

NIGERIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Nigeria be placed on the Watch List in 2024.¹

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 for the creative industries; unfortunately, in the absence of an effective copyright enforcement regime, Nigeria has experienced a growing online piracy problem. The increasing number of websites that make movies and music available illegally continues to ravage the country's creative sector, undermining revenues from legitimate channels, including streaming platforms and movie theaters, for disseminating licensed content. To address its online piracy problem Nigeria enacted a new Copyright Act, 2022 (Act No. 8 of 2022) in March 2023 that includes several positive aspects, including a clearer making available right, an administrative website blocking procedure, and improvements to Nigeria's enforcement framework. However, these are undercut by certain problematic provisions—including a vague extended collective licensing regime that does not yet have sufficient safeguards to ensure that it does not prejudice rights holders, an unclear open-ended fair dealing exception, and an overbroad compulsory licensing regime in the public interest by the Nigerian Copyright Commission (NCC)—that should be revised not only to foster investment in Nigeria, but also to bring Nigeria's legal framework in line with international copyright norms and best practices. In addition, Nigeria's enforcement authorities should maximize the new enforcement provisions in the new Copyright Act and take more enforcement actions, and the government should increase public awareness about the harms caused by piracy. Finally, the Government of Nigeria should reform the collective management framework in Nigeria to ensure a clear, fair, market-based, and transparent system, including by engaging with sound recording producers to allow for the existence of a collective management organization that represents local and foreign producers effectively and meets international best practices.

PRIORITY ACTIONS REQUESTED IN 2024

Legal Reforms

- Make additional legal reforms, including revising the new Copyright Act, to address several critical concerns (e.g., compulsory licensing, extended collective licensing, exceptions, exclusive rights of distribution and broadcast, term of protection) to ensure Nigeria fully implements the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) and meets its international obligations and evolving global norms.

Enforcement

- Maximize the new Copyright Act to improve enforcement, including resourcing and training NCC staff to enable them to use their new powers effectively and increasing enforcement actions against online piracy services that are harming the creative industries.
- Raise awareness among Internet service providers (ISPs) around effective policies to prevent piracy, and use the new powers granted to NCC under Section 61 of the Copyright Act to block access to pirate sites, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.
- Increase public awareness regarding the illegality of and harm caused by piracy.
- Reform the collective management framework in Nigeria to ensure a clear, fair, market-based, and transparent system, including by engaging with sound recording producers to allow for the existence of a collective

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/2024/01/Appendix-B-2024.pdf>.

management organization (CMO) that represents local and foreign producers effectively and meets international best practices.

LEGAL REFORMS

- **Make additional legal reforms, including revising the new Copyright Act, to address several critical concerns (e.g., compulsory licensing, extended collective licensing, exceptions, exclusive rights of distribution and broadcast, term of protection) to ensure Nigeria fully implements the WIPO Internet Treaties and meets its international obligations and evolving global norms.**

In March 2023, the President of Nigeria assented to the new Nigerian Copyright Bill, 2022 (Copyright Act), resulting in the enactment of the Nigeria Copyright Act, 2022 (Act No. 8 of 2022). The new Copyright Act includes several important reforms, including: an exclusive right of making available; improvements to the enforcement framework, including procedures for the blocking of websites and criminal penalties for online infringements; improved protections for technological protection measures (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. These elements are strongly welcomed and a positive step forward; unfortunately, there are several significant deficiencies in the Copyright Act 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 Copyright Act introduces a compulsory license scheme that risks being incompatible with Nigeria’s international obligations. 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 WIPO Internet Treaties. This 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, Section 35 reduces the scope of the exclusive right of making available, thereby undermining implementation of the WIPO Internet Treaties by compromising their milestone right.
- The Copyright Act also introduces 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 and the new ECL framework should be withdrawn. At the very least, adequate safeguards should be introduced, e.g. via the CMO Regulation proposals (discussed below), using best practice examples such as Article 12 of the European Union (EU) Digital Single Market (DSM) Directive.
- The Copyright Act appears to provide for a hybrid fair use-fair dealing provision that may be implemented substantially broader than the U.S. fair use doctrine to the detriment of the creative industries 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 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 Act as part of their ordinary activities” without limitation, and it would also permit lending such copies to users.
- The Copyright Act provides 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 it currently is not.
- While the Copyright Act 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 for sound recordings 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 rights holders can negotiate commercial terms that reflect the economic value of uses of recorded music to broadcasters.
- The Copyright Act introduces draconian criminal sanctions, including imprisonment, for rights holders who fail to keep proper records of the disposition of their rights. This provision is unprecedented and disproportionate to any intended purpose and should be deleted.
- 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 all works and sound recordings should be extended to 70 years from fixation or publication (and the same for juridical entities), and, for all works, to the life of the author(s) plus 70 years.

