

ADMINISTRATION OF COPYRIGHT ROYALTIES: THE LEGAL QUAGMIRE OF COLLECTIVE MANAGEMENT ORGANIZATIONS IN NIGERIA



Collective Management Organization's ("**CMO**") or Collecting Societies¹ serve as an intermediary between owners of copyrighted works and users of such works. A CMO's primary function is to negotiate, grant copyright licenses and collect royalties on behalf of copyright owners. It is not possible for a copyright holder to effectively monitor all avenues where the work is being used or infringed. For instance, the owner of a musical work cannot monitor all malls, bars, digital platforms, and other avenues where the work is exploited for commercial purposes. CMO's help bridge the gap as they license prospective users of copyright works, and collect royalties for the use of the works, which they distribute among copyright owners² on whose behalf they act.³ CMO's act as facilitators, they enable owners of copyright works obtain proper remuneration for their creative works while they enable easy access to these works by users.⁴ Without the CMO's, it may be impossible for users of copyright works to identify owners of protected works in order to clear the rights associated with the works. The CMO's have been described as a "clearing house"⁵.

Section 39 of the Copyright Act provides for the creation and licensing of CMO's by the Nigerian Copyrights Commission ("**NCC**"). It provides that a collecting society may be formed in respect of one or more rights of copyright owners for the benefit of such owners.⁶ Generally, the owner of copyright in a work has the right to exclusive control of that work.⁷ In the case of literary and musical works, the copyright owners have the exclusive right to reproduce, publish, perform, distribute or adapt the work amongst other things.⁸ A CMO may be established to

administer one or more of the stated rights for the benefit of the right owners. Currently, according to the NCC website, there are three approved CMO's by the NCC which administer different categories of rights, they include;

- a. Reproduction Rights Organisation of Nigeria (RERONIG), a collecting society for literary and publishing.
- b. Musical Copyright Society of Nigeria (MCSN), a collecting society for musical works.
- c. Audio-Visual Rights Society of Nigeria (AVRS), a collecting society for cinematograph films.⁹

The Copyright Act does not place a limit on the number of CMO's that can be created and licensed by the NCC. However, Section 39(3) appears to create a limitation by barring the Commission from approving another society in respect of any class of copyright owners, if it is satisfied that an existing CMO adequately protects the interests of that class of copyright owners. While this does not prohibit the NCC from approving multiple CMO's, it limits them to approving one for each class of right, except where existing ones do not effectively protect the interest of members. For now, the NCC has one licensed CMO for each class of copyright; RERONIG for literary works, MCSN for musical works and AVRS for cinematograph films. There have been calls to license more CMO's to promote competition, eliminate monopoly, liberalize administration of copyrights, and give authors the benefit of choice.

¹ The Copyright Act LFN, 2004 employs the phrase "Collecting Society" while "Collective Management Organization" is adopted by the Copyright (Collective Management Organizations) Regulations 2007.

² Section 39(2)(b) Copyrights Act, LFN 2004

³ Job Odion & Desmond Osaretin Oriakhogba; *Copyright Collective Management Organizations in Nigeria: Resolving the Locus Standi Conundrum*; Intellectual Property Law and Practice, July 2015.

⁴ John Onyido & ors; Issues and Perspectives on Collecting Societies and the Management of Musical Works and Sound Recordings in Nigeria, The Gravitas Review of Business and Property Law Vol. 9. No.4

⁵ Ibid

⁶ Section 39 Copyrights Act, LFN 2004

⁷ Section 6

⁸ Section 6(a)

⁹ <https://copyright.gov.ng/collective-management-organizations/#1607177484085-65a6d635-cd68> (accessed 3rd March, 2021)

In 2009 the Copyright Society of Nigeria (COSON) was licensed as the sole CMO in the music industry. At this time, COSON was the only approved CMO for musical rights. In the case of *MCSN v. NCC*¹⁰, MCSN challenged the approval of COSON as the sole CMO for musical rights, arguing that MCSN has a right to administer musical rights without license by the NCC. The major plank of their argument is that Section 39 and 17 of the Copyright Act is unconstitutional as they restrain an unregistered body from administering and enforcing copyrights. MCSN argued that it amounts to a violation of their right to property. The court discountenanced MCSN's arguments holding that it is illegal to act as a CMO without obtaining approval from the NCC.

However, following widespread allegations of mismanagement, financial misappropriation, and failure to comply with NCC directives, COSON's license was suspended.¹¹ Acting on a petition by the MCSN to the Attorney General of the Federation alleging bias by the NCC in its refusal to license MCSN as a CMO, the Attorney General of the Federation issued a directive mandating the approval of MCSN as a CMO, having met all the criteria under **Article 2 Copyright (Collective Management Organisations) Regulations 2007 (CMO Regulation)**.. COSON sought a declaration restraining the NCC from approving MCSN as a CMO in **COSON v. MCSN & NCC Suit No: FHC/L/CS/1259/2017**. By its judgement, the Federal High Court held that MCSN was validly appointed by NCC as a CMO, and the AG's directive to NCC to withdraw cases filed against MCSN was valid.

The suit was dismissed.

Despite its suspended license, COSON continues to operate as a CMO arguing that it is the owner, assignee, and exclusive licensee of copyright works in its repertoire, and in exercise of its proprietary rights guaranteed by the constitution, it has the right to institute actions to enforce rights over the said works. It places reliance on

two Supreme Court cases to justify its position; *MCSN v. Adeokin*¹² Records and Compact Disc Technologies Ltd. v. MCSN.¹³

MUST COSON BE LICENSED AS A CMO BY NCC TO ADMINISTER WORKS IN ITS REPERTOIRE?

