ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN NIGERIA

BY

ISAAC AMEH
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A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAWS - Ph.D.

DEPARTMENT OF PRIVATE LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY, ZARIA
NIGERIA

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DECLARATION

I hereby declare that work in this Ph.D. dissertation entitled "Analysis of the Legal and Institutional Frameworks for the Protection of Intellectual Property Rights in Nigeria" was undertaken by me under the supervision of Professor Y. Aboki, Professor B.Y. Ibrahim and Dr. A.R. Agom of Faculty of Law, Ahmadu Bello University, Zaria. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other institution.

_____	_____	_____
Isaac AMEH	Signature	Date
Student		

CERTIFICATION

This dissertation entitled "ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN NIGERIA" by Isaac AMEH meets regulations governing the award of Doctor of Philosophy in Laws - Ph.D of Ahmadu Bello University, Zaria, Nigeria and is approved for its contributions to knowledge and literary presentation.

_____ _____
Professor Yusuf ABOKI Date
Chairman, Supervisory Committee

_____ _____
Professor Bashir Yusuf IBRAHIM Date
Member, Supervisory Committee

_____ _____
Dr. Austin Robert AGOM Date
Member, Supervisory Committee

_____ _____
Dr. Abubakar Muhammad MADAKI Date
Head, Department of Private Law

_____ _____
Professor A. Z. HASSAN Date
Dean, School of Postgraduate Studies

DEDICATION

This dissertation is dedicated to my family for their constant love and care for my well being.

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ABSTRACT

The subject of intellectual property rights without doubt, has attained considerable universal prominence, especially in its ever growing significance to the core values of human enterprises. In today's world, the subject of intellectual property rights is so central and dynamic that it is the concern of many disciplines of law, technology, economics, health, culture, agriculture, environment, international relations, politics and more. Intellectual property has problems with political and socio-economic contents, for example, piracy, counterfeits and imitation. This is as a result of advancement in technology touching on internet, digitalization through compact discs, industrial photocopiers and scanners. There are various numeric legal provisions, for example, Copyright Act, Trademark Act, Patent and Design Act which are supposed to deal with these problems. But because of the ever-changing development in science and technology, the laws are always behind developments or the enforcement mechanisms are weak. Also there are institutional frameworks such as the Nigerian Copyright Commission, the National Office for Technology Acquisition and Promotion, the Customs and Excise, the Federal High Court, the Nigeria Police and so forth for the administration and enforcement of intellectual property in Nigeria. At the international plane such as Berne Convention for the Protection of Literary and Artistic Works, Paris Convention for the Protection of Industrial Property and Trade Related Aspect of Intellectual Property Rights (TRIPS) there are laws and conventions prohibiting offences touching intellectual property. Despite these legal and institutional frameworks, piracy of copyrighted materials, counterfeit or imitation of patented products still go on unabated in this country. That is, offences bordering on intellectual property such as piracy, imitation and counterfeiting are on the increase. Without legal and institutional protection, it is doubtful if any reasonable person would dissipate energy into creating intellectual property. This dissertation examined the legal and institutional frameworks for protection of intellectual property rights in Nigeria, with the view to ascertaining their efficacy or otherwise for the protection of intellectual property rights. The need for the protection of intellectual property rights cannot be over-emphasized. Both legal and institutional protections accorded to various species of intellectual property do not only encourage the owners of such rights to engage their creative intellect in more creativity for the utility of the society, but it also serves as an incentive to others that have creative minds to put their creative intellects into uses too. In analyzing the laws and institutions doctrinal approach was used. The researcher visited some of the institutions for the enforcement of intellectual property rights, such as Nigerian Copyright Commission, National Office for Technology Acquisition and Promotion, Trademarks and Patent and Design Registry for first hand information on the subject matter. Information was also obtained through the institutions' websites and other relevant sites on the internet. The works of other writers were also consulted. Laws such as Copyright Act, Trademark Act, Case laws, for example, decisions of superior courts of records where relevant were used. The research found that there are some deficiencies in enforcement mechanism of institutional frameworks, for example, lack of unity of command of different agencies, for example, the Police, Copyright inspectors, Custom and Excise share failure in protecting intellectual property rights. It was further found that there are several similarities in powers and functions of agencies which create confusion, for instance the role of copyright inspectors and police in respect of copyright matters. Also noted was that trademarks, patent and design do not have enforcement institutional framework like Nigerian Copyright Commission for Copyright. Another finding was the lack of expertise of personnel, inadequate manpower, facilities for operation and poor funding of the institutions. It was recommended that by improving the legal regime, enforcing the existing laws and increasing public awareness, the government in concert with relevant public and private sectors can make significant contributions in realizing its goal of protecting intellectual property rights in Nigeria. On the institutional cooperation it is recommended that the relevant agencies of government should build stronger cooperation and coordination for effective monitoring and enforcement of intellectual property rights.

