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**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**

ARTICLE SERIES



INTRODUCTION

In a judgment delivered on 29 May 2020 in *Multichoice Nigeria Limited v. Musical Copyright Society Nigeria Ltd/ Gte*[1], 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[2], 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. Therefore, 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.

BACKGROUND

The Appellant, Multichoice Nigeria Limited (“Multichoice”), is a subscription management company which grants its service subscribers access to programming and content on Digital Satellite Television (“DSTV”) bouquet via an enabled decoder. The programming is transnational and covers content from BBC, CNN, Al Jazeera, NTA, AIT and several other broadcasting stations.

The Respondent, Musical Copyright Society Nigeria Ltd/Gte (“MCSN”) is the owner, assignee and exclusive licensee of a body of some musical works over the Nigerian territory. MCSN acquired proprietary interests in major audio-visual works through copyright representation contracts entered into between MCSN and associations of producers and directors of audio-visual works.

THE DISPUTE

Multichoice alleged that the MCSN, whose licence had been revoked by the Nigerian Copyright Commission, had been demanding outrageous sums as payment for licensing musical works contained and broadcast in different channels and programming carried on DSTV bouquet.

[1] CA/L/188/2018.

[2] CAP C28, LFN 2004

Multichoice's contention was that only a collecting society, duly licensed by the NCC, can demand and receive royalties on behalf of copyright owners. Mutichoice also alleged that MCSN accompanied the demands for payment of the sums due as royalties to MCSN on behalf of the copyright owners it represents, with threats unspecified repercussions. Multichoice further asserted that MCSN 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.

Mutlichoice, as Plaintiff at the Federal High Court, Lagos Judicial Division ("the Lower Court"), filed a writ of summons seeking, inter alia, a declaration that Multichoice is not obliged under the laws of Nigeria to pay any monies to MCSN, as royalties or other payments, for material used in programming or as content on the DSTV bouquet, unless MCSN is licensed as a collecting society for that purpose.

In response, MCSN filed a defence and counterclaimed against Mutichoice asserting that it was the owner, assignee and exclusive licensee of a body of some musical works in the Nigerian territory and asking for damages for copyright infringement. The musical works were assigned to it by the Performing Rights Society ("PRS") and the Mechanical Copyright Protection Society ("MCPS") by two Agreements signed on 5 June 1990 between the MCPS and the MCSN, and in 1986 between the PRS and MCSN ("the Agreements") respectively. According to MCSN, Multichoice infringed/exploited the musical works, which made up its repertoire by communicating same to the public upon a fee through Satellite and Pay TV broadcasting, without obtaining a licence or paying royalties to it.

Multichoice's writ of summons was struck out for irregularity and the lower court granted MCSN's claims as contained in its counterclaim, necessitating Multichoice's appeal to the Court of Appeal.



THE APPEAL

Dissatisfied with the decision of the Lower Court, Multichoice appealed to the Court of Appeal. Nine (9) issues were formulated for determination, three (3) of which appear recondite. These issues will form the crux of this review.

Multichoice, relying on sections 17 and 39 of the Copyright Act, argued that MCSN lacked the locus standi to sue via its counterclaim as it was operating business as a collecting society without the authorisation of the NCC.

Multichoice further argued that MCSN was a stranger to the Agreements and therefore could not benefit from them. According to Multichoice, the purported assignee in the Agreements was 'Musical Copyright Society Nigeria Ltd' and not 'Musical Copyright Society Nigeria Ltd/Gte', which was MCSN's name on record in the suit. MCSN on the other hand relied on sections 16(1) and 52(3) of the Copyright Act in asserting otherwise.

MCSN also argued that it was incorporated in 1984 and the Companies Decree 1968 which predated the Companies and Allied Matters Act ("CAMA") was the extant law when the Agreement in 1986 between the PRS and MCSN was executed.

Multichoice also argued that MCSN failed to prove infringement of its copyright as provided in section 15 of the Copyright Act, and that the fact that MCSN continued operation as a collecting society without a licence made it illegal.

Finally, Multichoice argued that MCSN had not proved the award of damages granted to it by the Lower Court while MCSN argued that the principles for award of damages for breach of copyright were different, and that it did not need to prove the damages.

The provisions of the Copyright Act which were presented by the parties and interpreted by the Court of Appeal are as follows:



SECTION 15 OF THE COPYRIGHT ACT -

Copyright is infringed by any person who without the licence or authorization of the owner of the copyright- (a) does, or causes any other person to do an act, the doing of which is controlled by copyright;...

SECTION 16(1) OF THE COPYRIGHT ACT -

Subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of the copyright, 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 an infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights.

SECTION 17 OF THE COPYRIGHT ACT -

Notwithstanding the provisions of this Act or any other law, no action for the 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 50 owners of copyright in any category of 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 with a certificate of exemption by the Commission. (Emphasis supplied).

