

GUIDELINES FOR COPYRIGHT AGREEMENTS.

Introduction

The growth of the Copyright Industry in the last 15-20 years, exemplified by what has been described as the third largest movie industry in the world, “Nollywood” as well as the astronomical growth of the music industry has changed the perspective of the Nigerian entertainment industry as a whole and given it both local and international recognition. This growth has also given rise to the use of copyright protected materials and continues to encourage the creative genius’ in Nigerians. It is therefore no surprise that the airwaves in Nigeria and indeed several other African countries are dominated with Nigerian developed Copyright protected works. The recent complaints by several right owners of the unauthorized use of their copyright protected works in Europe, America, Asia and other parts of the world is an indication of the spread of Nigerian works in which copyright subsists.

The use of copyright protected work requires authorization. The Nigerian Copyright Law just like most other laws recognize two basic models for granting authorization, that is, by licensing (permit to use) or by assignment (transfer of title). A license could be exclusive or non-exclusive. It is exclusive when the licensee is granted permission to use the work to the exclusion of all others and non-exclusive when the permission is granted only in respect of certain aspects/things.

The Nigerian Copyright Act, Cap C28, Laws of the Federation of Nigeria 2004 has provided in Section 11 (3) that: **No assignment of copyright and no exclusive license to do an act, the doing of which is controlled by copyright, shall have effect unless it is in writing.**

The intent of the drafters of the above section is to avoid a situation of uncertainty and clearly document the terms of agreement between the licensor/assignor and the licensee/assignee as the case may be. In view of the above, the Commission is mindful of sensitizing the copyright industry on the need to encourage respect for Copyright and entronement of best practices in the use of copyright protected works. To this end, the Commission has come up with a guideline that would suggest steps to be taken by owners of works in which copyright subsists and intending users.

Below is a checklist or guidelines for an effective copyright agreement.

1.0 Definition and Interpretation: It is advisable to insert a definition clause into the agreement. The number of definitions and their content vary according to the type of Copyright protected work involved and the strategy the parties intend to adopt.

1.1 Examples of Definition and Interpretation:

In this agreement, except in a context indicating that some other meaning is intended:

“agreement means the terms and conditions set out in this document and its annexes

“artistic works” means artistic works in respect of which Mr.ABC is the holder of Copyright and other Intellectual Property Rights attached hereto marked Annexure “A”

“effective date” means the date of signing this agreement.

2.0 Licence Grant: This part of the agreement defines the rights that the licensee obtains in respect of the copyright work owned by the licensor. The issue of exclusivity or non-exclusivity must be addressed at this point. It is often desirable that the licensed work in which copyright subsists be identified in the definition clause and that the scope of the license is determined with reference to the relevant products and/or processes.

2.1 Example:

Authorization:

Mr. ABC grants XYZ Nig Ltd the right to(mention the copyright work) in accordance with the terms and conditions contained in this agreement in respect of the ...(mention the copyright work) as set out in Annexure ... hereto

2.2 Copyright Licence:

ABC hereby agrees to grant to XYZ Nig ltd a license to use XXX materials for the duration and in terms of this agreement. The license referred to in clause ... allows XYZ Nig Ltd to use and perform XXX in public for the sole purpose of ... in terms of this agreement.

2.3 Marketing Right:

ABC hereby grants XYZ Nig Ltd marketing rights in respect of ... media and territories as expounded in Annexure ... hereto. The marketing rights include the right to advertise and promote the XXXon behalf of ABC and the right to ... in the territories at with respect to the....

2.4 Sub Licenses:

NOTE: An exclusive license holder often has the right to sublicense. Where this is so, the agreement should state that sub licences will expire upon expiration of the licensee’s rights under the licence.

2.5 Personal Right: The license granted in terms of clauses ... shall be personal to XYZ Nig Ltd and it shall not be entitled to transfer or cede such licence to another person, entity, or institution without the prior written authorization of XXX.

2.6 Sub-Licenses

XYZ Nig ltd shall not be entitled to grant sub-licences in respect of any of the rights granted to it in terms of this agreement to another person or entity.

3.0: Consideration:

In exchange for the licence or grant the licensee must give consideration to the licensor. This consideration can be money or money's worth. Monetary consideration falls into two broad categories:

'Fixed payments: fixed payment schemes involve full payment upfront — when the licence agreement is signed, or at certain intervals or the occurrence of certain events (such as the achievement of certain targets).

'Running royalties: running royalties are typically a percentage of net sales (net sales are determined by deducting from gross sales items such as returns, shipping, and sales tax).

These categories can be used separately or together. Licensors need to watch for loopholes that licensees will exploit to reduce royalty payments.

