

# Copyright Law Protection of films in Nigeria (Nollywood) and South Africa (Sollywood): Pre and post-Covid-19 pandemic

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## Abstract

The Covid-19 pandemic inflicted socioeconomic harm on an unprecedented scale. Across the world and to varying degrees, cinemas were closed, festivals were cancelled or postponed, and film releases were moved to future dates or delayed indefinitely. In 2020 the entire global theatrical and home/mobile entertainment market totalled \$80.8 billion, the lowest figure since 2016 and a decline of 18% from 2019. Theatrical entertainment accounted for only 15% of the total global entertainment revenue, compared to 43% in 2019. While some has been written about the effects of Covid-19 on both international and local film industries, this article seeks to provide an African perspective focusing on the realities in Nigeria and South Africa, respectively. This article examines the importance of filmmaking industries in Nigeria and South Africa as well as the difficulties faced during the Covid-19 pandemic. Copyright laws in both terrains are critically reviewed based on the capacity of these laws to protect the interests of film industries pre and post-Covid-19.

## KEYWORDS

copyright, Covid-19, film, Nigeria, Nollywood, South Africa

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## 1 | INTRODUCTION

UNESCO recently released the first complete mapping of the film and audio-visual industry in 54 states of the African continent. This included quantitative and qualitative data and an analysis of their strengths and weaknesses at the continental and regional levels. According to this report, the production and distribution of film and audio-visual works in Africa is 'one of the most dynamic growth sectors in the world', with 'production [...] growing rapidly in Africa in recent years'.<sup>1</sup>

UNESCO has recommended Nigeria's 'Nollywood Model' as one that can help other African countries to build fully home-grown, self-sustaining commercial industries. This model is characterised by its low-cost, speedy production mode, which enables producers to complete a film for as low as US\$15,000 in a matter of weeks. Filmmaking in Nigeria is as old as the inception of Nigeria as a British colony. Since 2009, Nollywood films have continuously thrived in Nigerian cinemas in terms of quantity and quality. Several films by locally based directors, such as *Confusion Na Wa* (2013) by Kenneth Gyang or *93 Days* (2016) by Steve Gukas, have screened at international festivals like the Berlin International Film Festival, the Toronto International Film Festival, and the Durban Film Festival.<sup>2</sup>

South Africa, too has a longstanding history of a thriving film industry. In fact, South Africa's film industry—Sollywood—is as old as Hollywood's. It was one of the few countries in the world to see and hear sound motion pictures as early as 1895 when Kinetoscopes opened in Johannesburg, then a small town only 9 years old. The local industry has proved its worth with films like the Oscar-winners *Tsotsi* in 2005 and *My Octopus Teacher* in 2021, the 2005 Berlin Golden Bear-winning *U-Carmen eKhayelitsha*, the Oscar-nominated *Yesterday* in 2004 and the celebrated *Drum* of 2004. The ground-breaking, highly acclaimed coproduction with New Zealand and the United States, *District 9* (2009), cowritten and directed by South African Neil Blomkamp, earned South African actor Sharlto Copley a Best Actor nomination at the Oscars and achieved US\$210.8 million at the box office. South Africa has also proven an attractive destination for filming international productions, as seen in such films as *Invictus*, *Tomb Raiders* and *The Avengers*.<sup>3</sup>

The Covid pandemic has inflicted socioeconomic harm on an unprecedented scale. Across the world and to varying degrees, cinemas have been closed, festivals have been cancelled or postponed, and film releases have been moved to future dates or delayed indefinitely. In 2020 the entire global theatrical and home/mobile entertainment market totalled \$80.8 billion, the lowest figure since 2016 and a decline of 18% from 2019. The sharpest decline was in theatrical revenue, which dropped from \$42.3 billion in 2019 to \$12 billion in 2020. Theatrical entertainment accounted for only 15% of the total global entertainment revenue, compared to 43% in 2019.<sup>4</sup> While some has been written about the effects of Covid on both international and local film industries,<sup>5</sup> this article seeks to provide an African perspective focusing on the realities in Nigeria and South Africa, respectively. This article will both examine the importance of filmmaking industries in Nigeria and South Africa as well as highlight difficulties faced amidst the Covid pandemic. In doing so, it will consider whether current copyright frameworks in place are up to the task of protecting the interests of said industries in a post-Covid world.

## 2 | A PEEK INTO NIGERIA'S FILM INDUSTRY

Nigeria's film industry (Nollywood) is one of the world's best-performing entertainment and media marketplaces.<sup>6</sup> It is a highly informal industry created in an informal sector of the economy and addressed to a mass audience with different characteristics from those in the Anglo-American/Anglo-European field.<sup>7</sup> The reasons why Nollywood has become tremendously successful are not farfetched. On the surface, it is relatively easy to identify the globally competitive pool of talent in Nollywood landscapes as drivers of Nigeria's status.<sup>8</sup> The development of Nollywood is complex due to its dependence on low budgets and technologies.<sup>9</sup> Nollywood employs approximately one million people and generates over \$7 billion for the economy, thereby accounting for 1.4% of the country's Gross Domestic

Product (GDP).<sup>10</sup> Every year, the industry produces around 2500 films, with a projection of US\$22 Million by the end of 2021 for total cinema revenue.<sup>11</sup>

The industry has adopted film streaming with organisations such as Netflix (primarily for high budget films) and IROKOTv (primarily for low budget films).<sup>12</sup> Netflix made its official debut in Nigeria in February 2020 even though it has been around for longer,<sup>13</sup> thus mingling with several acquirers and distributors of films in Nigeria and essentially growing the industry further.<sup>14</sup> The constant growth of the sector begs certain legal questions without which the film industry's efforts would be jeopardised. Notably, it is pertinent to highlight the laws affecting the industry and how far these laws have come in making the industry better. In the same vein, the challenges beclouding the industry following the Covid-19 pandemic are dully considered to decipher how it has stifled distribution, production and structured financing.

Indeed the boom in the Nollywood industry is continuous, regardless of the Covid-19 pandemic. The best technologies are adopted by filmmakers such as Kemi Adetiba, Funke Akindele and Kunle Afolayan to hype the quality of high budget films.<sup>15</sup> Their patrons are dependent on such quality, while the low budget films using less technologies appear to be comfortable with their patrons, who are less concerned about the quality and can afford the medium of distribution. The Return of the King of Boys, which is a seven series sequel to the King of Boys released in 2018, is evidence of the continuous boom of Nollywood in 2021. King of Boys<sup>16</sup> was a successful hit in 2018 in the cinemas before the pandemic, and now it has returned hotter during the pandemic online.<sup>17</sup>

'The film was critically acclaimed for its gripping storyline and has remained on the list of highest-grossing Nigerian films to date... 'I'm so honoured that today, I get to share the world of Eniola Salami and *King of Boys 2: The Return of the King* to a global audience, but this time with the massive backing of Netflix. Continuing the King of Boys journey with Netflix is a big deal...'<sup>18</sup> Netflix often appears in Nollywood as the carrier of good things such as this film and others like Citation, another blockbuster. Netflix has become that contemporary medium of distributing high budget movies in Nigeria for filmmakers who shun the cinemas for their first film release. This medium of distribution appears to be significantly affected by the pandemic. Physical piracy might just have been sent to an early grave for high budget films, and the concerns have transcended online, where such movies are being showcased. It is worth mentioning that in 2022 film producers are testing the waters again. The release of the film Battle on Buka Street by Funke Akindele has hit the cinemas and the response is phenomenal at home and abroad. While many have gone to the cinemas to watch this film, some are patiently waiting at home for it to be streamed on NETFLIX.

