

## ENFORCEMENT OF NEIGHBOURING RIGHTS UNDER THE NIGERIA COPYRIGHT ACT 2022

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### Abstract

*The protection of traditional cultural expression and cultural legacy against unlawful use, duplication, misappropriation, and other types of unethical exploitation has proven to be attainable with the help of intellectual property law. The aim of this paper is to investigate the idea and procedures for enforcing neighboring rights within Nigeria's current copyright laws. The paper used a qualitative and doctrinal approach to explore the principles of neighboring rights, classifying them into performers' rights and expressions of folklore. It also explores civil and criminal proceedings for their enforcement. The paper found out that Nigeria's copyright laws appear to be unappreciated, which accounts for the paucity of documented incidents involving the violation and enforcement of performers' rights and the expression of folklore. It therefore suggests that in order to safeguard and uphold these rights, it is necessary to inform the public of their existence.*

**Keywords:** Copyright, Folklore, Enforcement, Infringement, Performer's Right

### 1. Introduction

Intellectual property is a word used to describe the legal rights that result from intellectual effort in the fields of business, science, literature, and the arts. Alternatively, intellectual properties are works of thought. By allowing to control the use of their creations, particular, time-limited rights, and intellectual property law seeks to protect the creators and other creators of

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intellectual products and services. These are intangible property rights since they only pertain to the intellectual invention itself rather than the physical object in which the creation may be embedded.

According to *Article 2* (viii) of the World Intellectual Property Organization (WIPO) Convention<sup>1</sup> Intellectual property includes all rights arising from intellectual activity in the industrial, scientific, literary, or artistic fields as well as rights to literary, artistic, and scientific works, performances by performing artists, phonograms, broadcasts, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations. It also includes all other rights resulting from such intellectual activity.

Industrial property rights and copyright, which cover written works, musical compositions, visual arts, audiovisual productions, sound recordings, and broadcast, are the two main categories of intellectual property rights. Industrial property rights include patents for inventions, trademarks, industrial designs, and geographical indications.<sup>2</sup>

The Act continued by stating a literary or artistic work is not eligible for copyright protection unless sufficient effort was made to give it a distinctive character, and the work has been fixed in any particular medium of expression currently known or later developed, from which it can be perceived, reproduced, or expressed in other ways either directly or with the help of any machine or device.<sup>3</sup>

Even if they are unique, some indigenous creative outputs do not meet the fixation requirements and are consequently ineligible for copyright protection. However, the Act protects these results as neighboring rights.<sup>4</sup> -

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<sup>1</sup> 1967.

<sup>2</sup> S. 2 Copyright Act 2022; Jadesola L.S. “Copyright Issues in Indigenous Knowledge” in Adeniyi O. Law and Policy Thought in Nigeria (Ibadan: Faculty of Law University of Ibadan, 2018): 93 – 94.

<sup>3</sup>Babafemi F. O. Intellectual Property: The Law and Practice of Copyright, Trademark Patents and Industrial Designs in Nigeria (1st edn.) (Ibadan: Justinian Books Limited, 2007): 10; Onwumere R. I. “An Examination of Neighbouring Rights in Nigeria” *The Gravitas Review of Business and Property Law* 9(2) (2018): 115.

<sup>4</sup>Fogum P. K. “Towards Enhancing the Status of Performers” *Nigeria Journal of Contemporary Law* (1995); Oyewunmi A. O, Nigeria Law of Intellectual Property

The concept of "neighboring rights" or "rights bordering on" copyright was born at this time.

In light of this, the article may examine the enforcement of neighboring rights under the Nigeria Copyright Act 2022. The document is broken down into four sections after this introduction, which serves as the first part of the paper.

The second part of the paper deals with the principles of neighbouring rights. It argues that related or adjacent rights should be used to safeguard individuals who help intellectual producers spread their message and make their works available to the general public. Additionally, it argues that there are two basic types of neighboring rights in Nigeria: performers' rights<sup>5</sup> and folklore expressions.<sup>6</sup>

The third part mentions the enforcement of neighbors' rights. It contends that neighboring rights are upheld in a manner comparable to copyright and that the Act establishes civil and criminal penalties for violators of neighboring rights. The right holders bring civil lawsuits, but the government brings criminal lawsuits. It is common knowledge that criminal cases must be proven beyond a reasonable doubt, whereas civil matters must be proven on the balance of probability. The fourth part of the paper makes suggestions for additional reading.

