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Key Highlights of the Copyright Act 2022

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Introduction

On Friday, March 17th, 2023, the President of the Federal Republic of Nigeria signed the Copyright repeal and re-enactment Bill (the "Bill"), which is now the Copyright Act, 2022 (the "Act"). The Act contains ample and innovative provisions that address modern-day realities, technological advancements, and international best practices, including the need to ensure Nigeria's compliance with obligations arising from relevant international copyright treaties and conventions.

The Act aims to protect the rights of authors to ensure appropriate rewards and recognition for their intellectual efforts; provide appropriate limitations and exceptions to guarantee access to creative works; facilitate Nigeria's compliance with obligations arising from relevant international copyright treaties and conventions; and enhance the capacity of the Nigerian Copyright Commission ("NCC" or the "Commission") for effective regulation, administration, and enforcement of the provisions of the Act[1]. The Act consists of twelve (12) parts and is divided into 109 sections and a schedule on supplementary provisions relating to the Governing Board of the Commission.

The purpose of this review is to highlight the notable changes introduced in the Act.

Key Highlights of the Act

1. Online Contents

One of shortcomings of the repealed Copyright Act was the absence of express provisions related to works on the internet. The Act contains detailed provisions aimed at protecting works in the digital space. It redefines the term "Copy"[2] to include a reproduction in any form, including digital copies. This definition therefore expressly brings all forms of reproduction within the purview of the Act, whereas the repealed Copyright Act had a restricted definition of "Copy".

Further, the Act replaced the term "cinematograph films"," which is one of the categories of works established under Section 1(1)(d) of the repealed Copyright Act, with the term "audio-visual work,"[3] which has a broader meaning and can be extended to the digital space.

2. Notice to Take Down Infringing Content

This innovative provision in the Act enables a copyright owner to request a service provider to take down infringing content or disable access to any link to infringing content hosted on its system or network. For the notice to be effective, it must:

i. be in writing and contain the signature of the person;
ii. identify the work claimed to be infringed, the infringing material and information necessary to permit the service provider to locate the infringing material;
iii. contain sufficient information for the service provider to contact the complaining party; and
iv. contain an affidavit stating that the complainant believes that the use of the material was not authorised by the owner, agent, or law; as well as a statement that the information in the notice is accurate, and that the complainant (if not the owner) is authorised to act on behalf of the owner[4].

[1] Section 1 of the Copyright Act, 2022.
[2] See the definition of "Copy" under Section 108 of the Copyright Act, 2022 c/f "Copy" under Section 51 of the repealed legislation.
[3] Section 2(1) of the Copyright Act, 2022.
[4] Section 54 (1) – (2) of the Copyright Act, 2022.

The service provider upon receiving the notice of infringement, is required to promptly notify the subscriber(s) responsible for the infringing content, and expeditiously take down or disable access to the infringing content. Thereafter, the service provider must notify the copyright owner[5].

In our view, the subscriber should be allowed some time to react to the notice prior to the initial takedown or restriction by the service provider.[6]

The Act further provides that the takedown or restriction may be restored by the service provider if they receive a counter notice from the subscriber, which must be forwarded to the copyright owner. If the owner fails to respond within 7 days of receipt of the counter notice indicating that the subscriber was not authorised to publish the content, the service provider is required to ensure that the content taken down is not reloaded onto the system in the future.[7]

The Act stipulates that in cases of repeated infringements by the same subscriber, the service provider may send a warning notice to the subscriber and subsequently suspend the subscriber's account.[8] The Act also excludes the service provider from liability for actions taken pursuant to the Act, to the extent that failure to comply with section 55 (1) and (2) (which relates to taking down of infringing content) will be considered to be a breach of statutory duty and infringement in equal terms as the subscriber.[9]

A person dissatisfied with a determination or action of a service provider, or the copyright owner may refer the matter to the Commission for determination. The Commission is empowered to block or disable access to any content, link or website hosted on a system or network which it reasonably believes infringes on a work of copyright owner.[10]

3. Circumvention of Technological Protection Measures

This is an entirely new provision introduced for the protection of copyright work in Nigeria. Section 50 of the Act prohibits:

a. The circumvention[11] of a technological protection measure[12] that effectively protects a work;
b. The dealing in a technology, product, service, device, or part that is primarily designed for the purpose of circumventing protection afforded by a technological measure that effectively protects a work; or has only limited significant purpose save to circumvent protection afforded by a technological measure protecting a work;
c. The manufacture, import, sell, or providing access to a product/device that is designed for the purpose of circumventing measures that protect works of copyright.

