three of France's most celebrated composers were sitting in the leading cafe of the time, Cafe 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 composers decide not to pay the bill and a trial ensued. This true 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. Societe des auteurs, compositeurs et editeurs 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 American Society of Composers Authors & Publishers (ASCAP) which has similar origins to that of SACEM 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, a group of broadcasters including major radio networks and nearly 500

³⁸Collection societies and the role in the copyright ecosystem by Olajide Oyewole were dealt with in details at <https://www.mondaq.com/nigeria/music-and-the-arts/1104488/collection-societies-in-nigeria39s-music-industry-the-case-for-change?score=75>

³⁹ <https://www.prsformusic.com/about-us/track-record/2016> accessed on 1 May 2022.

⁴⁰ <https://www.statista.com/statistics/281286/music-royalty-collected-and-distributed-by-prs-for-music-in-the-uk/> accessed 2 July 2019

⁴¹ <https://www.prsformusic.com/about-us/track-record/2017> accessed 1 on May 2022.

⁴² Folarin Shyllon, *Intellectual Property Law in Nigeria* (vol 21, Verlag C.H. Beck Munchen 2003)

⁴³ <http://www.cosonng.com/coson-agm-approves-40-million-naira-as-specific-distribution-to-members/> accessed on 1 May 2022.

⁴⁴ *Collection Societies In Nigeria's Music Industry: The Case For Change - Music and the Arts - Nigeria* (mondaq.com) accessed on 2 May 2022.

⁴⁵Much of these illustration were culled from Olajide Oyewole article on http://webcache.googleusercontent.com/search?q=cache:http://olajideoyewole.com/publications/Getting_paid_for_your_music_and_CMOs.pdf accessed on 2 May 2022.

⁴⁶Famous 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

independent radio stations established BMI⁴⁷. BMI is a credible alternative to ASCAP and is an automatic performance royalty earning machine for songwriters and publishers⁴⁸.

Operations of the CMO

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 repertoire 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.

9. At whose instance and when shall copyright infringement be actionable?

Infringement of copyright shall be actionable at the suit of the owner, assignee, or an exclusive licensee as the case may be in the Federal High Court exercising jurisdiction in the place where the infringement occurred, and in any action for such infringement, all such relief by way of damages, injunction, accounts, or otherwise shall be available to the plaintiff as it is available in any corresponding proceedings in respect of infringement of other proprietary rights.⁴⁹ Damages has been defined as 'that pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort'.⁵⁰

It is however worthy to note that the principles in award of damages for breach of copyright matters are sui generis, and are not the same with general principles of award of damages.⁵¹ As the determination of fair compensation payable by a broadcasting authority, in certain circumstances, to the owner of the right to broadcast a musical work, in absence of any agreement to the contrary, lies with the court exercising jurisdiction.⁵²

Statutorily also,

Where, in an action under this section (section 16), an infringement of copyright is proved or admitted, and the court in which the action is brought, having regard (apart from all other material considerations) to –

- a. The flagrancy of the infringement; and
- b. any benefit shown to have accrued to the defendant by reason of the infringement, is satisfied that effective relief could not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.⁵³

In the instant case of *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020), OGBUINYA, J.C.A. opined that I have given an intimate reading to it. It is obedient to easy comprehension. The respondent, pleaded therein, in an unmistakable terms, that it is the owner, assignee and exclusive licensee of copyright in a body of musical works and attendant neighbouring rights, in the territory of Nigeria, which the appellant infringed, via retransmitting, rebroadcasting and broadcasting to the public, without its licence. Thus, the respondent's status falls within the slim perimeter of the category of litigants hosted by section 16 of the Copyright Act. It stems from this that its litigable rights/status is, totally, divorced from being a collecting society or any other category of parties chronicled in sections 17 and 39 of the Copyright Act displayed above. There is no gainsaying the fact that section 16 of the Copyright Act donates to the respondent the right of access to court, and ventilate any violation of its copyright works.⁵⁴

⁴⁷ Broadcast Music Incorporated

⁴⁸ Unlike Nigeria and the U.K. the US allows for more than 1 collection society to represent the same class of owner

⁴⁹ Copyright Act, section 16(1); *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (PT. 1742) p. 522-523, paras. G-A)

⁵⁰ *Vere v. B.E.F.M. Ltd.* (2008) 18 NWLR (Pt. 1119) 300 at 345, per Muhammad, JSC; *Ukudie v SPDCN* (1975) 8-11 SC 155 at 162; *Neka B.B.B. Mfg. Co. Ltd. v A.C.B Ltd* (2004) 2 NWLR (Pt.858) 521.

