

# THE COPYRIGHT ACT 2022: INNOVATIONS FOR THE CREATIVE INDUSTRY

**THOUGHT LEADERSHIP**



# Introduction

The Nigerian creative industry has been experiencing a period of rapid change due to the emergence of innovative technologies and new forms of creative works. This has created unprecedented challenges for existing intellectual property rights, leading to growing calls for updated intellectual property laws.

Copyright is a form of intellectual property right and is the exclusive right given to the creator of a copyrightable work to control the use of their work. Any unauthorised use of work made by a person who is not the creator is considered an infringement of the copyright. Copyright works include creative expressions and productions such as music, photographs, films and books.

The old copyright act, which was enacted in 1988, did not contemplate and cover issues such as digitization, the internet, uses of copyright works online or even online infringement of copyright works. While there were international conventions and treaties which attempted to close the legal loopholes brought about by the development of technology, they required domestication and ratification.

Thus, stakeholders have clamoured for a complete overhaul of the old law in order to encourage innovation and creativity and promote the growth of Nigeria's creative industries; as well as to better protect the rights of copyright owners. In response, the Nigerian Copyright Commission ("NCC") the regulator of copyright in Nigeria, launched a stakeholder review process to update the copyright act. The new bill was then taken through various law-making processes. After a lengthy procedure, the National Assembly passed the Bill for an Act to repeal the old copyright act.



On the 17th of March 2023 President Muhammadu Buhari subsequently signed the Copyright Act, 2022 ("the Act") into law. This Act seeks to cure existing lacunae in the old law in a multitude of areas including in relation to technological advancements. The Act harmonizes Nigerian copyright law with developments made in international treaties and conventions, to which Nigeria is a signatory. The protection of content for people with disabilities, the protection of online and digital content, the establishment of takedown procedures for infringements and an expansion of the protections offered to performers and copyright owners generally are some notable innovations introduced by the Act.

The new Act improves the copyright landscape in Nigeria by ensuring that the intellectual works of creators are protected and that they receive just rewards and recognition for their creations. It also guarantees access to creative works by providing appropriate limitations and exceptions to copyright.

In this article, we delve into the novel provisions contained in the new Act and assess how it addresses the challenges posed by technological advancements, protects the rights of creators, and contributes to a more robust copyright ecosystem in Nigeria.





# Key Provision of the New Act

## 1. The Record Producer is now the owner of copyright in a music recording.

The new Act has done away with distinguishing the author of a sound recording of a musical work from a regular sound recording. It identifies recorded music as a sound recording and provides that the person who arranges for the sound recording to be made. i.e., the producer is author and initial owner of a sound recording subject to contract<sup>[1]</sup>.

Under the old law, the initial owner of sound recordings of musical works was the recording artiste i.e. performer, subject to any contract.

This change has put our law on the same trajectory with other jurisdictions such as the UK. Under the UK's Copyright, Designs and Patents Act of 1988, the producer who creates the sound recording is regarded as the creator and original owner of the sound recording, subject to any contractual obligations <sup>[2]</sup>.

While in the US, the author and initial owner of a sound recording can be the performer featured in the recording, or the producer who captured, manipulated, and/or edited the sounds that appear in the final recording<sup>[3]</sup> or where it is a work for hire, it belongs to whoever does the hiring.

[1] Section 108 of the Copyright Act, 2022.

[2] Section 11 of the the UK's Copyright, Designs and Patents Act of 1988. See also, Guidance on Ownership of copyright works, UK Intellectual Property Office <https://www.gov.uk/guidance/ownership-of-copyright-works> Published on 19 August 2014

[3] Section 201 of the US Copyright Act of 1976

## 2. Introduction of digital rights for the Copyright owner

The new Act in addition to reiterating all exclusive rights under the control of the copyright holder now includes the exclusive right to do and authorize the making of the work available to the public by wire or wireless means in such a way that members of the public are able to access the work from a place and a time independently chosen by them[4].