[5] Section 55(1) of the Copyright Act, 2022.
[6] This was adequately provided for in the Bill sponsored by Senator Mukhail Adetokunbo Abiru which stipulates that the subscriber has 48 hours to provide justifications for the publication for the content before the takedown or restriction of access to the infringing content.
[7] Section 55(2) and (3) of the Copyright Act, 2022.
[8] Section 56 of the Copyright Act, 2022.
[9] Section 55(5) and (6), and 56(3) of the Copyright Act, 2022.
[10] Section 61 of the Copyright Act, 2022.
[11] "Circumvent a technological protection measure" means avoiding, bypassing, removing, deactivating, decrypting or otherwise impairing a technological measure.
[12] A technological measure effectively protects a work under this Act if the measure, in the ordinary course of its operation, prevents or restricts acts in respect of the works, which are not authorized by the authors concerned or permitted by law.

Exceptions

I. The Act excludes from liability, a non-profit library, archive, or educational institution that gains access to a commercially exploited copyright work for the purpose of determining whether to acquire a copy of that work in order to engage in a conduct permitted under the Act: provided that it shall not retain the work for a time longer than necessary to make that determination; and not use it for any other purpose. This exception will only apply to a work when an identical copy of that work is not available in another form.[13]

II. A person that has obtained the right to use a copy of a computer program may circumvent a technological measure that controls access to a particular portion of that program for the sole purpose of identifying and analysing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, or that have previously been readily available to the person engaging in the circumvention so long as same does not constitute an infringement.[14]

III. The section does not affect any lawful authorised investigation, protection, information security, intelligence activity, or computer security measures.

IV. The section does not affect the exercise of any exception in the Act which relates to the work in respect of which the technological protection measure is applied[15]; and the general exceptions provided in Part II of the Act[16].

Nigeria is a signatory to the WIPO Copyright Treaty, 1996 ("WIPO Treaty") which, amongst others, provides remedies against the circumvention of technological measures which protect copyright works. The WIPO Treaty mandates contracting parties to provide adequate protection and effective legal remedies against the circumvention of effective technological protection measures.[17].

4. Moral Rights

Under the repealed Copyright Act, moral rights are perpetual, inalienable, and imprescriptible[18]. However, the Act altered the provisions relating to moral rights by including in section 14(3) that moral rights shall not be transmissible during the lifetime of the author, but upon his death, be transmissible by testamentary disposition or by operation of law. Further, it provides that moral rights subsist for the duration of the copyright[19].

It is interesting to note the addition of the right to object or reject a false attribution to a moral right or right of authorship in a work.[20]

5. Criminal Liability

The Act increased the penal sums under the repealed Copyright Act to meet the current economic realities. For instance, under the repealed Copyright Act, the monetary liability for anyone that

[13] Section 50(4) and (5) of the Copyright Act, 2022.
[14] Section 50(9). Interoperability is the ability of computer programs to exchange information and mutually use the information, which has been exchanged.
[15] Section 50(7) of the Copyright Act, 2022.
[16] Part II contain the general exceptions to Copyright, in Sections 20 - 27 of the Act.
[17] Section 50 of the Copyright Act, 2022.
[18] Section 12(2) of the repealed Copyright Act.
[19] Section 14(4) of the Copyright Act, 2022.
[20] Section 14(2) of the Copyright Act, 2022.

makes, causes to be made or has in his possession any material for the purpose of making any infringing copy of a work in which copyright subsists, was a sum not exceeding **₦1,000**, it has now been increased to at least **₦10,000** for every such copy[21]. In addition, the liability for selling, distributing or causing to be sold or distributed any infringing copy of a copyright work was a meagre sum of **₦**100 for every such copy distributed, whereas this has been increased to **at least ₦10,000** and **₦1,000** for every such copy sold and distributed respectively.[22] The Act also revised/increased the terms of imprisonment for acts of copyright infringement under the repealed Copyright Act to serve as a deterrent to infringers.

Further, the Act introduced a new provision, which stipulates that a person who, without the consent of the copyright owner, communicates to the public or makes a work available to the public by wire, wireless, or online means in such a way that the public is able to access same at a time individually chosen by them for commercial purposes, commits an offence and is liable on conviction to at least a term of 5 years imprisonment or a fine of at least **₦1,000,000** or both.[23] In addition to the foregoing, the Act empowers the Commission to compound any offence by accepting such money as it deems fit in the circumstance, which does not exceed double the minimum fine to which the offender would have been liable if he had been convicted of the offence.[24]

It is our view that this provision seems to empower the Commission to mediate over offences under the Act with the aim of speedy and agreeable settlement of disputes.