⁵¹ *Halsbury's Laws of England*, 4th Edition, vol. 9 page 612, para. 947; *Plateau Publishing Co. Ltd v Adophy* (1986) 4 NWLR (Pt. 34) 205 at 225; *Obe v. Grapevine Communication Ltd.* (2003-2007) 5 I.P.L.R. 354; *Ladan v Shakallo Publication* (1917-1976) 1 I.P.L.R. 270; *Exchange Telegraph Co. v. Gregory & Co.* (1896) 1 Q.B. 154; 74 L.I. 85.

⁵² Copyright Act, section 9(3).

⁵³ Copyright Act, section 16(4).

⁵⁴ *Supra*, p. 524, paras. A-D, per OGBUINYA, J.C.A.

It is necessary to note that transmission by assignment of copyright works can be done in writing.⁵⁵ In the case under review, by the tenor and phraseology of exhibits G and G1, the Mechanical Copyright Protection Society (MCPS) and Performing Rights Society (PRS) no doubt were the assignors and the respondent (M.C.S.N Ltd/Gte) the assignee in the copyright works. By the assignment, which implies transfer, exhibits G and G1, the respondent acquired a chose in action in the copyrights assigned. A chose in action, a proprietary right in personam, denotes 'all personal rights of property, which can, only be claimed or enforced by action, and not by taking physical possession'.⁵⁶ Copyright is a classic exemplification of chose in action. It can be gleaned from the facts of the case, that the assignors transferred, *vide* exhibits G and G1, their acquired rights in the itemised repertoire to the respondent, as an exclusive licensee, to sue against their infringement by anybody in the territory of Nigeria. An exclusive licensee wields lots of litigable power in the sense that: 'an exclusive licence means a licence in writing signed by or on behalf of the copyright owner, authorizing the licensee to the exclusion of all other persons including the person granting the licence to exercise a right which would otherwise be exercised exclusively by the copyright owner. The licensee under an exclusive license has the same rights against a successor in title who is bound by the license as he has against the person granting the license. An exclusive licensee may bring proceedings for infringement in the same way as an assignee.'⁵⁷ Again, 'an owner is one who holds an exclusive right or rights to copyrighted material.'⁵⁸

10. Retrospective Nature of the provisions of the Copyright Act of Nigeria

A statute is said to be retrospective where it takes away or impairs any vested right acquired under existing laws, or creates a non-obligation, or imposes a new duty, or attaches a new disability in respect of transaction or consideration already past.⁵⁹ Therefore, a retrospective enactment, which bears the other appellations, 'ex post facto' or 'retroactive laws', is one whose date of commencement is anterior to its date of enactment as well as accommodates or extends its effect to previous matters that had occurred before its enactment.⁶⁰ The reasons are not far-fetched. A statute, save on express provision, operates prospectively, *in futuro*. In the Latin days of the law, in the illuminating words of Nnamani JSC., it was encapsulated as *Lex prospicit non respicit* - the law looks forward and not back.⁶¹ The Facts of the case, by its tenor and phraseology, having laid credence that exhibits G and G1, the Mechanical Copyright Protection Society and Performing Rights Society are the assignors, and the respondent (M.C.S.N, Ltd/Gte) the assignee in the copyright works, and considering the dates (1986 and 1990) of the respective transmission by assignment, it is fundamental at this stage to answer the question of retrospective tendency or otherwise of the principal Act. To address the poser, generally, the Copyright (Amendment) Decree No. 42 of 1999, commenced operation on 10th May 1999, and since the birthday of the legislation was 10th May 1999, it was derobed of any retrospective effect vis-à-vis the respondent's vested rights.⁶² What is vested right? It is 'a right held by somebody in something to his advantage and interest. A vested right accrues to the owner or holder who has it for keeps as the allodial owner'.⁶³ On the retrospective status of the Act, it was enunciated by OGBUINYA, J.C.A, thus:

That apart, the provision of section 52 of the Copyright Act, in its paragraph 3(1) of the Fifth Schedule, to all intents and purposes, consolidates the vested rights of the respondent which enured to it in 1986 and 1990. It preserves the validity and efficacy of copyright licencing contracts which preceded/predated the commencement of the Copyright Act and treats them as effervescent ones during the existence of the Act.⁶⁴

⁵⁵ Copyright Act, section 11(1) and (3)

⁵⁶ *Torkington v Magee* (1902) 2 KB 47; *A. T.S. & H Sons v. B.E.C. (Nig) Ltd* (2018) 17 NWLR (Pt. 1647) 1; *Julius Berger (Nig.) Plc v T.R.C.B. Ltd.* (2019) 5 NWLR (Pt. 1665) 219.

