



Imperatives: Contract Drafting and Negotiation Support in the Creative Industry

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Introduction

The Creative Industry (CI) consists of various endeavours flowing from individual's creativity, skill and talent, with a huge potential for wealth and job creation. These industries include: film, music, art, photography, marketing and advertising, radio and television, fashion etc. According to the *National Bureau of Statistics' Quarter 4 2016 Report*, CI contributed 13.76% of the country's Gross Domestic Product in 2016, indicating its potential to contribute more if properly harnessed. The Government (Federal, State and Local level) and private sector's support towards ensuring CI's sustainability as one of the viable alternatives to crude oil, could make it a force to be reckoned with in the nearest future. For example, the Federal Government (FG) recently included CI on the *Pioneer List*, conferring eligibility to enjoy Pioneer Status (a tax holiday of up to five (5) years); examples abound of private sector's sponsorship of various CI initiatives and events.

One of CI's major perennial challenges is the exploitation of practitioners resulting from unbalanced negotiation position or capacity of parties. Usually, big industry operators use standard form contracts thereby excluding or restricting the opportunity to negotiate the practitioners' terms of engagement. Fully understanding the implications of contractual terms and negotiation to a contract has never been so vital, because its effects can be unfavourable or detrimental to a party.

*Plaintiff was given the right to dictate where and when the Defendant was to make music recording. The Plaintiff was assigned the full copyright of all the composition and recordings of the Defendant. The remuneration of the Defendant for his services was grossly inadequate... For example, the sale of a 12 inch double sided L.P. which cost about N6.00, the Defendant was to get 15 kobo while the Plaintiff would get the remaining N5.85k...*¹ Even though the Federal High Court (FHC) agreed that the terms of the contract were akin to servitude and onerous, it held that the contract was still subsisting, and therefore KSA could not record a new album with another Label until the expiration of the contract (contract was to expire in six months). However, KSA could, in order to make a living in the interim, do live performances for fees and keep the proceeds.

The dispute resurfaced in **Suit No. FHC/L/CS/196/97**, where KSA won N500 million damages in 2015 for continuing breach of his copyright (arising from failure by the Defendants to return master tapes to KSA - in line with judgement in earlier case, and continued reproduction of KSA's works).



This was exemplified in the famous legal battle: **African Songs Ltd (ASL) v. Sunday Adeniyi Adeyeye (aka King Sunny Ade (KSA)) Suit No: LD/1300/74**. In this case, KSA was blindsided by the need to get a Record Contract (RC) than the need to understand and negotiate terms. According to Professor Sagay, the RC provided that *"The Defendant was tied to the service of the Plaintiff exclusively for five years. The*

This is a clear case in which a party with greater bargaining power drove an extremely oppressive bargain, which could be challenging to overturn. Hence, the need for full appraisal of the terms of contract should not be taken too lightly, it helps to create understanding and a favourable position for parties.

¹ I.E Sagay: *Nigerian Law of Contract*, Sweet & Maxwell (1985), page 294



This article seeks to address contractual imperatives in the CI between parties and the need to engage professionals during the negotiation process.

Expert Negotiation Support in CI Contracts

I analyse hereafter, the importance of negotiation in some of the most active areas in Nigeria's CI:

a. Music Industry

The Nigerian Music Industry (NMI) grew over the years with Musical Artists (Artists) gaining international recognitions and accolades globally. Contractual arrangements commonly engaged by Artists usually come in form of: Endorsements Contracts (EC), Production Agreements (PA), Recording Contracts (RC), etc.

RCs are the most common harbinger of conflicts in the NMI unlike other types of contracts. Most times, Artists hurriedly sign RCs with Record Labels (Label) in the wake of an opportunity to make music and become famous without fully understanding its terms. This approach tends to catch up with them soon after when the RC begins to enforce some of the terms on the contract leading to conflict between both parties.

Conflict cases that arise from RC terms could have been avoided if the RC was properly understood and rightly negotiated. For instance, in the dispute between Michael Jackson (MJ) and Sony Music Entertainment (SME), according to news report, the dispute arose from MJ's inability to obtain the masters to his original albums despite the fact that he believed that he possessed this

right in his contract with SME. However, he owned this right in the contract but due to concealed clauses in his RC, SME owned the masters to his original albums for several more years which he was unaware of at the point of execution. Unfortunately, parties are bound by the terms of their contract—therefore MJ was left with no option but to abide with this unfavourable term.