3.1 Example: Licence Fees

During the subsistence of this agreement ABC shall pay XYZ Nig Ltd, in a manner designated by ABC, an annual license fee calculated at two per cent (2%) of the gross ... procured through XYZ Nig ltd's marketing services.

XYZ Nig Ltd shall provide ABC with a written provisional estimate of license fees owing by it to ABC in respect of each financial year before or on 31 December of the particular financial year.

XYZ Nig Ltd shall pay to ABC license fees before or on 28 February of every year in respect of license fees due and payable for the preceding financial year, and shall at the same time provide ABC with an official audit certificate issued by the auditors of XZY Nig Ltd certifying that such payment has been calculated correctly.

ABC shall be entitled to impose a late payment charge calculated at the bank overdraft rate charged by ABC's bankers from time to time, or the maximum rate allowed by law, per annum on all monies due and payable by XYZ Nig Ltd to ABC in terms of this agreement.

During the subsistence of this agreement ABC may at any reasonable times inspect the financial records or any other documentation or evidence of XYZ Nig Ltd as is required by ABC to enable it to determine the nature and the amount of any monies owing by XYZ Nig Ltd to ABC or any other financial matters incidental to this agreement.

4.0 Confidentiality:

The licence agreement should contain a clause in which it is acknowledged that the parties each receive trade secrets and confidential information or proprietary information of the other party, including information about business accounts, financial or contractual arrangements, transactions or affairs, reports, recommendations, advice or tests, source and object program codes, development plans, and customer demographics.

All information that is marked 'confidential', or that at the time of its disclosure is stated to be confidential, constitutes confidential information. Each party should agree not to divulge any confidential information to any of its employees who do not need to know it, and to prevent its disclosure to, or access by, any third party without the prior written consent of the disclosing party. This obligation survives the termination of the agreement until such time as the confidential information reaches the public domain other than through the fault of either party to the agreement.

In the event that certain specific know how, processes, or information about the licensor, which is not currently in the public domain, is made known to the other party, in order to enable it to render its services, a confidentiality agreement should be drafted. It should address matters such as:-

- What information is confidential,
- For how long the information should remain confidential, and
- Whether the confidentiality restrictions apply only to the disclosure of information or also to its use.

4.1 Example:

XYZ Nig Ltd recognizes that by nature of the relationship between the parties it may have occasion to review and receive proprietary or confidential information or material of ABC.

XYZ Nig Ltd agrees to maintain secret and confidential any such confidential information disclosed by ABC that was not previously known to XYZ Nig Ltd or to the general public, or that was not in the public domain prior to such disclosure.

The provisions of clauses ... shall survive the termination of this agreement for whatever reason by a period of five years.

The provisions of ... shall not apply to any information which comes into the public domain otherwise than by breach of this agreement; any information obtained free from restriction on disclosure or use from a third party.

Upon request XYZ Nig Ltd agrees to promptly return to ABC any written material and other forms of material reproduction which contain confidential information obtained from or through ABC, including all memoranda, copies or notes made by XYZ Nig Ltd or disclosed or transmitted to XYZ Nig Ltd by ABC which constitute confidential information.

5.0 Commencement: This is the date the agreement was made between parties. The date is a vital part of the agreement. This will show to the world when the agreement started.

5.1 Example:

This agreement will commence upon the effective date, namely the date when the parties append their respective signatures to it.

6.0 Parties: This will contain the names of the parties to the agreement. Without the names, the contract is as good as not in existence.

7.0 Duration: this aspect of the agreement details the period within which “use” is permitted.

7.1 Example For Duration Of Agreement

The term of this agreement shall be for **three (3) years** (put in the number of years you intend) calculated from the effective date, unless it is terminated earlier by written notice between the parties. The agreement may be extended for an additional period of three years, provided both parties agree in writing to such an extension one month prior to the full term of the agreement.

8.0 Termination:

Either party shall be entitled to terminate this agreement in the event of the other party committing a material breach of the terms and conditions of this agreement, provided: the aggrieved party shall, in the event of the other party committing a material breach, call in writing upon such party to remedy the breach within sixty (60) days of receipt of a written notice to remedy the breach complained of; and should the party fail to remedy such breach within 60 (sixty) days after receipt of the written notice, the contract shall be terminated, provided that such termination shall not take effect until the end of that calendar year.

The termination of this agreement, for whatever reason, will not affect the rights of a party that may have accrued as at the date of termination and will further not affect any rights, which specifically or by their nature survive the termination of this agreement.

The Commission has provided the above as a guide for entering transactions with copyright implications. The Commission advises that notwithstanding the information provided herein, proper legal advice should be sought from competent professionals.