Book Review: Desmond Oriakhogba, Copyright, Collective Management Organizations and Competition in Africa

By:

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The role, duties, governance and regulation of collective management organisations (CMOs) has continued to be one of the key issues in the copyright field in many countries and regions including Africa and African countries. In particular, the recognition of their natural monopoly status and its implications for competition in the copyright management and licensing markets has resulted in the use of competition law/regime as either a supplementary regime (with copyright law) or an independent regime in jurisdictions such as the European Union and the United States.

On the African continent, however, the regulation of CMOs have been undertaken mainly from a copyright law perspective with the aim of promoting accountability, transparency and efficiency in their operations. *Although they*

have not been applied in the copyright fields, competition regimes exists in African countries. Knowing that the sustenance of a collective management system depends significantly on the ability of CMOs to operate with high standards of accountability, transparency and efficiency, it becomes imperative to ensure that the regulatory framework for CMOs is optimised to achieve these results.

From a Nigerian copyright perspective, the activities of CMOs vis-a-vis copyright owners and users, their relationship and interactions with the Nigerian Copyright Commission (NCC) - the regulatory agency for the copyright sector in Nigeria - constitute a huge percentage of copyright litigation in Nigeria. Over the past few years, the courts in Nigeria have been asked to review the ways in which the **Copyright Act** and the **CMO Regulations** work to regulate collective management in Nigeria. In particular, the Federal High Court being the court with exclusive jurisdiction over copyright matters have been asked to review NCC's exercise of powers in granting CMOs the approval to operate (e.g. in ***MCSN v COSON; COSON v MCSN & Ors***) and to clarify the meaning of s38 of the Copyright Act regarding whether NCC's inspectors needed a search and/or arrest warrant to enter any premises and arrest persons they reasonably suspect to be infringing copyright (see ***MCSN v NCC***), etc. The Court of Appeal has weighed in on the question of whether the NCC needs to hear from existing approved CMOs before approving another CMO for a class of copyright owners. In recent times, Nigeria's apex court, the Supreme Court has also weighed in on CMO-related matters in ***MCSN v Compact Disc*** and in ***Adeokin Records v MCSN*** on the meaning of s17 of the **Copyright Act**, which relates to whether as owner, assignee and exclusive licensee of copyright, an unlicensed CMO may still have the locus standi to institute an action for copyright infringement in respect of copyright works under its administration. Whether these decisions help to further the goals of promoting accountability, transparency and efficiency in CMOs' operations in Nigeria remains to be seen.

The discourse around the regulation of CMOs is a topic of relevance and concern for the African continent. But, particularly in Nigeria where CMOs (in the music industry) have joined their counterparts in other parts of Africa to establish a **multi-territorial licensing hub** with which they have granted licence in respect of a large repertoire of music content to online platforms, the

spectre of accountability, transparency and efficiency in their services to copyright owners and users continues to be raised. *Are the affairs of CMOs conducted in a way that ensures that monies (royalties) belonging to copyright owners are duly and accurately paid/distributed? Are users able to obtain licence to use copyright works without incurring undue and/or high transaction costs? Do copyright owners have access to all CMOs relevant to their works and to which they may wish to belong? Are CMOs properly within the regulatory oversight of the relevant regulatory authorities/agencies?*

In the light of these pertinent questions and for several (other) reasons, Oriakhogba's book, *Copyright, Collective Management Organisations and Competition in Africa*, is a much-needed addition to the literature in this field. It offers an accurate historical account of the emergence of CMOs in Nigeria and of the regulation of collective management in Nigeria. This helps to know where we are coming from and in applying that knowledge to inform where we are going to in terms of regulation of collective management and collective management of copyright, generally in Nigeria and in Africa. As the Igbo saying goes: *onye na a maghi ebe mmiri nò bido ma ba ya, a gaghi a ma ebe ó nò kwusi.*

The book (particularly, chapter 4 on Nigeria) highlights and discusses CMOs across all sectors (music, audiovisual; reprographic; etc), showing that collective management is multifaceted and cuts across all sectors implicated by the copyright regime. It discusses, analyses and critiques case law on collective management in Nigeria, Kenya and South Africa. This is important as it enhances the book's value beyond being a scholarly work. Practitioners and litigants alike can benefit from the insights provided by Oriakhogba's analysis (and review) of the case law on this important topic.

Another important contribution of the book is its discussion of the ways in which relevant statutes regulate collective management in Africa. In Chapter 4, for example, Oriakhogba discusses ways in which Nigeria's **Copyright Act 2004 (as amended)** and **CMO Regulations 2007** regulate collective management in Nigeria: through the requirement of NCC's approval to operate as CMO (s39 of the Copyright Act and Regulation 1(1) and 18 of the CMO Regulations); through setting conditions for approval, renewal and revocation of approval (s39(2) of the Copyright Act); through conferment or denial of locus standi of

CMOs i.e. CMOs who do not have the licence to operate as such will not have the requisite locus standi to sue for copyright infringement of works under their administration (s17 of the Copyright Act); etc. More significantly, the book focuses not just on these regulatory "methods" but also analyses the oppositions and challenges of these methods as applied in practice. For example, the book discusses the issue of whether the requirement for application for approval to operate is a formality for copyright subsistence or a mere condition (canvassed in ***MCSN v Detail*** before the Court of Appeal); the issue of whether the approval requirement contravenes the human rights of freedom of association and freedom to own property (answered in the affirmative by the Federal High Court in ***MCSN v NCC*** and overturned by the Court of Appeal in ***MCSN v Detail***. The Court of Appeal decision being the prevailing view); the role of the Supreme Court in "watering down" the effect of s17 of the Copyright Act as a regulatory "method" (CMOs, such as the Copyright Society of Nigeria (COSON), have relied on the Supreme Court's decision in ***MCSN v Compact Disc*** and in ***Adeokin Records v MCSN***, to argue that it can carry on operations and sue for copyright infringement in the absence of a licence from the NCC as it is an "owner, assignee and exclusive licensee of copyright" as envisaged by s17 of the Copyright Act); etc.

Finally, the book makes an important contribution to the law and practice in the field of copyright collective management in the manner in which it proffers recommendations after due consideration and in some cases, comparison with the position elsewhere in Africa. For instance, the exception contained in ss8 and 9; item 1(3)(c) of South Africa's **Companies Act 2008**, which requires CMOs previously incorporated as companies limited by guarantee to incorporate a non-profit company form, is recommended for Nigeria. This is to address the problem of requiring CMOs to be incorporated as companies limited by guarantee when they have to collect and distribute royalties to their members - an action that companies limited by guarantee are not allowed to undertake. Kenya's approach of approving three CMOs for the music industry and a common window for users to obtain licence from these three CMOs is recommended for Nigeria as an approach that promotes healthy competition amongst CMOs and inclusiveness of all stakeholders.

In sum, **Copyright, Collective Management Organisations and Competition in Africa** is a book that delivers on its promise to rigorously

analyse and distil useful models for regulating and operating collective management in Africa. It is one that will serve as a useful guide for scholars, practitioners and policy makers in Africa on the subject of collective management.

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