## **2. Principles of Neighbouring Right**

By using related or neighboring rights, it tries to safeguard those who help intellectual creators spread their message and make their works available to the general public.<sup>7</sup>

In terms of copyright law, neighboring rights are the legal claims to creative works that are unrelated to the author's original creation. It is used to contrast the concept of writers' rights.<sup>8</sup> Neighboring rights, expressed simply, are

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(1st edn.) (Lagos: University of Lagos Press and Bookshop Ltd, 2018): 123; WIPO, *Intellectual Property Handbook* (2nd edn., 2004): 46.

<sup>5</sup> *Ibid.* S. 63 – 73 Copyright Act

<sup>6</sup> *Ibid.* S. 74 – 76 Copyright Act

<sup>7</sup> WIPO, *supra* note 4.

<sup>8</sup> Royalty Exchange "What are Neighbouring Rights?" <<https://www.royaltyexchange.com/learn/what-are-neighbouring-rights>> Accessed 2nd August, 2023.

public performance payments owed to the owners of the copyright to sound recordings. Keep in mind that every song is protected by two different forms of copyright: one for the song's authorship and the other for its recording. The songwriter and publisher are paid under the composition copyright while the recording artist and record company are paid under the sound recording copyright. <sup>9</sup>The term "performance right" denotes the ability to publicly perform the musical composition that is connected to a particular song, whereas the term "neighboring right" denotes the cost to be paid to the owner of the sound recording (typically the recording artist and/or label) for the same public performance. Major international collection organizations also collect neighboring rights. <sup>10</sup>

The importance of neighboring rights as a framework for protecting cultural rights from unfair exploitation lies at the heart of their recognition and preservation. As a result, it makes sure that in Nigeria, cultural and traditional activities that fall under the purview of these rights are given the respect and attention they deserve.

There are two primary sorts of neighboring rights in Nigeria, and these are as follows:

- i. Performers right.<sup>11</sup>
- ii. Expressions of folklore.<sup>12</sup>

### 2.1 Performers Right

According to Section 63 of the Copyright Act, a performer has the sole right to manage all aspects of his performance, including the act of:

- a. His original fixation, or fixation of his unfixed performance, was made without his agreement and was not a fixation of his unfixed performance as defined by Section 68.
- b. Reproduction is made for reasons other than those for which the performer granted permission to make the original fixation or a reproduction, i.e., the original fixation was made in line with Section

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<sup>9</sup> *Ibid.* This is the idea of neighbouring rights in some other jurisdictions like the USA. In Nigeria, however, there are two basic neighbouring rights recognized by the law, which are the "performers rights" and "rights to the expression of folklore". These will be discussed in detail below.

<sup>10</sup> Royal Exchange, *supra* note 8.

<sup>11</sup> *Ibid.* Ss 63 – 73 Copyright Act

<sup>12</sup> *Ibid.* S. 74 – 76

- 68's provisions but the reproduction is made for purposes not covered by those provisions.
- c. Release to the public through the sale or other transfer of ownership of copies or a fixation of his performance that has not been the subject of a distribution authorized by the performer;
  - d. unless the performance is a broadcast performance itself, broadcasting or making publicly accessible a performance by this artist that has not been fixed;
  - e. renting or lending the general public a fixation or copies of a fixation of his performance, or engaging in public lending without taking ownership of the copy into consideration;
  - f. putting his fixed performance in the public's reach using wired or wireless techniques, allowing viewers to view them from a place or at a moment of their choosing.
- “Performance” includes a:
- a. dramatic performance that incorporates mime and dance;
  - b. performance of music; and
  - c. the live performance of a literary work by one or more people, whether it be by reading, recitation, or another comparable presentation.

The term "performance" as used in this section refers to the acting, singing, declaiming, playing, interpreting, or otherwise presenting literary or creative works or folkloric manifestations by actors, musicians, dancers, or other performers, whether or not the work was previously fixed or was only fixed for the performance.