In the pipelines for more than a decade were various copyright Bills seeking to update the Copyright Act. Exploring all the Bills drafted over the years is a daunting task; thus, the focus here is on the Executive Copyright Bill of 2015, updated in 2021 and the Private Copyright Bill of 2021.<sup>19</sup> The irony of the situation is that the Private Bill, which was recently drafted, is in a gazette, a couple of steps above the Executive Bill, which was drafted earlier. Curiosity lies in whether these Bills are repetitive and could be merged, or one supersedes the other, and the other will have to close shop. What is most important is the fact that copyright law in Nigeria should, as soon as possible, rise to the task of dealing with the digital challenges faced by the film industry and other copyright industries. Adejoke Oyewunmi is emphatic on the fact that in the era of digital technology, 'uploading the film and causing it to be accessed online are modern ways of causing it to be seen in public, and should fall within the exclusive preserve of the copyright owner'.<sup>20</sup> This article deems it imminent to explore copyright law and the protection of the film industry in Nigeria while exploring the pending Copyright Bills (Executive and Private Bills).

## 2.1 | Nollywood and the Copyright Act of Nigeria: Asking for more like oliver twist

The Copyright Act<sup>21</sup> is considered the primary law for the protection of films in Nigeria. Section 1 of the Copyright Act identified cinematograph films as one of the six eligible works of copyright in Nigeria. Essentially, section 51 of the Copyrights Act defines film (referred to as 'Cinematograph Film' in the Act) as the first fixation of a sequence of visual images capable of being the subject of reproduction and includes the recording of a soundtrack associated with the

cinematograph film. In essence, the author of a film, by virtue of section 51 of the Act, is the producer of the movie unless there is a contract between the parties stating otherwise. Section 6(1) (c) gives exclusive rights to sell, license, dispose of, possess and exploit the film work to the rights holder in the film.<sup>22</sup> This presupposes that anyone who does any of the acts specified in Section 6(1) (c) above without the producer's consent infringes the producer's copyright.

Copyright in film portends complex issues; this is because diverse materials go into the making of a movie, and before the completion of any film, such materials have individuals or corporations on whom copyright of such materials subsist. Materials that go into making a film include the script, music, artistic works (such as images, painting), and performance.<sup>23</sup> Consent of the right holder(s) of these materials must be sought before such materials can be used in a film. Specifically, unless it is stated expressly in a contract that a person whose work is used in making a film has copyright in the film, such person's copyright only covers his work used in the film's making and not the film itself.<sup>24</sup>

In a situation where a movie is based on a book or script owned by someone else whose consent was not sought before use, then such person can go after the filmmaker for infringement of their exclusive right in the book/script, but this does not give such person copyright over the film itself. In the same vein, the consent by a copyright holder that their material is to be used in a film does not affect the moral right of the copyright holders of such material. Such films would usually uphold the paternity right of such holders and mention them in such movies.<sup>25</sup> Currently, the Copyright Act cannot fulfil its role in protecting rights holders, especially in the digital era; hence, there has been a call for the Act to be updated to reflect adequate protection in the current dispensation. This has resulted in the sponsorship of two Copyright Bills to repeal the Act. The Executive and Private Copyright Bills are discussed below.<sup>26</sup>

## 2.2 | The Nigerian Film Corporation Act 1979 (NFC Act)

This Act established the NFC as the special purpose vehicle of the government's participation in promoting and developing the film industry. The Act is considered the first concerted effort by the Nigerian government towards the development of an indigenous film industry as well as participation in the industry.<sup>27</sup> Notably, the Act gives power to the Nigerian Film Corporation to produce films for domestic consumption and export; establish and maintain facilities for film production; encourage production by Nigerians of films through financial and other forms of assistance; provide financial assistance to encourage the development of cinematograph theatres; provide training and advance the skills of persons employed in the industry and maintain national film archives.<sup>28</sup> When the NFC was established in 1979, it was vested with the responsibility of censoring films in the country. However, this responsibility was later moved to the Nigeria Films and Video Censors Board, NFVCB.<sup>29</sup>

The Copyright Act aims to protect the creations and rights of creators in the industry, while the NFC Act is posed more for the structural development of the sector and the talents therein. Commendably, the NFC has pulled lots of resources and opportunities into the industry with structured training,<sup>30</sup> film festivals for example, it held the Zuma film festival in Abuja in April 2022,<sup>31</sup> as well as organising an NFC Annual Film Essay Competition to pull talents into the industry.<sup>32</sup> Laudably also, the industry recently facilitated the signing of a Nigerian-France Agreement in January 2020 to pull finance for the development of motion pictures in the industry.<sup>33</sup>

## 3 | CHALLENGES OF COVID-19 PANDEMIC IN NOLLYWOOD

The Covid-19 pandemic has unarguably affected every sector of the economy, and the film industry is not an exception. Cumulatively, cinemas earned over N3 billion in the first half of 2019 and over N1.2 billion in July and August.<sup>34</sup> There is presently no assurance that the industry will keep up with this trend following the physical distancing guidelines.<sup>35</sup> The absence of assurance to keep the industry on its feet stems from the drop in movie

production, considering on the one hand that the production of movies is hinged on physical gatherings and on the other hand that the industry also strives on investment which dropped in the wake of the pandemic.

Particularly, producers who produced their movies and were looking forward to making huge revenue from releasing the movies to cinemas had their hopes cut short. Film producers such as Kayode Kasum took to premiering their movie on YouTube for free, flowing from the lockdown of all cinemas in early 2020. This, according to him, reduced massively the revenue he expected from the movie.<sup>36</sup> Omoni Oboli, one of the Nigerian film producers, lamented how he stopped the shooting of his new TV series titled 'Last Year Single' due to the physical restrictions placed by the federal government.<sup>37</sup> Some movies are yet to be released mainly because the pandemic has greatly affected production activities. Top on the list includes *La Femme Anjola* (from the Audrey Silva Company), *The One for Sarah* (Trino Motion Pictures) and Netflix *Naija Original Series*.<sup>38</sup>

The challenges have not been stifled down, notwithstanding the ease of the Covid-19 lockdown rules on physical gatherings restrictions. In the same vein, it has become more challenging to access finances and investment in the industry mainly because investors consider the restrictions caused by the pandemic a stifling factor to movie productions and distributions in the industry. For example, the Funke Akindele's debut Movie 'Omo Ghetto', which made a revenue of N442 Million, would have made more revenue if it had been released in the cinema at a time when the world was not just recovering from a pandemic.<sup>39</sup> *Quam's Money*, *Still Falling*, *Day of Destiny*, and *Fine Wine* have the same reports.<sup>40</sup> Another problem that the pandemic poses to the industry is the exponential rise in piracy.

