NGERIAN INTELLECTUAL PROPERTY:
OVERVIEW OF DEVELOPMENTS & PRACTICE

By

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Introduction

Intellectual Property (IP) protection has been on the forefront of developments in most developed as well as developing countries. Any nation concerned with its economic growth must pay attention to protection and enforcement of Intellectual Property Rights (IPRs). Foreign Direct Investment (FDI) is attracted into a country when an investor knows that there is return on investment and this can be achieved mostly with protection of IPRs and effective enforcement. One area through which Nigeria can explore huge investment opportunities is in intellectual property rights development and protection. This will result in increased revenue. Conversely, non-protection of IPRs will force investors to take their businesses to other jurisdictions resulting in loss of jobs and government revenue through non-payment of taxes.

This article shall briefly discuss important IP and IPRs issues, amongst others, the development of IPRs protection in Nigeria, the challenges and the raging issue of patent protection amongst others, and finally make recommendations. However, first the definition of intellectual property.

The World Intellectual Property Organization (WIPO) defines IP as:

Creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.

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IPRs are property rights in something intangible that protect innovations and reward innovative activity.

IP refers to property rights in creations of the mind, such as inventions, industrial designs, symbols, names, images among others. It allows people to own their creativity and innovations in the same way that they can own physical property and it is indeed the most valued asset owned by a company. This is aptly put in the following quote by Ben Franklin:

> If a man empties his purse into his head, no man can take it away from him. An investment in knowledge always pays the best interest.

Intellectual property is divided into two categories:

[a] Industrial property, which includes inventions (patents), trademarks, industrial designs, etc., and

[b] Copyright, which includes literary and artistic work such as novels, poems and plays, films, musical works, artistic works i.e. drawings, paintings, photographs and sculptures, and architectural designs. It also includes performing and recording rights

### Intellectual Property: Evolution and Role

IP has developed over the years, right from the medieval era. In Roman times, it was common for pottery to be embossed or impressed with a mark, for example a representation of a dolphin or the maker’s initial. Merchant’s marks were used in commerce in Britain from the thirteenth century; William Caxton used the mark W74C, gold and silver articles were hallmark as early as the fourteenth century. By the end of the sixteenth century it was very common for shopkeepers to erect

signs illustrating their trade. Traders took to using cards bearing their name and address, often accompanied by a device of some sort, an early form of what we have today as business card. The industrial revolution saw an enormous growth in the use of names and marks in advertising and thus modern trademark was born. This marked the early development of the modern Trademark Law.

In the area of patent, the first recorded patent for an industrial invention was granted in 1421 in Firenze, Italy to Architect and Engineer Filippo Brunelleschi. The claim was that he had thought of a better method for transporting goods on the River Aron. He undertook with the Florentine authorities that to divulge details of his new invention he would be granted a monopoly in respect of the exploitation of the invention within Florence for a number of years. After this, any person would be free to exploit the invention or introduce further improvements to the technology.

Copyright awareness on the other hand, arose with the growth of the printing press, and the need for the authors and publishers of popular works to profit for their task. In 1709 the UK Parliament enacted the world’s first Copyright Act, the so-called Statue of Anne. This Act established principles of copyright law which remain valid today and have developed to the current Copyright laws existing in most countries.

IP thus continued to evolve over the years with the evolution of brands from indication of source to quality. Few strong brands today have source and quality messages. The Coca-Cola Company no longer merely sells coke; it sells refreshments, entertainments, amongst others. Eastman Kodak Company no longer merely sells film; it sells a “Kodak moment” Modern marks have become hugely informative “data clusters” This is a new age, the age of information, moving from the industrial age and its source/quality based brands.

Given the evolution of brand signals from source to quality, brands have become the most powerful communicators in our
everyday vocabulary. The bags, the cars, the watches, clothing, pens, and other luxury brands including five star hotels we lodge in, all these make fashion statements about our character. Today, an owner’s mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name/symbol for good or ill. If another uses it, he borrows the owner’s reputation, whose quality no longer lies within his control. A brand that today only denotes source and quality is thus lacking in added attributes or content that consumers now want i.e. “a promise to deliver” in slogans such as TIDE “is so powerful, it cleans down to the fibre”, “never leave home without it” American Express, “we peel it, then fry it” suggesting that this particular potato fries is fresh and organic.