⁵⁷ *MCSN (Ltd./Gte) v C.D.T Ltd.* (2019) 4 NWLR (Pt.1661) 1 referred to. p. 525, para. C per, Peter-Odili, JSC. quoted with approval in *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (PT. 1742) P. 525, paras. B-C.

⁵⁸ *MCSN (Ltd./Gte) v C.D.T Ltd.* (2019) (supra) per, Peter-Odili, JSC.

⁵⁹ *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377 referred to. p. 526, paras. C-D

⁶⁰ *Adesanoye v. Adewole* (2006) 14 NWLR (Pt. 1000) 242; *Alewa v. S.S.I.E.C.* (2007) 15 NWLR (Pt. 1057) 285; *Olaniyi v. Aroyehun* (1991) 5 NWLR (Pt. 194) 652; *Arema II v. Adekanye* (2004) 13 NWLR (Pt. 891) 572; *Ojukwu v. Obasanjo* (2004) 12 NWLR (Pt. 886) 169; *Ayida v. Town Planning Authority* (2013) 10 NWLR (Pt. 1362) 226; *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 357) 414; *S.P.D.C. Ltd. v. Anaro* (2015) 12 NWLR (Pt. 1472) 122; *Obiuweubi v. C.B.N.* (2011) 7 NWLR (Pt. 1247) 465; *Goldmark (Nig.) Ltd. v. Ibafon Co. Ltd.* (2012) 18 NWLR (Pt. 1308) 291; *Ogaga v. Umokoro* (2011) 18 NWLR (Pt. 1279) 924; *B. B. Apugo & Sons Ltd. v. O.H.M.B.* (2016) 13 NWLR (Pt. 1529) 206; *Gana v. S.D.P.* (2019) 11 NWLR (Pt. 1684) 510; *N.C.C. v. Motophone Ltd.* (2019) 14 NWLR (Pt. 1691) 1; *MCSN Ltd/Gte v. C.D.T. Ltd.* (2019) 4 NWLR (Pt. 1661) 1; *Toyin v. P.D.P.* (2019) 9 NWLR (Pt. 1676) 50 referred to.] (P. 526, paras. D-G)

⁶¹ *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377 at 391.

⁶² *Supra*, p. 525-526, paras. H-B

⁶³ *Adesanoye v Adewole* (2006) 14 NWLR (Pt. 1000) 242 at 277 per Tobi, JSC., see also *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020) (supra) referred to. p. 525, paras. E-F.

⁶⁴ Pp. 526-527, paras. G-A:

In the instant case, it is deductible that the documents, exhibits G and G1, which evidenced the rights of the respondent were executed between 1986 and 1990 when the regime of collecting society was not yet in existence. The Copyright (Amendment) Decree No. 42 of 1999, which introduced section 15A (now section 17) commenced operation on 10th May, 1999, and section 39 of the Copyright Act came to life through Decree No. 98 of 1992, by which time the respondent's right (choses in action) had been reposed and vested.⁶⁵ It is also necessary to note from available facts, that the respondent (M.C.S.N LTD/GTE) was incorporated in 1984 and exhibit G1 made in 1986 under the Companies Decree 51 of 1968 which predated the Companies and Allied Matters Act, 1990 (CAMA), and sections 2(b) and 3 (a) (1) of the Companies Decree, 1968 allowed companies Limited by guarantee to put limited in its name.

