

PEARLS OF LAW

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Musical Works and Copyright Issues

Introduction

The other day I watched a comical opera performance at the MUSON centre, it was clear that Nigerians are extremely talented, the soloists sang beautifully and the orchestra was brilliant. We have many musicians who are very popular locally and internationally.

What is missing is an enabling environment to reach our full potential. The starting point should be the framework for the protection of our intellectual property rights.

Under the Copyright Act 2004 section (1) protects musical works while section (2) stipulates the conditions for eligibility for copyright protection which are originality and fixation- meaning that the work should be expressed in a definite medium. Section (5) confers a variety of rights on the author of a musical work i.e. reproduce the work in any material form; publish the work; perform the work in public; produce, reproduce, perform or publish any translation of the work; make any cinematograph film or a record in respect of the work; distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement; broadcast or communicate the work to the public by a loud speaker or any other similar device; make an adaptation of the work.

Currently our copyright act offers artists a traditional form of protection but the emphasis should be on the protection of their digital rights as well since the advent of the internet and illegal file sharing website pose new challenges for artists. The major issue that is being constantly battled by Nigerian artists is piracy especially digital piracy. Artists have noted that their content is being used on digital media channels without their permission and being downloaded illegally.

Interesting Copyright Cases

A pioneer case illustrating the danger of file-sharing records is the well-known case of **A&M RECORDS, INC. v NAPSTER, Inc.** Napster was an early peer to peer file sharing network which could be used transmitting various files but was mainly popular for members to share files through MP3. Major record companies were affected by this arrangement and naturally brought an action against Napster for direct, contributory, and vicarious infringement of copyright in order to protect their intellectual property. One of the defences raised by Napster was fair use, however, rejecting this argument the court held that Napster allowed repeated and exploitative copying. Additionally, songs were close to the core of the types of songs to be protected by copyright. Most importantly entire songs were downloaded which had a detrimental impact on album sales. The court also granted an injunction to prevent any future infringing activities. Years later music publishers went as far as suing Bertelsmann (a German Media Company) for supporting Napster with loans totalling \$85 Million who agreed to pay the National Music Publishers Association \$130 million to settle the Napster case's final copyright claims. In the wake of the Napster case, many decentralised file sharing companies have emerged without a central server making it difficult for them to be traced and prosecuted. This makes it difficult to suggest that prosecuting illegal file sharing companies is the way to go in protecting copyright in the music industry. A more cost effective approach is to hone digital channels such as iTunes, Facebook and Spotify for the benefit of artists with proper licensing agreements.

A major source of copyright litigation especially in developed countries is the sampling of songs without the author's permission. Sampling has been described as the process of incorporating a portion



of another artist's recording into a new recording. When a recording is sampled there is copyright infringement of the sound recording and the song itself.

Several American cases have dealt with the issue of sampling for example In **TUFAMERICA, INC. v WARNER BROS. MUSIC CORP.**, et al. 67 F. Supp. 3d 590 (S.D.N.Y. 2014) TufAmerica alleged that the defendants sampled the word "oh" from their sound recording and used it more than forty times in the song "Run this Town" the district court stated that "we are concerned here with an alleged sample of a single syllable that is, at best, barely perceptible in the allegedly infringing works and that at best has only the most dubious claim to qualitative significance with respect to the allegedly infringed work." Since that alleged copyright infringement was for the word "oh" the court held that single words and titles were not sufficiently original to be eligible for copyright protection.

Another major source of litigation in the music industry is music plagiarism. This is the outright copying of another artist's work while representing it as an original work. In

ROBBIN THICKE v MARVIN GAYE

2014 the estate of Marvin Gaye brought an action against Robbie Thicke, Pharell Williams and rapper T.I and Universal Records for copying Marvin Gaye's "Got to give it up". A Los Angeles jury found them guilty of unlawfully copying "Got to Give It Up" and ordered them to pay Gaye's family \$7.3 million. The figure was later reduced to \$5.3 million and the Gayes were awarded 50 percent of the song's future royalties. This is a landmark copyright case because apart from the fact that it involved a huge sum of money, other extraneous matters were put into consideration when the case was being decided such as studio arrangements, the strident walking bass and background chatter". In an unprecedented move the court also stated that "Blurred Lines" aped the vibe of Gaye's song which ordinarily is beyond copyright protection.

Led Zeppelin's case, in 2014 Mark Andes filed a case through his former bandmate's estate California to prevent the reissue of Led Zeppelin's fourth Album which included the song Stairway to heaven which he claimed infringed on their copyright. During the

trial, Led Zeppelin's lawyers argued that the chord progression in question was very common and had been in use for more than 300 years. Conversely, the plaintiff's lawyers had argued that Led Zeppelin became familiar with Spirit's song after the two bands played at a club in Plant's hometown in Birmingham in 1970, a year before Stairway to Heaven was released in 1971. The jury held that while California owned the copyright to "Taurus," "there was no substantial similarity in the extrinsic elements of 'Taurus' and 'Stairway to Heaven'."

Conclusion

Coming back to the Nigerian music industry, to create awareness about piracy, various artists held a rally on 1st September 2016 tagged "No music Day". This is a step in the direction but judging from the sophistication of the cases discussed above we still have a long way to go in developing our jurisprudence in this area. Urgent steps need to be taken especially by improving our legal framework for the protection of artists' rights so that we can encourage the talent we possess.