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LIST OF ABBREVIATIONS

ABJ	Abuja
A.C	Appeal Cases
A.G	Attorney-General
A.U	African Union
All E.R Rep.	All England Reports Reprint
All E.R.	All England Reports
All FWLR	All Federation Weekly Law Report
ALR Comm	All Commercial Law Report
All N.L.R	All Nigerian Law Reports
App.Cas.	Law Reports, Appeal Cases
ARIPO	African Regional Industrial Property Organization
ASTRIP	Association for Advancement of Teaching and Research in Intellectual Property
B.O.N	Broadcasting Organization of Nigeria
C.A	Court of Appeal
C.B.	Common Bench
C.C.H.C.J.	Selected Judgments of the High Court of Lagos State (Certified Copies of High Court Judgments)
C.L.R.	Common Law Reports
CLRN	Commercial Law Report of Nigeria
C.M.O	Collective Management Organization
C.O. Bul.	Copyright Office Bulletin
C.O.S.O.N	Copyright Society of Nigeria
C.P.A.	Criminal Procedure Act (Southern Nigeria)
C.P.C.	Consumer Protection Council or Criminal Procedure Code (Northern Nigeria)
Cap	Chapter
Ch.	Law Reports, Chancery
Ch.App.	Chancery Appeal Cases
Ch.D.	Law Report, Chancery Division
DNA	
E.C.A	Economic Commission for Africa
E.C.D.R.	European Copyright and Design Report
EIPR	European Intellectual Property Report
E.M.L.R.	Entertainment and Media Law Report
E.N.L.R.	Eastern Nigeria Law Reports
E.P.O	European Patent Office
E.R.	English Report
F. Supp.	Federal Supplement

FCT	Federal Capital Territory
F.H.C.R.	Federal High Court Reports
F.R.C.L.R.	Federal Revenue Court Reports
F.S.R	Fleet Street Patent Law Reports
G.L.R	Ghana Law Reports
HC	High Court
H.L	House of Lords
H.L. Cas.	House of Lords Cases
I.C.T	Information and Communication Technology
I.F.P.I.	International Federation of Phonogram and Videogram Producers
ICPLAW	International Convention for the Protection of Literary ad Artistic Works
ICSAC	International Confederation of Society of Authors and Composers
IFRRO	International Federation of Reprographic Rights Organization
IPCA	International Patent Classification Agreement
IPLR	Intellectual Property Law Report
IPR	Intellectual Property Rights
IPTTO	Intellectual Property and Technology Transfer Office
ISBN	International Standard Book Number
ISPs	Internet Service Providers
ISSN	International Standard Serial Number
K.B.	Law Reports, King's Bench
LDCs	Least Developed Countries
L.F.N.	Laws of the Federation of Nigeria
L.J	Lord Justice
LLR	High Court of Lagos Law Reports
MANCAP	Manufacturers Conformity Assessment Progarmme
MR	Master of Rolls
N.C.C	Nigerian Copyright Commission
N.C.L.R.	Nigerian Commercial Law Reports
N.L.R.	Nigerian Law Reports
N.N.L.R.	Northern Nigeria Law Reports
N.P.A	Nigerian Publishers Association or Nigeria Port Authority
N.W.L.R.	Nigerian Weekly Law Reports
NAFDAC	National Agency for Food and Drug Administration and Control
NESREA	National Environmental Standards and Regulations Enforcement Agency Act
NOTAP	National Office for Technology Acquisition and Promotion
OAU	Organization of African Unity
P.C.C.	Patents County Court
P.C.T.	Patent Cooperation Treaty
P.R.S.	Performing Rights Society
PMAN	Performing Musicians Association of Nigeria
Q.B.	Queen Bench

Q.B.D.	Law Reports, Queen's Bench Division
Rep	Reports
R.P.C.	Reports of Patent Cases
S.C	Judgments of the Supreme Court
S.C.N.L.R.	Supreme Court of Nigerian Law Reports
SCR	Supreme Court Reports
SON	Standard Organization of Nigeria
STRAP	Strategic Action Against Piracy
T.L.R	Times Law Reports
TLT	Trademark Law Treaty
TMA	Trademark Act
TRIPS	Trade Related Aspect of Intellectual Property Rights
U.C.C.	Universal Copyright Convention
U.I.L.R	University of Ibadan Law Report
U.K.	United Kingdom
U.S.	United States
U.S.P.Q.	United States Patent Quarterly
UNESCO	United Nations Educational, Scientific and Cultural Organization.
UPOV Conv.	Convention for the Protection of New Varieties of Plants
USIS	United States Information Service
Ves	Vesey Junior
W.L.R.	Weekly Law Reports
W.R	Weekly Reporter
W.R.N.L.R.	Western Region of Nigerian Law Reports
W.T.O.	World Trade Organization
WACA	West African Court of Appeal
WCT	World Intellectual Property Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	World Intellectual Property Organization Performances and Phonograms Treaty
www	World Wide Web

