

Can an Artiste Lose 'Real Names' to a Record Label through an Entertainment Contract?

Commentary

by

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This question is not one to conclusively answer in the affirmative. A number of factors must be put into consideration in arriving at an answer to this question. It is one to be answered on a case by case basis.

This commentary sheds light on some of the factors to be considered by artistes and/ or legal practitioners in the consideration of entertainment contracts. To address factors to be considered in arriving at an answer, these questions will be succinctly analysed:

1. What is the relationship between trademarks, copyright and branding?
2. Is the name subject to trademark protection?
3. If the answer to no. 2 is yes, who is the proprietor of the trademark?
4. What are the terms of the entertainment contract (the contract)?
5. Are there defences available to the artiste?

In Nigeria, trademark and copyright protection is regulated by the Trade Marks Act, CAP T13 Laws of the Federation of Nigeria (LFN) 2004 (Trade Marks Act) and Copyrights Act, CAP C28 LFN 2004 (Copyrights Act) respectively. Recourse will be made to the relevant provisions of these legislations in the course of this comment.

I. The interplay between copyright, trademark and branding

Simply, trade mark is a sign (words including personal names, designs, colours, numerals, and shapes amongst others)¹ which identifies products; goods and/or services in the same way that a name identifies a person (natural or artificial).² There is a misconception that a brand and trademark mean one and the same. Although a trademark is indicative of a brand and these concepts converge and are used interchangeably, they are distinct. A brand transcends a design for which products of an undertaking is identified. It is the personality of a business or undertaking and branding is the process of giving meaning to a trademark. While brands are regulated by trademarks, they maintain their position as information resources.³ This is

¹ *Phillips Electronics BV v Remington Consumer Products* [1998] RPC 283

² Catherine Colston and Jonathan Galloway, *Modern Intellectual Property Law* (Taylor and Francis Group 2010) p 578; Justine Pila and Paul Torremans, *European Intellectual Property Law* (Oxford University Press 2016) p 369

³ Deven R Desai 'From Trademarks to Brands' (2012) 64 Florida Law Review 981

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2137766> accessed 25 May 2020; Robert G. Bone, 'Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law' (2006) 86 BUL REV 547, 548

why a brand may fail irrespective of trademark protection. This distinction is essential in the entertainment industry where an artiste's brand is a determinant of his/ her progress in an industry.

Copyright protection, simply, grants exclusive use and right to be associated to any literary, dramatic, artistic and musical works for which a person is the author or owner.⁴ The distinction between moral and economic rights in copyright is beyond the scope of this analysis. For purposes of this comment, however, copyright shall be interpreted to mean economic rights.⁵ Economic rights enable right- holders (copyright) to control/ license the use of their works and obtain remuneration(s) from such use. The interplay between copyright, trademark and branding is arguably more prominent in the music industry where these may be vested more than one person at a time. For instance, Cynthia Ikponmwemosa Morgan is the name of the artiste whose stage name is Cynthia Morgan. 'Cynthia Morgan', as a stage name, may be subject to trademark protection for which she is the proprietor. Efforts culminated in projecting 'Cynthia Morgan' as a brand becomes the collective effort of the artiste, her manger and/or record label. Where the artiste is signed to a record label, the terms of the contract shall determine ownership of copyright for the duration of the contract. These seem quite self-explanatory in theory but are more complicated in practice. One complication may arise from trademark ownership of, in this case, 'Cynthia Morgan' as a stage name.

II. Is the name subject to trademark protection and who is the proprietor of this trademark?

As in every business venture, the purpose of investment is to make profit. The music industry is a business venture. It is not unusual, therefore, for a record label to acquire trademark protection over the stage name(s) of its artistes.⁶ It provides a sense of security over the investments (in millions and billions) to be expended on newly signed on artistes.⁷

Where the stage name of an artiste is a combination of personal names, the registered trademark becomes a property right distinct from the person as an individual. This in no way implies inability to use a personal name. Consequently, such stage name (like every other trademark) may be assigned or transmitted to a third party for continued use for which it was registered.⁸ Where an artiste is the proprietor of his or her stage name, the terms of contract

⁴ Victoria Onyeagbako, 'Subject Matter of Copyright Protection' [2019] MIPLG 2 <<https://myiplawguide.com/practice-area/copyright/>> accessed 25 May 2020

⁵ Part I and II of Copyright Act, CAP 28 Laws of the Federation of Nigeria 2004

⁶ G- Worldwide Entertainment Limited's Trademark Application to register Kiss Daniel under class 41 (Application no NG/TM/O/2017/122929) of 11.12.2017

⁷ Section 5, 6 Trademarks Act, CAP T13 Laws of the Federation of Nigeria 2004

⁸ Section 26 Trademarks Act, CAP T13 Laws of the Federation of Nigeria 2004; Registration for Entertainment is done under Class 41 of trademark registration. Although Nigeria is not a party to the WIPO Nice Agreement (1957), it adopts the International Classification of Goods and Services for the Purposes of the Registration of Marks (NICE CLASSIFICATION).

executed between the artiste and a record label will determine ownership and liability, since the name as a trademark may be assigned to the record label by the artiste.

