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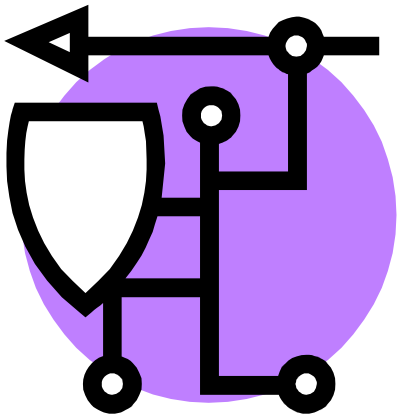
INTERNATIONAL PROTECTION OF SOUND



United States vs. Nigerian Copyrights, with Concentration on Sound Recordings and Folkloric Works

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I. INTRODUCTION

The United States is home to some of the world's finest entertainers. It could be said that she is the leader in music and film worldwide. Her gorgeous actors and actresses appear in the homes of many on their TV screens, magazine covers, and computer screens. Her singers sell out concerts worldwide. But what is it about these individuals that has led to the world's love affair with them? What makes them so desirable, so envied? Is it just them, or is it their work? What makes a good film…good? Is it the script or is it the actors? There have been times of disappointment when talented actors, it seems, have made the wrong decision in choosing a script. There have been sequels to movies that just outright sucked. I remember the sheer disappointment I felt after viewing Indiana Jones and the Crystal Skull. I was disappointed in Shia Laboeuf, and I definitely felt that Harrison Ford should have been ashamed. But was my problem their acting, or the story line itself?[1] In reality, it makes one wonder if the writers make the stars? And if so, should these writers not receive as much benefit as the actors who bring their works to life? Maybe our favorite actors are not as funny as we think they are; perhaps they wouldn't be as exciting, but for the writing. The characters portrayed make the actors appear as mesmerizing as they do; characters created by writers. Although it may appear that actors receive all of the credit associated with Hollywood, behind all the glitz and glamour the true owners of the works are rightfully compensated and honored; all thanks to copyright law. Copyright is the core of entertainment; it is seen as a means by which the general welfare is advanced through provisions of economic incentives to creators and disseminators of works of the intellect, new and old.[2]

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[1] The latter was more likely the case considering that Indiana Jones was saved from an explosion by hiding in a refrigerator.

[2] CRAIG JOYCE ET AL., COPYRIGHT LAW 28 (8th ed., Lexis Nexis 2010).

This paper will compare the Copyright laws of the United States to those of Nigeria, and discuss the differences and commonalities between the two. It is intended to shed some light on the areas where the developing Nigerian industry is lacking, as opposed to that of the US which could be considered a well oiled machine. Of the many facets of entertainment, this paper's main focus shall be on music, specifically sound recordings, and neighboring rights in folkloric works.

Although sound recordings are not new in Nigeria, there has been a recent shift in the style of popular African music to a more western sound, and the industry has seen a great spike in international demand within the continent. The new afro pop and afro hip-hop sound has completely taken over the African continent, initiating the creation of companies like MTV Base, whose audiences are concentrated mainly in Africa and Europe.[3] But with the big music boom came the big demand for compensation. Although the copyright laws are in place, application and enforcement have proved difficult. This paper will suggest possible solutions, based on American law and practice, to certain problems in the Nigerian music industry.

As mentioned above, this paper will also address neighboring rights. These are rights that are similar to, but not exactly the same as basic copyrights. In most cases, the copyright owner is not the individual who receives the compensation for the use of the copyrighted work. Of the many existing neighboring rights, this paper will concentrate on folkloric works, how they are treated under the Nigerian copyright laws, and the lack of protection afforded such works under US copyright law. It will also explore some of the history behind the decision to protect folkloric works in Nigeria, as opposed to allowing them pass into the public domain.

[3] The video to the song Ice Cream Factory, performed by Lynxxx, a Nigerian rapper, and Enzé (this paper's author), actually debuted on this television station in February 2012.

II. BACKGROUND

A. United States

Sound recordings are a fairly new development in the music industry, thus they were not always covered under copyright law. The protection of creative works dates back to the 15th century, a time where the printing press was the latest technology, and has adapted to protect new creative developments.

Statute of Anne

The very first copyright statute, the Statute of Anne, was a reaction to the latest technology of the 15th century: the printing press.[4] The printing press was introduced into England in 1476 and allowed for the possibility of mass reproduction of books. This raised questions as to which printers/publishers owned the rights to print certain books, leading to significant competition among them. Although financially beneficial to printers and book sellers, this possibility also posed a threat to the crown.[5] The Crown decided to regulate the art by prohibiting the publishing of any book without the licensing and approval of royally appointed official censors. By 1557, the Stationer's Company had obtained a publishing monopoly from the crown.[6]

The Statute of Anne was enacted in 1710 as a response to petitions from printers and booksellers to secure author's rights so as to encourage learning. These were not selfless petitions made with only the authors in mind. The publishers of the time knew that if they were able to by the rights to an author's books outright, they would be

[4] JOYCE ET AL., *supra* note 2 at 15
[5] The new printing press would allow for the widespread dissemination of works containing material that the crown would find distasteful. *Id* at 16.
[6] This group of London printers and booksellers lined their own pockets while controlling the press according to the orders of the Crown. *Id*.

provided with legal ownership to combat the infringement of other publishers attempting to reproduce the work. The new statute covered books alone, and prevented the printing, reprinting, importation, or selling of copyrighted books without the permission of the author or copyright owner. It maintained the publishers' rights in already printed works up until 1731, and granted protection of new works to the authors. Under the statute, the authors were given an initial term of protection for 14 years from the date of first publication, and a second term of 14 years, provided he or she was living at the commencement of such term. At the end of the terms the works would pass into the public domain. For an author's copyright to have been enforceable, the title of the work had to have been registered with the Stationer's Company before the work was published.

