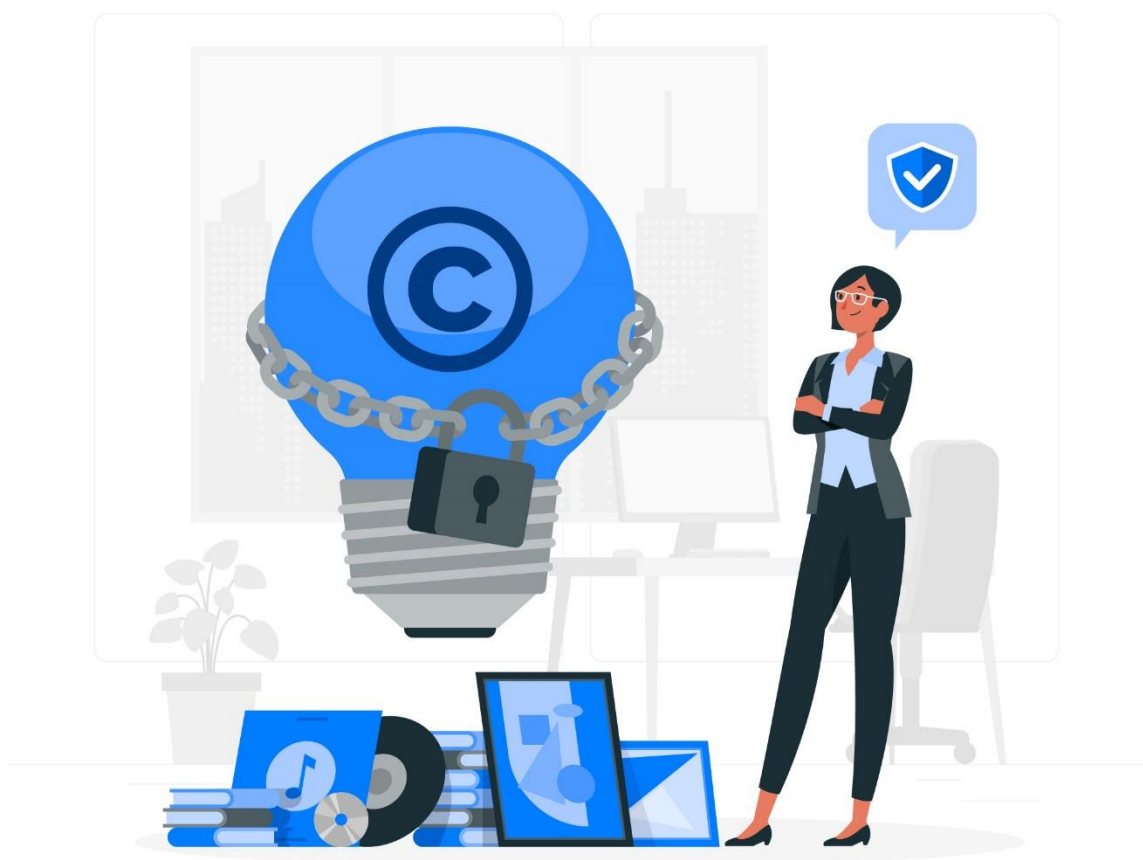


Copyright in Audiovisual Works and Performers' Rights in Nigeria: A clash rather than a connection?



1. Introduction

- 1.1. On March 17, 2023, the Copyright Act, 2022 (the “**Copyright Act**”) was enacted after the signing of the bill into law by President Muhammadu Buhari. The Copyright Act introduced a new category of work eligible for copyright; namely audiovisual works, which replaced the former category of cinematograph films under the repealed Copyright Act, 2004. While the protection of audiovisual works is applaudable, there exists some controversies on copyright in audiovisual works as it relates to performance and performers’ rights under the Copyright Act.
- 1.2. The Copyright Act does not expressly make clear on whom copyright or ownership in performed but unauthorized audiovisual works vest. What is however clear is that the Copyright Act sets minimum standards for protection of performers’ rights separate from copyright. This article analyses the connection and clashes between copyright in audiovisual works and performers’ rights, the limitations of copyright in audiovisual works *vis a vis* performers’ rights and the extent to which protection is afforded to performers under the Copyright Act.

2. Performers’ rights

- 2.1. Performers’ rights are intellectual property rights that performers have in relation to their performance which may exist in works protected by copyright. Performers’ rights are protected by the Copyright Act. Although they are separate from copyright, they are related to copyright and are viewed as neighboring rights.
- 2.2. The Copyright Act defines ‘performance’ to include “(a) dramatic performance, which includes dance and mime; (b) musical performance; and (c) reading or recitation of literary act or any similar presentation which is a live performance given by one or more individual”¹ and ‘performer’ 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 irrespective of whether the work was fixed or only fixed during performance.”² The Copyright Act uses the word “include(s)” in both definitions of performance and performer, hence, the aforementioned activities and persons cannot be regarded as exhaustive categories of performance and performers under the law.

3. Rights in Performed Audiovisual Works

- 3.1. The Copyright Act defines audiovisual works as “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 sound track, but does not include a broadcast.” This definition encompasses content creation as well as works with performance.
- 3.2. Ordinarily, copyright and ownership of an audiovisual work are vested in the creator of the work. The creator of the audiovisual work has the exclusive right to (a) reproduce, distribute, translate and make an adaptation of the work, (b) publicize the work, (c) make the work available to the public by wire or wireless, (d) broadcast the work and (e) make any copy of the sound track of the work.³

¹ Copyright Act, s. 63(2).