Another instance is the ongoing legal battle between Chocolate City Limited (CCL) and Ashimi Olawale Ibrahim (*aka Brymo*). Brymo signed a five year RC with CCL in April 2011. However by 2013 after the release of his first album, *Son of a Carpenter*, Brymo wanted to opt out of the contract and continue his career with an American Label - Tate Music Group. According to *Premium Times*,² Brymo wanted to leave CCL because they allegedly paid him no royalties on his album, gave him no advance fees for recording his album and he was also responsible for paying his manager. He also alleged that he was not paid any money for featuring in Ice Prince's 2010 hit song "Oleku" He further alleged that even though his featured appearance was a trial for him, the treatment was the same even after he officially joined in 2011. On its own part, CCL proceeded to institute legal action at the FHC, Lagos against Brymo. The matter is ongoing.

Based on Brymo's description of his relationship with the Label, one can deduce that he had a one-off deal to prove himself (as a featured artist) and upon successful outcome, he signed a five year RC without fully understanding the terms of the deal. Thus, understanding the RC terms before execution and seeking professional advice for negotiating the RC terms should not be underestimated.

One would have thought that the *KSA case* would make Artists alert to the pitfalls in concluding RCs without requisite negotiation and advisory support. However, the reality is that limited resources are available to upcoming Artists. And often times their 'naivety' in the 'rush' to join leading musical/publishing labels on long term but 'unfavourable' or 'one sided' contracts could presumably provide 'rich temptation' for labels to capitalise on. In the Artist's calculations, the contractual tie up not only assures a decent shot at stardom, it is more than likely to accelerate the journey to stardom and attendant benefits, hence other considerations such as outsize compensation to the label is as important. This is moreso for an Artist that has years of 'struggling' without support without any commercial success or industry recognition for his work, to show for it. It could then be a case of "get what you can now, and when we get to the bridge, we will cross it."

In fairness to the Labels, they are committing their resources, deploying their weight and goodwill to backing the Artist, on a "carry" basis. Labels can "groom" Artists for years, and such significant risks needs to be rewarded. For an upcoming Artist, there is likelihood that the first set of releases may not be commercially successful (although many turn out to be very successful), hence the need to stipulate a higher "label take" in the initial RCs. Once an Artist achieves recognition (and potentially an attractive bride for competing labels), it is very likely he would like a review of the RC in order to improve his take. The sense is that "after all, without me, there is no act to promote", a counterweight to the Label's "we made you, without our resources and leverage you won't be what you are, and where you are, now." Ultimately, whether a revised deal would be made would be a function of the business judgment of the parties (given other contextual dynamics).

However, a win-win sometimes results from parties' realisation that each side could make more money if they continue their collaboration with the possibility of making the Artist (who by now has realised the importance of having personal professional advisers), an even bigger commercial success. Or the parties could part ways: the Artist going to another label where he can negotiate a "better" package or setting up his own record label and promotion outfit; and the original label also going after other upcoming Artists that could be their next commercial success.

² Ben Ezeamalu, 'Chocolate City Battles Brymo, Says N20 Million Invested on Artiste Yielded Below N3 Million', *Premium Times*, 24/9/2016: <https://www.premiumtimesng.com/news/more-news/211125-chocolate-city-battles-brymo-says-n20-million-invested-artiste-yielded-n3-million.html>

In endorsement contracts (ECs), Artists receive consideration from a company in order to use his name, likeness and reputation to promote a service or product. Most companies who have endorsement relationships with Artists usually use standard form contracts. However this does not take away the right of the Artist (who presumably is now more experienced) to negotiate and raise issues with provisions that he has reservations about. Negotiation is a core aspect of contracting between parties and it is a critical requisite to ensuring that Artists' interest are protected.

For example, negotiation gives room to discuss the extent of usage of a brand name where the Artist expressly signs to be the brand ambassador of a particular product (character merchandizing). It also makes it possible to discuss the tenor, options for renewal and the ability to model for other brands or otherwise. Negotiation also gives the Artist an opportunity to deliberate on the extent of the Artist's obligations. Where a company signs an EC with an Artist for stated product, but then uses his brand and likeness on another product without the Artist's consent, would the Artist not be entitled to compensation?

If during negotiations, the company wanted the Artist to endorse its bouquet of products, the contract could have provided accordingly. Conversely, brand ambassadors for certain products should not be seen in public with competing products, not to talk of endorsing such competing products, unless after termination of the initial EC or expiration of the prescribed cool off period thereafter, if any. The foregoing underscores the need to understand the contract terms.

b. Film Industry

According to *June 2015 Fortune Magazine*,³ the Nigerian Film Industry (NFI) is the second largest globally by volume, after India's Bollywood. Its success can be hinged on the increased appreciation for Nigerian movies and resuscitation of the cinema culture in the country. For example *The Wedding Party*, a movie released in 2016 reportedly grossed about N453 million, highlighting positive industry trends. However, the industry is yet to adopt standard contract concretization of engagements – employment and volunteer, rental, production/post production,

screening, electronic /digital rights assignment, etc. - which has repeatedly caused conflicts and hindered growth.