A performer's executive rights are still in effect with regard to a given performance for a period of 50 years following the year the performance was first presented.<sup>13</sup> Any unlawful use of the performer's rights during this time frame is, therefore, an infringement that can be legally challenged by the owner of the right under the provisions of Sections 70, 71, and 73 of the Copyright Act and so replicated in extensor. Section 70 provides as follow:

- Someone who violates a performer's rights without the performer's knowledge or permission
- a. Does any of the things listed under Section 63 of this Act, or induces someone else to do them;

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<sup>13</sup>Babafemi F. O., *supra* note 3: 91.

- b. Broadcast a sizable portion of the live performance using a recording that you know or have cause to know was made without your permission;
- c. Imports a recording of a performer's work that is infringing for purposes other than his personal or domestic use; or
- d. A recording of a performer's work that has been made without permission is sold or made available for hire, offered, distributed, or shown for those purposes in the course of commerce.

Accordingly, actions for performer's rights infringement are allowed under section 72 of the Act:

A person who has a right that is protected by Sections 63 and 66 of this Act may take legal action for the infringement of that As a result of the violation of the law, you may be entitled to conversion, an account of profits, an injunction, or financial compensation.

The owner of the performer's or recording right in regard to the performance is entitled to a court order that the recording be forfeited and delivered up to him when someone acting in the course of his business has an unlawful recording of a performance in his possession, custody, or control.

Accordingly, section 73 of the Act establishes criminal responsibility for the breach of a performer's right:

Anyone who performs any of the acts listed in Section 71 without the performer's consent or authorization is guilty of an offense and subject to punishment upon conviction unless they can demonstrate to the satisfaction of the court that they had no knowledge that their actions violated the performer's rights.

- a. A person, to a fine of at least N100,000 or to a period of imprisonment of at least one year, or to both;
  - b. An at least N2,000,000 fine for a body corporate.
- A court that hears a case involving a violation of this section has the authority to mandate delivery of the recording or any other part to the performer's rightful recipient.

Infringers of performers' rights may be exempt from responsibility if they can demonstrate one or more of the following exceptions:

- a. **Ignorance:** If the offender can convince the court that he was not aware that his actions were an infringement of the performer's rights, he may be released from responsibility.
- b. **Importation for Private or Domestic Use:** When a performer's work is copied illegally and is imported for personal or domestic use, there is no infringement. This suggests that only importation for business or commercial purposes is punishable; however, if the public usage is accompanied with a crediting of the author and title of the work, the "infringer" may be exempt from punishment.<sup>14</sup>
3. **Protection of Public Interest:** When a performer's permission is requested to record a live performance for research, personal, or domestic use, such permission should not be arbitrarily denied.<sup>15</sup>
4. **Education:** the use of the performance for educational purposes.<sup>16</sup>
5. **Illustration of Original Work:** If the extent of such use is consistent with good faith, the performance used as an example is considered to be an author's original work.<sup>17</sup>

According to section 64 of the Act, the performer's privilege provided under this Act will apply to any performance if:

- a. On the day of the performance, at least one performer is a national of one of the nations listed below: The performer resides in Nigeria or travels there frequently.
- b. The performance occurs in Nigeria or in a nation that either originated in, or is a party to, a treaty or other international agreement to which Nigeria is a party.

A certification to that effect from the commission should be sufficient evidence of that fact in cases where it is disputed whether a nation is a party

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<sup>14</sup> There are reported cases where such consent was refused by the performer and the infringer proceeded to record the performance for commercial use, the infringers were held liable – *Zacchini v Scripps – Howard Broadcasting Co.* No. 76 – 577 “Supreme Court of the United States” 433 U.S. 562 Decided June 28, 1977. <[http://www.bc.edu/bc\\_org/avp/cas/comm/free\\_speech/zacchini.html](http://www.bc.edu/bc_org/avp/cas/comm/free_speech/zacchini.html)> Accessed 4th June 2023. No Nigerian case was found on the subject.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Onwumere R., supra note 3: 117 – 119.

to an obligation in a treaty or other international agreement to which Nigeria is also a party.

According to Section 68 of the Act, the performance is no longer subject to Section 65 of the Act if the actor gives his approval for the performance to be included in a visual or audio-visual fixation. The provisions of this Act's Part II shall be applicable after any required modifications regarding performances.