III. What are the terms of the contract?

The terms of an entertainment contract stipulates the contractual relationship between parties; rights and obligations, nature of the contract amongst others. With respect to ownership of copyright, the terms of contract should determine the ratio of royalties accruing to the parties, entitlement of performing and broadcasting rights *inter alia*. An artiste may assign or transfer trademark ownership through the contract signed. Where trademark ownership is transferred (from artiste to record label), it becomes irrelevant that such stage name constitute 'personal names' of the artiste. The proprietor of a trademark acquires exclusive use of such trade mark and must prevent other persons from using this trademark or a similar mark in carrying out activities for which the trademark was registered.⁹

It has been established that a personal name must be distinguished from the trademark and brand (in this case, the stage name). Consequently, the name Cynthia Morgan although personal names may constitute intangible property of the record label for the duration of the contract. It follows, therefore, that use of the trademark and remuneration accruing to 'Cynthia Morgan' belongs to the owner of the trademark subject to other terms of the contract such as ratio. In the event of a breach of contract, all contractual obligations may be enforced against a defaulting party.

What is more?

What happens where the stage name 'Cynthia Morgan' is not a registered trademark?

In this case, the terms of the contract only determines ownership of copyright; royalties and other remuneration amongst others. No claim of ownership may be laid on the name 'Cynthia Morgan' by a record label. However, economic rights which *ought* to have accrued to the record label in the course of the contractual relationship for the specified period of time and damages where applicable may be claimed.¹⁰

IV. What options are available to an artiste who by contract and/or trademark registration assigns personal name(s) to a record label?

Are there possible defences available to the artiste?

⁹ Ibid (n 5); *Beecham Group Ltd v Esdee Food Products Nigeria Ltd* 28 NIPJD [CA 1985] 12/1984 <<https://nlipw.com/cases-principles/beechem-v-esdee-food-products/>> accessed 25 May 2020; *Alliance International Limited v Saam Kolo International Enterprises Limited* 53 NIPJD [CA 2010] L/143/2003 <<https://nlipw.com/cases-principles/alliance-international-ltd-v-saam-kolo-international-enterprises-limited/>> accessed 25 May 2020

¹⁰ This is open to all parties to the contract.

The existence or otherwise of a defence largely depends on an understanding of the facts of each case and terms of the contract. This question suggests that ownership of the trademark which constitutes personal name(s) of the artiste reside in the record label. It is paramount to state that such contract cannot deprive an artiste of the use of his/ her personal names (all things being equal). Therefore, irrespective of the existence of a trademark protection secured by or assigned to a record label, the name 'Cynthia Morgan' may be used for bank transactions, personal identification and other *personal* use without constituting trademark infringement.

There is a likelihood of infringement, however, when the name (following a breach of contract) is maintained by Cynthia Ikponmwemosa Morgan in the ordinary course of business for which the name was registered, which is entertainment.¹¹ It is a likelihood of infringement because the Trade Marks Act recognises '**own name**' as an exception to trademark infringement in Nigeria. Section 8(a) of the Trade Marks Act provides thus:

The registration of a trademark shall not interfere with any *bona fide* use by a person of his (or her) own name...¹²

The language of the law suggests that this is not an absolute defence as what is *bona fide* use is determined by the Court,¹³ upon consideration of the facts of each case. Notwithstanding, it remains a viable defence and may be resorted to under such situations. This is available to artistes whose stage names are personal names. Where this is not the case, continued use of that name by the artiste constitutes a trademark infringement.

Furthermore, trademarks are protected for a period of seven years in Nigeria and may be subsequently renewed indefinitely in accordance with the Trade Marks Act.¹⁴ Application for revocation of a trade mark may be made prior to or upon its expiration for a number of reasons, one of which is 'non-use' as provided for by section 31 of the Trade Marks Act. Where a record label, following assignment or transmission of ownership of trade mark sits on this right without evidence of use (usually because the artiste breaks away from the label), section 31 provides a viable option of revocation open to the artiste, subject to fulfillment of necessary conditions as stipulated under the Trade Marks Act. For an artiste, this may help prevent the indefinite retention of the stage and personal name as trade mark by the record label.

There may be other persuasive defences such as evidence of bad faith by the record label in registration of the trademark. Again, this may be available on a case by case basis.

¹¹ Section 5 Trade Marks Act, CAP T13 Laws of the Federation of Nigeria 2004

¹² *ibid*, Section 8

¹³ The Federal High Court is the Court of competent jurisdiction; Section 67 Trade Marks Act, CAP T13 Laws of the Federation of Nigeria 2004

¹⁴ Section 23 Trade Marks Act, CAP T13 Laws of the Federation of Nigeria 2004

V. Conclusion

With the trend of 'slave contracts' over up and rising stars in the Nigeria music industry, entertainment contracts remain a major concern of players in the field. These contracts may be used as tools to achieve enslavement of vulnerable artistes. This has attracted attention and calls for enlightenment and legal discussions on the subject matter. Artistes must understand the need to seek legal advice in the execution of entertainment contracts so as to understand obligations and possible heinous clauses buried within the terms of contract.

Entertainment contracts properly drafted and executed provide artistes (without available means) with sponsorship opportunities to harness their potentials. They may also pose as much threat to advancement in the industry on an artiste.

Up and rising artistes, therefore, must discountenance a 'fame at all cost' approach in executing entertainment contracts but resort to legal aid and vigilance.

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