The import of the above paragraph is that exhibits G and G1 though appear quite different from the name of the Respondent, thereby capable of denying it her beneficial status. The respondent's DW1, the star and only witness, in the crucible of cross-examination, at page 1179, volume III, of the huge record of Appeal, gave evidence that the respondent, as a limited liability company, acquired 139 works of copyright as at 1984. The irresistible inference, flowing from this impregnable evidence elicited from the cross-fire of cross-examination, is that the respondent was incorporated/registered as at 1984. The court took judicial notice of the fact that the company law in operation as at that time was the Companies Decree (Act) 1968. The prescription of section 3(a)(1) of the defunct/erstwhile Companies Act, 1968 permitted a company limited by guarantee, like the respondent, to add the word 'Limited' as a suffix to its name. Thus, that nomenclature does not, in the least, alter the configuration of the respondent with the words 'Limited by Guarantee' as enjoined by the Companies and Allied Matters Act (CAMA). Undeniably, the CAMA, in section 568 thereof, expressly repealed the Companies Act, 1968. The Transitional and Savings Provisions in the Fifth Schedule *inter alia* states that 'Subject to this Schedule, this Act applies in relation to works made before the commencement of this Act as it applies in relation to works made after the commencement of this Act.'⁶⁶ Section 52 (1) of the Act provides that 'the Copyright Act 1970 is hereby repealed', then Section 52 (3) states that 'The Transitional and Savings Provisions in the Fifth Schedule to this Act shall have effect *notwithstanding*⁶⁷ subsection (1) of this section or any other provisions of this Act.'⁶⁸ The import of the word, 'notwithstanding' used above, signifies a phrase of exclusion, in section 52 of the Act, is that the section supersedes, controls, and overrides all other provisions of the Copyright Act. It is usually intended to express a clear intention to exclude any impinging/impeding effect of any other provision in a legislation, so that the provision it introduces will fulfill itself.⁶⁹ It follows, that every other provision in the Copyright Act must bow/genuflect to the preeminence of the sacrosanct provision of section 52 of the Act. In the instant case, the provision of sections 17 and 39 of the Copyright Act, which the appellant paraded as dominant, vaporized in the face of section 52 of the Act. The section is at the apex of the pyramid of the Copyright Act and other sections are impotent to dethrone it. It remained the lord within the confines of vested right of the respondent, invariably, exhibits G and G1, in the instant case, falls within the category of such saved contracts. Instructively therefore, the respondent was therefore not required to seek and obtain approval or exemption from the Nigerian Copyright Commission, as enjoined by sections 17 and 39 of the Copyright Act, since it did not come within the ambit of a collecting society.⁷⁰

The learned Justice concluded in resolving issue No. 4, by stating thus:

In the light of this judicial survey, done in due consultation with the law, the respondent was not destitute of the right to sue the appellant on violation of the copyright works assigned to it. In a word, the respondent was clad with the requisite locus standi to institute the counter-claim against the appellant. In effect, all the strictures, while the learned appellant's counsel rained against the locus standi of the respondent, pale into insignificance. I resolve the issue four against the appellant and in favour of the respondent.⁷¹

⁶⁵ *Halsbury's Laws of England*, 4th Edition, Vol. 35 paras. 1104 and 1105 page 611. Having established that the respondent's chose in action came to being in 1986 and 1990, the implication is that as at these dates, the respondent had acquired, in the assigned copyright musical works, vested right-

⁶⁶ Para. 1

⁶⁷ Underline, mine.

⁶⁸ *Adesanoye v. Adewole* (2000) 9 NWLR (Pt. 671) 127; *Afolabi v. Gov, Oyo State* (1985) 2 NWLR (Pt. 9) 734

⁶⁹ *N.E.C.O. v. Tokode* (2011) 5 NWLR (Pt. 1239) 45.

⁷⁰ *Multichoice (Nig) Ltd. v. M.C.S.N. Ltd/Gte* (2020) 13 NWLR (PT. 1742) pp 527-528, paras. H-A, per OGBUINYA, J.C.A.; [*Olatumbosun v. N.I.S.E.R. Council* (1988) 3 NWLR (Pt. 80) 25; A.-G., *Fed. v. Abubakar* (2007) 8 NWLR (Pt. 1035) 117; *Ugwuanyi v. Nikon Ins. Plc* (2013) 11 NWLR (Pt. 1366) 546; *Adebayo v. P.D.P.* (2013) 17 NWLR (Pt. 1382) 1; A.-G., *Lagos State v. A.-G., Fed.* (2014) 9 NWLR (Pt. 1412) 217; *Cocacola (Nig.) Ltd. v. Akinsanya* (2017) 17 NWLR (Pt. 1593) 74; *Ehinderu v. FR.N.* (2018) 5 NWLR (Pt. 1612) 301; A.-G., *Bauchi State v. A.-G., Fed.* (2018) 17 NWLR (Pt. 1648) 299 referred to.] (P. 527, paras. B-F)