6. Commencement of Copyright

Previously, it was not expressly stated in the Act that a work qualifies for copyright protection upon creation. The Act has now made express provisions stipulating that "Eligibility for copyright under this Act shall not require any formality"[25] and "Copyright shall commence when the work is created or made".[26]

Prior to the advent of the current Act, the absence of a clear provision on the registrability of works left practitioners and the courts in a state of quagmire. For instance, in the case of *Paul Allen Oche v. Nigerian Breweries Plc & 3 Ors.*,[27] the Federal High Court sitting in Abuja, Per Justice Binta F.M. Nyako held that the registration of a copyright is what confers locus standi on a plaintiff to institute an action for copyright infringement and that to claim copyright protection, the relevant work must be registered. However, in the case of *Zain Nigeria v. TV Xtra Productions Ltd & Anor.,* [28] the Court of Appeal Per Mohammed Mustapha, JCA held that "nothing compels the Appellant or anyone to register their work because there is no compulsion in registration of copyrights."

The position has now been settled statutorily, as the Act provides that copyright works shall not require any formality or registration, and where an author applies to deposit a copyright work with the NCC[29], the deposition of same will not confer copyright in the work. In practice, however, it is advisable for copyright owners to take part in the NCC voluntary notification, as this will present an added advantage.

[21] Section 44(1) of the Copyright Act 2022.
[22] Section 20(1) (2) and (3) of the repealed Act, and 44 (1) to (4) of the Copyright Act 2022.
[23] Section 44 (7) of the Copyright Act, 2022.
[24] Section 44(9) of the Copyright Act, 2022.
[25] Section 4 of the Copyright Act, 2022.
[26] Section 18 of the Copyright Act, 2022.
[27] Unreported Suit No.: FHC/ABJ/CS/145/ 2019.
[28] (2021) LPELR -53534 (CA) at pp. 29 – 33, paras C- B.
[29] Sections 4 and 87(3) of the Copyright Act, 2022.

These provisions are commendable as they reinstate the well-known status of copyright protection, which is automatic without the requirement for registration in many jurisdictions.

7. The Nature of Protection of Literary, Artistic and Musical Works

In the repealed Copyright Act, "sufficient" efforts must be expended by a copyright owner making a work to give it an original character for copyright to subsist in any literary, artistic or musical work, in addition to being expressed in a fixed medium.[30] However, under the Act, this position was altered so that the author now only needs to exert "some" efforts in making the work for originality, in addition to being expressed in a fixed medium[31]. It was provided further that any work that meets these requirements shall be eligible for copyright protection notwithstanding the quality of the work or the purpose for which same was created[32].

It is our view that this altered provision may likely lead to increased infringement and plagiarism due to the seemingly reduced originality requirement for copyright protection.

A novel provision has also been included, which stipulates that a work will be ineligible for copyright if, at the time the work was made, it is intended by the author to be used as an industrial design.[33]

We note the error in the Act on the reference to "pattern designs" as against the "Patents and Designs Act."

8. Matters Ineligible for Copyright

Prior to the repealed Copyright Act, it was generally understood that copyright cannot be claimed in respect of subjects such as ideas, procedures, official texts of government, etc. However, there was no express provision under the repealed Copyright Act excluding these matters from copyright protection. The Act now expressly provides that these matters, amongst others such as concepts, principles, discoveries, mere data, official state symbols and insignia, processes, and formats, etc. are not eligible for copyright[34].

9. The Defence of Fair Dealing

Though the Act made provisions for fair dealing as a defence to copyright infringement, under the repealed Copyright Act, it failed in specifying the factors to be considered in determining whether the use of a work in any particular case would amount to "fair dealing". The Act now makes provisions to fill this lacuna. Specifically, the Act provides that the factors to be considered in deciding whether the use is "fair or not" shall include the purpose and character of its usage; the nature of the work; amount and substantiality of the portion used in relation to the work as a whole; and the effect of the use upon the potential market or value of the work[35].

We note that previously, whilst interpreting what would amount to fair dealing, references had to be made to decisions of the court including foreign case law, and sometimes foreign statutes, such as the United States Copyright Law. This has now been statutorily recognised by the Act.