At the heart of copyright administration by CMO's is the ability to institute actions for infringement and unlawful use of copyright works. CMO's may also institute actions for unpaid royalties by registered users. Generally, CMO's are recognized as owners, assignees and exclusive licensees of works in their repertoire. The argument has been made that "unlicensed CMO's" may institute actions to enforce rights in respect of the works they administer in exercise of their proprietary rights in the copyright works. Restraining them from seeking judicial relief on the basis of non-registration with the NCC is a violation of their property rights over the works. A review of judicial authorities reveals that this argument was valid before the 1999 amendment to the Copyright Act which introduced Section 17.

In *MCSN v. Adeokin Records*, an action for infringement of copyright against the respondent, the respondent raised an objection on the grounds that the appellant lacked the locus-standi to sue as it is not approved by the NCC as a CMO. In response, the appellant argued that it instituted the matter as owner, assignee and exclusive licensee of the work. The Federal High Court agreed with the respondent, holding that failure to obtain approval from the NCC to act as a CMO, incapacitates the appellant from commencing an action for infringement. However, on appeal the Court of Appeal set aside the decision of the trial court holding that the appellant instituted the action as owner, assignee and exclusive licensee of the works. The Court of Appeal considered Section 15 of the 1992 Decree (now section 16 of the Act). Under the said section, the owner, assignee and exclusive licensee of copyright has exclusive right to institute an action for infringement. The

¹⁰ FHC/L/CS/478/2008

¹¹ <https://www.premiumtimesng.com/news/more-news/267313-coson-crisis-ncc-suspends-copyright-societys-operating-license.html>

¹² APPEAL NO: SC.336/2008

¹³ (2018) LPELR-46353(SC)



Supreme Court upheld the position taken by the Court of Appeal. The court, however, noted that the suit was instituted in 1997 and the rights in the work were assigned to the appellant before the 1999 amendment of the Act which introduced Section 17, and as such cannot apply retrospectively.

Section 17 expressly restrains any person carrying on activities as a CMO, or exercising any of its functions including; negotiating or granting licenses or collecting and distributing royalties in respect of copyright works, or representing more than 50 copyright owners from instituting any action for infringement of copyright unless approved by the NCC as a collective society. Section 17 has been interpreted as introducing a condition precedent which must be fulfilled by any person or body carrying on as a CMO or exercising any of its functions before commencing an action for infringement of copyright. In *Musical Copyright Society of Nigeria Limited (MCSN) v Compact Disc Technology Limited and 2 Others*, MCSN instituted an action at the Federal High Court for infringement of copyright against the defendant. The defendant objected on the ground that MCSN is not approved by the NCC as a CMO, accordingly, it lacks the locus to institute the action. MCSN countered that it did not sue as a CMO, but as the owner, assignee and exclusive assignee of the infringed work. The Federal High Court agreed with MCSN and dismissed the defendant's contentions. The Court of Appeal set aside the decision of the trial court, holding that Section 17 imposes a condition

precedent on MCSN to fulfill before it may have the right to sue. The Court of Appeal examined the Statement of Claim to reach a conclusion that though not expressly mentioned, MCSN operates as a CMO. However, the Supreme Court reversed the decision of the Court of Appeal holding that Section 17 cannot be applied to operate retrospectively as the copyrights, the subject matter of the suit was transferred between 1986 and 1990, much earlier than the 1999 amendment.

From above, it is evident that by the operations of Section 17 of the Act, COSON cannot institute actions for infringement of copyright unless and until its license is restored by the NCC to act as a CMO. However, for rights obtained prior to the amendment of the Act in 1999, COSON may enforce such rights as owner, assignee and exclusive licensee relying on *Adeokin v. Compact Disk* decisions. It should be noted that Section 39(4) of the Copyright Act makes it an offence to purport to perform the duties of a copyright society without approval by NCC.

It has been argued by Oriakhogba, that the broader implication of the Compact Disk decision is that while it has not repealed Section 17 of the Act, it has watered down its effects.¹⁴ Oriakhogba, argues that an unlicensed CMO can still institute actions for infringement of copyrights in its personal capacity as owner, assignee, or exclusive licensee of the copyright.

However, the unlicensed CMO would likely face credible locus standi challenges where it institutes actions in a representative capacity for more than 50 persons in violation of Section 17. The CMO may have a defense where it represents less than 50 persons. In his opinion, it comes down to the ingenuity of counsel when drafting the Statement of Claim and making arguments.

¹⁴ Desmond Osaretin Oriakhogba and Eunice Odufa Erhagbe: How the Nigerian Supreme Court finally resolved the copyright collective management organizations' locus standi conundrum

CONCLUSION

The attitude of the NCC is to approve one CMO for each class of right. As previously stated, nothing in the Copyright Act outrightly prohibits the NCC from appointing multiple CMO's. It is necessary for liberalization and the promotion of healthy competition. The experience with COSON is that monopoly can easily be exploited, creating an unhealthy situation for copyright owners whose works are being administered. An unlicensed CMO would always run into problems if it intends to hide within the crevices of the law while continuing operations. The Act outrightly prohibits carrying on as a CMO without regulatory approval.

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