Essentially, the drop in movie production has seen entry into the movie distributions channel of pirated and fake movies. In the months preceding Funke Akindele's 'Omo Ghetto' cinema release, many fake copies of 'Omo Ghetto' were sold in Nigeria. The experience of these phoney movies was also seen online, especially on YouTube. Viewers are drawn to particular films because the YouTube Channel owner used a fake title, usually of a trending and newly released movie, to draw traffic to its channel. When considered alongside the discussions on the legal framework for the film industry in Nigeria, these issues begs appreciation of the strides made to make the legal framework for the industry to tackle these issues better. Notably, a law that effectively tackles piracy is needed now than ever in the industry and commercialisation of the Nigerian Film Corporation to help it better serve the film industry.

## 4 | NOLLYWOOD AND FILM DISTRIBUTION: COPYRIGHT BILLS—WHERE ART THOU TO THE RESCUE

Section 6 (1) (c) (ii) and (iv) of the Copyright Act of Nigeria expressly states that the exclusive right of the owner to control the doing in Nigeria of the listed acts includes: 6 (1) (c) (ii) causing the film in so far as it consists of visual images to be seen in public... 6 (1) (c) (iv) distribution to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.<sup>41</sup> While causing the film to be seen in public is broad enough to encompass cinemas and streaming, it is not clear whether similar arrangement to rental, lease, hire and loan does the same. The major question is whether the acts of streaming are adequately covered and whether Netflix can be perceived as a distributor of films or merely causing the film to be seen by the public.

In the case of *Peek & Cloppenburg SA v Cassina SpA*,<sup>42</sup> the court was asked whether distribution can encompass a series of acts: agreement to sell, sale, and delivery. The court said 'or otherwise' was limited to situations in which ownership of the goods was transferred.<sup>43</sup> However, in another case,<sup>44</sup> the court indicated that distribution could encompass a series of acts: agreements to sell, sale, and subsequent delivery.<sup>45</sup> The word distribution is controversial unless a specific interpretation is provided. Overall, Section 6(1) (c) (iv) is limiting regarding the act of distribution. A major form of distribution is sale and streaming online in the digital era. Such issues make exploring the copyright Bills essential to this discussion.

Indeed one is aware that there are many sites for online streaming; nevertheless, the focus here for precision is Netflix. It is a site for streaming films, involved in the distribution of many Nollywood movies from the past and present. Some filmmakers create for streaming online sites and boycott the cinemas and DVDs. In Nigeria, it is common knowledge among practitioners and academics that the Copyright Act of 1988, as amended, is outdated. Missing from the Act is a reflection of the digital era and the challenges it brings to copyright protection of original works of authorship.

## 5 | COPYRIGHT BILLS IN NIGERIA: LIGHT AT THE END OF THE TUNNEL

### 5.1 | Motion Picture Practitioners Council of Nigeria (MOPICON) Bill

A commendable prospective legal framework for Nollywood is the MOPICON Bill, introduced in 2006 but has yet to be passed into law primarily due to disunity in the industry and the prevailing structural deficiencies.<sup>46</sup> The Bill, if passed, is expected to establish the entry qualifications and production standards that are required to make the industry world-class. The MOPICON would be to the Nigerian film industry what the Standard Organisation of Nigeria is to the Manufacturers Association of Nigeria.

### 5.2 | The executive and Private Copyright Bills Saga: Prospective protection for Nollywood

As earlier mentioned, there are presently two Copyright Bills with the same objectives and similar content (with a few differences) for the purpose of updating copyright law in Nigeria. The primary mission of the Bills is to repeal the Copyright Act of 1988 as amended.<sup>47</sup> It is worth mentioning again that there were strings of Copyright Bills before this moment. Even though both Bills deal with numerous issues, this section focuses on the changes that affect the film industry and the rights of those involved in making the film in the digital era. The Private Bill was introduced before Senate on 7 June 2021. The Bill then passed its second reading. Before this time, it had gone through a few stages successfully. There have been suggestions regarding the possibility of harmonisation between the two Bills.

It is commendable that the Copyright Amendment Bill has been recently passed by the Nigerian Senate and the National Assembly. On 7 April 2022, the Nigerian Senate, passed the Bill for an Act to Repeal the Copyright Act, Cap C28 LFN, 2004 and enact a new Copyright Act to provide for the Regulation, Protection and Administration of Copyright; and for related matters, as amended. The National Assembly in concurrence with the Senate passed the Bill on Wednesday, 27 July 2022.<sup>48</sup>

The journey of the Executive Copyright Bill began in 2015. This Bill was approved by the Nigerian Federal Executive Council in 2018 and presented to the Nigerian National Assembly for approval and enactment into law on 6 July 2021. A couple of months later, on 28 September 2021, the Executive Bill passed its second reading before Senate. There was a public hearing for the two Bills on 21 October 2021. It was apparent that both Bills appeared united in their demands in resolving contemporary copyright matters. The sponsor of the Private Bill, Senator Tokunbo Abiru, stated that the Bill is meant to cater for issues arising due to the global digital revolution in the music and film industries.<sup>49</sup> John Asein (Director General Nigeria Copyright Commission) stated simply that the Bill is an attempt to cure the defects in the Copyright Act. It is a joint effort between NCC and the Federal Ministry of Justice.<sup>50</sup> Both Bills have been criticised for different reasons, which cannot be discussed in this section in order not to divert from their aim.

There are provisions in both Bills on issues of online activities and infringement of copyright. The problem with the Executive Bill is that it has been stagnant for approximately 5 years and might be outdated regardless of the recent update in 2021. There were some changes in response to the urgent need for provisions on digital technology and copyright content online. Part VI is on Antipiracy and Other Measures.<sup>51</sup> The other measures include section 50 on circumvention of technological protection measures, section 51 on rights management information and section 52 on the circumvention of technological protection measures and rights management information.<sup>52</sup> *Part VII: Provisions Relating to Online Content Sections 54–61.*<sup>53</sup> Section 54. Notice for a takedown, 55. Takedown of infringing content, 56. Procedure for suspension of accounts of repeat infringers, 57. Misrepresentations, 58. Information residing on systems or networks at the direction of users, 59. Information location tools, 60. Identification of infringer, 61. Blocking access to online content.<sup>54</sup> Similar provisions are found in *Part II Online and Antipiracy Measures*—Sections 25–30 of the Private Bill.