Basically, IP law protects the right of owner of a work created by exertion of mind or intellect to use the work exclusively, barring any use of the work without the owner’s prior consent. IPRs are classified into different rights ranging from copyright, trademark, industrial designs, and patents, Utility Model, Plant and Animal Varieties, amongst others. The term IP scarcely describes trademarks and similar marketing devices; but has now acquired international acceptance. IP is indeed becoming a fashionable description of research results and other original ideas, whether or not they fall within the ambit of what the law protects.2

The question that constantly raises agitation is how to balance the rights of an inventor or owner of an IPR with the right of the public to share in the work. The patent system is designed to promote innovation and, at the same time, offer a mechanism that would ensure that the fruits of such innovation are accessible to society. The challenge of balancing the private interest of the IPR owner with the public rights of disclosure

forms the circle of IP protection characterized by the laws of the States in the region and the world in general. The role of IPRs is to ensure that the IP owners do not lose rights to the information by disclosing it since such information can be used by an indefinite number of persons simultaneously i.e. the internet.

On the other hand, copyright has witnessed considerable activity in Nigeria. Considering recent developments particularly in the entertainment industry, it is ironic that Nigeria produces quite a number of home video entertainments with Nollywood leading the chart in Africa; still some of these works are not protected due to lack of awareness of IPRs. The Nigerian movie industry (Nollywood) is third only to Hollywood and Bollywood with the production of over 200 home videos per month. Nollywood attracts multi-million Dollar investment locally and internationally however the industry continues to struggle with some technical and quality issues.

In 2007, registration of Service Marks was allowed in Nigeria by the then Minister of Commerce acting under powers in section 42 (1) of the Trade marks Act 1965 to extend classification of goods to include services. Although the legality of this has been challenged i.e. whether regulations made by the Minister can amend the Act which, in itself is still awaiting revision.

The National Agency for Food and Drugs Administration and Control (NAFDAC) was established to regulate and control Foods, Drugs, related products imported or manufactured

5. Ibid.
locally and distributed in Nigeria. There is now a cross-reference with the Trademark Office to check true ownership of marks attached to the product to be registered. This practice has helped to keep off agents who attempt to register marks belonging to foreign brand owners. Standard Organization of Nigeria (SON) collaborates with NAFDAC to ensure that substandard products are not brought into the country. Unlike NAFDAC, SON is empowered to monitor non-edible products. The National Office for Technology Acquisition and Promotion (NOTAP) is charged with the registration of agreements involving the transfer of technology and Technical Service Agreements (TSAs). The NOTAP Act makes it mandatory for parties to subject the agreement to Nigerian law. Parties are to use skills available in Nigeria and may only offer jobs to foreigners in area of specialized skills not found within Nigeria. In this case, training of local staff by the investor/franchisor will be required. Nigerian Communications Commission (NCC) collaborates with the SON to check influx of fake telephone handsets into Nigeria. To achieve this, NCC issues Type-Approval licenses to genuine manufacturers. Therefore any consignment not covered by this license is treated as substandard and the same will be confiscated.

The Nigerian Copyright Commission\textsuperscript{6}, a creation of the Federal Legislature, is empowered to regulate the music, artistic and literary creations. The Nigerian Broadcasting Commission\textsuperscript{7}, also a creation of the legislature regulates the broadcasting sector. The Registry of Trademarks, Patents & Designs regulate the filings of trademarks, industrial designs as well as grant of patents in Nigeria. Likewise, the National Office for

\textsuperscript{6} Established by the Nigerian Copyright Act CAP N97 Laws of the Federation of Nigeria, 2004.

Technology Acquisition and Transfer\(^8\) registers Technical Service Agreements and Technology Transfer and Know-How Agreements.