SECTION 39(1) OF THE COPYRIGHT ACT -

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 Commission for approval to operate as a collecting society for the purpose of this Act.

SECTION 52(3) OF THE COPYRIGHT ACT -

The transitional and saving provisions in the Fifth Schedule to this Act shall have effect notwithstanding sub-section (1) of this section or any other provisions of this Act.

PARAGRAPH 3 OF THE FIFTH SCHEDULE TO THE COPYRIGHT ACT -

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 the corresponding copyright under this Act.

DECISION OF THE COURT

In determining whether the Lower Court lacked jurisdiction to entertain and grant MCSN's counterclaim, the Court of Appeal interpreted sections 16, 17, 39, 52(3) and paragraph 3 of the Fifth Schedule to the Copyright Act, applying the literal rule of interpretation.

In construing the Agreements, the Court held that the MCPS and the PRS are the assignors respectively and MCSN is the assignee in the musical works assigned. The provision of section 11(1) and (3) of the Copyright Act allows the transmission by assignment of copyright works in writing. By the assignment, via the Agreements, MCSN acquired a chose in action in the musical works assigned. The Court affirmed 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, and by virtue of section 16 of the Copyright Act, MCSN could sue in case of infringement by anybody in Nigeria. The Court of Appeal cited the case of **MCSN (Ltd/Gte) v. C.D.T Ltd (2019) 4 NWLR (Pt 1661) 1**.

Further, the Copyright Act came into force on 10 May 1999 and cannot have retroactive effect in respect of MCSN's rights. The Court held that section 52(3) of the Copyright Act preserves the validity of copyright licencing contracts that predate the commencement of the Copyright Act. This is 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 therefore held that MCSN had the locus standi to institute the suit and counter-claim against Multichoice.

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, in determining whether the damages awarded against Multichoice for infringement of copyright were wrong and unjustifiable, the Court held, upholding the award of damages against Multichoice, that an appellate court will not interfere in the exercise of discretion of the lower court, except there are extenuating circumstances to warrant interference.



The Court cited **British Airways v Atoyebi (2014) 13 NWLR (Pt 1424) 253**; and **Agu v General Oil Ltd (2015) 17 NWLR (Pt 1488) 327**.

On the issue of special and general damages, the Court relied on **Plateau Publishing Company Ltd v Chief Chuks Adoply (1989) 4 NWLR (Pt 34) 205 at 225** where the Supreme Court, per Uwas JSC, held that “*in an action for infringement of copyright, damages are at large and it is not necessary to prove actual or special damages*”. In summary, in the eyes of the law, infringement of copyright interests is like trespass, it is actionable per se. The Court of Appeal held that the Lower Court acted judicially and judiciously in granting the award for special and general damages.

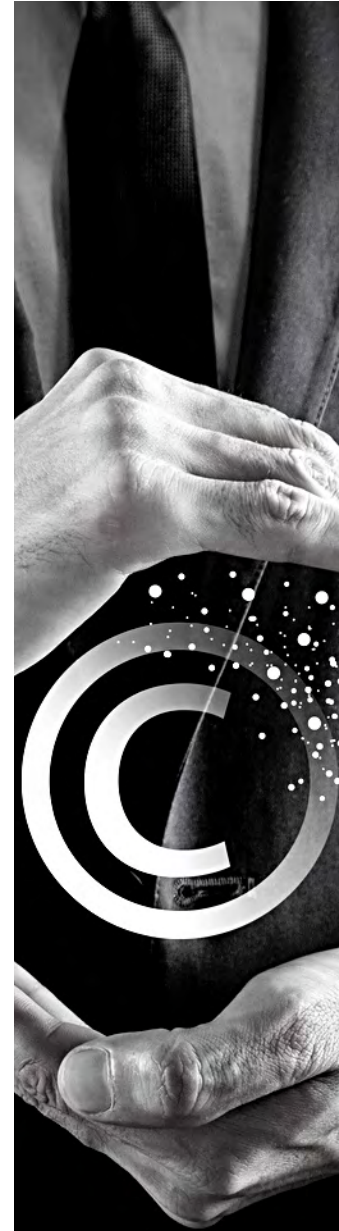
On the issue of aggravated/punitive damages, the Court held, relying on the case of **UBN Ltd v Odusote Bookstores Ltd (1996) 9 NWLR (Pt 421) 588**, that intellectual property law allocates power to the court to award additional punitive damages where there is blatant infringement which aggrandises the copier[3].

The Court held that the infringing actions of Multichoice had grave implications and, as such, upheld the award of aggravated damages.

COMMENTS

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 important to 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.



[3] The Court also relied on section 16(4) of the Copyright Act which provides thus: Where in an action under this section, 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... 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.

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