US Copyright Acts

The first ever US copyright act was passed in 1790 pursuant to constitutional authority.[7] It was modeled on the Statute of Anne, and provided authors with the rights to print and sell maps, charts, and books for two 14-year terms (original and renewal term).

In 1905, President Roosevelt requested that the copyright law of the nation be reflective of modern conditions. As a result, the Copyright Act of 1909 was passed. The act covered "all the writings of an author."[8] The duration of protection was also expanded to two 28-year terms (original and renewal term), allowing for a possibility of 56 years of protection. Unlike the prior copyright act which required registration before publication, the 1909 Act provided protection from the first date of publication as long as proper

[7] The framers of the Constitution, after 12 of the new American states adopted copyright statutes following the American Revolution, provided the Federal Government with the right to promote the progress of science and useful arts. U.S. CONST. art. I, §8, cl. 8.
[8] 17 U.S.C. §4 (1909) (current version at 17 U.S.C. §102 (1976)).

notice was affixed to the work. After various amendments and attempts to revive this act,[9] it became apparent that further repair to the Act would not prove helpful; an entirely new Act would be needed to serve the development creative works had undergone over the years. Hence the Copyright Act of 1976, which is the present copyright law, was passed.

The Copyright Act of 1976 expanded the categories of copyrightable subject matter to include: literary works; musical works; dramatic works; pictorial, graphic, and sculptural works; pantomimes and choreographic works; and sound recordings.[10] It also removed the registration or notice requirement, providing protection for works fixed in a tangible form. Although sound recordings were officially provided protection under the 1976 Act, in 1971 sound recordings were recognized as copyrightable works distinct from the musical and or lyrical works that they embodied.

B. Nigeria

The Nigerian Copyright Act was enacted in 1970, the year the civil war ended in Nigeria. Not much thought was put into this particular legislation as most people just wanted to be happy and celebrate the end of the war. As a result, the first Nigerian Copyright, enacted 10 years after Nigeria gained her independence from the British, was almost a carbon copy of the British Copyright Act. [11]This was also the beginning of the oil boom in Nigeria. With the entry of companies like British Petroleum and Royal Dutch Shell, offering millions, Nigerians were a carefree bunch. No one cared about copyright; they were finally rich, just by residing on oil rich soil. Had they known of the "oil curse,"

[9] Motion pictures were added as protectable subject matter in 1912.
[10] 17 U.S.C. §102(a) (1976).
[11] Many Nigerian laws are modeled after British law because Nigeria was formerly a British colony.

perhaps they would have been more diligent.[12] With the desire to party came the demand for popular music. Through the development of popular African music, Nigerians realized the potential for economic gain in protecting the rights to creative works.[13] Under section 1 of the Nigerian Copyright Act, the following works are eligible for copyright: literary works; musical works; artistic works; cinematographic works; sound recordings; and broadcasts.[14]

III. SOUND RECORDINGS

Sound recordings are works that result from the fixation of a series of musical, spoken, or other sounds. These do not include the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material object, be it a disk, tape, or other phonorecord, in which the sounds are embodied. [15]

A. Licensing

A copyright owner owns a bundle of exclusive rights which he may sell or authorize another to exercise. Each stick in the bundle may be limited by time, geography, and purpose. A transfer of an exclusive right is similar to a sale in that the transferee obtains full ownership of the copyright once granted. A transferee may then transfer a granted right to another, the permission of the original copyright owner not being required because the transferee has obtained full ownership of the right.

A license is different from transfers in that the copyright owner is not selling his right but authorizing another to exercise his copyright. Licenses may be divided into

[12] In international oil and gas, there is reference to an "oil curse" which seems to befall African countries as soon as oil and gas is discovered and exploited. Corruption abounds through private dealings with national resources, thus actually increasing the generally poverty rates.
[13] This is probably why the Nigerian Copyright Act was not amended until 20 years later in 1990.
[14] Nigerian Copyright Act §1.
[15] 17 U.S.C. § 101.

exclusive and non-exclusive licenses. Of the two, exclusive licenses are more similar to transfers in that once a right has been exclusively licensed, the grantor may no longer exercise the right in question throughout the duration of the license. All exclusive copyright licenses are usually required to be in writing and signed by the owner. Non-exclusive licenses on the other hand, may be granted orally, or even implied from the conduct of the parties. The non-exclusive licensing of a right does not usually prevent the grantor from continuing to exercise the right through the duration of the license. Most non-exclusive licenses also tend to be limited in scope.[16] A common characteristic of all licenses that differentiates them from transfers is the inability of grantees to transfer a license without the consent of the grantor.

1. United States

The 1909 US Copyright Act did not provide for division of copyrights. Until the passing of the 1976 Copyright Act, exclusive rights of copyright owners were considered indivisible. A copyright owner could only transfer or license all or none of his or her rights to the copyrighted work. After the passing of the 1976 Act, it became clear that a copyright owner had the right to grant less than the entire bundle of rights to third parties who could exploit, resell, and register claims to such copyrights, and even bring suits in their own name for infringement by others.[17] The 1976 Copyright Act provides the owner of a copyright in a sound recording the exclusive right to do and authorize any of the following:

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[16] See, e.g. *Microstar v. Formgen Inc.,* 154 F.3d 1107, 1113, 48 U.S.P.Q.2d 1026 (9th Cir. 1998) (users of "Duke Nukem 3D" game granted permission to create new levels on the condition that the resulting product was offered for free and not used in a commercial product.

[17] JOYCE ET AL., *supra* note 2 at 23.