Practicing IP lawyers also play a crucial role. The Registries mentioned above are inundated with IP related filings. The IP lawyers have taken the challenge with the formation of the Intellectual Property Lawyers Association of Nigeria (IPLAN), Nigerian Local Chapter of the International Association for the Protection of Intellectual Property (AIPPI) and Anti-Counterfeiting Collaboration (ACC), Nigeria\(^9\). These pressure groups are formed with the sole objective of promoting and developing IP in Nigeria as well as lobbying for IP law reform. The Nigerian Intellectual Property Commission (NIPCOM) Bill which is currently awaiting enactment is largely due to efforts of the IP community, both private and public working together with the various international associations. The faculties of law of Nigerian Universities now offer courses in IP; undergraduate students are introduced to developments in IP law. Students are also admitted into internship programs with leading IP law firms in Nigeria. The Performing Musicians Association of Nigeria (PMAN) and Federation of Intellectual Property Owners (FIPO) both play significant roles in protecting members’ rights\(^10\) as well as Collective Management Organisation (CMO). The continent boasts of a multi-million Dollar investment in “home video” entertainment. Introduction of Music Broadcast stations like Nigezie and Channel O. There is therefore need for an effective system of collection of royalty in Nigeria. A few years


\(^9\) Membership includes brand owners and regulatory authorities and others

\(^10\) There are presently one approved collecting society namely Copyright Society of Nigeria (COSON). Collecting Societies in Nigeria are regulated by Copyright (Collective Management Organization) Regulation 2007 pursuant to the Copyright Act as amended (Laws of Nigeria 2004). The Musical Copyright Society of Nigeria (MSCN) has not been approved by government.
back, IP was not often discussed. Indeed, a lot of people were unaware of IPRs and implications of IP theft. The concept until recently was foreign such that individuals and organisations alike did not appreciate that they could commercially exploit their IPRs or that IPRs are assets of immense value. Also there were very few IP Practitioners in Nigeria and those practitioners had a difficult time convincing the Courts to enforce IPRs.

There was no respect for IP, our Artists due to loss of revenue to counterfeit work, could not secure loans from Banks who were very hesitant to grant loans and the entertainment Industry was left struggling. Although our IP laws are outdated, in addition, our law enforcement agents lacked the understanding and capacity in enforcing IPRs. Although there were numerous International Treaties on the Protection of IPRs, they are yet to be incorporated into our local legislation. Nonetheless, Nigeria’s success story began when His Lordship Anyaegbunam CJ in 1980 granted the first Anton Pillar order in the case of Ferodo case, and in the intervening years IP protection/enforcement in Nigeria has been transformed. The courts in Nigeria as well as various IP- related regulatory agencies such as NAFDAC, SON, TM Registry, NBC, NFVCB play major roles in enforcement of IPRs and IPR related issues.

On the entertainment scene, the Nigeria entertainment industries have started to reap the fruits of their labour, and the banks are more willing to grant them credit facilities. Corporations providing services i.e. Glo, MTN, Airtel and the banks now recognize the brands that the artistes are selling and use them for advertisements and brand promotions. During the World cup, The Coca-Cola Company discovered the artiste that sang the “Waving flag” song and made him a star.

There are also progressive developments at the Nigerian Trademarks, Patents and Designs Registry. There is now regular (quarterly) publication of the Trademarks Journal and the Registry is undergoing computerization and now offers online services, and sharing international best practices. Furthermore,
an IP Academy has been established at the Registry, and Service Marks have also been introduced albeit controversial.

Today, there are numerous pressure groups and civil society organisations pushing for the protection and enforcement of IPRs in Nigeria. A good example is the Anti-Counterfeiting Collaboration; Nigeria (“ACC”) a non – political, non – governmental, organisation to assist in the reform of IP Laws in Nigeria and to bring brand owners, regulatory agencies, interest parties and the public together in order to fight counterfeiting and piracy in Nigeria.

Challenges
There are many challenges but just a few are mentioned here. First, the administration of IPRs in Nigeria is incapacitated by inadequate skills and competence. Persons involved in its administration are usually not experts. There is acute shortage of manpower in the qualitative sense.

Secondly, the infrastructure for operation of IPR in Nigeria is still largely undeveloped. Information Technology has not been fully developed and applied towards encouraging proper research by IP experts, students and scholars. Filing of applications is always slow; the process of grant of IPR could take years due to the limited infrastructural facilities\textsuperscript{11} at the Trade mark and Patent Registries. These infrastructure deficiencies have not encouraged business development in Nigeria and with bottlenecks in passage of goods and services across borders in the region.

Thirdly, Piracy and Counterfeiting have become an important factor frustrating business development in Nigeria. Nigeria is a big market with so much potential for growth however, the country has not been able to achieve maximum

\textsuperscript{11} Including but not limited to inadequate electricity supply, inadequate communication system, poor road network and insufficient Information Technology know-how.
potential due to acts of piracy and counterfeiting and remains a gateway to the rest of Africa for counterfeit products; fake goods are constantly being offered alongside genuine goods to consumers.