The ongoing case: **Jude Idada v. Omoni Oboli & 2 Ors.**,⁴ before the FHC, Lagos exemplifies the essence of contracts. Here the Plaintiff, sought for an injunction preventing the premiere of '*Okafor's Law*' (the Movie) from screening, and also from any future screenings. The Plaintiff claimed that he owned the idea behind the Movie and the Defendants action was an infringement of his Intellectual Property Right (IPR). On the other hand, the 1st Defendant claimed that she had initially pitched the idea of the Movie to the Plaintiff (a screenwriter) in order for him to write a script for the Movie but when he failed to do so in due time, she employed someone else to do the job. However, the injunction was lifted but the matter has proceeded to trial to determine the Movie's copyright ownership. Hence the above case underlines the need for standard contracts in all forms of arrangements in the film industry.

An employment contract is a legally binding document between two or more parties to uphold terms in a relationship as set forth by the contract to achieve a common goal. When employing a team to make a movie, parties need to agree on the desired outcome, ownership of copyright, remuneration, job description, duration, remedies for breach, etc. Of course, parties have a right to walk away if they are unable to agree on the terms, during negotiations. Negotiation thus helps parties to clarify issues and agree on terms that are considered beneficial to the parties involved.

c. Radio and Television Broadcast Industry (RTBI)

The RTBI's major contractual arrangement is the Broadcasting Contract (BC). It grants a Broadcasting Station (BS) the Broadcasting Right (BR) to disseminate a company's content on Television (TV) or radio. A Content Owner (CO) has an IPR on his content and the extent of a BR given to a BS is totally dependent on the CO, hence violating any BC term is an infringement of the CO's IPR and a BS may be liable for contract breach.

For example, the popular 1990 hit television series, *The New Masquerade* reportedly came to an end because of a conflict between the

star cast members James Iroha (aka *Gringory*), and Chika Okpala (*Zebrudaya*). Nigerian Television Authority (NTA) that used to air the series allegedly assigned it for *Zebrudaya* to produce as an independent producer without permission from *Gringory*, who is allegedly the creator/owner of the IPR. *Gringory* objected to the assignment, stating that NTA had no IPR in the series. The conflict allegedly led to the end of the series; however, there have been no reports on the matter being taken to court to be resolved.⁵

Also in *Gilliam v. American Broadcasting Companies Inc. (538 F.2d 14 (2d. Cir. 1976))* the United States Court of Appeal for the Second Circuit held that the agreement between BBC and Monty Python did not authorize the BBC to make drastic cuts in the script, so the BBC had no right to authorize Time-Life or the Defendant to make such cuts on the half hour comedy show. In another instance, if an advert is not aired for the amount of time agreed upon in the BC due to certain circumstances, the BS will still be obliged to air the advert at another time for the agreed period.

In negotiating the BC terms, parties need to agree the length of the show and how often it will be aired, license fee, moral rights and credits, date of delivery and format of delivery of the content, the exclusivity of the BS etc. Agreeing to these terms gives room for the CO and BS to accept, refuse or make changes to clauses that they are not agreeable to. This ensures an amicable relationship between parties.

Conclusion

Nigeria's CI especially the entertainment industry are breaking new grounds. Such achievements means more recognition for the practitioners in the sector and in the long run, more engagements. Having a water tight contract ensures the rights and obligations of the parties are clearly highlighted and protected. Since proper negotiation avails the parties to extract the best possible value from every engagement, the need for practitioners to be fully armed with requisite negotiation and advisory support cannot be overemphasized.

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³ Jake Bright, 'Meet 'Nollywood: The Second Largest Movie Industry in the World', *Fortune Magazine*, 24/6/ 2015: <http://fortune.com/2015/06/24/nollywood-movie-industry/>

⁴ Premium Times, 29/3/2017, "Nollywood: 'Okafor's Law' Ownership Controversy Continues in Court Thursday": <https://www.premiumtimesng.com/entertainment/nollywood/227461-nollywood-okafors-law-ownership-controversy-continues-court-thursday.html>

⁵ Chukwu Eke, "Zebrudaya Killed Masquerade" - James Iroha", *MC Ghana* 13/11/2008: <https://www.modernghana.com/movie/3291/zebrudaya-killed-masqueradejames-iroha.html>