ENFORCEMENT

- **Maximize the new Copyright Act to improve enforcement, including resourcing and training NCC staff to enable them to use their new powers effectively and increasing enforcement actions against online piracy services that are harming the creative industries.**

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. These sites also frequently make use of .NG country code Top Level Domains (ccTLDs) to provide access to websites that make available infringing content.² Social media is used to further drive

² Many piracy sites, both operated from within Nigeria and overseas, make use of the .NG country code Top level Domain (ccTLD). Accordingly, Nigeria should act 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.

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. Nigeria has also witnessed the proliferation of Internet protocol TV (IPTV)-based piracy. Chinese-manufactured set top boxes are shipped to Nigeria in large quantities and an illicit distributor loads those devices with applications that are designed to access pirated content and sells them to consumers, often involving a monthly subscription to access the pirated content.

Many of these piracy sites and services fail to remove infringing content upon notification by rights holders. Moreover, removal on notice should not be sufficient where the content is uploaded by the site operators, because such operators should not be eligible for safe harbor protections. For music and audiovisual piracy, the unauthorized content includes a mix of domestic and international content. Such sites are exceedingly 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) and movie theaters. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study for 2023 (MCS) found that the music piracy rate in Nigeria was the highest in any of the 26 countries included in the study.³ Across a nationally representative sample of 16-44-year-olds, 76% of respondents said that they had used unlicensed means to obtain music in the previous month, nearly three times the global average of 29%. Nearly three-quarters (74%) of these users of pirated music used illegal stream-ripping sites and apps to download music content, mainly on mobile devices (the most common way of accessing the Internet in Nigeria). The most popular stream-ripping site was *SSYouTube*, which received 17.5 million visits from Nigeria during calendar year 2023. *Y2Mate*, another internationally popular site, received 14.3 million visits from Nigeria during the same period. The MCS also found that two-thirds (65%) of respondents admitted to using direct download piracy sites such as *TrendyBeatz* to obtain music.

Nigeria has taken some positive steps recently to address its piracy problems, including some administrative enforcement actions undertaken by the NCC.⁴ Nevertheless, more must be done by law enforcement, local domain registries and registrars, and ISPs to shut down pirate online services. For example, local intermediaries, including hosting providers, domain registries and registrars should take effective measures to prevent the use of their services in connection with infringing sites, including by enforcing provisions of their Terms of Service that allow them to terminate and suspend services in the case of infringement of intellectual property rights (IPR).

Several enforcement deficiencies and limitations negatively impact intellectual property (IP) protection and enforcement in Nigeria, including:

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

³ See International Federation of the Phonographic Industry (IFPI), *Engaging With Music 2023*, available at https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023_full-report.pdf.

⁴ For example, on May 11, 2023, the Nigerian Copyright Commission (NCC) arrested a suspect in the Somolu area of Lagos for illegal reproduction of various schoolbooks belonging to Learn Africa. 3,377 pirated copies were found, and it is expected the suspect will be charged and arraigned before the courts. In addition, a team of Copyright Officers made an unscheduled visit in July 2023 to some bookshops around Bata roundabout in Kano.