The penalty for offence of IPRs is not sufficient to deter would-be offenders. The only remedy for an owner in a civil action in court, leaving except in the area of copyright where the owner can institute a criminal action thorough the Nigerian Copyright Commission (NCC).

Fourthly, it is quite disappointing that after decades of independence, Nigeria has not made any significant change in its IP laws, the laws have remained outdated. However two major development of IP law in Nigeria are instructive. First:

Nigeria still lags behind in developing an indigenous law that will address basic issues on IPRs germane to its economy and social cultural environment. In the area of trademarks, there have been developments of other forms of marks different from marks relating to goods. There are service marks, scent marks, sound mark and slogans. The grant of patent on some plant varieties and seeds already in force in England has been recognized and regulated in Kenya and South Africa and it is indeed a milestone development. Nigeria and some other sub-Sahara Africa still regard plant varieties as non-patentable in their laws. It is hoped that this will be corrected in the Bill amending the Trademark Act of 1965 to protect and conserve the rich natural and bio-cultural products in the country.

Secondly, the level of IP practice, jurisprudence and enforcement is not fully developed. The judiciary is not up to date with issues relating to IPRs. Most of the IPR litigations are in the area of trademarks while there are very few on copyright and even fewer in patents. Also most IP cases are settled by the parties before they get to the appeal courts. This does not allow for proper catalogue of case law in this practice area.

**Patent Protection and Public Policy**

The essence of IP development is to help to increase public knowledge for development and also provide incentives to create knowledge. However, a major issue in the development of IP has been how to balance economic gain accruing from the invention and ensuring that the creations/ works of Intellectual Property benefit the general public for the common good of all. For instance, how do you allow a patentee to continue to enjoy his rights without denying the public of some human rights? Particularly in the case of important drugs such as Polio Vaccines and HIV drugs etc. This is why the issue of patent, public health and public policy requires special attention.

Many have argued that the prevailing system does not adequately address public health crisis. It is argued that the commercial incentives provided by the patent system are not sufficient to ensure the development of new products in certain areas, for example, in respect of neglected diseases, and that patent rights, which are enforced on the basis of commercial and market-based considerations, prevent access to, or lead to an increase in the prices of essential medicines such as HIV/AIDS drugs.\(^\text{15}\)

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However, the patent holders contend that by ensuring long-term patents and a small margin on the costs of drugs, they are rewarded for their years of toil on the one hand, while the public on the other hand is, invariably assured of much needed innovations. In the light of these concerns, pharmaceutical corporations have been accused of opposing attempts by developing countries to reform their patent laws. The resolution of this conflict lies in the better understanding of public health implications of TRIPS$^{16}$ flexibility, initiatives by all the stakeholders$^{17}$ and reversing the current attitude of patent owners by emphasizing the need to save lives which is vital without necessarily undermining the justifiable ground for return on investment. The achievement of public health objectives must be the guiding principle for the implementation of IP rules and policies in the pharmaceutical sector. This will be based on certain key principles and guidelines.

According to a WIPO report, developing countries such as Zimbabwe, Malaysia, Mozambique and Zambia recently are prepared to embrace the TRIPS flexibility initiative in the areas of patent and public health. In Nigeria, a pharmaceutical company was once engaged in discussions with NAFDAC to explore the possibility of importing HIV/AIDS drugs into Nigeria to be sold on a non-for-profit basis. Another viable method of narrowing the divergence between the patent system and public health objectives is to encourage the government to fund important scientific research thereby making the drugs more affordable. It is advocated that developed countries should implement the provisions of the Doha Declaration on TRIPS and public health, particularly those dealing with the issue of compulsory licenses to less developed countries that cannot produce these vital drugs. It is refreshing to note that some

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17. These include the governments, non-governmental institutions, the multinational pharmaceutical companies, the general public, etc.
developed countries and patent holders are assisting in this regard. In addition, certain drugs that are critical to human survival should not be patented so that of Patents should not be granted in respect of these categories of drugs. According to Buell Jonas who invented the Polio vaccine who was once asked whether he would patent the Polio vaccine\textsuperscript{18}. His famous reply was “what, would you patent the sun?”\textsuperscript{19}. That underscores the point that there are certain drugs which, owing to their biological importance, should not be patented.