[30] Section 2(1) of the repealed Copyright Act.
[31] Section 2(2) of the Copyright Act 2022.
[32] Subsection 3, ibid
[33] Section 2(6) of the Copyright Act, 2022.
[34] Section 3 of the Copyright Act, 2022.
[35] Section 20(1) of the Copyright Act, 2022.

10. Access to Works by Disabled Persons

In compliance with international copyright treaties, and perhaps to give effect to the contents of the *Marrakesh Treaty*, the Act makes provisions permitting the reproduction of a literary and artistic work in which copyright subsists in a form accessible to print by the blind and visually impaired[36]. Interestingly, the reproduction is permitted to be done by the authorised entity without consent of the copyright owner.

It is our view that this provision offers an exception/limitation to acts that would otherwise constitute copyright infringement in addition to those under the repealed Copyright Act and would foster more social inclusion for the blind or visually impaired.

11. Provisions on Performers' Rights

The Act overhauls the provisions relating to performers' right and makes extensive provisions intended to protect performers, including their right to adequate remuneration[37]. Under the Act, a performer now has the exclusive right to control, in relation to his performance: the fixation of his unfixed performance; and the reproduction of a fixation of his performance in any manner or form. [38]

Performers under the Act also have the right to broadcast or communicate to the public the performance; control the rentals and communication to the public of fixation of the performance. Further, performers have the right to share in the proceeds of a fixation of audio-visual work in respect of a broadcast or communication to the public of the same.

Interestingly, the Act confers moral rights on a performer in respect of performances and provides that same shall be transmissible during the lifetime of a performer but upon the death of the performer , by testamentary disposition or by operation of law[39]. The Act also provides that moral rights shall subsist for the duration of the performer's right.

We note that under the repealed Copyright Act, moral rights were not extended to performers. We also note that the Act has excluded the umbrella provision themed neighbouring rights, which included performers' right and rights to folklore.

12. Collective Management Organizations

Under the repealed Copyright Act, this is termed as "Collecting Society" and in the current Act as "Collective Management Organizations ("CMO")". The Act provides that a CMO may be formed in respect of any one or more rights of copyright owners for the benefit of such owners, and the CMO may apply to the Commission for approval to operate as a CMO[40].

We note that an innovation in this regard under the Act is the recognition of performers as one of the owners of copyright who may be represented by a CMO in Nigeria[41]. It is also

[36] Section 26 of the Copyright Act, 2022.
[37] See Part VIII of the Copyright Act. Section 63 (3) define "performer" to include actors, singers, musicians, dancers and other person, who act, sing, deliver, disclaim, 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 the performance.
[38] Section 63(1) of of the Copyright Act, 2022.
[39] Section 66 of the Copyright Act, 2022.
[40] Section 88 of the Copyright Act, 2022.
[41] Section 88(7) of the Copyright Act, 2022.

explicitly provided in the Act that the Commission shall not approve any other CMO if there exists any approved CMO that adequately protects the interests of the copyright owners of that same category.[42] **The Act also seems to categorically bring the control and supervision of CMOs under the Commission in order to cure the current issues surrounding approval, operations, and existence of CMOs in Nigeria.**

Further, the Act increased the criminal sanctions for acting as a CMO without the approval of the NCC. Specifically, the Act increased the fine from ₦1,000 (first conviction, and ₦2,000 for subsequent convictions) to **₦1,000,000**[43]; and from a term of imprisonment not exceeding 6 months to a term not less than **3 years** for contravention by an individual person. For contravention by corporations, the Act increased the fine to **₦5,000,000**[44] from the previous ₦10,000 - on the first conviction and ₦2,000 for each day on which the offence continues.

The Act also stipulates that a CMO may issue licenses permitting the use of works of copyright owners who are not members of the CMO under some special circumstances provided in the Act.[45]

13. Remuneration for Broadcast of Works

The Act provides that where a broadcast organisation broadcasts an audio-visual work which incorporates a literary, musical or artistic work with the authorisation of the owner of the copyright in the audio-visual work, the owner of the copyright in the literary, musical, or artistic work shall be taken to have authorised the broadcast in the absence of any express agreement to the contrary, and subject to the payment of fair compensation by the broadcasting organisation.[46] Further, in the absence of an agreement on the compensation payable, the sum shall be determined by the NCC[47].

The Act also provides that the owner of sound recording, and the performer shall be entitled to remuneration where that work is broadcasted for commercial purpose.[48] The remuneration is payable by the person who uses the sound recording or copies thereof, and the amount payable shall be as agreed by the user, the owner and the performer or their representatives, failure of which the NCC shall determine same.[49]

Further, the Act provides that where remuneration is to be received on behalf of a performer and the copyright owner in the sound recording by more than one CMO, the CMO concerned shall agree on which of them shall collect such remuneration on their behalf, failing which the NCC will intervene and decide the receiver.[50]

We note that under the repealed Copyright Act such determination was left to the Court.