Without obtaining the permission required by Section 63 of this Act, a performance, a fixation of a performance, or a replica of such a fixation may be used for the purposes of –

- a. A dealer showing a client, in good faith, a radio or television receiver, recording equipment, or playback equipment on the dealer's property;
- b. Brief excerpts from works protected by performer's rights may be reproduced in current-events reporting to the degree permitted by that purpose;
- c. Private study of a work protected by performer's rights that is housed in a publicly accessible library, school, museum, or archive on the grounds of the aforementioned organizations;
- d. Reproduction that is non-commercial, done for the benefit of individuals with disabilities, and done to the level that is necessary due to the handicap;
- e. Using their own equipment and for their own broadcasts, broadcasting organizations may make an ephemeral recording of a performer's work under the following conditions:
  - i. The recording must be deleted following its usage for transmission after being preserved for no longer than 30 days; and
  - ii. An extraordinary documentary chancellor's recordings may be sent to specific archives for preservation.

In most cases, the performer must expressly approve any use of their rights by a third party. This usually happens in the form of a written license.<sup>18</sup>

## 2.2 Expression of Folklore

In folkloric phrases, the right is the subsequent neighboring right. It is recommended by some authors to use more modern terminology, such as

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<sup>18</sup>Oyewunmi A.O., supra note 4: 126.



"expressions of culture" or "traditional cultural expressions," in place of the phrase "folklore." The two terms are interchangeable.<sup>19</sup>

In the 2015 UNESCO convention on the protection and promotion of the diversity of cultural expressions, expressions that are the result of individual, group, and societal creativity and contain cultural substance are referred to as cultural expressions.<sup>20</sup>

The customary beliefs and tales of a group are referred to as folklore. Folklore, myths, ideologies, customs, superstitions, etc. are all included in this.<sup>21</sup> Folklore is the expression and transmission of a group's cultural identity, which reflects its values and beliefs, whether verbally or in set forms through various types of art and craft or other ways. Section 74(5) of the Act further defines folklore as a creation of groups or individuals that is group-oriented and tradition-based, reflecting the standards and values that have been passed down orally, through imitation, or through other means by the community as an appropriate manifestation of its cultural and social identity, including:

- a. Folklore, folk poetry, and folk riddles;
- b. Folk song, and instrumental folk music;
- c. Folk dances and folk plays; and
- d. creation of folk arts, such as illustrations, paintings, sculptures, terracotta, mosaics, jewelry, handicrafts, costumes, and native textiles.

It is crucial to keep in mind that folktales, or stories that are particular to a group of people and are passed down orally, are an important part of folklore.<sup>22</sup> When labor is finished for the day, folktale storytelling is a method to unwind in the evening.

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<sup>19</sup>Inventa International, "Traditional Cultural Expressions, a protection beyond Intellectual Property Law" <<http://inventa.com/en/news/article/288/traditional-cultural-expressions-a-protectioin-beyond-intellectual-property-law>> Accessed 4th August, 2023.

<sup>20</sup>*Ibid.*

<sup>21</sup> Difference between Folklore and Folktale <<http://www.differencebetween.com/difference-between-folklore-and-vs-folktale/>> Accessed 4th August, 2023.

<sup>22</sup>Onwumere R., supra note 4: 119 – 120.

Folklore and folktale are not the same thing, which some people mistake for one another. Folktales, as opposed to folklore, are legends that have been orally transmitted from one generation to the next by ancestors of a particular group of people. A community's traditional beliefs, practices, and stories that have been passed down from one generation to the next are referred to as its folklore. You could consider folklore to include folktales. From beliefs to superstitions, folklore encompasses a wide spectrum of aspects. Folktales are just stories. Folktales and folklore are passed down from one generation to the next orally.<sup>23</sup>

Folklore expressions are protected by Section 74 of the Nigeria Copyright Act from being reproduced, broadcasted, distributed via cable, or performed in public, as well as from being altered, translated, or otherwise changed when done so for profit or outside of the context of their traditional or customary use.