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work (also known as the adaptation right); (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[18]; (6) to perform the copyrighted work publicly by means of a digital audio transmission.[19]

Due to the 1976 Copyright Act, any of these rights may now be legally licensed separate of the others. This licensing must be done by or with the consent of the copyright owner. All exclusive licenses must be in writing and signed by the owner. While non- exclusive licenses may be granted orally, or implied from the conduct of the parties. The exact terms of the license are determined through private bargaining, and will depend upon market conditions and the bargaining position of the parties. Licenses may be granted for a specific geographic area, over a specified period of time, or for use in specific media. This provides greater sources of income for the copyright owner, and increases diversity in the use of the copyrighted work. Most licensing of sound recordings in the U.S. is handled by performing rights organizations.[20]

[18] 17 U.S.C §106 (1-3).
[19] 17 U.S.C. §106 (6).
[20] See Section B. Royalties and Collecting Societies of this document, for more details.

2. Nigeria

The Nigerian Copyright Act provides copyright owners of a sound recording exclusive control of the following in Nigeria:

> (a) the direct or indirect reproduction, broadcasting or communication to the public of the whole or substantial part of the recording either in its original form or in any form recognizably delivered from the original; (b) distribution to the public for commercial purposes of copies of the work by way of rental, lease, hire, loan or similar arrangement.[21]

Section 10 of the Nigerian Copyright Act addresses the issues of assignment and licensing. All exclusive licenses are required to be in writing[22], but non-exclusive licenses may be orally granted or inferred from conduct.[23] Licensing of sound recordings in Nigeria is also determined through private negotiations, and is greatly affected by market conditions.[24] Musicians or their representatives usually go to a place known as Alaba Market (herein after referred to as Alaba), a known electronics marketplace that is also home to the top CD production and licensing moguls. There they negotiate for a fee to be paid by the market to produce copies of and market the musician's material. There are no contracts signed and most offers are disappearing offers that must be accepted on the spot. Unfortunately this lack of contracts leaves the Nigerian performer vulnerable to claims by Alaba of rights in the bundle that were not originally granted them.

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[21] Nigerian Copyright Act §6.
[22] §10(3).
[23] §10(4).
[24] It is commonly done under the table in an actual marketplace.

3. Summary

The major difference between licensing in the United States and licensing in Nigeria is the existence of a "paper trail." Most performers would be willing to license almost every right, except the right to prepare derivative works, as this has proven to be a future source of income for many. American performers can license freely because they have access to legal assistance, and the license agreement will clarify any confusion in the future. Unfortunately for the Nigerian artist who grants a license to Alaba, there is no such availability of proper legal aid, as not many lawyers are interested in copyright law. The lack of paperwork to document the exact rights granted also makes this process more difficult. It seems the only relief is that the Alaba license agreements are not in writing and hence do not amount to exclusive licenses.[25] Thus a party with a good lawyer (which will prove to be expensive due to the lack of expertise in this field) may actually be able to find his way out of the grips of Alaba in Nigeria.

B. Royalties and Collecting Societies

Radio stations all over the world play thousands of songs belonging to different copyright owners in an average month. So as not to run afoul of the law, these stations must obtain the authorization of the owners of all the works it uses. It would be physically and economically impracticable for station representatives to have to individually contact each of these thousands of copyright owners to negotiate acceptable royalties and obtain the necessary licenses.

[25] The Nigerian Copyright Act, like that of the U.S., requires all exclusive licenses to be in writing.

This problem can be solved by the use of collective management of copyrights. Collective management is carried out by organizations known as collecting societies, or performing rights societies. A collecting society is an association, corporation, or other entity created by copyright law or private agreement. It licenses the public performance of nondramatic musical works on behalf of the copyright owners of such works, collects resulting royalty payments, and distributes such payments to the copyright owners.

1. United States

Before 1897, the United States copyright statute did not include public performance rights. After its inclusion there was still no practical way to collect substantial monies due to the availability of other sources of income in the form of live performances, the non-existence or underdevelopment of broadcasting, and the lack of organization of copyright owners to license and collect.[26] Although the name may hint otherwise, these organizations do not protect the rights of performers.[27] They actually protect the rights of the authors of the underlying musical works to permit others perform the works.

Today, music publishers in the United States are usually affiliated with one of three major royalty organizations, namely ASCAP, BMI, or SESAC. American recording artists obtains an accounting of their royalties from their record company and usually do not need to contact any of the broadcast royalty entities, unless the artist is also a songwriter. No writer or publisher may collect from more than one performing rights organization for the same songs at the same

[26] M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 142 (10TH ed., Billboard Books 2007).
[27] There are no performers' rights in the U.S.

time, as dual affiliation is not permitted.[28]But just because a party is affiliated with one organization does not mean that he or she will remain bound to that organization for life. A party may resign from an organization and sign up with another.[29] Usually the contract with the new organization will not begin until the end of the contract with the former, or until the costs of terminating the contract are recovered by the former organization.

American Society of Composers, Authors and Publishers (ASCAP)

This is a not-for-profit membership organization that was founded in 1914. ASCAP claims to have the oldest and largest repertory in the United States.[30] It issues a blanket license for its entire catalogue to radio and television stations. Income is not based on the amount of usage, but on gross receipts of the stations reduced by certain adjustments like agency commissions and wire adjustments.