The Executive Bill covers an array of possible infringements of copyright in the film industry which appears very broad regarding protection for copyright content online and related technology measures. The downside is the length and arrangement of the provisions. Most in this terrain already have difficulties interpreting the Copyright Act and applying it appropriately to various scenarios. A total change creates more problems. In addition, the provision is not specific to areas eligible for copyright protection. In the sections that deal with the nature of copyright, possible infringements are foreseen from the rights list for the owner of the copyright. The online version could have been structured to tow the same style. An apparent change is the fact that the term cinematography is substituted for audio–visual. This change is evident in both bills. Oyewunmi is of the view that the term cinematography is linked to the era in which the Act was drafted, and it is not suitable for the digital era where the term film is more appropriate with regard to the definition of cinematography in the Act.<sup>55</sup>

In the Copyright Act of 1988, as amended in 1992 and 1999, a cinematograph is ‘the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a soundtrack associated with cinematograph film’.<sup>56</sup> The copyright owner of the film, according to Section 6 (1) (c) of the Act, has the exclusive right to: ‘(1) Make a copy of the film; allow the film as long as it has visual images or sounds, to be seen or heard in public; (2) Make any record embodying the recording in any part of the soundtrack associated with the film by utilising such soundtrack; (3) Distribute to the public, for commercial purposes of the work, by way of rental, hire, loan or similar arrangement’.<sup>57</sup>

Even though it appears there is a wide range of exclusive rights on films due to the era in which it was drafted, there is no form of electronic distribution included. Obviously, Nigeria did not respond to the era of the millennium such that this mode of distribution was not provided for in the Act in contrast to other jurisdictions like the United States. Now, technology is demanding to be considered in the Act. Nollywood distribution by streaming online is dependent on copyright contracts. Through these contracts, the copyright owner agrees to a license to enable another distribute the films; otherwise, such act without permission is regarded as illegal.

These contracts subsist from production to distribution. According to Sodipo, ‘given the complex nature of the works involved in films, the Act expressly provides that it is obligatory for the author to execute written contracts with all those whose works are to be used in the film prior to the making of the film’.<sup>58</sup> There are various relationships in making a film; if the contents of a contract are well stated and unambiguous, the parties can avoid issues. Thus a distribution contract is an agreement between the owner of exclusive (distribution) rights in a film (usually the producer) and a company engaged in the business of marketing such works to users and purchasers, such as Netflix as online streamers of Nollywood films.

In the Executive Bill, eligibility of audio–visual work for copyright protection is no longer situated in Section 1, while it remains in Section 1 in the Private Bill. It was moved to Section 2 of that Bill. Section 11 is on the nature of copyright in audio–visual, while it remains in Section 6 of the Private Bill. Audio–visual work in the Executive Bill is defined as ‘the aggregate of a series of related visual images with or without sound, which is capable of being shown as a moving picture by means of a mechanical, electronic or other device and irrespective of the material on which the visual images or sounds are carried and includes the soundtrack but does not include a broadcast’.<sup>59</sup>

Conversely, in the Private Bill, even though the definition is in two parts, the definition has a similar intention. The wordings of the Executive Bill are similar to the content of subsection (b). Audio-visual in section (a) is the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction and includes the recording of a soundtrack associated with the audio-visual works.<sup>60</sup> The Executive Bill deemed it worthy to define or interpret the word audio-visual work in section 108 as 'the person by whom the arrangement for the making of the audio-visual work was made, unless the parties to the making of the audio-visual work, provide otherwise by contract between themselves'. This definition is descriptive of the creator or creators of the work, and they are the ones entitled to copyright protection of the audio-visual work.

The Executive Bill has altered to a great extent the arrangement of the sections with many inclusions in added sections. There are five sections catering for the nature of copyright relating to different eligible works, and section 11 focuses on audio-visual works. The content of Section 6 in the Private Bill is similar to the content of section 11 in the Executive Bill. However, in Section 6 of the Private Bill, online was added to the provision on 'make available to the public on wire, wireless or online means in such a way that members of the public are able to access the work from a place at a time individually chosen by them'.<sup>61</sup> Obviously, intentional consideration is given to streaming online, which is crucial at this point. Where it is mentioned is also acceptable, rather than clumping it together in another section dedicated to online materials. The reader can easily know the position of the law and apply it accordingly. The good news in 2022 was both Bills were harmonised and passed by the Senate on Wednesday, 6 April 2022, definitely something for Nigeria to be excited about.<sup>62</sup> The downside of the situation is, it is still pending approval 8 months later. Nigeria patiently awaits the new copyright law.

Online streaming and the protection of Nollywood films are crucial to the industry and must be well drafted, as observed in Section 6 of the Private Bill, which is missing in section 11 of the Executive Bill. The issue of piracy of streaming websites is not adequately catered for in the Bills. It is conspicuously evident that both Bills have not considered appropriate online antipiracy measures. Even though online is added to the matters to be considered in sections 25–30, nothing is specific to online piracy of streaming websites by various individuals. Service providers are perceived to be obligated to take down infringing content. Whether this provision regarding service providers and infringement content will suffice in matters of online piracy of streaming sites is questionable. The provision on antipiracy measures of the physical is explicit on the actions and the persons. The same is applicable to sections of the Executive Bill.

There are three common ways of piracy online. They include: 'Peer-to-peer (P2P) file-sharing, direct downloads, and streaming from an illegal website. The P2P file-sharing transfers films with copyright protection to the public while downloading a film is a form of reproducing the film. Both are regarded as illegal offences'.<sup>63</sup> However, 'streaming from an illegal site is neither a permanent nor public reproduction of copyrighted content; it is technically legal. (The host sites themselves are still illegal and face a high risk of prosecution)'.<sup>64</sup>

Many have moved to streaming online for various reasons. The presumption is that Covid-19 pandemic is a major reason, thus creating a high demand for streaming websites. It is expected that piracy often surfaces when there is a high demand for a product, which is witnessed in the film industry. Convenience seems to be another reason why people patronise illegal streaming websites.<sup>65</sup> These sites are more accessible due to their friendly user interface.<sup>66</sup> They are not often concerned about the price to be paid, which could be little or free, rather the ease of watching a film they have been searching for drives them. Such sites are not alien to the Nigerian terrain, and copyright law in Nigeria is expected to cater for such activities.

Streaming is the new means of film distribution technology has got to offer Nollywood. Indeed, it has provided an opportunity to explore various terrains globally. Apart from the ease of illegal streaming websites based on being user-friendly, the Covid-19 pandemic has made many switch from cinemas to streaming in, similar to the music industry. The lockdowns and closing of cinema houses had an impact on revenue generation in cinema businesses. The effect still lingers as smart televisions enable many to watch a film on Netflix in their homes.