⁷¹ P. 527-528, paras. H-A, per OGBUINYA, J.C.A

It was the case of Appeal No. CA/L/787/2008: *Compact Disc Technology Ltd. (CDT) & 2 Ors v. MCSN Ltd* (unreported) delivered by this court on 17th March, 2010. The appeal, at the instance of the respondent therein which lost, had meandered/travelled, at the measured speed of court process, to the apex court. On 14th December, 2018, -the Supreme Court, unanimously, allowed the respondent's appeal. It has been reported as *MCSN Ltd/Gte v C.D.7. Ltd* (2019) 4 NWLR (Pt. 1661) 1. In other words, the decision in exhibit B, which the appellant insisted that the lower court should have followed, under the canopy of the doctrine of *stare decisis*, had been overturned.

11. Conclusion: Decisions of the Court

First, the appeal Court having found that MCPS and PRS were the assignors of the copyright in the respective musical works and MCSN, the assignee, in the musical works assigned rightly held that the provisions of section 11(1) and (3) of the Copyright Act allows the transmission by assignment of copyright works in writing. That by the assignment, via the Agreements, MCSN acquired a chose in action in the musical works assigned, therefore, the MCSN's assertion that it is the owner, assignee and exclusive licensee of a body of copyright works in Nigeria, which Multichoice infringed by re-transmitting, re-broadcasting and broadcasting to the public without its licence is correct and in line with the law, and by virtue of section 16 of the Copyright Act, MCSN could sue in case of infringement of the vested right by anybody or group in Nigeria, as held in the case of *MCSN (Ltd/Gte) v. C.D.T Ltd*⁷² Agreed also that the Copyright Act came into force on 10 May 1999 and cannot have retroactive effect in respect of such vested rights. The Court's position which the researcher agrees with that section 52(3) of the Copyright Act preserves the validity of copyright licencing contracts that predate the commencement of the Copyright Act, evinced by the phrase '*notwithstanding subsection (1) of this section and any other provisions of this Act.*' Hence, the provisions of sections 17 and 39 of the Copyright Act which Multichoice relied on are subservient to the superseding provision of section 52 of the Copyright Act. The Court was therefore right in holding that MCSN had the *locus standi* to institute the suit and counter-claim against Multichoice.⁷³

In determining whether the Lower Court was right in holding that MCSN's rights were infringed and that Multichoice was liable in damages for same despite the fact that MCSN had failed to obtain the approval or license or exemption from the NCC to operate as a collecting society, the Court held that MCSN did not need to obtain a licence from the NCC before instituting the counter-claim and was not in contravention of sections 17 and 39 of the Copyright Act. The Court held that MCSN was not a stranger to the Agreements and was the assignee under those contracts. Acting on the inference that MCSN had been incorporated in 1984, the Court took notice of the fact that the companies' law in existence at the time was the Companies Decree Act (1968). Section 3(a)(1) of the erstwhile Companies Act 1968 permitted a company limited by guarantee to add the word 'Limited' as suffix to its name. Hence, the nomenclature did not alter the identity of MCSN with the words 'Limited by Guarantee', as required under CAMA. MCSN was thus, a competent party to the Agreements and was entitled to sue on the assigned right to the musical works.

Finally, As can be gleaned from the foregoing, the Court of Appeal has interpreted sections 17 and 39 *vis-à-vis* section 16 and 52(3) of the Copyright Act to the effect that although, generally, only collecting societies licenced by the NCC are entitled to demand royalties on behalf of copyright owners for exploitation of copyright works, where the exception permits, assignees and exclusive licensees of copyright works can also demand and receive royalties in respect of exploitation of the assigned rights and can sue for infringement in the case of default. Also of note is that the Court emphasised that the rules applicable to award of damages in copyright actions differ from the conventional principles applicable to award of damages; to the extent that actual and special damages need not be proved. We however awaits the position of the Supreme court on the subject matter.

⁷² (2019) 4 NWLR (Pt 1661) 1.

⁷³ Collection of royalties for the exploitation of copyright works- A Review of the Court of Appeal's decision in Multichoice Nigeria Limited v. Musical Copyright Society Nigeria Ltd/ Gte - *ÆLEX Legal* (aalex.com)