The implication of this provision is that creators have the right to make their works accessible online whether through streaming or downloads. No one is permitted to put a creator's work online without their permission. This provision recognizes the importance of digital platforms and increased online access to copyrighted content. It aims to give copyright holders control over the distribution of their works in the digital realm and addresses issues related to online piracy and unauthorized streaming.

Where there is evidence of piracy, copyright owners can now exercise their digital rights to prevent such through take down notices. To give a practical illustration, John, a musician, discovers that Sarah has uploaded a song on the digital platform MusicHub that sounds identical to his copyrighted song, "Sunset Serenade." John follows the takedown procedure outlined in Nigeria's Copyright Act by issuing a written notice to MusicHub, providing specific information about his copyrighted work and the infringing material. MusicHub promptly notifies Sarah, takes down the song, and informs John about the takedown.

Hence, only copyright owners have the right to put their works on digital platforms such as YouTube etc. unless they authorise other persons to act on their behalf.

## 3. Performing Artists and Record Labels are expressly entitled to payment for their music

The Act makes it clear that performing artists and record labels are entitled to remuneration by broadcast companies, for the broadcast of any sound recording which had previously been made available commercially. By specifically calling out the rights of performing artists and record labels, the Act provides the veritable basis for fees to be demanded by performing artists and record labels directly or through their representatives. This remuneration is to be split equally between the performer and the copyright owner.

The Act also makes it clear that owners of copyright work which is embedded in the recordings are also entitled to remuneration. This covers the rights of songwriters and music composers.

[4] Section 9 (1) of the Copyright Act, 2022.

This means that a radio station that plays Davido's "FIA" should ensure payment goes to Davido, his record label/producer DMW ( Davido Music Worldwide ), Fresh VDM the composer and Peruzzi the songwriter. While this appears complex, contracts, artist representatives and legal experts are utilised to unravel knotty issues.

#### **4. Introduction of more rights for Performers**

The new Act expands and clearly delineates the entitlement of performers concerning their performance.

The word "performer" is defined to include actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore whether or not the work was fixed or only fixed during performance. This definition covers a broad category of persons and is preferred to the old law which only defined "performance".

The Act provides that performers are entitled to a portion of any payment received by a person who arranges for the fixing of their performance for broadcast or public communication[5].

The new Act bestows on performers the moral right to be recognised as the performer in any use of their performance and the right to object to any derogatory modification of their performance. This right is only transmissible upon death[6].

To break this down, let us say Anita Actress stars in a film titled "Bad Boil", she must be credited as an actor in the film and if her acting does not come across good when watching the "Bad Boil" movie, she may have a right to object to the way her performance was recorded.

This provision on moral rights will be particularly keen for film and record producers to ensure due credits in any production. However, it poses an issue where directors and producers are forced to avoid modifying performance in a derogatory manner while doing their jobs of making a successful film. What this will entail and the creative implication for film and record productions remain to be seen.

[5] Section 15 of the Copyright Act, 2022.

[6] Section 66 (a) (b) of the Copyright Act, 2022.

Where group performances are broadcasted, consent for use of the performance shall be given by any person in charge of the group and any payment for the use of the performance may be made to such person and divided equally among all the performers, subject to any contract among them[7].

The Act also provides for certain exceptions to performer's rights which on close inspection are for the public good. A fixed performance may be used without consent for the following reasons: to demonstrate the good working condition of tv, radio or recording equipment by a salesperson, news reporting, research and private study where the fixed performance is kept in identified institutions, for the benefit of persons with disabilities, and for the short-lived recording of a performance by a broadcaster for broadcasting purpose[8].

These instances are in line with fair use principles when it comes to copyright and neighbouring rights.

## **5. Provision for Take down of infringing material and suspension of accounts.**

The Act provides a worthy and overdue introduction of the Take-Down rights to the Nigerian creative landscape. This enforcement mechanism is an offshoot of the digital rights of copyright owners and is relevant to the war against infringement and piracy. It enables copyright owners and their representatives to request service providers to remove infringing materials that are discovered on their platforms.