## 6 | EXPLORING FILMS IN SOUTH AFRICA BEFORE AND AFTER COVID

The South African film and television industry—centred mainly on the cities of Cape Town and Johannesburg—has grown significantly since the end of Apartheid.<sup>67</sup> According to the Capstone Report—published by the South African Cultural Observatory, a national research project of the Departments of Sport, Arts and Culture—the direct impact (also called 'Value Added') of the cultural and creative industries in 2018 was ZAR74.39 billion. This accounts for 1.7% of South Africa's GDP compared to 1.5% in 2016. Visual Art and Crafts, Audio-Visual and Interactive Media and the Transversal Cultural Education Domain were the cultural and creative industries that have grown the fastest in South Africa, having grown by more than 5% over the period 2016–2018.

The creative industry also has indirect and induced effects on South Africa's economy. Indirect impacts occur when the creative industry buys inputs from other industries, which increase demand on their suppliers and so on through the supply chain. Induced impacts occur when direct and indirect economic activity increases household income as a result of job creation and profits. Including the direct as well as the indirect and induced impacts, the creative industry generated a GDP value of ZAR241.8 billion in 2018, which represents about 5.2% of the national GDP of South Africa. Due to their strong linkage (multiplier) effects, 69% of the creative industry's GDP impact was generated in other sectors in the rest of the economy.<sup>68</sup>

In 2017 the market share for domestic films was 4%, and the market share for South African produced films in the first half of 2018 was 3%. In 2017 a total of 222 films were released in South Africa, of which 23 films originated from South Africa. Out of the 23 local titles released, 2 of those were official coproductions, namely, *Love By Chance* (a South African American production) and *Accident* (a South African-French production). *Schuks Tshabalala's Survival Guide to South Africa* has been South Africa's highest-grossing film to date at ZAR38 million.

Existing skills and knowledge, advanced technical capacity, a great variety of locations, and competitive prices have all encouraged the production of foreign film and television series in South Africa. Not only can such projects provide valuable foreign exchange inflow, but they are also an opportunity for skills transfer, further developing the capacity and competitiveness of South African labour in the industry.<sup>69</sup>

The National Film and Video Foundation of South Africa (NFVF) is an agency of the Department of Arts and Culture that was created to ensure the equitable growth of South Africa's film and video industry. The NFVF does this by providing funding for the development, production, marketing and distribution of films and also the training and development of filmmakers. In addition, the NFVF commissions research and produces industry statistics that provide both the public and stakeholders with valuable insights into the South African film industry. According to a report commissioned by the NFVF in 2017,<sup>70</sup> the film industry in South Africa had a direct impact of ZAR4.4 billion on economic production, leading to a rise in total production in the economy to approximately ZAR12.2 billion. The net operational expenditure produced in the four financial years analysed in the study amounted to ZAR17.5 billion. It is pertinent to highlight the laws affecting the industry and how far these laws have come in making the industry better. In the same vein, the challenges beclouding the industry following the Covid-19 pandemic are dully considered to decipher how it has failed to adequately address the shortfalls in the current regime and protect filmmakers.

## 7 | LAWS PROTECTING FILM IN SOUTH AFRICA

### 7.1 | Copyright Act 98 of 1978

In South Africa, the Copyright Act 98 of 1978 regulates copyright. The Act includes a closed list of works that may be eligible for copyright protection, including 'cinematographic films'. The Copyright Act defines a cinematographic film as: '[T]he first fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of

reproduction, and includes the sounds embodied in a soundtrack associated with the film'. Section 3(1)(b) confers copyright on an author who is a qualified person, which includes a person who is a citizen of or domiciled or resident in South Africa, and in the case of a juristic person, being incorporated under the laws of South Africa.

However, while filmmakers are the authors of cinematographic films, they are seldom the copyright owners of said works in practice. This is because of section 21(1)(c) of the Copyright Act. According to this, when a (natural or juristic) person commissions the making of a cinematograph film and pays or agrees to pay for it in money or money's worth and the work is made in pursuance of that commission, it is the commissioning person who is deemed to be the owner of the copyright subsisting in said work. Exclusive rights acquired in a cinematograph film by the copyright owner are wide-ranging and are explicitly listed in Section 8(1) of the Act. These include the right to reproduce the film, causing the film to be publicly shown, broadcasting, and making adaptations. According to Section 3(2)(b), copyright in cinematograph films subsists for 50 years from the end of the year in which the work is lawfully made available to the public or, failing such an event, 50 years from the end of the year in which the work is made.

The South African courts have broadly interpreted the statutory definition of a cinematographic film. For example, the Appellate Division (as the Supreme Court of Appeal was then known) in *Golden China TV Game Centre & others v Nintendo Co. Ltd* [1996] ZASCA 103 (infamously referred to as the *Nintendo* decision) held that, for the purpose of copyright protection, video games constitute cinematographic films and not computer programmes (the latter a separate category of work protected under the Copyright Act). A video game is a concurrence of different works created especially for entertainment or adapted for the same purpose. Harms JA in *Nintendo* noted that the obvious difference between a 'conventional' cinematograph film and a video game lies in the fact that, with the former, the sequence of images is fixed, whereas, in the case of the latter, the sequence of images is—to an extent—variable and under the control of the player.<sup>71</sup> However, Harms JA stressed that a substantial portion of the visual images used in a video game are repetitive and remain constant each time the game is played. The choice of sequential imaging available to the player is limited, and the difference is thus minimal.<sup>72</sup> The *Nintendo* decision was unsurprisingly met with much criticism. Pistorius argues that the definition of cinematographic films has been 'severely strained' by the courts,<sup>73</sup> while Dean critiques the courts for being 'artificial and contrived' in the breadth they have afforded to the definition of cinematographic films.<sup>74</sup>

Furthermore, some have suggested that the *Nintendo* decision is out of kilter with other jurisdictions whereby video games have either been classed and protected under copyright as computer programmes or given a distributive classification whereby the different elements of the game have been protected under copyright as different types of works.<sup>75</sup> However, it must be remembered that under current international copyright treaties, there is no copyright protection afforded to video games as a separate category of work. As such, a WIPO comparative analysis of how 24 jurisdictions afforded copyright protection to video games showed a marked lack of harmonisation on the matter.<sup>76</sup> It is therefore perhaps unfair to critique the approach taken by the South African courts in *Nintendo* too harshly given the overall lack of clarity on this subject-matter.