² Copyright Act, s. 63(3).

³ Copyright Act, s. 11.

- 3.3. Notwithstanding the foregoing rights that creators of audiovisual works have, an issue of ownership might arise in situations where an audiovisual work is based entirely or partially on the fixation of a performance not authorized by the performer. The Copyright Act does not expressly resolve issues of ownership over such audiovisual works; particularly claims on copyright by the performers where audiovisual works incorporating their performance are created without their consent. What is however not in doubt is that performers have rights in relation to their performance in audiovisual works. The extent to which such performers' rights can impede on or restrict on the rights of the creators of audiovisual works (supposed copyright owner), to a substantial range remains unclear.

4. **Connection and Clash Between Copyright in Audiovisual Works and Performers' Rights**

Audiovisual Works created without Performer's Consent

- 4.1. A performer has exclusive rights to (a) fixate his performance, (b) reproduce the fixation of his performance in any form, (c) distribute the fixation of his performance to the public for commercial purposes, (d) broadcast or communicate to the public his unfixed performance and (e) rent, lend or make available (either by wire or wireless means) to the public the fixation of his performance.⁴ If the fixation of a performance was done *via* audiovisual means, this would mean that the performer has exclusive rights to reproduce, distribute, publicize, lend or rent the audiovisual work containing his performance. These rights appear to run contrary to the rights of the creator of the audiovisual works whom the Copyright Act vest with exclusive rights over his audiovisual works. The Copyright Act vests "exclusive rights" on both copyright and performers' rights. The use of the word "exclusive" entails that both rights are separate rights. The question that follows is; to what extent can performers' rights and copyright in audiovisual works overlap?
- 4.2. First, it is what considering the provisions of section 2(4) of the Copyright Act which provides that "[a] work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involved an infringement of copyright in some other works." At first glance, this infers that copyright in a work is not extinguished by infringement of copyright in some other works, and as such, the creator of an audiovisual work can claim copyright in the work irrespective of the fact that the creation of the audiovisual work breached the performer's rights of a person. However, one may argue that the provision of section 2(4) of the Copyright Act is applicable to only works eligible for copyright and not performers' rights which are separate from copyright under the Copyright Act.
- 4.3. Further, the Copyright Act provides that if the original fixation of a performance was made without the performer's consent, the performer has the right to the reproduction of the fixation of his performance in any manner or form.⁵ The Copyright Act also provides that where a person, in the course of trade or business, has in his possession, custody or control, an unauthorized recording of a performance, the person having the performer's right or recording right in relation to the performance, is entitled to an order of the court that the recording be forfeited and

⁴ Copyright Act, s. 63(1).

⁵ Copyright Act, s. 63(1)(b)(i).

delivered up to him.⁶ A performer whose rights have been infringed can also claim damages, injunction, and account of profits or conversion.⁷

- 4.4. Interestingly, from the foregoing remedies available to a performer, it would appear that where an audiovisual work of a performance has been made without the consent of the performer, the performer may go as far as claiming conversion or delivery of the work to him.
- 4.5. Albeit performers' rights are not protected as works under the Copyright Act, performers' rights in loose and basis terms are synonymous and akin with copyright in audiovisual works given that the performers have the exclusive rights to fixate their performance, reproduce, publicize, distribute and/or lend the fixation of their performance incorporated in audiovisual works. Performers have rights that are similar to the underlying copyright in audiovisual works. To the extent that performers' rights are exclusive rights, there might be no copyright in audiovisual works except where the performance has been commissioned by the creator of the audiovisual work with the performer's consent.

Audiovisual Works created with Performer's Consent

- 4.6. Where a performer has authorized the fixation of his performance in an audiovisual work, in the absence of any agreement to the contrary, the performer is deemed to have granted the exclusive rights to the performance to the creator of the audiovisual work.⁸ Nonetheless, the performer retains moral rights to the performance, such as the right to be identified as the performer, and the right to object to or prevent any distortion, mutilation, modification or other fixation of his performance, as well as any other derogatory action in relation where such action will be or is prejudicial to the performer's honour or reputation.⁹
- 4.7. Further, by virtue of the Copyright Act, a performer is entitled to share in any payment received by the creator of the audiovisual work notwithstanding that he has consented or authorized the fixation of his performance in the audiovisual work.¹⁰ The Copyright Act does not stipulate the ratio or percentage that the performer is entitled to in such a circumstance. Also, the Copyright Act seems to suggest that a performer who has been commissioned or paid for his services from the onset, can proceed to claim a share in the profits of the audiovisual work. The provisions of the Copyright Act regarding performers' entitlement to payment for the commercialization of works with their performance create some sort of ambiguity and it is imperative for the same to be resolved by contract with express provisions stating the performers' entitlements and non-entitlements.

5. Conclusion

- 5.1. It is noteworthy that ownership in performed audiovisual works may be determined by contract or agreement between creators of the work and the performers. The contract may specify whom copyright in the audiovisual work vest as well as the rights, compensation and entitlements of the performer(s). A performer's moral rights are however not negotiable nor transmissible by

⁶ Copyright Act, s. 72(2).

⁷ Copyright Act, s. 72(1).

⁸ Copyright Act, s. 69(2).

⁹ Copyright Act, s. 66(1).

¹⁰ Copyright Act, s. 69(3).

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