



REGULATING NIGERIAN CONTENT ON BROADCASTING PLATFORMS: AN EXAMINATION OF THE AMENDMENTS TO THE 6TH EDITION OF THE NIGERIA BROADCASTING CODE

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INTRODUCTION

Technological advancements have indisputably resulted in the globalisation of the economy and an increase in the commercialisation of the broadcasting industry. Specifically, information communication technology and the internet of things have eased the exploitation of indigenous resources and contents by persons in the broadcast industry, regardless of their location in the world.

This exploitation is evident in the inter-jurisdictional streaming sites, Pay TV, mobile TV apps and other broadcasting platforms springing up daily.

In response to the above, governments of various countries have promulgated laws, published regulations or established agencies to regulate the dynamic broadcasting industry[1], protect local content and sometimes prevent monopolies which may be attributed to access to enormous capital by a select few.

In 2019, Nigeria's National Broadcasting Commission ("the Commission") pursuant to its powers under Section 2 (h) of the National Broadcasting Commission Act (NBC Act), published the 6th edition of the Nigeria Broadcasting Code (hereinafter referred to as "the NBC Code").

The NBC Code which represents the minimum standard of broadcasting in Nigeria, was published to provide regulations for broadcasters and to ensure that broadcasting played a pivotal role in the social, cultural, technological, economic, and political lives of Nigerians.[2]

However, the NBC Code, prior to its amendment, did not seem to make adequate provisions for matters such as broadcasting online using Nigerian content or the determination of adequate local content for a broadcaster in Nigeria. Further to the recommendations of the committee on the reform of the Commission and consequent approval of the President of the Federal Republic of Nigeria, the Commission in 2020 published certain amendments to the NBC Code to address some of these matters.



[1] For instance, the United States' Communications Act as amended established the Federal Communications Commission to regulate interstate and international communications by radio, television, wire, satellite and cable in all 50 (fifty) states, the District of Columbia and U.S. territories. See www.fcc.gov
[2] 0.2.3 of the NBC Code.

This article discusses the objectives of and key amendments to the NBC Code, and highlights legal issues which may arise from enforcement of certain amendments to the NBC Code.

OBJECTIVES OF THE AMENDMENT

The aims of the amendments to the NBC Code are to create restrictions for monopolistic behavior in the broadcast industry, provide for local content in the broadcast industry and increase advertising revenue for broadcast stations and content producers. [3]

The NBC Code also establishes codes of practice relating to content acquisition, sharing of content rights for rebroadcasting and technical standards for media services; and for the regulation standards of fair market. [4]

KEY AMENDMENTS TO THE CODE

Some of the key amendments to the NBC Code include the following:

- **Web/online broadcasting:** All persons who wish to operate web/online broadcasting services in the Nigerian territory are now mandatorily required by the amendment to the NBC Code to register with the Commission and conform to the provisions of the NBC Code on programming standards. In addition, a service provider who breaches any provision of the NBC Code on web/online broadcasting will be liable to sanctions including but not limited to a takedown order, blocking of its channel, or a shutdown order..[5]
- **Character of local content:** Prior to the amendment of the NBC Code, Chapter 3 of the NBC Code merely demanded that a broadcaster promotes Nigerian content and encourage the production and projection of Nigerian life within and outside its borders, amongst other similar demands.[6]

[3] 0.2.2.7(a) of the NBC Code as amended.

[4] 0.2.2.7(b) of the NBC Code as amended.

[5] 2.0.3 of the NBC Code as amended.

[6] 3.11, 3.12, 3.13, 3.14 of the NBC Code.

By the amendment to the NBC Code, what amounts to promoting Nigerian content has been succinctly stated and the requirements updated. Specifically, a broadcaster is now required to ensure that, its conceptualisation, production, target audience – which should be Nigeria – satisfies certain conjunctive conditions such as that the director(s) and author(s) of the programme should be Nigerian(s).[7]

- **Acquisition of sports rights:** The NBC Code as amended provides extensive provisions on acquisition of sports rights. For instance, in the bid to ensure fair and effective competition on all platforms at an agreed fee, rights owners to live foreign sporting events are mandatorily required to offer the rights to broadcasters on (i) Satellite DTH; (ii) Multipoint Microwave Distribution System (MMDS); (iii) Cable (Fibre Optics); (iv) DTT (Terrestrial); (v) Internet; (vi) Mobile; (vii) Internet Protocol Television (IPTV); and (viii) Radio.[8]

- **Prohibition of exclusive licensing:**[9] Upon the coming into force of the amendment to the NBC Code, broadcasters or licensees are prohibited from entering into any form of agreement, concerted practices or taking any decision which have the objective of preventing competition in the broadcasting industry.[10] Broadcasters or licensees are also expressly prohibited from acquiring any broadcasting rights in such a manner as to exclude persons, broadcasters or licensees in Nigeria from sub-licensing same. [11] A broadcaster who fails to comply with these provisions of the Code can be liable to a fine not below N10,000,000 (ten million Naira) alongside other sanctions.[12]
- **Access for Pay TV platforms:** For the purpose of ensuring the widest possible distribution and viewership of content considered critical to the sustainability of new entrants in the Pay TV industry in Nigeria, the NBC Code as amended demands that a broadcaster is to ensure access by all Pay TV platforms to premium content in the sports and news genre.

[8] 6.2.5 of the NBC Code as amended.

[9] 9.0 of the NBC Code as amended.