More recently, the Supreme Court of Appeal—the highest court relating to nonconstitutional matters in South Africa—sought to further clarify the definition of a cinematographic film in the landmark case of *Tellytrack v Marshalls World of Sport (Pty) Ltd and Others* [2019] ZASCA 153. *Tellytrack* (the appellant) is a partnership made up of racetrack operators and betting companies who alleged copyright infringement in their cinematographic films. The films in question consisted of raw footage of horse racing events which were edited and enhanced by the appellant in their control room before being sent to the headquarters of a dedicated horse racing channel (channel 239) on South Africa's digital satellite TV service. Channel 239 was also owned by the appellant who possessed the right to grant communal subscribers—such as bookmakers—authorisation to receive, distribute or broadcast the channel. A collection of bookmakers (the respondents)—without receiving permission from the appellant to do so—aired these films for public viewing on their premises, thus allegedly infringing the appellant's copyright. The respondents countered that the works of the appellant were not, in fact, cinematographic films but broadcasts. Navsa JA disagreed with the respondents, ruling that:

[T]here can be no doubt that what the public is allowed to see at the respondents' business locations are a sequence of images seen as a moving picture constituting in the main horse racing events. Those images and others, including those of studio interviews and the overlay of all the items imposed by way of the computer programme, have indisputably been reduced to material form by way of the recordings on the aforesaid occasions.<sup>77</sup>

Essentially, Navsa JA logically reasoned that what is seen on channel 239 is what had already been recorded and stored in the appellant's control room.<sup>78</sup> Furthermore, Navsa JA wryly stated that, 'One cannot broadcast "nothing" and consequently 'what the public was being allowed to view at the respondents' business locations was a cinematograph film'.<sup>79</sup>

Importantly, while the definition of cinematographic film includes the sound recording associated with the said film, a single film may embody a host of different works, which will each be eligible for copyright protection independently. For example, a film's script or plot may be eligible for copyright protection as a literary work, while any associated musical arrangements may be eligible for copyright protection as a musical work. Films, therefore, represent a diverse and complex medium for the purpose of copyright protection in South Africa.

Unlike other works that are eligible for copyright in South Africa, the Registration of Copyright in Cinematograph Films Act 62 of 1977 allows for the registration of copyright in films. However, the registration of copyright in a film does not in any way change or extend the rights of copyright that subsist in the film. Instead, registration serves as *prima facie* proof of the existence of copyright and therefore removes the burden of proving this from the holder in cases of copyright infringement.<sup>80</sup>

## 8 | CHALLENGES OF COVID-19 IN SOUTH AFRICA'S FILM INDUSTRY

A report by the United Nations Department of Economic and Social Affairs Statistics Division estimates that for the first time since 1998, global poverty will increase. At least half a billion people may have fallen into poverty by the end of 2020, with some 60 million at risk of being pushed into extreme poverty.<sup>81</sup> South Africa's GDP fell 16.4% in the second quarter of 2020, the equivalent of an annualised drop of 51%. The IMF projected an 8% contraction in GDP in 2020 as a result of Covid, ahead of a recovery in 2021 of 3.5%.<sup>82</sup> Many of those working in the creative sector are freelancers, and this situation has been exacerbated further by the effects of Covid-19.

It is without question that the South African entertainment industry has been hard hit by the Covid pandemic. According to a recent economic impact assessment study by NFVF, the Covid-19 pandemic had a destructive impact on the film industry, with the contribution of the industry to the South African economy contracting substantially by 59% in 2020/21 compared to 2019/20. In total, the direct, indirect, and induced economic impact of the film industry on the South African economy has been estimated at ZAR7.2 billion in 2019/20, declining to ZAR2.9 billion in 2020/21 due to the negative impact of Covid on industry operations. The total number of full-time equivalent jobs created/sustained by the activities of the film industry was approximately 31 444 in 2019/20, before falling to 12 775 in 2020/21. Annualised income derived by employees as a direct, indirect, or induced impact of the film industry amounted to ZAR218 million for South Africa in 2019/20, declining to ZAR88 million in 2020/21. The direct impact of the film industry at market prices was estimated at ZAR522.33m, the indirect impact at ZAR157.01m and the induced impact at ZAR408.41m. The total estimated impact of the film industry on GDP at market prices if all the impacts are added is estimated to be ZAR1 087.75m. Thus, for every ZAR1 million in output generated by the film industry, an additional ZAR0.76m of GDP at market prices was generated in the economy if the direct and indirect impacts are considered, and ZAR1.22m if the induced impacts are also added.<sup>83</sup>

On 30 October 2020, the South African government issued an open call for artists, sport and recreation professions to apply for a share of The Presidential Employment Stimulus Programme (PESP) in an effort to retain and create jobs in the Sport, Arts and Culture Sectors.<sup>84</sup> In 2021, the South African government issued their

Economic Reconstruction and Recovery Plan, a policy document created to aid in the recovery post Covid-19. Within this plan, the government recognises that creative industries were among the hardest hit by Covid-19. Accordingly, efforts aimed at ensuring these sectors' recovery and growth will form an integral part of the overall reconstruction and recovery effort. In this regard, the plan states:

To support the revival and sustained growth of the cultural and creative industries in the Covid-19 era, interventions will be made to strengthen the development of online platforms for the distribution of creative products and where they exist these will be strengthened. Linked to this will be interventions to strengthen, including through the introduction of appropriate incentives, online dissemination of cultural products such as music, film and design.<sup>85</sup>

While the South African government has chosen to focus on redirecting the creative industry toward an online platform as a means of addressing the hardships suffered due to Covid-19, its recovery plan fails to take cognisance of the fact that Covid-19 will no doubt exacerbate the longstanding shortfalls in South Africa's unfair, imbalanced, out of date and unconstitutional copyright regime to the further detriment of authors in the creative industry. The primary concerns relating to the current Copyright Act in so far as the film industry is concerned include that it utilises a complex and circumspect system of limitations and exceptions to copyright ownership, as well as that it does not adequately protect authors' rights.

## 8.1 | Concerns relating to the Copyright Act 98 of 1978 post-Covid

Section 12(1) of the Copyright Act states: Copyright shall not be infringed by any fair dealing with a literary or musical work—(a) for the purposes of research or private study by, or the personal or private use of, the person using the work; (b) for the purposes of criticism or review of that work or of another work; or (c) for the purpose of reporting current events—(i) in a newspaper, magazine or similar periodical; or (ii) by means of broadcasting or in a cinematograph film provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

The fair dealing provision extends to films and sound recording per sections 16 and 17, but only for the purpose of 'criticism or review' or 'reporting current events'. Section 12(3) states:

The copyright [...] shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

While it is important to note that the above exceptions have not been designed for the benefit of filmmakers but users in general, including telecommunications industries, it must be noted that they offer particularly little assistance to South African filmmakers. Practically, the fair dealing provisions would only be useful where the use of another work in a film was for criticism or review, for example, in a documentary rather than a feature film. Furthermore, both the fair dealing and incidental usage exceptions are ambiguous, for neither statute nor case law defines what 'fair' or 'incidental' means. Equally as important is the lack of understanding of said limitations and exceptions amongst South African filmmakers.