The service providers are mandated to immediately act on the notices where provided in the designated format and inform the alleged infringers of the situation[9]. Those alleged infringers also have the opportunity to respond to the claims by submitting a written counter-notice within seven days where they believe they have the copyrights to publish the work. This is in line with fair hearing principles.

This take down provision is a welcome development which shortens the time for dealing with infringing works and provides for non-litigious quick steps that copyright owners can benefit from even while taking legal action in an infringement case.

Service providers are as a result now statutorily mandated to act and take steps upon receiving complaints of infringement.

[7] Section 67 of the Copyright Act, 2022.

[8] Section 68 of the Copyright Act, 2022.

[9] Section 55 of the Copyright Act, 2022.

They are also enabled to suspend accounts of recalcitrant subscribers. The Act defines service providers as providers of online services or network access, such as operators of such facilities, and any entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received[10].

This take-down procedure emphasizes involving the copyright owner, promptly notifying the subscriber responsible for the content, and providing a mechanism for dispute resolution through the NCC, as mandated by the law.

It is similar to the provisions in the US where copyright holders can seek relief through the Digital Millennium Copyright Act (DMCA) by submitting takedown notices to internet service providers, who may then disable access to infringing content.

## **6. Introduction of limitation of liabilities for Internet service providers.**

Generally, distributors of infringing content are liable for copyright infringement. This typically puts social media companies and internet service providers at risk of infringement claims on account of content posted or uploaded by users acting independently. To protect these sets of companies, the Act provides that service providers will not be held liable for monetary relief for infringement merely because the infringing material is stored at the instruction of a user in a system or network operated by the service provider, or merely because the service provider directed users to an online location containing infringing material.

This protection would avail a service provider only if all the following circumstances exist:

- The service provider had no actual or circumstantial knowledge of the infringement, and upon becoming aware has acted to remove the infringing material,
- The service provider has no monetary gain from the infringement,
- The service provider, when informed of infringement, has acted expeditiously to remove the infringing content[11].

[10] Section 108 of the Copyright Act, 2022.

[11] Section 58 (a) – (c) of the Copyright Act, 2022.



These conditions aim to strike a balance between protecting the rights of copyright holders and providing a certain level of immunity to service providers who are not responsible for the content posted by their users. By complying with these conditions, service providers can reduce their exposure to liability for copyright infringement claims.

## **7. Collective Management Organisations now have wider powers**

Collective Management Organisation (“CMO”) is an organization established by copyright owners to oversee the monitoring, licensing, and collection of performance and mechanical rights on behalf of its members. Additionally, CMOs ensure compliance with licensing agreements, as well as the collection and distribution of royalties generated from these licenses.

Under the new Act CMOs are now empowered to issue licenses for use of works even for non-members where<sup>[12]</sup>:

- Such works are of the same category as works for which it is approved to issue licences;
- The owners of copyright in such works are not otherwise represented by any other CMO;
- There is not more than one CMO approved to operate in the particular category of works concerned;
- The owners of copyright in such works have not by written notice to the CMO, opted out of collective management of their rights; and
- The CMO does not discriminate against such owners in terms of the tariffs for the use of their works and the payment of royalties to such owners.

This development is questionable. While it attempts to harmonise the industry and simplify the process of obtaining a license it has taken away a copyright holder's freedom of choice. Given the current state of CMOs in Nigeria, it is not clear that this new provision will not be open to abuse by persons in position of authority against the creatives themselves. It is proposed that rather than an opt out option to right holders, it should be made an opt in and the CMOs should market their abilities in order to attract more membership.

[12] Section 88 (9) of the Copyright Act, 2022.