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. Now that the Copyright Act has entered into force (as discussed above), NCC staff should be trained to fully use the new criminal provisions in the Copyright Law as the basis for improved 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 new Copyright Act 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 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.
- **Raise awareness among Internet service providers (ISPs) around effective policies to prevent piracy, and use the new powers granted to the Nigerian Copyright Commission (NCC) under Section 61 of the new Copyright Act to block access to pirate sites, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.**

There is no formal framework for cooperation between ISPs and rights holders in Nigeria. The Nigeria Communications Commission issued a Guideline for the Provision of Internet Service, 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 IP rights.⁵ The Government of Nigeria should raise awareness among ISPs around effective policies to prevent piracy, including the site blocking provision (Section 61) of the new Copyright Act, which NCC should use to block access to pirate sites, with a view to building the foundations of cooperative efforts between ISPs, enforcement entities, and rights holders.

- **Increase public awareness regarding the illegality of and harm caused by piracy.**

In Nigeria, many people are unaware that piracy is illegal and that pirate websites are operating illegally. For many, piracy is seen as common and widespread, and they have not seen those engaged in piracy suffer any negative consequences. The Government of Nigeria should implement a policy to increase public awareness regarding the illegality of and harm caused by piracy.

- **Reform the collective management framework in Nigeria to ensure a clear, fair, market-based, and**

⁵ See Nigeria Communications Commission, Guidelines for the Provision of Internet Service, available at <https://www.ncc.gov.ng/docman-main/legal-regulatory/guidelines/62-guidelines-for-the-provision-of-internet-service/file>.

transparent system, including by engaging with sound recording producers to allow for the existence of a collective management organization (CMO) that represents local and foreign producers effectively and meets international best practices.

An additional concern in Nigeria is the failure by the NCC to meaningfully engage recording industry stakeholders on the accreditation of a related rights CMO following protracted dispute between the NCC and The Copyright Society of Nigeria (COSON, the CMO that was responsible for managing performance rights in musical works and sound recordings but whose operating license was withdrawn by the NCC). While rights holders and the NCC took steps to improve COSON's transparency and governance, in 2023 the NCC in consultation with select rights holders validated an Action Plan for CMO in the Music Industry that included recognition of the Musical Copyright Society of Nigeria (MCSN) as the only accredited music industry CMO. Several leading domestic stakeholders and international companies in the industry controlling significant repertoire have expressed concern regarding the ability of MCSN to effectively manage their rights. To resolve this, the Government of Nigeria should reform the collective management framework in Nigeria, in partnership with key stakeholders including the recording industry body, RELPI, to ensure a clear, fair, market-based, and transparent system. This should include engaging with sound recording producers to allow for the existence of a CMO that represents local and foreign producers effectively, has the relevant expertise and technical capability to perform collective management functions, is owned or controlled by its member rights holders, and is a non-profit organization. Accordingly, IIPA recommends that through the Nigerian recording industry body, RELPI, a new CMO should be established with the support of the NCC to ensure there is adequate and effective representation of both local and international rights holders. With these provisions in place, as well as improved enforcement as noted above, CMOs would be able to license effectively in Nigeria.

The NCC published the Copyright (Collective Management Organizations) Regulations 2023 (CMO Regulations), which is intended to repeal the Copyright (Collective Management Organizations) Regulations 2007 and update Nigeria's collective management regulations in keeping with international and good practices. At a fundamental level, the CMO Regulations should reflect essential characteristics and ensure that CMOs are operating according to good standards of transparency, accountability, and governance, including that the definition of a "collective management organization" should be amended such that entities falling within the definition are owned or controlled by their member right holders as well as to confirm the non-profit nature of the organization; and the regulation addressing ECL should be amended to include essential safeguards in keeping with best practice that must be met before an ECL system is put into operation in Nigeria.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

As noted above, certain provisions of the new Copyright Act, notably the overbroad compulsory licensing provision of Section 35, are likely inconsistent with Nigeria's obligations under the WTO TRIPS Agreement, the Berne Convention, and the WIPO Internet Treaties.