By 1941, ASCAP's success had become unbelievable. By joining lyricists and composers together into the same organizations, it was given greater negotiating power against restaurants, theaters, and other venues that charged an admission fee for entertainment. Unfortunately, this success involved the possible creation of a monopoly, which led to the creation of the 1941 consent decree which created federal jurisdiction over many of ASCAP's activities.[31] Today the Southern District of New York serves as the rate setting court for disputes

[28] KRASILOVSKY, *supra* note 21 at 150.
[29] The party will still be entitled collection rights to any song that are still licensed with the former organization.
[30] Adding approximately 100,000 new titles annually. *Id* at 145
[31] *United States v. ASCAP*, 2001 US Dist LEXIS 23707.

involving royalties paid for licenses under the 2001 amendment to the consent decree. A summary of the decree may be found in any ASCAP license agreement.[32]

Broadcast Music Incorporated

BMI is owned by various entities but operates as a quasi no-for-profit organization.[33] It was established in 1939 to increase competition against ASCAP. It became an alternative to those writers and publishers who did not necessarily want to be affiliated with ASCAP, and wanted a better partner for radio. BMI also operates under blanket licenses for a finite period of time, and charges broadcasters a fee based on gross receipts adjusted by certain fees or costs. Due to unique conditions (similar to those of ASCAP) recognized as anti-competitive, BMI's business operations are also regulated by a court approved consent decree. A summary of the decree may also be found in any BMI license.[34]

Society of European Stage Authors and Composers

SESAC is the smallest of the three groups, and is a private licensing company. It was established in 1930 to serve European composers not adequately represented in the United States.[35] It operates on a for profit basis and its fees are based on fixed determinants such as market population served by the station, standard advertising rates, as opposed to a percentage of gross receipts as in the case of BMI and ASCAP. Although the company name was

[32] *See* Appendix A: ASCAP Agreement
[33] RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 366 (Billboard Books 1999).
[34] *See* Appendix B: BMI agreement.
[35] http://www.sesac.com/About/About.aspx.

once an acronym, today it is simply SESAC and no longer an abbreviation of anything.

SESAC claims to be the fastest growing and most technologically adept of the nation's performing rights companies due to its international reach and vast repertoire of artists from various genres of music. Unlike ASCAP and BMI, SESAC utilizes a selective process when selecting which copyright owners to represent. The organization desires a roster of affiliates who have personal relationships with the SESAC staff; relationships that seem to be lacking in BMI and ASCAP.

2. Nigeria

Many Nigerian artists do not know that they can be paid for their sound recordings performed on the radio, let alone that they are entitled to these funds. For many years, radio stations in Nigeria refused to play the music of Fela Anikulakpo Kuti because he demanded royalty payments for the performance of his works. But Fela was the exception; he was a British trained lawyer who knew his rights, unlike the many young artists in Nigeria who do not even know that laws exist to protect musical works in their country.

The Evolution of Collective Administration in Nigeria

Nigeria was a British colony up until she gained her independence in 1960. Records show that the old Nigerian Broadcasting Service (NBS) was paying royalties to the London based Performing Right Society (PRS), as far back

as 1940. [36] It was standard requirement for all producers of programs in which music was used, to keep logs of all music broadcasts. These logs were the basis for the calculation of royalties based on the *needle time* system. The *needle time* system was derived from the needle used in record players to play old vinyl records. Collecting societies calculated royalty payments based on how long each work was played, which in turn was determined by the length of time the needle stayed on in contact with a record.

After Nigeria gained her independence there was some reluctance to give money to the London based PRS to distribute to European composers. Nigerian composers at the time seemed to be more interested in performance related income, as opposed to royalties and other business related income.[37] This could also be due to the lack of understanding of the technicalities of copyright. Nigeria promulgated its first indigenous copyright law in 1970, the year the Nigerian civil war ended. A year later, the Giwa agency secured PRS agency in Nigeria[38]. This agency was given two major assignments: recruiting a good number of Nigerian composers into PRS membership to reduce the notion that PRS's interests were entirely foreign; and commencing extensive licensing of copyrightable work users in Nigeria. Some artists did join the membership of PRS but the suspicion of British institutions had not yet fully dissipated, thus making the second objective

[36] TONY OKOROJI, COPYRIGHT NEIGHBORING RIGHTS & THE NEW MILLIONAIRES 191 (Tops Ltd. 2009).
[37] *Id*. at 192
[38] The Giwa Agency was formed out of the Lagos based law firm of Giwa & Atilade and Co. The firm approached PRS seeking appointment as their agents in Nigeria. After the civil war, it seemed that goodwill towards Britain had increased, and since this firm seemed to be the only one interested in the business of copyright, it was very easy for them to secure agency in Nigeria on behalf of PRS London. *Id*.

of commencing licensing, extremely difficult[39]. The broadcasting stations refused to pay the Giwa agency because they claimed that the number of Nigerians in PRS membership was too small; they also would have rather have worked with a Nigerian institution.

The Giwa agency, affected by the unhappiness of its London based principals with low receipt of income from Nigeria (whilst still paying its members), and the thriving suspicion of the Nigerian artiste, decided to transform the agency into what could publicly be seen as an independent Nigerian collecting society, thus the Musical Copyright Society of Nigeria (MCSN) was formed in 1984. But to most Nigerians in the industry, there was no real difference between MCSN and the Giwa agency. MCSN operated out of the same office as the former Giwa agency, and PRS was given special rights and privileges amounting to veto power over MCSN.[40] As resistance grew against the Giwa agency and MCSN, a new prospective collecting society by the name of PMAN (Performing Musicians Association of Nigeria)[41] was emerging behind the scenes.

It is essential to note that at this time there was no provision in the Nigerian Copyright Act for the Copyright Council to regulate collecting societies. PMAN believed that such a provision was necessary for a functioning musical society. It was believed that it would be dangerous to leave collective administration open to people who have no other motivation than personal financial interest, especially in a country like Nigeria where a substantial amount

[39] There was a vibrant anti-imperialist movement driven by the liberation efforts in Angola, Zimbabwe and Namibia and the anti-apartheid struggle in South Africa. *Id*.
[40] *Id.* at 193.
[41] The author of this paper worked with this organization in 1996, at the age of 8 to promote copyright awareness and protection through on stage performances in music, recital, and dance.

of the population were illiterate and did not (and still do not) have access to adequate legal services.[42] Although the name seems to apply only to performers, membership was broad based and included song writers and composer.[43] PMAN attempted to work with the Federal Radio Corporation of Nigeria (FRCN) to agree on a scheme to license the stations under the corporation. FRCN representatives did not operate in good faith; if they did show up to meetings, they showed up too late for anything productive to amount from the gathering. It became evident to the PMAN leadership that even if an agreement could be reached with FRCN, there was no reliable existing mechanism to manage such an agreement.