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- There is not more than one CMO approved to operate in the particular category of works concerned;
- The owners of copyright in such works have not by written notice to the CMO, opted out of collective management of their rights; and
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## **8. New Powers are granted to the Nigerian Copyright Commission**

The Act has increased the powers of the Nigerian Copyright Commission (NCC). Some of the new powers include:

- **Blocking of access to online content that infringes copyright<sup>[13]</sup>:**

Beyond the issuance of take down notices by copyright holders, the NCC can stop access to infringing content placed on online. Section 61 of the Act empowers the NCC to take direct action or seek assistance from other entities to restrict access to infringing content hosted on a system or network, regardless of other laws. While the Nigerian Copyright Act grants the NCC the power to block or disable access, the practical enforcement and implementation of this provision would depend on factors such as the NCC's resources, technical capabilities, and cooperation from internet service providers and other entities involved in hosting and providing access to online content. The effectiveness of enforcement may vary and would require appropriate mechanisms and procedures to be in place.

<sup>[13]</sup> Section 61 of the Copyright Act, 2022.

Comparatively, in the UK there are provisions under the Digital Economy Act 2017 that allow for the blocking of websites and online locations that facilitate copyright infringement. The blocking orders are obtained through court orders, and internet service providers are required to block access to specific websites or domains[14]. Similarly, in the US, copyright holders can seek relief through the Digital Millennium Copyright Act (DMCA) by submitting takedown notices to internet service providers, who may then disable access to infringing content. However, the blocking of websites or content in the US generally requires a court order.

- **Determination of remuneration for copyright holders and performers where the parties are unable to agree:**

As earlier stated, where songs are broadcast commercially, payment is to be made to performers and copyright owners. The NCC is empowered to determine how much should be paid where the user of the song, the owner and the performer cannot agree on a fee[15].

- **The NCC can grant compulsory licenses for the use of a work to rectify the abuse of a dominant market position or to promote public interest[16]:**

This is done where the NCC sees that a licensee has requested for a license on reasonable terms but has not been granted permission. The compulsory license is not exclusive, it is restricted to the domestic market and adequate remuneration must be paid to the licensor. Where a licensor is dissatisfied with the NCC's actions, the licensor is permitted to apply to the court for a review. This provision can assist in the breaking of monopolies in relation to content licensing for broadcasters.

- **The NCC can establish dispute resolution panels to resolve issues arising from royalty payments or licensing terms[17]:**

According to the Act, the dispute resolution panel shall consist of three individuals with expertise in copyright matters, with one of them designated as the chairman. Panel members are not to have any conflicts of interest regarding the matters they are required to determine. If a member of the panel is unable to continue during a proceeding, the panel remains valid with the remaining two members.

The NCC, with the approval of the Minister of Industry, Trade & Investment, is responsible for creating regulations that outline the procedure and operations of the panel. If a person is dissatisfied with the panel's decision, they have the option to apply to the Federal High Court for a review of the decision.[18]

[14] Section 23 of the Digital Economy Act 2017 United Kingdom.

[15] Section 15 (3) of the Copyright Act, 2022.

[16] Section 35 of the Copyright Act, 2022.

[17] Section 90 of the Copyright Act, 2022.

[18] Section 90 (2) – (6) of the Copyright Act, 2022.

The provision of this dispute resolution panel is of practical importance as it provides a specialized forum for resolving copyright-related disputes in Nigeria. The panel's composition, independence, and adherence to procedural regulations ensure a fair and impartial resolution process. However, the ultimate recourse for dissatisfied parties is to seek a review of the panel's decision through the Court.

## 9. New provisions for persons with disabilities

The old act allowed the copying of works in braille and sound recordings for the exclusive use of the visually impaired without the copyright owner's permission. The new Act expands the provisions by allowing for cross-border sharing of such works. All such uses must be non-profit[19].

The implementation of a new exception to accommodate the production and global transfer of specially adapted books for individuals with visual impairments or blindness is in accordance with the WIPO Marrakesh Treaty to facilitate access to published works for persons who are blind or visually impaired.