These rights were however subject to a few exceptions, such as the performance of any of the acts in good faith for domestic and private use, provided that, if the use is disclosed, credit is given to the author and the title of the work; the taking of phrases from folklore in order to create creative works or authors, given that the level of such use is acceptable under fair use; the incidental use of a folk expression or the use of a folk expression as an example in an author's original work, provided that the extent of such use is acceptable under fair use.

A third requirement of the clause is that all printed publications and other clearly recognizable manifestation of folklore must provide adequate and ethical reference of the community or area from where the expression utilized originates.

According to Section 75 of the Copyright Act, anyone who violates Section 73 of this Act by using a folk expression without the Nigerian Copyright Commission's consent is in violation of the law and liable to the commission for financial penalties, an injunction, and any other remedies the court may find appropriate to grant in the circumstances. Section 76 states that it is unlawful and hence punishable to interfere with folklore expression. It states that it is prohibited to alter a folkloric expression in a way that undermines the honor, dignity, or cultural value of the community from which it

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<sup>23</sup>Jadesola L. A., *supra* note 1: 111 – 113.

originated as well as to engage in any of the activities listed in Section 73 without the commission's consent or license. The offending or violating article may be given to the commission upon order of the court hearing the case involving the alleged offense.

There are several issues with how Nigerian folklore is administered. First off, it can be challenging to identify the group that is the owner of a certain folkloric expression. Second, the sole authority to provide permission for the use of folkloric expression is with the Nigerian Copyright Commission. This will include certain phrases that, in the community of origin, have a spiritual meaning. This challenge is compounded by the possibility that the beliefs governing a specific manifestation in one group may differ from those governing a similar production in another. Making the proper decisions can so be difficult at times.

The question of ownership and the exercise of ownership rights is still open. While the Nigeria Copyright Commission issues licenses for the use of folkloric expressions, it is thought to be holding those rights in trust for the various groups. The commission's judgments are assumed to be made after consultation with the affected community. Can the community appeal or persuade the commission to reverse its judgment in cases when this power is not used in a way that pleases a particular community? The Act stipulates that the commission is entitled to legal recourse for improper use of folklore, but because it has the right on trust, it would be responsible to the community for paying damages.

Finally, it should be highlighted that the Commission has been given the authority to grant licenses for the exploitation of folklore, but not to charge money for those rights. As a result, the communities might not gain anything from it. This may help to understand why the Commission, rather than the communities, is responsible for administering the folklore rights. This can be viewed as a form of public service. Although this justification seems reasonable on the surface, it is unlikely that it can stand up to scrutiny given the possibility of other justifications, such as the fact that the WIPO's model for national law permits such.<sup>24</sup>

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<sup>24</sup>Oyewunmi A. O., *supra* note 4: 83; what constitutes infringement is outlined in Section 71 of the Act (Performers' Exclusive Right) and Section 75 (Expression of Folklore).

### 3. Enforcement of Neighbouring Rights in Nigeria

Similar to copyright, neighboring rights are enforced. This study will make an effort to evaluate how well the specified neighboring rights are being upheld in Nigeria.

The following conditions must be met in order for a claim of neighboring rights violation to succeed:<sup>25</sup>

- i. The adjacent right is present in the work that is being violated;
- ii. The plaintiff is the owner of the neighboring right, whether as the original inventor, an assignee, or a licensee;
- iii. Without the plaintiff's consent, the defendant performed an act related to the plaintiff's work.

The Copyright Act of 2022 establishes civil and criminal penalties for those who violate neighboring rights.<sup>26</sup> In contrast to criminal actions, which are brought by the state, civil actions are brought by the owners of the rights (i.e. the Nigeria Copyright Commission). It is well known that although criminal cases must be proved beyond a reasonable doubt, civil matters must be proven on the basis of the preponderance of the evidence. The enforcement of neighboring right infringement actions is subject to the same legal basis.

In essence, private rights include those related to intellectual property. Without the owners of intellectual property rights actively participating in enforcement actions, which they must do either individually or collectively, enforcement efforts can never be successful. Individuals can therefore use the legal system to vindicate their rights as a private right.<sup>27</sup> The importance of the court in enforcing copyright (including neighboring rights) has also been emphasized.<sup>28</sup> In the case *NCC v. Abi Bassey Eno and Ors*,<sup>29</sup> Hon.