**International Relations and Intellectual Property Rights Development**

Recent development in World Intellectual Property Organization has brought in its wake the need to reawaken Nigeria and make it the beneficiary of international developments reiterated in treaties and updates\textsuperscript{20}. WIPO is constituted of 184 member States, with forty-eight of them in Sub-Sahara Africa\textsuperscript{21} and administers several treaties including the Berne Convention, Rome Convention, among others. The WIPO aims to bring about cohesion and inflow of activities among member States. The WIPO also acts as depository to other treaties and has launched the Development Agenda to facilitate and support the pro-development initiatives for developing countries.

An extension of the international economic relations to the development of IPR is the creation of World Trade Organization (WTO), which succeeded General Agreement on Tariffs and Trade (GATT) in 1994. The advent of a new international economic order has fundamentally changed the nature of the global economy, affecting countries as well as the firms and individuals in every nation and region\textsuperscript{18}. The introduction of WTO therefore brought about the start of international

\textsuperscript{18} See John Buell, Private Profit & Public Health http://www.populist.com/01.7.buell.html.
economic law. One of the instruments in this respect is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Prior to TRIPS Agreement, countries practiced the doctrine of territoriality (which states that property rights are to be honoured by each State’s rules) and the doctrine of independence (which states that the grant of property rights within one country does not have force in another). This however changed with the introduction of TRIPS Agreement which preaches free market economy as against the earlier practice by Least Developed Countries (LDCs) of reduction of benefits to innovators (working requirement and compulsory licensing). The framework of TRIPS Agreement emphasizes the view that the justification for granting IPRs is to present to the innovator some monopolistic return for an investment that will benefit society and which would otherwise not occur. Provision is however made to address the issues of concern to developing countries. The Agreement also reinforces transfer of technology between the developed and developing

19. Ibid.
23. Ibid at p438.
24. Ibid op cit.
25. Ibid op cit.
countries of the world. Over a period of time, member countries have met to formulate policies further to the implementation of the provisions of TRIPS Agreement. Doha Round negotiations whereby the Doha Declaration on TRIPS and Public Health (“Doha Declaration”) calls for flexibility to allow LDCs to decide on extent of IP protection in the face of public health crises which can constitute national emergencies and allows LDC member States to grant compulsory licenses for the importation of drugs in cases of emergency which is usually determined by these countries subject to notification to the General Council.

The above discussion shows that the WTO and WIPO allows for participation of Sub-Saharan African countries in economic development thus attaining the status of technology oriented States in near future through transfer of technology.

With the assistance of WIPO, the trademark registry recently opened a training academy. The registry is also online to give access to measures presenting trademark pendency, quality, application filings, registrations and assessment of inventory for pending applications, and to achieve the goal of achieving low turn-around time while maintaining and increasing quality.

United States Patent and Trademark office (USPTO) and the Commercial Law Development Program (CLDP) have been organizing training for the trademark registry officials and Judges’ training respectively.

Conclusion and Recommendations

IPRs continue to develop in Nigeria, though it must be noted that it is not where it ought to be.

The role of collecting societies in Nigeria is fast becoming significant and an example of this is the licensing of traders in Alaba International Market Lagos, to produce and corporate users as well as distribute albums belonging to the members of those societies. In combating piracy, the Nigerian government also introduced through the NCC, the Copyright (Optical Discs Plants) Regulations 2006 which mandates all disc manufacturing companies in Nigeria to register with the NCC and meet required conditions for operation. However, the challenges of illegal digital and internet downloads, that is met by the extant Copyright law still remains daunting for enforcement agents and IPR holders.

The need for an impressive development of IPRs is however conditional on some factors being put in place and this include: Proper review and amendment of IP laws in Nigeria; Provision and maintenance of basic infrastructure; Financing of Research and Development (R&D); Regular training of IP personnel to be up-to-date with international best practice; Ratification, careful operation of and participation in Treaties of WIPO and WTO on IPRs; The introduction and adequate implementation of collective system of royalty; Appointment of IP experts and professionals to key offices to implement policies; Application and enforcement of local content rules in respect IP; Zero tolerance of fakes by all stakeholders; effective prosecution of Counterfeiters; Cooperation among industry practitioners; and public-private partnership.

The list of recommendations is inexhaustible and it is expected that this area of law practice will continue to evolve.