## 10. Increase in weight of sanctions and punishments under the new Act.

Under the old law punishment for offences such as infringement, piracy and non-compliance ranged between fines of N100,000 for individuals and N500,000 for companies at the maximum and imprisonment of not more than 12 months[20]. The new Act in line with current economic realities and to ensure stronger deterrence provides for sanctions ranging from N1,000,000 for individuals[21] and N2,000,000 for companies[22] at the maximum to imprisonment of up to 5 years. These sanctions are for offences such as infringement, piracy, non-compliance with provisions of the Act and circumvention of technological protections.

## 11. Amendments of some definitions and terms.

The Act replaced the word "Cinematograph works" which is contained in the old law, with "Audio-visual works"[23]. The definition of such works has been simplified to be the aggregate of a series of related visual images with or without sound, which is capable of being shown as a moving picture by means of a mechanical, electronic, or other device and irrespective of the nature of the material on which the visual images and sounds are carried and includes the soundtrack, but does not include a broadcast[24];

**The definition of "copy" has been expressly expanded to include a digital copy. This aids in further strengthening the intellectual property protection for digitized content such as music, videos, e-books, etc.**

[19] Section 26 (5) of the Copyright Act, 2022.

[20] Section 48 & 49 of the Copyright Act, 2022.

[21] Section 44 (7) of the Copyright Act, 2022.

[22] Section 73 & 76 of the Copyright Act, 2022.

[23] Section 2 (d) of the Copyright Act, 2022.

[24] Section 108 of the Copyright Act, 2022.

## 12. New exemptions to copyright protection for Software/ Computer Programs.

The new Act provides instances where the copying or adaptation of software is exempted from copyright control:

- Where it is necessary for use for the purpose it was gotten,
- For archival purpose or replacement if the original is unusable or lost,
- To activate a machine which lawfully contains an authorised copy of the computer program,
- For purposes of maintenance or repair only of that machine[25].

These exemptions can provide flexibility for software developers and users, allowing for the legitimate use and maintenance of software without infringing copyright. However, it also highlights the importance for software developers to clearly define and communicate the permissible uses and restrictions of their software to ensure compliance with copyright laws while balancing user needs and expectations.

## 13. Introduction of stronger Anti-piracy and technology protection measures.

Quite like the old law, the Act contains provisions for the criminalisation of unauthorised use or sale of anti-piracy devices. However, the Act has taken further steps:

- It criminalises any tampering with information which identifies ownership that is contained in a copyrighted work.
- It criminalises the use, importation, or sale of technology that tampers with any technology or device used to prevent the infringement of copyright.

The Copyright Act of 2022 now imposes stricter penalties for piracy-related offences compared to the old law. The new law increases fines and imprisonment terms for various piracy-related activities, such as selling copyrighted works unlawfully, importing or possessing piracy-related equipment without permission, and reproducing or counterfeiting anti-piracy devices. The Act also criminalizes the circumvention of technological protection measures (TPMs) for copyrighted works[26]. The legal protection of technological protection measures (TPMs) was adopted as required by the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). TPMs are mechanisms or technologies used to safeguard copyrighted content and prevent unauthorized access, use, copying, or distribution.

Examples of TPMs include digital rights management (DRM) systems, watermarking, access controls, region coding for DVDs and Blu-ray discs, anti-copying technologies, and secure encryption. These measures are intended to protect the rights of copyright holders by limiting unauthorized use and distribution of their works.

[25] Section 20 (2) of the Copyright Act, 2022.

[26] Section 49 & 50 of the Copyright Act, 2022.



However, the use of TPMs has sparked debates over potential limitations on fair use, access to content for individuals with disabilities, compatibility across devices and platforms, and innovation and creativity. It is still difficult to strike a compromise between copyright protection and rights to fair use and reasonable access.

#### **14. Expansion of restrictions on importation of infringing materials.**

The new Act enables copyright holders in audio-visual works and all copyright works to also utilise the Nigerian Customs Service in the prohibition of the importation of infringing materials[27]. It also delineates the procedure for dealing with such infringing materials between the NCC and the Nigerian Customs Service in section 53 of the Act.