Section 32B of the Nigerian Copyright Act became part of the law after the Copyright Amendment Decree No 98 of 1992. This provision gave the Nigerian Copyright Council the power to regulate collecting societies. §32B provides:

> (1) A collecting society (in this section referred to as "a society") may be formed in respect of any one or more rights of copyright owners for the benefit of such owners, and the Society may apply to the Council for approval to operate as a collecting society for the purpose of this Act.
> (2) The Council may approve a Society if it is satisfied that –
> a. it is incorporated as a company limited by guarantee;
> b. its objects are to carry out the general duty of negotiating and granting copyright licenses and

[42] *Id* at 195.
[43] Song writing as a distinct profession has never really thrived in Nigeria. Virtually every performer is his own primary composer. On the rise songstress, Tiwa Savage, actually worked as a songwriter for Sony and has helped compose songs for Grammy nominee Fantasia Barrino. But in Nigeria, the concept of performing the work of another seems to be highly looked down on.

collecting royalties on behalf of copyright owners and distributing same to them;

c. it represents a substantial number 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 performers rights;

d. It complies with the terms and conditions prescribed by regulations made by the Council under this section.

(3) The Council shall not approve another Society in respect of any class of copyright owners if adequately protects the interests of that class of copyright owners.

(4) It shall be unlawful for any group of persons to purport to perform the duties of a Society without the approval of the Council as required under this section[44]

After this law was enacted, MCSN applied to the Copyright Council for approval as a collecting society and was rejected. MCSN went to court in *MCSN v. NCC* [45]requesting an order of certiorari, and requesting that the Nigerian Copyright Council be legally compelled to approve them as a collecting society. It attempted to perform the functions of a collecting society despite its non-approval and received backlash in two judicial opinions.[46]

The Performing and Mechanical Rights Society of Nigeria (PMRS) was given statutory approval to act as a collecting society in 1994. It has been said that PMRS was the result of different right holders coming together to attack piracy

[44] §32B (2) (c) is actually number one through nine, the remaining providing for sanctions for violations. Subsection nine provides that "The Council may, where it finds it expedient, assist in establishing a collecting society for any class of copyright owners."
[45] Suit No: FHC/L/CS/683/94
[46] *MCSN v. Details Nigeria Limited*, [1996] 2 FHCLR 473 (Nigeria)*; MCSN v. Ade Okin Records*, Suit No. FHC/L/CS/216/96.

once and for all. PMRS mandated licenses by fast food chains that publicly performed the works of artists, and radio stations. But as most things do, PMRS slowly began to fall apart. In a society like that of Nigeria, where superstition and suspicion thrive, the people began to lose a sense of trust for PMRS. This could be because of the internal battles going on behind the scenes.

Copyright Society of Nigeria (COSON)

Within the last few years, the Copyright Society of Nigeria (COSON) was formed. Headed by Tony Okoroji[47], the former president of PMAN, COSON offers free membership to musicians who have music that has been published or publicly released. It collects its fees from the royalties due the artist. COSON has received licenses from a great number of artists and has received the statutory approval required to operate as the collecting society of Nigeria. But not many artists have withdrawn their membership from PMRS (who was barely functioning within the past five years) and taken their rights to COSON. It would appear that the collecting societies of Nigeria are in a catch 22. One society, COSON, has the statutory approval to collect, with an ever increasing database of artists and their approved licenses. While PMRS holds the licenses of some artists, but may not collect on them. In fact, should PMRS attempt to collect on these licenses, it would be in breach of the Nigerian Copyright Act, and exposed to severe sanctions.

[47] Whom this author was able to interview and discuss copyright issues affecting Nigeria.

3. Summary

The major differences between collecting societies in Nigeria and the U.S. are that performing rights organizations in Nigeria are simply known as collecting societies because, unlike the U.S., Nigeria provides protection to performers of recorded works along with the owners of the underlying works; and collecting societies in the U.S. are private organizations, whereas in Nigeria, there is only one government appointed society. This is probably because Nigeria is a government run nation; even electricity and water are provided by the government.

IV. NEIGHBORING RIGHTS

A. Generally

Neighboring rights are rights that do not fall within those granted the exclusive rights section of a country's Copyright Act, but are rights relating to a copyrighted work. They are similar to but not the same as copyrights. These rights are common in many countries around the world but are not recognized in the US. Most neighboring rights are created as an afterthought to intellectual property rights which may have been overlooked in copyright laws or conventions.[48] Perhaps we shall see more of these as technology advances.

If the United States were to have neighboring rights they would probably fall under the miscellaneous rights section of the Copyright Act. Miscellaneous rights provide for non-traditional protection, and seem to be as result of the interaction of new technologies, modes of commerce, and interest politics. An example of this would be the

[48] SCHULENBERG, *supra* note 28 at 365.

Audio Home Recording Act of 1992 which created a new compulsory license and imposed legal limitations on copying technology.[49]

In Nigeria, neighboring rights involve the use of copyrighted material but the person receiving compensation is not necessarily the owner of the underlying copyrighted work. The Nigerian Copyright Act provides for two neighboring rights: performers' rights; and folkloric works. Lack of enforcement aside, Nigeria prides itself on providing her performers with extensive rights. Section 23 of the Nigerian Copyright Act, in its entirety, is dedicated solely to performer's rights.[50]The Act also provides criminal sanctions for infringement of these rights.

Although an interesting topic, performers' rights are not the subject matter of this paper; instead it shall focus on the copyrights of folkloric works. Neighboring rights vary from country to country and seemingly adapt to meet the dynamic needs of copyrighted works.

