

NIGERIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Nigeria be placed on the Watch List in 2023.¹

Executive Summary: As sub-Saharan Africa's largest economy, Nigeria is a critical market for the copyright industries, which have made significant investments in the creation and distribution of creative content in the country. The substantial increase in the accessibility of high-speed Internet and mobile devices in Nigeria has created opportunities; unfortunately, in the absence of an effective copyright legal and enforcement regime, Nigeria has experienced a growing online piracy problem. The increasing number of websites that make movies and music available for illegal digital downloads continues to ravage the country's creative sector, undermining revenues from legitimate channels, including streaming platforms (e.g., Netflix, Showmax, and Prime Video) and movie theaters, for disseminating licensed content. To address its online piracy problem, Nigeria needs to upgrade its legal and enforcement frameworks to provide adequate and effective protection and enforcement online. Nigeria ratified the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) in 2017, but it has not yet fully implemented the treaties. A copyright bill (CB) that passed the National Assembly in 2022 includes several positive aspects, including improvements to Nigeria's enforcement framework, but these are undercut by certain problematic provisions that should be revised for Nigeria to fully implement the WIPO Internet Treaties and meet global minimum standards and evolving global norms for copyright protection and enforcement in the digital environment. In addition, Nigeria's government should increase resources for enforcement against online piracy and take more enforcement actions. The Government of Nigeria should also reinstate the operating license of the Copyright Society of Nigeria (COSON), the collective management organization (CMO) mandated by international music rights holders to administer broadcasting and public performance rights, and ensure CMOs are owned or controlled by their member rights holders and are non-profit organizations.

PRIORITY ACTIONS REQUESTED IN 2023

- Make revisions to the few, but important, remaining elements of the CB that require updating to ensure Nigeria fully implements the WIPO Internet Treaties and meets its international obligations and evolving global norms, in particular by: extending Nigeria's term of protection for works and sound recordings in line with the international standard of 70 years from fixation or publication (and the same for juridical entities), and, for works, to the life of the author(s) plus 70 years; withdrawing the overbroad extended collective licensing provision; withdrawing the overbroad compulsory license for uses in the public interest; and amending the unclear open-ended fair dealing exception to maintain the closed list of specific fair dealing exceptions.
- Provide more resources, including critical resources such as electricity and Internet access, for the Nigeria Copyright Commission (NCC) online enforcement unit to adequately engage in and sustain efforts to combat piracy in the country.
- Increase investigations and take action against online piracy services that are harming the creative industries.
- Raise awareness among Internet service providers (ISPs) around effective policies to prevent piracy, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.
- Reinstate the operating license of COSON (subject to a satisfactory audit to ensure appropriate good governance and operational practice) and ensure that CMOs are owned or controlled by their member rights holders and are non-profit organizations.

¹ For more details on Nigeria's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

THE COPYRIGHT MARKETPLACE AND ENFORCEMENT IN NIGERIA

Nigeria's vibrant film and music industries are critical to its economy.² Nigeria's Minister of Information and Culture, Lai Mohammed, recently summarized the conclusion of an Afreximbank report that the creative industry "is a resource which is limitless, renewable, and can easily create wealth and jobs."³ He further stated, "When you look at the development of the creative industry in Africa today you will realize that we are sitting on a goldmine."⁴

Unfortunately, pervasive piracy remains a significant obstacle for Nigerian authors and artists, who, as a result, struggle to receive any compensation for their works.⁵ In 2019, the NCC disclosed that the country loses approximately \$3 million yearly to digital piracy.⁶ According to the World Bank, nine out of every ten films sold in Nigeria are pirated copies.⁷ Nigeria is a hub for music copyright piracy (and other forms of cybercrime) with its international reach undermining legitimate music markets across Africa, Latin America, and even in Europe. Illustrating the problem, a Nigerian actor commenting on the decline of that country's Hausa language film industry (known as "Kannywood") pointed to piracy, stating that "[w]e are all not happy and surely, piracy was what destroyed us."⁸ In its report on Africa, the U.S. International Trade Commission (ITC) found that piracy "remains the largest threat" to the film industry in Nigeria, citing to a 2014 NCC report that estimated that Nigeria lost over \$1 billion annually to film piracy.⁹ Particularly as Nigeria looks to recover from economic damage caused by the pandemic, stronger copyright protection and enforcement are needed to support the country's burgeoning creative sector.¹⁰