Research on the perceptions of South African documentary filmmakers about copyright clearance requirements and the effect of such requirements on their works paints an unsettling picture. In research surveys and focus groups, filmmakers described the industry as dominated by a 'clearance culture', that is, 'a common law on the

ground that everyone thinks is the law' requiring that every use of copyrighted material in a film be licensed. Nearly 70% of the filmmakers interviewed reported that they did not know of any instances when they could use copyrighted content in their work without a licence of remuneration.<sup>86</sup> As a result, most of the filmmakers sought to obtain licences for things like incidental capture, even when they could have used the content for free without a licence.<sup>87</sup>

The experience of these documentary filmmakers is perhaps unsurprising as, given the lack of legislative or judicial clarity on exceptions and limitations, users in general are likely to err on the side of caution to their detriment.<sup>88</sup> As copyright exceptions and limitations can be overridden by contract in South Africa,<sup>89</sup> this ignorance of limitations and exceptions by users means that South African user's rights are not adequately protected in practice. Bargaining power between copyright owners and oft-confused users—such as filmmakers—is skewed in favour of the former to the costly detriment of the latter.

The South African copyright system also does not protect the author's right to remuneration, leaving it to the parties—authors and owners—to negotiate remuneration along with other contractual terms of engagement. This can lead to instances whereby authors have been on the receiving end of deals that may be labelled as exploitative due to power imbalances and ignorance of rights.<sup>90</sup> Additionally, authors can face the challenge of having invested heavily in the production of works under commission which the copyright owner has no intention of exploiting. Unfortunately, the balancing act undertaken by the courts between fairness and the public interest relating to user rights on the one hand, and the protection of copyright owner's rights and freedom of contract on the other, has arguably left much to be desired. This can perhaps best be seen in an unsuccessful attempt that was made for an exploitation exception to be read into South African copyright law in the public interest so as to deal with such scenarios. In the case of *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* [2016] 4 All SA 623, the South African Broadcasting Corporation (the plaintiff) commissioned the making of a documentary by Via Vollenhoven (the respondent). However, upon receipt of a version of the work, the plaintiff decided not to air said documentary.

Even though the plaintiff was the copyright owner of the work, the respondent alleged that as the author of the cinematographic film, they retained a right under freedom of expression as protected in the South African Constitution to exploit their work if the copyright owner refused to do so. This is because, so argued the respondent, a purposive constitutional interpretation of the underlying rationale for the Copyright Act would find that it ought to protect the personality right of authors; ensure that the acquisition and use of intellectual property are fair; promote the free spread of art, ideas and information, not to hinder it; and regulate copyright so as to enhance a vibrant culture in South Africa.<sup>91</sup> The court disappointingly disagreed, concluding that, '[The respondent's] construction of public good or welfare is equated to the dissemination of ideas and this is nowhere to be found or implied [in the rationale for copyright protection both in South Africa and in general]'.<sup>92</sup>

In a different system with Latin or continental European roots, the situation might have been different based on the moral right to publish. However, the South African court interpreted copyright within an almost exclusively economic framework whereby copyright owners are rewarded with the rights to exploitation and authors are incentivised by financial remuneration as agreed upon in contract.<sup>93</sup> In fact, the court provided a scathing critique of the respondents' public interest argument and lack of respect for the primacy of contract in South African copyright law:

The respondents seek to be indemnified from the consequences of alienating the work and the rights thereto but simultaneously accept the *quid pro quo* under [their contractual agreement with the plaintiff]. They are asking for the [Copyright] Act to be read or amended to override their own consensual arrangements in the event that the plaintiff does not exploit the work—a condition that could have been but was not stipulated. This undermines the sanctity of contract - *pacta servanda sunt*. It negates the *caveat subscriptor* rule [...]. A limitation of freedom is irreconcilable with the right of choice.<sup>94</sup>

This lost opportunity to meaningfully engage with and consider the possibility of a public interest defence within the realm of copyright law is unfortunate but not surprising given the reliance on the economic incentive theory and the underutilisation on a national and international scale of public interest exceptions and limitations to copyright exclusivity.<sup>95</sup> While the South African courts have been enthusiastic in extending the scope of protection for copyright owners—as evidenced in their generous interpretation of ‘cinematographic films’—they have been less so in protecting the public interest and rights of users. *Via Vollenhoven* illustrates the supremacy of contract law and how concepts such as fairness and public interest in the realm of copyright have been seen as secondary to this.

## 9 | THE COPYRIGHT AMENDMENT BILL

Since the end of Apartheid, there have been many legislative attempts to reform South Africa's copyright regime. The most notable attempt came in May 2017 when the Copyright Amendment Bill (B13-2017) was introduced in South Africa's parliament. Although the Copyright Amendment Bill was passed by both houses of parliament (South Africa having a bicameral parliamentary system consisting of the National Assembly and the National Council of Provinces),<sup>96</sup> the President of South Africa exercised his power to return the long-considered Copyright Amendment Bill back to Parliament because of reservations about its constitutionality. Specifically, the South African President declared potentially unconstitutional the provisions in the Bill that would require contracts with creators to include royalty payments, the reversion of ownership rights back to creators, and the introduction into South Africa of a fair use right.

On royalty payments, the Bill allows for the Minister to make regulations requiring the payment of ‘fair’ royalties for currently existing contracts assigning away copyright, but only in relation to activity taking place after the enactment of the Act. This has been critiqued by President Ramaphosa as an arbitrary deprivation of property contra section 25 property rights in the Constitution. The Bill would also shift the South African copyright system from a closed list of fair dealings excepted from or limiting copyright, to a broader and American system of fair use. This would have vast benefits for South Africa's film industry. For example, if game developers in emerging technology hubs such as Cape Town or Braamfontein wanted to adapt ideas from international video game titles for the local market, that would be considered ‘fair use’. If local TV and film producers featured clips of historical movies in their productions, they would similarly be exempt from strict copyright controls. This is especially important for Africa, since the majority of all copyright royalties currently flow to the United States and Europe.<sup>97</sup> Unfortunately, this too has been critiqued by President Ramaphosa as an arbitrary deprivation of property contra section 25 property rights in the Constitution.

It is the opinion of this article that such findings of unconstitutionality are not in line with precedent and international standards. No explanations as to why and how the above proposed amendments constitute a breach of section 25 have been provided.<sup>98</sup> By contrast, there have been submissions and detailed arguments as to why the *inclusion* of the above could be considered a constitutional necessity.<sup>99</sup> In fact, on 7 December 2021, the High Court of South Africa in the case of *BlindSA v Minister of Trade, Industry and Competition* (Case No. 14996/21) issued a declaratory order that the Copyright Act 98 of 1978 in its present, unamended form is unconstitutional. The High Court ruled that provisions of the Copyright Amendment Bill, which would have improved access to materials for people with visual impairments, ought to forthwith be read as if specifically incorporated in the Copyright Act to remove the inconsistency of the Act with the Constitution.<sup>100</sup> Mbongwe J further criticised the delay in the passing of the Copyright Amendment Bill: ‘There exists no substantive grounding for the delay in the implementation of the provisions of the Copyright Amendment Bill. In particular, a reading-in to the existing provisions of the impugned Copyright Act will be an alleviation of whatever the burden causing the delay in the amendment of the Copyright Act.’<sup>101</sup>

It is relevant to note that the President's returning of said Bill to Parliament came amid crushing and overt foreign political pressure exercised primarily by US and European Union industry owners. For example, President

Ramaphosa received a letter that was signed by the US's Motion Picture Association (MPA) and the EU's International Confederation of Music Publishers (ICMP) (among others) stating the following:

Regrettably, the Copyright Amendment Bill and the Performers' Protection Amendment Bill, as currently drafted, [...] would [...] undermine South Africa's creative communities [...]. The proposals contained in the bills would, if adopted, limit the creative sectors' ability to protect their rights and invest in South Africa, substantially weakening the South African internal and export markets for creative content [...]. This would harm South Africa's creators, its strong creative culture and, ultimately, its citizens.