[10] Any such agreement entered into by the Broadcaster shall be void. See Chapter 9.0.2 of the Code as amended.

[11] 9.0.1 of the NBC Code as amended.

[12] 9.1.1.11 of the NBC Code as amended.

Factors to be taken into consideration in determining charges for access have also been outlined in the NBC Code. [13] In addition, the NBC Code clearly shows that the Commission can compel a broadcaster to license its broadcast and/or signal rights in any genre of programming to another licensee or broadcaster in Nigeria if the following circumstances exist: [14]

- i. The genre of programme(s) enjoys compelling viewership by Nigerians;
- ii. It relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
- iii. It is likely to lead to the elimination of effective competition on the downstream markets; and
- iv. The refusal is likely to lead to consumer deprivation.

ISSUES ARISING

In an apparent bid to control every form of broadcast of Nigerian content and ensure competition in the Nigerian broadcasting industry, certain provisions of the NBC Code have raised issues especially as it relates to its legality and the practicability of enforcement. These issues have been set out below.

Conflict with Nigeria's copyright law

The NBC Code is a subsidiary legislation and so derives its force from the principal legislation, the NBC Act, to which it is secondary and complimentary[15]. This was elucidated by the Supreme Court in NNPC V. Famfa Oil Ltd[16] where the court held:

"It is the principal law that provides subsidiary legislation the source of its existence. Without Principal Law there can be no subsidiary legislation, and so subsidiary legislation must conform with the principal law. The petroleum Act is principal law, a statute. Where it prescribes a particular method of exercising statutory power the procedure so laid down must be followed without any deviation whatsoever"




[13] 9.1.1 of the NBC Code as amended.

[14] 9.1.1.8 of the NBC Code as amended.

[15] Best Njoku V Chief Mike Iheanatu (2008) LPELR - 3871 (CA)

[16] (2009) 12 NWLR (PT. 1156) 462



It is pertinent to note that the NBC Act provides that regulations, such as the NBC Code, can be made “generally for the purpose of giving effect to the provisions” of the NBC Act[17]. Thus, the inference drawn from this is that whatever changes the amendments to the NBC Code seeks to introduce must be supported by the NBC Act.

It is however our view that the amendments to the NBC Code appear to be in conflict with the provisions of the Nigerian Copyright Act[18] which affirm the exclusive right of the owner of a copyright in a broadcast to control the broadcast, sale or licensing of such work.

As earlier mentioned in this article, the NBC Code as amended prohibits broadcasters from acquiring exclusive rights in a broadcast or entering into similar agreements. It also affirms the power of the Commission to compel a broadcaster to license its broadcasting rights to another broadcaster where certain circumstances exist.

These provisions are likely to raise questions on the applicability of the NBC Code in light of the fact that Nigeria’s Copyright Act has already affirmed the right of the owner of a copyright in a work to grant exclusive licence over his work and control how he wants to sell or license his work.

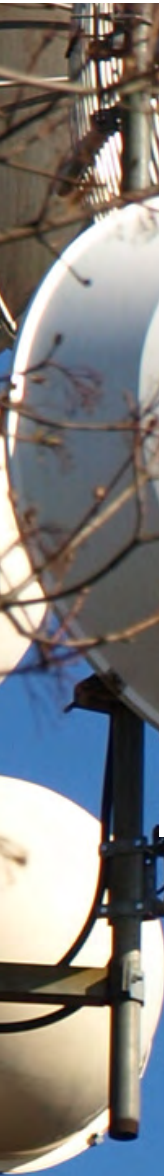
With this sort of conflict existing between both laws, it is our view that the Copyright Act should prevail as the holders of intellectual property rights cannot be compelled to license their copyright to third parties.

Compliance and enforcement

Another issue is how the Commission will effectively enforce compliance and sanctions, considering advancements in technology which allow non-resident broadcasting platforms to provide content to Nigerian residents from anywhere in the world. Conflict of laws and other jurisdictional issues are also bound to arise in light of the fluid nature of online broadcasting,

[17] Section 23 of the NBC Act.

[18] Specifically, section 5, 7, 8 and the definition of “exclusive licence” in section 39 of the Copyright Act.



The possibility of the Commission exceeding its powers

We note that the Commission is empowered in its enabling act to control the broadcasting industry and publish the NBC Code[19]. However, stakeholders are likely to question the Commission's legal backing to delve into matters such as anti-competition, intellectual property and freedom of contract, some of which statutes have been promulgated to govern them. Also, it may be argued that the despite the omnibus powers of the Commission to regulate broadcasting, the publishing of regulations restricting copyright use and freedom to contract were not envisaged under the powers of the Commission as set out in its enabling law.

CONCLUSION

Despite the above-mentioned issues, the underlying objectives of the NBC Code are quite commendable in light of the need to encourage the use of indigenous human resources in the broadcasting sector and increase advertising revenue for broadcast stations. It is hoped that the Commission will rectify ambiguous/questionable provisions of the NBC Code or provide clarifications on same. Meanwhile, stakeholders in the broadcast industry should urgently seek legal advice on compliance with the provisions of the NBC Code as amended.

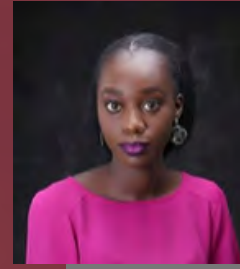


[19] Section 2(d) and 2(h) of the National Broadcasting Commission Act

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