A large number of Nigeria-based individuals operate advertising-funded piracy websites. These individuals use mainly foreign based, but also some regional, web hosting services to distribute links to infringing content, including pre-release and other high value content. Social media is used to further drive traffic to these sites, thereby increasing revenue derived from advertising. Site operators use a mix of pop-under and in-situ advertisements to generate revenue based on site traffic and advertisement clicks. Unlike in most other countries, site operators do little to hide their identities and contact information. Many of these sites fail to remove infringing content upon notification by rights holders. For music and audiovisual piracy, the unauthorized content includes a mix of domestic and international content. Such sites are very popular within Nigeria but also, in many cases, regionally and beyond, hampering not only the development of the local music, film, and television industries but also polluting other markets.

The growing number of these websites undermine legitimate channels for licensed content, including streaming video-on-demand (SVOD) (e.g., Netflix, Showmax and Prime Video) and movie theaters. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2022 (MCS) found that the music piracy rate in Nigeria was the highest in any of the 22 countries included in the study. Across a nationally representative sample of 16-44-year-olds, 88% of respondents said that they had used unlicensed means to obtain music in the previous month, nearly three times the global average of 30%. Nearly all of these music pirates used illegal stream-ripping sites and apps to download music content, mainly on mobile devices (the most common way of accessing the

² Universal Music has launched a division in Nigeria, and Netflix has increased its investment in Nigeria as well as other key markets in Sub-Saharan Africa. See Richard Smirke, "Universal Music Grows African Presence With Launch Of Nigeria Division," July 17, 2018, Billboard, <https://www.billboard.com/articles/business/8465836/universal-music-nigeria-western-africa-ezegozie-eze>; and Christopher Vourlias, "Netflix's Head of African Originals Lays Out Streamer's Plans for the Continent (EXCLUSIVE)," Feb. 28, 2020, Variety, <https://variety.com/2020/digital/news/netflix-head-african-originals-lays-out-plans-for-continent-1203518648/>.

³ See James Ojo "Lai: Creative industry is Africa's only hope from economic woes," June 21, 2022 TheCable Lifestyle, <https://lifestyle.thecable.ng/lai-creative-industry-is-africas-only-hope-from-economic-woes/>.

⁴ See id.

⁵ See, e.g., "Nigeria: Piracy Is Endangering Kannywood Industry – Uzee," March 7, 2021, Leadership (Abuja), <https://allafrica.com/stories/202103100305.html> and Dionne Searcey, "Nigeria's Afrobeats Music Scene is Booming, but Profits Go to Pirates," June 3, 2017, NY Times, <https://www.nytimes.com/2017/06/03/world/africa/nigeria-lagos-afrobeats-music-piracy-seyi-shay.html>.

⁶ NCC: Nigeria Loses \$3bn Annually to Piracy <https://www.thisdaylive.com/index.php/2019/04/26/ncc-nigeria-loses-3bn-annually-to-piracy/>.

⁷ Nigeria's film industry: A potential gold mine <https://www.un.org/africarenewal/magazine/may-2013/nigeria%E2%80%99s-film-industry-potential-gold-mine>.

⁸ See, Mohammed Lere, "Nigeria: Kannywood is on the Brink of Collapse – Actor," June 24, 2019, Premium Times, <https://allafrica.com/stories/201906240774.html>.

⁹ U.S. International Trade Commission, U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments, Investigation Number 332-571, 186, available at <https://www.usitc.gov/publications/332/pub5043.pdf>.

¹⁰ See Samuel Andrews, "Netflix Naija: creative freedom in Nigeria's emerging digital space?," March 19, 2020, The Conversation, <https://theconversation.com/netflix-naija-creative-freedom-in-nigerias-emerging-digital-space-133252>. See also Joseph Onyekwere, "Nigeria: Outdated Laws, Bane of Nigeria's Creative Industry, Says Idigbe," May 15, 2018, The Guardian, <https://allafrica.com/stories/201805150315.html>.

Internet in Nigeria). In addition, 27% of respondents downloaded pirated music from cyberlockers and 25% from BitTorrent sites. The most popular stream-ripping site was *Y2mate.com*, visited by 19% of all Internet users. SimilarWeb reported that the site was the 109th most visited web site of any kind in Nigeria in Q2 2022 with over 1.3m visits.