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<sup>25</sup> S. 72 and 73 Copyright Act, *Ibid*, for performers' right and S. 75 and 76 Copyright Act for expression of folklores.

<sup>26</sup> Nigeria Law Today, "Copyright Owners and Civil Remedies for Copyright Infringement in Nigeria: Sleep No More! (1)" <<http://nigerianlawtoday.com/copyright-owners-and-civil-remedies-for-copyright-infringements-in-nigeria-sleep-no-more-1/>> Accessed 4th August, 2023.

<sup>27</sup> *Nigeria Copyright Commission v Abi Bassey Eno and Ors* Suit No. FHC/CA/31C/2003) 17.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* in *Achebe v Drum Publications Nigeria Ltd* (1974) ALR Comm 227, an action for copyright infringement was brought before the FHC of the defunct East Central States. The court held that it lacked the jurisdiction to determine any action which bordered on copyright once it was exclusive to the FHC.

Justice Ajakaiye highlighted the aforementioned position by using the following words:

It has become incredibly common in this nation to violate the copyright of people who have earned it through diligence and hard work. To stop the slump, strict actions are required. The courts shouldn't downplay their obligations to see that this is carried out decisively. It is necessary to apply just punishment that will be deferential to other criminals.

The Federal High Court with jurisdiction at the infringing location is where the lawsuit for copyright infringement is brought.<sup>30</sup> The defendant successfully made a preliminary objection to the filing of the lawsuit in the State High Court rather than the Federal High Court in the matter of *Chinua Achebe and Anor v. Drum Publications*.<sup>31</sup> It is significant to note that while the Nigeria Copyright Commission has brought legal action against violators of copyright in several instances, none of these cases involved performers' rights or the freedom to express folklore. The commission must therefore consider this option because several Nigerian performers' rights to free speech and expression at folklore events are being violated without proper or timely remedies.

A successful criminal case will result in the imposition of a fine and/or period of imprisonment on the infringer, whereas damages, an account of profit, an injunction, and delivery up are the available civil remedies.<sup>32</sup> We'll talk about enforcement in terms of both civil and criminal measures.

### **3.1 Civil Proceedings for the Enforcement of Neighbouring Rights**

The right owner, an assignee, and an exclusive licensee<sup>33</sup> of the neighboring right are the three major kinds of parties who may bring legal action for the violation of neighboring rights. These parties may be natural or artificial

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<sup>30</sup>S. 37 Copyright Act.

<sup>31</sup> 4ECCLR 74; *NCC v Taiwo Adeniji* FHC/IB/70C/10 – convicted and sentenced to six (6) months imprisonment or a fine of ₦250,000; *NCC v Awara Chukwuma Abel* FHC/L/15/C/13 – The accused was convicted and sentenced to three (3) months imprisonment with a fine of ₦35,900; NCIP “2013 Nigerian IP Judicial Decisions: The Year in Review” <<https://ncipw.com/2013-nigerian-IP-judicial-decisions-year-review/>> Accessed 4th August, 2023.

<sup>32</sup> S. 37 Copyright Act, *Ibid*, this may include a collecting society or the NCC.

<sup>33</sup> *Ibid*.

persons.<sup>34</sup> It is significant to highlight that intellectual property lawsuits are filed at the Federal High Court in the jurisdiction where the infringement took place with regard to the court's jurisdiction to hear the case.<sup>35</sup>

When rights have been transferred to a collecting society for the purpose of collective management, collecting societies may also file civil lawsuits in the name of the proper owners. The collecting society must have received the proper approval and authorization to act on behalf of right owners from the commission or be properly granted an exemption in order to be competent to institute on their behalf.<sup>36</sup> Numerous cases have shown that the "collection society" cannot file a lawsuit against an infringer in court without such clearance or exemption.<sup>37</sup> Despite the aforementioned principle, a collecting society has been successful in pursuing an action on behalf of the right owner due to the assignment agreement that granted the organization the only authority to act on the right owners' behalf.<sup>38</sup>

Hugo Zacchini, the petitioner in the case *Zacchini v. Scripps Howard Broadcasting Co.*,<sup>39</sup> is a performer. He does a "Human Cannonball" trick in which he is launched 200 feet into the air and lands in a net. The length of each performance is 15 seconds. The petitioner had a contract to regularly perform his act at the Gauga County Fair in Burton, Ohio, in the months of August and September 1972. At the fairgrounds, he performed on a face-off arena surrounded by grandstands. There was no additional admission cost for attendees of the fair to see him perform.