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[49] The Audio Home Recording Act of 1992was designed to protect hardware manufacturers, sellers of digital equipment, and blank tape marketers from infringement liability by payment of statutory blanket license fee.

[50] (1) A performer shall have exclusive right to control, in relation to his performance, the following acts, that is-

a. performing;
b. recording;
c. broadcasting live;
d. reproducing in any material form; and
e. adaptation of the performance.

(2) In this section, "performance" includes-

(a) a dramatic performance (which includes dance and mime);
(b) a musical performance; and
(c) a reading or recitation of literary act or any similar presentation which is or so far as it is, a live performance given by one or more individuals.

These rights last from the time of the performance for 50 years thereafter calculated from the end of the year in which the performance took place. In the face of infringement, performers may take civil action in the Federal High Court which has jurisdiction where the alleged infringement occurred. §26(1) allows for a prevailing copyright owner to receive damages, injunctions, account of profit, conversion damages, and or delivery up, in relief for infringement.

B. Folklore

Folklore can be defined in many ways. It is sometimes embodied in the history of a group of people within a society, or the history of a society as a whole. Folklore is not limited to stories, but may also be found in objects, clothing, music, and art. Of the many definitions, I have still not found one that I find satisfactory. I choose to define folklore as the essence of a people as they develop over time. Folkloric works reflect the thoughts and beliefs of a society at the time.[51]

1. United States

America does not seem to possess works that would be considered folkloric. There are fairy tales and nursery rhymes, but these are not reflections of the American culture or its society as such. America does not have one culture, due to the various backgrounds of her citizens. The true Americans are the original Native Americans but their culture is not viewed as the "American Culture." Works which they would consider to be folkloric would either be in the public domain or not even recognized as the reflections of American culture, as they are but one minority in a vast sea of immigrants.

On the other hand, the Anglo-American culture has been dominant throughout US history. An Anglo-American story that would probably be considered folkloric in another country would be that of George Washington and the cherry tree. But, unlike many countries around the world, the U.S. is such a young country that we know the identity of the author and the date of creation of

[51] Most stories that involve the existence some form of magic actually reflect society's belief in the existence of magic and mythical beings at the time.

the story[52] for sure, so there is no need for folkloric protection. Weems got a copyright, pure and simply. Had the author and date of creation been unknown, folkloric protection may have been necessary. Unfortunately, U.S. copyright law descends from the Statute of Anne which prohibited protection of works without a known author or date of creation. Although the present Act includes some protection for orphaned works, it may not breathe life into works that have passed into the public domain under the 1909 Act.

2. Nigeria

If Na Me Eat This Rice

A long time ago, in the village of Bakana, but not too long to be remembered, there lived a widow who had six young children. Every day the widow would go out and search for work to help her provide for her offspring. One day, the widow prepared a pot of jollof rice for the family's dinner. She warned the children not to touch it, as it was to be the family's dinner, and then she went off in search of work. While the widow was away in search of food, her youngest daughter Telema decided to have herself a taste of this forbidden rice. Telema was so greedy that she ate almost half the pot. The widow returned, and discovered to her horror that the rice had been eaten. She rallied the children up for confessions. "Who chop this rice?" she asked. "Which one of una chop this rice?" No one would own up. Lies were not tolerated in Bakana land. When the truth needed to be heard, the villagers would go to the nearby river to swear until one admitted. If no one admitted, Maninkolom, the god of the river would carry the person away. So the widow, with her six children went to swear before Maninkolom. Each child stood in the water, beginning with the oldest, and sang "If na me eat this rice, if na me eat this rice, frying

[52] PARSON WEEMS, THE LIFE OF WASHINGTON (1800).

pan go cover me and Maninkolom go carry me go." As the line got shorter, Telema's legs wobbled, but she never owned up. Finally at Telema's turn she stood in the water shaking and singing the song, daring the gods. Before she could even finish her song, the waters swept her up and began to carry her away. She cried "Mama, help me!" there was nothing the mother could do. As she was being carried away, Telema sang "Ta tee oh toh, tah tee oh toh, my mama bin dey tell me say strong ear him no good."

This is a story my mother would tell me under the moonlight as a child; a story her mother told her. I was told it story was a very old tale, and there were different variations of it, all with the same message: "Listen to your parents; do not steal; do not lie." This story and its theme would be considered a folkloric work under the Nigerian Copyright Act. As stated by §28 of the Nigerian Copyright Act: "folklore" means a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social entity, its standards and values as transmitted orally, by imitation or by other means.[53]In the words of Tony Okoroji, folklore is the traditional creation of a community.[54] CITE Tony Okoroji.

Why Protect Folklore?

In 1988, when the Nigerian Copyright Act was drafted, there was great concern that foreigners would be attracted to the traditions of developing countries for exploitation. The drafters feared that multi-national companies, who only sought economic benefit, would not consider the effects of their use on the

[53] Nigerian Copyright Act §28(5).
[54] OKOROJI, *supra* note30 at 142.

true owners of their traditional knowledge. These multi-national companies had worked with local creators in the past, leaving them with peanuts, while the companies prospered as a result of the local creators' labor.[55] As evidenced by Disney and many other major film producers, when cultural treasures are exploited, some novelty is added to them thus making them brand new commercial products entitled to copyright protection of their own. Even the original owners would require the permission of the new found copyright owner before usage. If Disney were to remake "If Na Me Eat This Rice,[56]" Telema could end up being a boy played by Justin Bieber, and the song performed in front of Maninkolom could be written by Elton John. The name of the story would probably not even be the same. The Disney version of this story would probably be better understood by audiences around the world, when compared with the traditional Nigerian version. The amount in revenue received by Disney would probably be nothing short of a windfall in comparison to the compensation that would be contracted for with the true owners of this work.