MP3 download sites focused on pirating local music are a major issue in Nigeria. IFPI's MCS found that more than half (54%) of all Internet users visited *TheNetNaija.net* to download music. The audiovisual industry also reports significant concerns with downloads of film and television content from the site and, according to SimilarWeb, *TheNetNaija.net* attracted 30.87 million global visits in December 2022 and is the 11th most popular site in Nigeria. According to the MCS, 43% of Internet users downloaded pirated music from *trendybeatz.com* (the 38th most popular site in the country) and 39% from *justnaija.com* (the 93rd most popular site). By providing free pirated downloads of MP3s, these sites harm primarily domestic and African artists and restrict the growth of the local music industry.

There is no formal framework for cooperation between ISPs and rights holders in Nigeria. The NCC issued a guideline for the Provision of Internet Services, which mandates ISPs to ensure that users are informed of any statements of cybercrime prevention or acceptable Internet use published by the Commission or any other authority, and that failure to comply with these acceptable use requirements may lead to criminal prosecution, including for violations of intellectual property rights (IPR).¹¹ The Government of Nigeria should raise awareness among ISPs around effective policies to prevent piracy, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.

Enforcement: Nigeria has taken some positive steps recently to address its piracy problems, including several administrative enforcement actions undertaken by the NCC.¹² In August 2022, the NCC signed a memorandum of understanding (MOU) with the Federal Airport Authority of Nigeria to curb hard goods piracy.¹³ In addition, the government recently developed a National Intellectual Property Policy that aims to, *inter alia*, drive training, education, and awareness and strengthen institutional frameworks for administration, management, and enforcement of IPR.¹⁴

Nevertheless, more must be done by law enforcement, local registry and registrars, and ISPs to shut down pirate online services.¹⁵ Several enforcement deficiencies and limitations negatively impact intellectual property (IP) protection and enforcement in Nigeria, including:

- high levels of corruption;
- bureaucracy within government agencies—including Nigerian police, IP registries, and other related agencies—that impedes access to justice and undermines protection of IPR by obstructing rights holders' ability to make criminal complaints against piracy and other forms of infringement or to seek to protect their IPRs;
- protracted litigation and case backlog in courts that impede speedy access to justice and non-deterrent outcomes, all of which create little disincentive against piracy, enabling locally operated pirate sites to thrive and proliferate;
- insufficient technical capacity of IPR officials;
- lack of funding for IPR Registries in the country, resulting in an ineffective IPR protection system; and
- poor utilization of technology by the IPR Registries leading to inefficient administrative systems.

¹¹ See <https://www.ncc.gov.ng/docman-main/legal-regulatory/guidelines/62-guidelines-for-the-provision-of-internet-service/file>.

¹² For example, in October 2022 the NCC seized 1,600 copies of pirated books worth over N2 million from four bookshops in the Federal Capital Territory, FCT, Abuja. In September 2022, the NCC conducted an anti-piracy action against a digital television station, Real Summit Television, for allegedly intercepting and stealing the program contents of other digital Satellite transmitting stations like DSTV and StarTimes, impounding illegal digital cable networks worth N250 million. See "NCC impounds illegal digital cable network worth N250m in Enugu," <https://www.vanguardngr.com/2022/09/ncc-impounds-illegal-digital-cable-network-worth-n250m-in-enugu/>. Furthermore, a recent Court of Appeals decision, *Ugochukwu v. Nigerian Copyright Commission (2022) LPELR-57970(CA)*, interpreted the Copyright Act to permit Copyright Inspectors to enter premises and recover evidence without a court order.

¹³ See <https://www.worldstagenews.com/2022/08/10/nigeria-faan-ncc-sign-mou-to-curb-piracy-at-nations-airports/>.

¹⁴ See World Intellectual Property Organization (WIPO), "Nigeria Validates National IP Policy and Strategy," https://www.wipo.int/about-wipo/en/offices/nigeria/news/2022/news_0002.html.

¹⁵ Many piracy sites, both operated from within Nigeria and overseas, make use of the .NG country code Top level Domain (ccTLD). Accordingly, Nigeria should take action against piracy sites that use the .NG and .COM.NG ccTLDs. Unfortunately, the music industry did not receive a substantive response from the domain registrar *WEB4AFRICA.NG* in response to a complaint filed in 2018.