A freelance reporter for Scripps-Howard Broadcasting, the owner of a television station and the case's respondent, went to the fair on August 30. He

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<sup>34</sup> The Federal High Court has exclusive jurisdiction on IP related matters – The 1999 Constitution of the Federal Republic of Nigeria (as amended); Section 37 Copyright Act, *Ibid*; *Chinua Achebe and Anor v Drum Publications* 4 ECSR 74.

<sup>35</sup> *Disc Technology Ltd and 2 Ors v Musical Copyright Society of Nigeria Ltd IGTE (MCSN)* (2008 – 2011) 6 IPLR 198.

<sup>36</sup> *Musical Copyright Society Nig v Details Nig Ltd IGTE* (1990 – 1997) 3 IPLR 260.

<sup>37</sup> *Compact Disc Technologies Ltd and Others v Musical Copyright Society of Nigeria Ltd IGTE (MCSN)* (2008 – 2011) IPLR 198; *Musical Copyright Society of Nigeria Ltd IGTE v Ade-Okin Record and Alhaji Saka Alagbada* (2008 – 2011) 6 IPLR 39; Oyewunmi A. O., *supra* note 4: 98 – 100.

<sup>38</sup> *Ibid*.

<sup>39</sup> No. 76 – 577 Supreme Court of the United States 438 at 562. Justice Whyte delivered the opinion of the court.

was carrying a little movie camera, and when the petitioner saw the reporter, he urged him not to record the act. The reporter did not do it on that day, but on the producer's orders, he turned around the next day and recorded the entire incident for the respondent's daily program. The 15-second-long video clip and supportive commentary were broadcast that evening on the 11 o'clock news program.

The complainant subsequently filed this lawsuit for damages, asserting that he is "involved in the entertainment enterprise," that the act he performs was "invented by his father and... conducted only by his family for the last 50 years," that the defendant "showed and made commercial the film of his act without his concept," and that such behavior constituted "unlawful appropriation of plaintiff's professional property." In response, the respondent asked for summary judgment, which the court of trial approved.

The judgment was overturned by the Ohio Court of Appeals. The majority concluded that the petitioner's complaint establishes a claim for conversion and the violation of a common-law copyright, and they also agreed that was denied under the First Amendment the press the right to broadcast the entire performance on a news program without paying the petitioner for any monetary harm he could establish at trial.

In an appeal, the Supreme Court of Ohio based the petitioner's legal claim on his "title to the publicity value of his performance." The opinion syllabus, which is where we should look for the legal principle that was applied to decide the case, stated first that it is forbidden to use another person's name or likeness for personal gain, whether or not that gain is commercial in nature, further, the responder would be held accountable for the appropriation of the petitioner's right to the publicity value of his performance against his will and in the absence of any authorization or privilege. Despite this, the court decided in favor of the respondent for the reasons stated in the syllabus.

Unless the TV station's actual intent was to use the publicity's benefits for some non-privilege private use or unless the station's actual intent was to harm the individual, it is legal for a TV station to cover newsworthy topics of

rightful public interest that would otherwise be protected by the individual's right to privacy in its newscast.<sup>40</sup>

### **3.2 Criminal Proceeding for the Enforcement of Neighbouring Rights**

Due to their detrimental and widespread effects on the socio-cultural and economic well-being, some infringing behaviors are regarded as public problems.<sup>41</sup> This is the rationale behind the Copyright Act's provision of criminal responsibility. Acts that could result in criminal prosecution for performance include:

- i. Committing any of the acts listed in Section 63 of this Act, or causing another person to do so;
- ii. Broadcasts a significant portion of a live performance using a recording that they are aware was made without the performers' consent or have cause to suspect it was;
- iii. Imports an infringing recording of a performer's work for purposes other than his personal or household use; or
- iv. Sells, rents, provides, distributes, or shows a recording of a performer's work that is an infringement recording in the course of trade or business.