The provisions in §28 and §29 of the Nigerian Copyright Act, which deal with protection of folkloric works, were greatly influenced by several factors including the Tunis Model Law on Copyright for Developing Countries.[57]

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[55] *Id.* at 146.
[56] *infra*
[57] The Tunis Model Law on Copyright was produced following the Paris revision of both the Berne Convention and the Universal Copyright Convention (UCC) in 1971, when a need a for a model law to take care of the requirements of developing countries became obvious. A Committee of government experts was convened by the Tunisian government with the assistance of the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). The committee was given the responsibility to produce a model law that deals with the peculiar problems of developing countries while adhering to the rules of the Berne Convention and the UCC; the Tunis Model Law on Copyright resulted. *Id*.

Scope

Under the Nigerian Copyright Act, folklore includes a) folklore, folk poetry and folk riddles; b) folk songs and instrumental folk music; c) folk dances and folk plays; productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, handicrafts, costumes, and indigenous textiles.[58]

Protection of Expressions of Folklore

According to §28(1) of the Nigerian Copyright Act, expressions of folklore are protected against the following when such expressions are made either for commercial purposes or outside their traditional or customary context:

(a) Reproduction;
(b) communication to the public by performance, broadcasting, distribution by cable or other means;
(c) adaptation, translation and other transformations[59]

Exceptions to Protection

Not every use of folklore requires authorization. In an attempt to balance protection of these works with fair use, the Nigerian Copyright Act provides the following exceptions to protection:

(a) the doing of any of the acts by way of fair dealing for private and domestic use, subject to the condition that, if the use is

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[58] §28(5).
[59] §28(1).

public, it shall be accompanied by an acknowledgement of the title of the work and its sources;

(b) the utilization for purposes of education;

(c) utilization by way of illustration in an original work of the author:

(d) provided that the extent of such utilization is compatible with fair practice;

(e) the borrowing of expressions of folklore for creating an original work of the author:

(f) The incidental utilization expressions of folklore.[60]

Term of Protection

There is no limit to the period during which an expression of folklore is protected. Under Nigerian law, these works enjoy a never ending copyright. Most times it is difficult to determine when such works came into existence. Determining how long a works protection would last would require consideration of many cultural and possible political factors, due to the volatility of cultural/tribal relations in Nigeria.

Criminal Liability

Initially, there were no criminal sanctions for the unauthorized use of folklore. But after the 1999 Amendment to the Act, individual violators now face the possibility of a fine not to exceed N100, 000[61], imprisonment for a term of 12 months, or both.[62] Corporate violators may be fined up to N500, 000.[63] Infringement leading to criminal liability attaches to any person who:

[60] §28(2).
[61] The current dollar to naira exchange rate is a little over $150: 1Naira, hence the equivalent of $666.
[62] Nigerian Copyright Act §29(A) (2).
[63] $3,333.

(a) Does any of the (protected) acts set out in §28 of the Nigerian Copyright without the consent or authorization of the Commission; or

(b) Does not comply with the requirement to obtain authorization from the Nigerian Copyright Commission, as set out in §28(4).

(c) Willfully misrepresents the source of an expression of folklore; or

(d) Willfully distorts an expression of folklore in a manner prejudicial to the honor, dignity or cultural interests of the community in which it originates.[64]

Whenever an identifiable expression of folklore is used in connection with any communications with the public, it is required that the source be indicated in an appropriate manner, and in conformity with fair practice, by mentioning the community or place from where the expression used has been derived.[65]This may prove difficult because in most cases, it is hard to identify the original creator of certain folkloric works; sometimes even the community from which the work originates cannot be traced. In an attempt to provide a solution to this problem, Nigeria decided that the right to authorize the exploitation of folklore shall vest in the Nigerian Copyright Commission.[66]This has raised a fair amount of controversy and criticism on the part of the Nigerian people.

The decision to protect folklore was probably one of the most difficult decisions made by the Drafting Committee of the Nigerian Copyright Law. The regime for the protection of folklore is still an unsettled issue, thus the

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[65] §28(3).

[66] §28(4).

enforcement of the provisions will require application of common sense by the Nigerian Copyright Commission and Nigerian courts.

3. Summary

While the American equivalent of neighboring rights are after the fact and may give off the appearance of shortsightedness in our drafters, one must bear in mind that the U.S. Copyright Act has been around for a long time. The U.S. has amended its copyright statute and Constitution as it has matured. Nigeria on the other hand, had the opportunity to learn from the U.S.'s prior mistakes. In fact, by the time, the Nigerian Copyright Act was created, the U.S. was on her way to her 3rd Copyright Act.

In regards to folkloric works, because of how young of a country the U.S. is, we more often than not, know the identity of the author and the date of creation of a work for sure, thus giving it a copyright pure and simple. But if the identity of the author and the creation date of the work are both unknown, the work is not provided any protection because US copyright prohibits the protection of such works. Nigeria chose to protect such works due to its fear of exploitation by foreigners or large international companies. This skepticism was probably as a result of past dealings with foreigners, the lingering effects of colonialism, and the beginning signs of the oil curse.

V. ANALYSIS

A. Licensing & Royalties

Licensing is the act of permitting another to use some or all of one's exclusive rights for specified amount of time or purpose, sometimes in a specific location.

Royalties on the other hand, are the payments received as a result of the licenses granted. These two are quite interrelated. Collecting societies are used to collect most royalties on behalf of owners and publishers of musical works, but are not necessarily employed in collecting compensation for every single license.

Is one collecting society truly the answer?