Nigeria needs to more effectively enforce against the numerous unlicensed online music and audiovisual services that operate in Nigeria, which are harming many markets inside and outside of Nigeria. If passed, new criminal provisions in the CB, discussed below, should be used by the NCC as the basis for enforcement actions against piracy services. Moreover, more resources are needed for the NCC online enforcement unit to adequately engage in sustained efforts to combat piracy in the country, including to ensure authorities have critical resources such as electricity and Internet access. In addition, the Government of Nigeria should take the following steps to improve enforcement:

- The judiciary should fully maximize the current IP legislation (discussed below) to protect rights holders, and take the following actions:
 - build up case precedents that promote the rights of creators and reinforce confidence and trust in the law and the judiciary by borrowing from case law interpretation in foreign jurisdictions that provide adequate and effective protection and enforcement of copyrights;
 - form specialized cybercrime courts and prosecution units;
 - designate specialist courts and specialist IP judges within states that have large creative ecosystems;
 - increase reliance on expert witnesses in the requisite IP fields; and
 - partner with reputable academic institutions for regular updates on IP laws, consultations, and training on IP to improve IP expertise among judges.
- Provide for adequate statutory and punitive damages in cases of copyright infringement and online piracy.
- Ensure that rights holders' enforcement of their rights is not impeded due to protracted litigation.
- Provide sufficient resources and enhance engagement by enforcement authorities to ensure IP cases can be investigated and prosecuted efficiently and at scale.
- Ensure the NCC, in collaboration with other relevant IP agencies in the country, develops an awareness policy to educate rights holders on available IP protection mechanisms.
- Increase judicial and prosecutorial training in IPR cases, with a focus on anti-piracy enforcement matters.

Collective Management: An additional concern in Nigeria is the absence of an accredited CMO for music rights holders to manage their public performance and broadcast rights. This absence is the result of a dispute between the NCC and COSON, which was responsible for managing performance rights in musical works and sound recordings, but whose operating license was withdrawn by the NCC. Since then, working with rights holders, steps were taken to improve COSON's transparency and governance. As a result, IIPA recommends COSON should be reinstated, subject to a satisfactory audit to ensure appropriate good governance and operational practice. Additionally, legislation is needed to define CMOs and their proper governance to ensure that CMOs should exist only if they are owned or controlled by their member rights holders and are non-profit organizations. With these provisions in place, as well as improved enforcement as noted above, CMOs would be able to license effectively in Nigeria.

COPYRIGHT LAW AND RELATED ISSUES

Nigeria ratified the WIPO Internet Treaties in 2017 but has not fully implemented the treaties. As a result, Nigeria's legal regime has fallen short of international copyright norms in several key respects. A draft copyright bill, first circulated in 2017, was re-circulated as an Executive Bill, alongside a Private Member Bill in 2021. Following a public consultation, including positive engagement by the U.S. Government, the two bills were ultimately merged – resulting in the CB. Although the CB has not been officially released to the public, IIPA understands that the legislation addresses some of stakeholders' concerns with the Executive Bill, including providing definitions for technological protection measures (TPMs) and broadcasting that are consistent with the WIPO Internet Treaties, removing the registration requirement to exercise exclusive rights, and providing for expeditious takedowns and provisions to address repeat infringers. The CB was passed by the National Assembly in 2022 and was sent to the President for assent. However, because the President did not give his assent by the required deadline, the CB was subsequently returned to the National Assembly. It remains unclear whether Parliament will adopt an amended bill before elections take place in February 2023.

The CB would introduce several reforms, including: an exclusive right of making available; improvements to the enforcement framework, including procedures for blocking websites and criminal penalties for online infringements; improved protections for TPMs; and obligations for ISPs to ensure their networks do not facilitate piracy, including to “expeditiously” take down infringing content, institute a repeat infringer policy, and ensure infringing content that has been taken down remains off their networks. Unfortunately, there remain several significant deficiencies in the CB that should be corrected for Nigeria to properly implement the WIPO Internet Treaties and meet its international obligations and evolving global norms, including the following:

- Section 35 of the CB introduces a compulsory license scheme that is arguably incompatible with Nigeria's international obligations, including under the Berne Convention and the WCT. Under this provision, the NCC could bypass the copyright owner and authorize the use of a copyrighted work "by any person for the purpose of rectifying the abuse of a dominant market position or to promote public interest." The provision would undermine rights holders' ability to assert their rights in or license their works because any user could request that the NCC bypass the copyright owner and authorize or prohibit certain uses of a work based on the mere allegation that the user "made a reasonable effort to obtain permission from the owner of copyright on reasonable commercial terms and conditions and that the effort was not successful." Hence, Section 35 undermines contractual freedom and legal certainty and is inconsistent with Nigeria's international obligations, including under the Berne Convention and the WCT. The section is outside the scope of the compulsory licenses set out in the Berne Convention and its Appendix, which cannot be applied to the right of making available or beyond the narrow uses set out therein. Moreover, the Section reduces the scope of the exclusive right of making available, thereby running afoul of the bill's objective to implement the WCT by compromising its milestone right.
- The CB includes a proposal to add extended collective licensing (ECL) in Nigeria. An ECL system is appropriate only in well-developed collective rights management systems, where organizations represent a substantial number of rights holders for each segment of the collective marketplace, and only in well-defined areas of use where obtaining authorization from rights holders on an individual basis is typically onerous and impractical to a degree that makes a license unlikely. As noted above, Nigeria's collective management system is inadequate. In addition, the provision is overly broad. For these reasons, such a system is not appropriate in Nigeria.
- The CB appears to provide for a hybrid fair use-fair dealing provision that is substantially broader than the U.S. fair use doctrine for several reasons. First, the provision includes additional broad purposes that are not present in the U.S. statute, including "private use" and "private study." Second, U.S. fair use is determined on a fact-intensive, case-by-case basis. Without the foundation of a well-developed body of case law, Nigeria's untested, broader fair use provision would result in uncertainty for both rights holders and users on the parameters of permissible uses. The additional broad purposes listed in the text adds to the uncertainty and risk that Nigerian judges, none of whom have ever adjudicated a fair use case and would be doing so without any binding precedent to guide them, will find an unacceptably wide range of uses to be non-infringing. Third, the expansive new "fair use" exception is included as part of a "fair dealing" system that includes several overly broad new exceptions, as discussed below. This unprecedented hybrid approach further adds to the uncertainty and risk that the fair use provision will deny copyright owners fundamental protections on which they rely to license their works and sound recordings. Therefore, the proposed broad hybrid fair use-fair dealing provision is inconsistent with the three-step test because it is not limited to certain special cases and there is a substantial risk that it would be applied in a manner that conflicts with the normal exploitation of a work or unreasonably prejudices the legitimate interests of the rights holder.
- An exception for archives, libraries, and galleries, is broader than the exception in U.S. law and inconsistent with the three-step test, because it would permit these institutions to make and distribute "copies of works protected under this Bill as part of their ordinary activities" without limitation, and it would also permit lending such copies to users.

- The CB also would provide for compulsory licenses for translation and for reproduction of published works. This provision should be revised to ensure it is calibrated according to the terms of the Berne Convention Appendix, which currently it is not.
- While the CB includes an exclusive right of distribution, extraneous language has been added that appears to limit the right of distribution "for commercial purposes" and for works that have "not been subject to distribution authorized by the owner." IIPA is concerned that this language could be interpreted to extend the concept of exhaustion of rights to distributions of digital content.
- While the broadcast right is granted as an exclusive right in Section 12, it is then downgraded to a mere remuneration right in Section 15. Sound recording producers' broadcast right should be maintained as an exclusive right without being downgraded to provide the fair market conditions in which right holders can negotiate commercial terms that reflect the economic value of uses of recorded music to broadcasters.
- The CB would propose draconian criminal sanctions, including imprisonment, for rights holders who fail to keep proper records of the disposition of their rights. This proposal is unprecedented and disproportionate to any intended purpose and should be deleted from the bill.
- The overbroad quotation exception should be revised to limit the use of a quotation to purposes of criticism or review.
- Private copying exceptions, and with them, provisions for levies, should apply only to content that is lawfully acquired—the exceptions should not be misused as a license to legalize piracy—and ensure that rights holders receive adequate shares of collections made, deductions are kept to a minimum, and compensation is payable directly to rights holders.
- The term of protection for sound recordings should be extended to 70 years from fixation or publication (and the same for juridical entities), and, for works, to the life of the author(s) plus 70 years.
- Eligibility for safe harbors from liability should be limited to only passive and neutral intermediaries that do not contribute to infringing activities.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Nigeria's enforcement framework is deficient, lacking effective remedies to combat pervasive online piracy, which is inconsistent with Nigeria's obligations under the WTO TRIPS Agreement enforcement provisions, including Articles 41 and 61. As noted above, certain provisions of the CB, notably the compulsory licensing provision of Section 35, would put Nigeria out of compliance with its obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Internet Treaties.