14. First Ownership of Copyright

The Act provides that copyright initially vests in the author of the work, except there exists an agreement to the contrary.[51] It further provides that, where a person for private and domestic

[42] Section 88(3) of the Copyright Act, 2022.
[43] Section 88(5)(a) of the Copyright Act, 2022.
[44] Section 88(5)(b) of the Copyright Act, 2022.
[45] Section 88(9) of the Copyright Act, 2022.
[46] Section 16 of the Copyright Act, 2022.
[47] Section 16(1)(2) & (3) of the Copyright Act, 2022.
[48] Section 15 of the Copyright Act, 2022.
[49] Section 15(2)(3) &(4) of the Copyright Act, 2022.
[50] See Section 15(5) of the Copyright Act, 2022.
[51] Section 28(1) of the Copyright Act, 2022.

purposes and subject to any agreement between the parties, commissions the taking of a photograph or the painting or drawing of a portrait or the making of an audio-visual work, the person shall be deemed to have the non-exclusive license to exploit the work for non-commercial purposes, and also be entitled to restrain the publication, exhibition, broadcasting, communication or distribution of the work to the public.[52] The section also provides for commissioned works under contract of service or employment by a government department, internationals or inter-state government etc., that the copyright in the work shall vest in the employer, government, etc., except by agreement to the contrary.[53]

The Act recognises collective works and provides that copyright in these categories of works shall vest in the person on whose initiative or direction the work was created. It also stipulates that the authors of the works incorporated in a collective work shall have the right to exploit their works independent of the right in the collective work.[54]

15. Administration of Copyright

a. **Appointment and Qualification of the Director-General (DG) of the NCC:** Under the repealed Copyright Act, there was no requirement (qualification) for appointment of the DG of the NCC. The repealed Copyright Act simply provided that the DG shall be appointed by the President on the recommendation of the Minister.

   Under the current Act, the DG is now required to be a person with proven knowledge of copyright, with at least 15 years' cognate experience in copyright practice and administration.[55]

b. **Functions of the NCC:** One of the key functions of the NCC under the repealed Copyright Act was its responsibility to monitor and supervise Nigeria's position in relation to international conventions and to advise the government thereon[56].

   Under the Act, this responsibility has been amended to "monitor and advise government on Nigeria's position in relation to bilateral and multilateral agreements between Nigeria and any other country."[57].

c. **Authority to Make Regulations:** Under the repealed Copyright Act, the authority to make regulations lies with the Minister of Culture[58].

   This has changed under the current Act to "Minister of Justice" [59]. The necessary implication of the amendment is that the Ministry of Justice, headed by the Attorney-General of the Federation, is now empowered to make regulations for copyright.

d. **Constitution of the Board of the NCC:** The Act slightly adjusted the constitution of the board of the NCC by removing the requirement to have one representative of the Ministry of Education on the board and replacing same with a representative from the Ministry of

[52] Section 28(3) of the Copyright Act, 2022.
[53] Section 28(2) of the Copyright Act, 2022.
[54] Section 29 of the Copyright Act, 2022.
[55] Section 36(1) & (2) of the repealed Copyright Act c/f Section 83(1)(2) of the Copyright Act, 2022.
[56] Section 34(3)(a) of the repealed Copyright Act.
[57] Section 78(1)(b) of the Copyright Act, 2022.
[58] "Minister" under the repealed legislation was defined to mean the Minister of Culture.
[59] See definition of "Minister" under Section 108 of the Act

Culture[60]. The Act also makes provisions for tenure in office, cessation and removal of the Chairman of the board and its members[61].

Conclusion

The Copyright Act, 2022 sufficiently mirrors international best practices and contains innovative provisions that cater for today's intellectual property needs, especially in the face of various technological advancements, the internet, and the increasing potential for copyright infringement. If properly implemented, the Act will adequately ensure the protection of the copyright of innovative and creative Nigerians.

[60] Section 35 of the repealed legislation c/f Section 79(1) of the Act.
[61] Section 80-82 of the Act.

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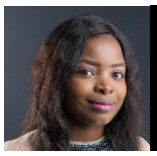

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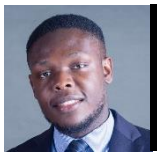

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