As evidenced by the creation of the consent decree, the U.S. encourages competition within its marketplace, and frowns upon the concept of a monopoly. Where there exists only one provider of a specific service, individuals interested in such service are forced to either accept the terms and conditions offered by the provider, or do without the service. Unfortunately, in Nigeria, this is not the case. For years Nigerians have suffered in the hands of various monopolies. Water, electricity, and telephone services were a few of the amenities supervised by the government in Nigeria when I was child. Finally, by some odd twist of fate, the Nigerian Telephone Company building burned to the ground one day. Many were without phones for a very long time. People had grown to depend on telephones for communication. What were we to do? The federal government finally had to give in and allow private companies supply telephone services to the Nigerian people. A private South African based telecommunications company by the name of MTN was brought to Nigeria to market cellular phones. Due to MTN's success, many other Nigerian telecommunication companies were formed. The privatization of telephone services, although not done willingly by the federal government, led to somewhat stable and reliable communication in Nigeria for the first time in years.

Privatization of many government regulated industries is currently on the rise in Nigeria, but it is highly unlikely that this change will affect collecting societies. Most of the population still does not have access to adequate legal services, and it would be dangerous to put the protection of copyright in the hands of private entities or individuals fueled solely by monetary gain. The Nigerian Copyright Act authorizes the appointment of only one collecting society but does not mention what happens should one society replace another as the legally authorized and recognized collecting society of Nigeria. There are also no rules in place to protect copyright owners from unfair practices of the collecting society. Due to the lack of access to legal services and the limited knowledge of copyright law, many copyright owners do not even understand the contracts they sign with the Nigerian collecting society.[67]

Who Will Monitor the Collecting Society?

Licensing and Royalties issues in Nigeria prove a need for record labels with infrastructure. Many artists in Nigeria belong to their own record labels or begin labels with their friends. Most of these supposed record labels do not even provide financial support for artists; they are merely groups of friends struggling to make it in the industry. Labels like Storm Records and Kenny's Music have been rumored to have cheated their artists in the past. And one of the major producers of Nigerian music, Mo'hits Records recently broke up due to a dispute between the labels two partners, old friends, D'banj and Don Jazzy.

Perhaps the reason most Nigerian record labels tend to fail is the lack of financial backing and the personal interest that the artists and performers hold in the record label

[67] A copy of COSON forms may be found in Appendix C.

itself. Bring in foreign record labels to create subsidiaries. It would seem that the best solution for this problem would be the incorporation of subsidiaries of major international record companies in Nigeria. Kentucky Fried Chicken brought its chains to Nigeria in 2009 and business has not stopped booming ever since. Companies like Sony Music and Universal Music Group could provide the financial support needed to develop the Nigerian music industry. And the reputation of these companies will also attract more acts and increase professionalism in the business. Not only would this solution prove lucrative for Nigeria, but immensely profitable for American record labels.

B. Folklore

The protection of folkloric works, due to its nature as a neighboring right, is enforced by the giving of compensation for use of these works to the natives of the land from whence the works originated (not necessarily the individual who created the work). This could be due to the very nature of the Nigerian society where people believe that folkloric stories reflect the culture and history of the people as a whole, and not the individual who merely expresses it. It could also be the lack of capitalism and the concept of "sovereign rules all" like in oil and gas. In most African countries, when a resource or commodity is viewed as belonging to the people as opposed to individuals, the sovereign takes control of the trade of such commodity or resource, as the Copyright Commission has done with rights to folkloric works. A prime example would be that of natural oil and gas in Nigeria which is controlled by the sovereign through the Nigerian National Petroleum Company (NNPC).

Like natural resources, folkloric works are controlled by the government, and the government chooses who to license the rights to use such works to. Foreign dealings

between private entities and the federal government of other nations often proves extremely complicated. What recourse does a U.S. company granted the right to use a folkloric work have when the Nigerian government decides to renege on its agreement? What a nation decides to do with its natural resources is normally never questionable in court under the Act of State Doctrine.[68]These are all things that would more than likely affect the decision of nationals and foreigners to attempt to develop Nigerian folkloric works. Unfortunately, this leads to the possibility that this resource may never be efficiently tapped into to benefit the Nigerian people.

Some, within Nigeria, have argued that the strict control of the use of folklore hurts creativity; the federal government has no business meddling with folklore. Some even argue that folklore should be in the public domain. Others argue that folkloric works were created over hundreds of years ago, and if these works were granted copyright when they were originally made, their protection term would have expired and they would be in the public domain by now. Artists have raised concern about facing criminal liability for basing their works on folklore. But, §28(2)(d) of the Nigerian Copyright Act provides that the expression of folklore for creating an original work of an author is allowed, as long as the extent of the use is compatible with fair practice.

Very few American resources are controlled by the U.S. government. Even natural resources are regulated by the rule of capture. Perhaps the reason behind this is that the U.S. in itself is a land that was captured. None of the resources below the ground belong to the historical majority of the U.S. They all belonged to the Native Americans who are now the minority. Even if one were to say that the benefits from resources

[68] The domestic actions of a sovereign within its own borders may not be questioned in the courts of another nation.

should be used to benefit the culture who has been the majority historically, this would raise many issues of unconstitutionality and equal rights violations. The main reason why U.S. law does not provide folkloric protection is because the country is fairly new, and most works can be traced back to a specific individual or time.

VI. CONCLUSION

There are many lessons that Nigeria could learn from the United States. With a music industry that is experiencing phenomenal growth, Nigerian copyright law must actually be adhered to and enforced. What is it that makes American musicians so successful? It is not just the copyright laws provided by the U.S. Copyright Act, but their actual enforcement. Also, the widespread use of performing rights societies to regulate licenses and collect royalties allows U.S. record labels fully serve their clients. The existence of more than one performing rights organization also promotes healthy competition between the organizations in regard to the benefits offered to members.

Nigeria also provides protection for folkloric works from the use by nationals and foreigners. The right to authorize the use of such resources lies within the Copyright Commission. But for a country where skepticism abounds, and there is little trust of foreigners or the government, this government control has proven and may continue to prove problematic.