Folklore expressions are protected under Section 76 of the Copyright Act, which states that anybody who commits any of the acts listed in Section 74 of this act, whether on purpose or for profit, including but not limited to: When such expressions are created either for commercial purposes or outside of their traditional or customary context, or when they misrepresent the source of an expression of folklore or distort a folklore expression in a way that is detrimental to the honor, or dignity of the expression, they may not be reproduced, performed for the public, broadcast, distributed by cable or another method, or subject to additional modifications like translations and adaptations.

A person who violates Subsection 1 by using folkloric expressions does so illegally and is responsible for the following:

- a. a person, to a fine of at least N100,000 or to a period of imprisonment of at least one year, or to both;
- b. A body corporate, to a fine of at least ₦2,000,000.

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<sup>40</sup>Oyewunmi A. O., supra note 4: 101.

<sup>41</sup> S. 71, Copyright Act



The offending or infringing article may be given to the commission by a court that hears an offense under this provision.

While under Section 73 of the Act, someone who performs without the performer's knowledge or permission, performs any of the acts listed in Section 71, including performing or inducing another person to perform any of the acts listed in Section 63 of this Act, including fixing the performer's unfixed performance; the original fixation, other than a fixation excluded by Section 68 from the requirement that the performer obtain consent; reproduction is made for purposes that are unrelated to those for which the performer gave his consent to the creation of the original fixation or of a reproduction; or the original fixation was created in accordance with Section 68's requirements, but the reproduction is made for purposes that are not covered by those requirements; distribution of his performance general public through ownership transfer through a sale or other means of a fixation or duplicates of it without the performer's permission; broadcasting or making a performance accessible to the public by this performer that has not been fixed, except when it's a broadcast performance itself; regardless of who owns the copy rented or lent, renting, lending, or a fixation loaned out by the public or copies of the fixation of his performance; and making his fixed performance accessible to the general public via wired or wireless technologies, allowing users to access it at any time and from any location, unless he can demonstrate to the satisfaction of the court that he was unaware that his actions violated the terms of the contract. –

- a. that individual to a fine of at least N100,000, a term of at least one year's imprisonment, or both; and
- b. A body corporate, to a fine of at least ₦2,000,000.

A court that hears a case involving a violation of this provision has the authority to mandate delivery of the recording or any portion of it to the performer's rightful recipient.

The infringer's lack of knowledge and lack of cause to suspect that he was working with an unauthorized copy of a work is a defense to a criminal charge. Consequently, the prosecution must demonstrate both the *actus reus* (the actual act of infringement) and the *mens rea* (the mental element or intention of the infringer to commit the infringing act). The prosecution in *NCC v Votalis Ikakuoha*,<sup>42</sup> was successful in establishing both the act and the

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<sup>42</sup> (2008 – 2011) 6 IPLR 1.

intentions necessary for a criminal prosecution, leading to the accused's conviction for piracy. In the case of *NCC v. Edo Co.*, the prosecution was unable to establish *actus rea*.<sup>43</sup> – The court's satisfaction on the substantiation of the purpose requirement was lacking.

As was already said, the Act does not exclude artificial persons, businesses, firms, or organizations from criminal prosecution for violating neighboring rights.

#### **4. Conclusion**

Finally, it is well understood that copyright is incomplete without neighboring rights just as a mother is without her offspring. The Nigerian legal system statutorily recognizes neighboring rights as the privilege of artists and producers, or manifestations of folklore. Similar remedies apply and these rights are enforceable in Nigerian courts just like copyright is. This article found that generally speaking, Nigeria's copyright laws appear to be lax in this area, which accounts for the paucity of documented cases involving the infringement of performer's rights and folkloric expressions. It appears that the Commission has not yet brought any criminal charges involving the infringement of folklore expressions or performers' legal rights as defined by the Act.

The article consequently urges that the public be made aware of these rights' existence and the need for their protection and enforcement. The status of performer's rights and folkloric expression should also be upgraded to copyright; this will improve the balance of performing artists and raise awareness among those who own these rights.

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<sup>43</sup>Onwumere R. I., *supra* note 3: 122 – 126.