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The Amendment to the 6th Edition of the Nigeria Broadcasting Code: Consequences & Constitutional Concerns

The National Broadcasting Commission (“the Commission”), on 27th May 2020, unveiled the amendments to the 6th edition of the Nigeria Broadcasting Code (“the Code”). The objectives of the Code are to promote fair, efficient and effective competition and regulate the acquisition and sharing of content rights in the broadcast industry.

This Article examines the relevant provisions of the Code on the subject matters of exclusivity, compulsory sub-licensing and the constitutional concerns that they raise.

Exclusivity & Compulsory Sub-licensing

The relevant provisions of the Code are as follows:

9.0.1 - Regarding exclusivity generally:

“...no broadcaster or licensee shall enter into any form of broadcasting rights acquisition either in Nigeria or anywhere in the world to exclude persons, broadcasters or licensees in Nigeria from sub-licensing the same.”¹

6.1 - In respect of exclusivity of Sport’s rights:

“...in the actualization of this policy the broadcast industry in Nigeria shall promote the exploitation of rights to sports and other programming content for the broad benefit of Nigerians. Therefore, the exclusive exploitation of rights even when acquired is not permissible.”

9.1.1.8 - On compulsory sub-licensing:

“...The Broadcaster shall comply with directives by the Commission that compel any broadcaster in the broadcast industry to license its broadcast and/or signal rights to any genre of programming to another licensee or broadcaster in Nigeria if the following circumstances are present:”

- a. The genre or program enjoys compelling viewership by Nigerians.
- b. It relates to a product or service that is objectively necessary to be

able to compete effectively on a downstream market.

- c. It is likely to lead to the elimination of effective competition on the downstream markets.
- d. The refusal is likely to lead to consumer deprivation.”

The above sections of the Code raise legal concerns as to their consistency with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (“the Constitution”), statutes and judicial pronouncements from our courts. They also raise policy concerns as to what the ideal approach to balancing the conflict between the exclusivity of copyright in broadcast and the promotion of competition should be. A conundrum which is not peculiar to Nigeria alone.

The Constitution provides that any law which is inconsistent with its provisions shall be void to the extent of its inconsistency.² It also states that “No moveable property or any interest in an unmovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily except in a manner prescribed by a law that, among other things: (a) requires the prompt payment of compensation therefore; and (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.”³

The question that necessarily follows is whether there exists any “law” – a primary legislation – that allows for the compulsory acquisition of any interest in broadcasting rights, sports rights and the like. The answer is no. The Copyright Act of 1988 (“the Copyright Act”) which confers copyright over broadcasts makes no such provision. Rather, it states in Section 7 that:

“copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is:”

- a) the recording and the re-broadcasting of the whole or a substantial part of the broadcast;
- b) the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognisably derived from the original; and
- c) the distribution to the public for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement.”⁴

It suffices therefore to say that, under Nigerian law, the very essence of a copyright in a work or broadcast is exclusivity. It should be noted that the Code, being a subsidiary legislation, cannot derogate from the exclusivity conferred on broadcast owners by a primary legislation – the Copyright Act. The Court of Appeal, in *Olanrewaju v Oyeyemi & Ors*, held that “It is settled law that a subsidiary legislation derives its authority and validity from and subject to the provisions of the parent enabling statute. It follows therefore that a subsidiary legislation cannot expand or curtail the provisions of the substantive statute. It must be within the authority derived in the main enabling statute.”⁵



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It is not in doubt that the National Broadcasting Commission is authorized by its enabling Act (the National Broadcasting Commission Act 1992) to establish a code setting the standards of content and quality of materials for broadcast in Nigeria.⁶ However, the National Broadcasting Commission Act does not grant any powers to the Commission to regulate the ownership of content or copyright. Hence, any provisions of the Code purporting to do so will be void, being outside the scope of the Commission’s powers to make subsidiary legislation.

The Commission’s attempt to compel a copyright holder to sub-licence its rights to a third-party without a right of access for the determination of his interest in the property and adequate compensation amounts to a breach of Section 44 (1) of the Constitution. The Supreme Court in *Federal Republic of Nigeria v George Osahon & Ors* held that “Any power given by the Constitution, cannot therefore be taken away by any Act of National Assembly or Law of a state or a subsidiary legislation”⁷

Having considered the spectrum of our laws on the subject matter, it is without contention that Sections 9.0.1, 6.1 and 9.1.1.8 of the Code are void and fall outside of the ambit of its legislative scope (i.e. setting the standards of contents and quality of materials for broadcast in Nigeria) and that the Commission, in seeking to regulate the exclusivity of copyright and compel the licensing of the same to competitors, does so ultra vires its powers and in contravention of the Constitution as well as the clearly defined provisions of the Copyright Act and the National Broadcasting Commission Act.

¹ 9.0.2 Additionally provides that “An agreement by a broadcaster or decision prohibited by 9.0.1 shall be void”
² Section 1(3) of the 1999 Constitution of the Federal Republic of Nigeria (As Amended)
³ Section 44 (1) of the Constitution. Moveable property in this context includes intangible property such as Intellectual property, stock, bonds etc.
⁴ Section 7 of the Copyright Act
⁵ (2000) LPELR-6045(CA)
⁶ Section 2 (1) (h) of the National Broadcast Commission Act 199 “The Commission shall have responsibility of—establishing and disseminating a national broadcasting code and setting standards with regard to the contents and quality of materials for broadcast”
⁷ (2006) LPELR-3174(SC)

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