The International Intellectual Property Alliance—an organisation representing large US entertainment companies—asked the US Trade Representative to sanction South Africa should they adopt the Bill and therefore a system of fair use. This threat of unilateral trade sanctions was premised on the Bill having a 'lack of IP protection and enforcement' as its proposed system of fair use is considered 'too broad' and contrary to the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement') so-called 'three-step test' by the US; this despite the US itself utilising a system of fair use in its own copyright regime. Indeed, the hypocrisy of such an allegation has been highlighted by the recent uncovering of comments made in 2018 by Michele Woods, Director of the Copyright Law Division of WIPO, which in effect refute the central argument of the International Intellectual Property Alliance's petition to USTR.<sup>102</sup>

## 10 | CONCLUSION: WHICH WAY TO GO NIGERIA AND SOUTH AFRICA

Nollywood is pulling massive revenue into Nigeria's GDP as well as providing mass employment opportunities in the Nigerian Labour Market. However, more can be done to strategically fit the industry as a world-class in movie production and quality. More attention must be given to the provisions of the law to tackle the challenges heralded by the pandemic and beyond. In averting our minds to these provisions, regard should also be had to the proposed amendments and strides in bettering the legal framework for the Nigerian film industry. Indeed the Copyright Act requires an urgent update to be at par with other jurisdictions grossing an income from the entertainment industry. Other laws on films also require some form of reform to deal adequately with the new trends in the film industry.

Mostly high budget films are found on Netflix. Other mediums are used to stream low budget films. In these circumstances, the digital era requires more than the ordinary means of physical distribution. There are low budget streaming sites that are indigenous as well as foreign. The Copyright Act of Nigeria cannot cater adequately for content created in this era. The Copyright Bills in existence in 2021 have contents that can cater for the digital era. However, it is suggested that no area is left untouched. These Bills are similar in many ways but have some differences as well. A merger of the two Bills maintaining the style of the arrangement of the sections in the Copyright Act and the Private Bill is proposed. There must be harmony in progressing to the next level of development of copyright law in Nigeria.

Similarly, South Africa's Copyright Amendment Bill offers a way of addressing the many shortfalls being experienced in the 21st century with the Copyright Act 1978. Some criticisms levelled against South Africa's Copyright Amendment Bill—for example, that fair use would allow exploitation of protected works by third parties without compensation to the owners—have at best demonstrated ignorance of the principles behind copyright law, and at worst, been used for fear mongering amidst an uninformed public.<sup>103</sup> Even from a layman's perspective, the idea of a third party making *fair* use of a copyright protected work while simultaneously exploiting the owner of said copyright is a *non sequitur*. The same logical inconsistency applies to arguments that allowing the law to eliminate future exploitation of filmmakers who have fallen victim to unfair contracts by making these contracts fair through the payment of future royalties.

Regarding the allegation that South Africa adopting a US style of fair use would violate the TRIPS Agreement's three-step test, this too can be shown to be unfounded and illogical. According to Article 13 of the TRIPS Agreement (the so-called three step test): 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.' It is true that whether or not the US fair use doctrine falls foul of the above is hotly contested within the literature in light of the lack of clarity provided on an international scale as to the exact boundaries of Article 13.<sup>104</sup> However, that 'certain special cases' does not necessarily preclude the introduction of open-ended exceptions like fair use can be deduced from the fact that the US and other countries have introduced fair use into their laws. These countries consider their exceptions to be compliant with Article 13 and have not been challenged in international forums on this. Indeed, the US fair use doctrine was accepted as consistent with the three-step test when the US joined the Berne Convention in 1989 and arguably remains consistent with the three-step test.<sup>105</sup> However, even if a circumspect/narrow interpretation of Article 13 were to be adopted and the US system of fair use were to ultimately be deemed a contravention of Article 13, then why does the US not focus on changing its own system accordingly? It is the opinion of this article that it would be both patently and practicably unfair that a finding of inconsistency with Article 13 be implemented against a developing nation like South Africa while a worldwide powerhouse of the developed world like the US may continue to flout the rules which it so enthusiastically seeks to police on the global arena. To do so would provide yet another example of the colonial hypocrisy which, left unchecked, risks undermining the legitimacy of the international copyright framework *in toto*.<sup>106</sup>

While the US itself utilises a system of fair use in its IP framework which has benefitted its own creative industries (as has been the case for many decades), it seems that they are not prepared to allow African nations the same freedom. This hypocrisy has—quite reasonably—been hailed as 'a racist policy' by Ben Cashdan, a South African documentary filmmaker and television producer who has worked with ReCreateZA, a body that defends the rights of the South African film industry.<sup>107</sup> Unfortunately, the pressures exerted by the developed world—particularly the US—may mean that the entirety of the Copyright Amendment Bill will never be brought into law in its current form, with South Africa's creative industries ultimately being the victims of foreign political bullyboy tactics and a President who has failed to act on behalf of the best interests of his citizens. This unfortunate scenario will be all the more exacerbated in light of a post Covid-19 world where the problems highlighted above within South Africa's current unfair and unconstitutional copyright framework will only further tip the scales away from users of copyright, particularly filmmakers and those in the creative industries more broadly.

The Covid-19 pandemic had an unprecedented impact on the film industry worldwide. The above has demonstrated the seemingly paradoxical duality of Africa: On the one hand, utilising local ingenuity in the creation of the Copyright Bills that adequately cater to *lacunas* in Nigeria's copyright regime relating to content in the digital era, which is particularly relevant during the Covid-19 pandemic; and on the other, the reliance on foreign cooperation to pass the South African Copyright Amendment Bill so as to address the imbalances that already exist and which the Covid-19 pandemic will no doubt intensify in the case of South Africa's copyright regime. While national governments have done their best to offset the catastrophic effects of the Covid-19 pandemic on local filmmakers and the creative industries, the pandemic serves to exacerbate already-present shortfalls in the copyright regimes of Nigeria and South Africa. Unfortunately, while national governments and local industries may do their best to offset this, ultimately cooperation on a global scale will be needed to meaningfully preserve and protect the invaluable social, cultural and economic contributions of film making industries in developing nations like Nigeria and South Africa.

## DATA AVAILABILITY STATEMENT

This article is a literature review and therefore makes no use of primary data collection methods.

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