#### **15. Provision of a list of items that are not protected by copyright.**

Where the old law left it to interpretation the sort of items or works that do not enjoy copyright protection, the new Act now expressly stipulates them. Section 3 of the Act provides that ideas, procedures, processes, systems, methods of operation, concepts, discoveries or mere data, official texts of a legislative or administrative nature, state symbols or insignia etc. are excluded from copyright protection[28].

This list is beneficial as it simplifies and makes clearer those kinds of works which are not eligible for copyright protection.

#### **16. Provision for implied non-exclusive license to use commissioned works.**

The Act provides that where a person for private and domestic purposes, commissions the creation of an artistic or audiovisual work, the commissioner is deemed to have a non-exclusive licence to exploit the commissioned work for non-commercial purposes; and is entitled to restrain the publication or distribution of the work to the public[29].

This provision is of import additionally from an image rights and data privacy perspective as most persons who request services such as photography, painting, or creation of audio-visual materials, have been left without remedy at the mercy of the service providers such as photographers and videographers who publish those works at will.

[27] Section 53 of the Copyright Act, 2022.

[28] Section 3 of the Copyright Act, 2022.

[29] Section 28 (3) of the Copyright Act, 2022.



# The Act's Effect on the Entertainment Industry

From the above provisions, the significant impact of the Act on Nollywood and our music industry is clear.

One of the key provisions as mentioned above is the implementation of a take-down mechanism and account suspension provision. This mechanism will allow copyright owners, such as film producers, song owners, artists etc. to swiftly address infringement and piracy issues by requesting service providers to remove infringing materials hosted on their platforms. The Act also contains fair hearing principles as the host can respond with evidence of their authorisation to post such content.

The timely removal of infringing content as enabled by the law will reduce the spread of unauthorized works online. Therefore, film producers who notice their films are illegally available for download or streaming can, directly or through legal representatives, issue the prescribed takedown notice to website and application hosts. They should also report the offending website for possible blocking/suspension by the NCC.

Also, performers such as actors, actresses, musicians etc. greatly benefit from the Act as it ensures that they receive due recognition and compensation for their creative contributions. Performers are now entitled to a share of the payments received by those responsible for fixing their performances for broadcast or public communication. Moreover, performers have the right to be credited for their performance and to object to any derogatory portrayal of their performance. These rights empower performers by protecting their artistic integrity and providing them with a stronger position in contractual negotiations. Now, even actors in minor or “wakapass” roles are emboldened to take legal action if their names do not appear in film credits.

In addition, the redefined ownership of copyright in music recordings clarifies that the person who arranges for the sound recording to be made (usually record producer/record label) is considered the author and initial owner of the copyright in a music recording, subject to any contractual agreements.

This revision aligns the law with industry practices, acknowledging the crucial role of record producers in the creation and production of music recordings. By providing clarity on ownership, this provision should reduce the incessant ownership claims prevalent in the music industry and enable smoother licensing and distribution processes, benefiting both record producers and artistes. **Recording artistes should note that voicing or performing written lyrics no longer gives them ownership rights to the recorded song unless there is a written contract to that effect.**

As well, the Act ensures fair remuneration for performing artists, record labels, and copyright owners. Performing artists and record labels are explicitly entitled to payment for the broadcast of sound recordings that have been commercially available. Broadcast companies are now required to provide equitable remuneration, with the revenue split equally between the performer and the copyright owner. This provision helps address longstanding issues of unfair compensation and supports the sustainability of the music industry. The Act recognizes the rights of copyright owners whose works are embedded in recordings, guaranteeing fair remuneration for songwriters and music composers.

# Conclusion

The new Act is a welcome development for all stakeholders in Nigeria's entertainment industry as it brings substantial benefits. This is a billion dollars industry that meets international needs and is becoming subject to such international standards. The provisions of the Act are expected to strengthen the entertainment industry's legal framework, fostering an equitable environment that supports the rights and interests of all stakeholders. For the newly introduced benefits to be fully realized, all enforcement procedures put in place must be fully utilised and the Nigerian Copyright Commission should be well-funded for this purpose.

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