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The concept of property has changed significantly over time. It is scientifically defined[1], as the jural relationship between two or more persons in relation to a thing. That is, the right to use and enjoy it. This includes the right to exclude others from using the thing. To many, especially laymen, when talk of property, what normally comes to minds is a tangible property, such as a house, a vehicle, electronic gadgets and so forth. Aboki held that in some cases both legal practitioners and laymen rarely think of modern forms of property, such as, copyright, patents and Trade Marks which are called intellectual property. These properties are not less important than other properties. They need the protection of law just like other forms of property not only at national level but at international level[2].

In the present era of globalization and liberalization in the world economy, a nation must be able to harness her ideas, inventions, innovations and creative works towards technological advancement and global competitiveness. To nurture national talents, Nigeria requires identification of her researchers and inventors, creation of an enabling environment and to initiate strategies to protect all the stakeholders and their creative works. These creative works constitute *corpus juris* in general called intellectual property. It is intellectual property because unlike other properties created by nature or modeled by physique and labour, intellectual property is one created as a result of intellect. It is a different area of property. Like other forms of property, intellectual property such as Trade Marks, patent and copyrights have problems with political and socio-economic contents, for example, piracy, plagiarism etc. At present, both at national and international planes, there are laws and conventions prohibiting offences touching intellectual property. But alas! Offences bordering intellectual property such as piracy, imitation and counterfeiting are on the increase. Nigeria is not an exception. In this regard, the analysis of legal and institutional frameworks for the protection of intellectual property are undertaken in

[1] Aboki, Y. (2002) Economic and Cultural Bases for Copyright Protection in Nigeria, In: A Decade of Copyright Law in Nigeria 1st ed. Nigerian Copyright Commission, Abuja, p.76.
[2] ibid

order to access the efforts of both institutions for implementation and curbing the menace of piracy, counterfeit, imitation and other offences, which are inimical to intellectual property.

The need for intellectual property protection cannot be over-emphasized. Such legal protection accorded to various species of intellectual property do not only encourage the owners of such rights to engage their creative intellect in more creativity for the utility of the society, but it also serves as an incentive to others that have creative minds to put their creative intellect into use too. Without legal protection, it is doubtful if any reasonable person would dissipate energy into creating intellectual property for public consumption. For example, there would have no privilege to have books such as Introduction to Legal Research Methodology, Law of Banking in Nigeria, Law of Crimes in Nigeria, Material and Cases on Public International Law and so forth. In other words, creativity would not be attractive or considered worth pursuing by many. This is because if after all the efforts, such as physical execution, intellectual exertion, investment of time, money and other resources put into creation of intellectual property, the property is thrown into public domain for the society to use as it pleases and with the author or inventor of the property getting nothing in return from the society. The society would be the worse for the absence of creative zeal in the circumstance, because it would have been deprived of the utility of most of the artistic, literary, musical and others creative works of the authors we enjoy today.

The utility of the various species of intellectual property to the society has been aptly put by Keane[3] thus:

> …without copyright protection society would be deprived of artistic and literary creativity. Without trademark protection consumer would be deprived of a means of assessing quality and standards of goods. Patent protection acts as an incentive to invent and for product development permitting the inventor to recover research and development costs plus a reasonable profit.

This quotation highlights the importance of legal protection of intellectual property for society to benefit. The field of intellectual property law is essentially related to the protection against theft of virtually all the intangible products of human intellect

[3] Keane, T.M.: (1995) "Irish Competition Law and the Treaty of Rome: An Overview" Copyright World, May p.17.

or creativity[4]. It protects the exclusive rights of the author, inventor or other creator in the product of his intellectual or inventive creativity. The story of development of intellectual property is, by and large, that of growth of international trade and commerce, and conflicts arising therefrom. It encompasses such legal concepts as copyright, Trade Marks, patents and design rights and it also includes rights against disclosure of trade secrets and unfair competition. It is a category of intangible rights protecting commercially valuable products of the human intellect.

1.2 STATEMENT OF RESEARCH PROBLEM

The recent technological advancement in electronics in particular and high 'spirit' for acquisition of wealth promote piracy, counterfeit and imitation which have become a global challenge to the intellectual property rights. One characteristic shared by all types of intellectual property rights is that they are essentially negative. That is to say, they are rights which stop others from doing certain things, for example, the rights to stop piracy, making of counterfeits and imitations. In some cases, it stops third parties from exploiting the right-owner without the licence of the right owner.

Many goods moving through international commerce are counterfeited[5]. These raise the questions: what is responsible for the increase of this ugly situation? Are there adequate legal and institutional frameworks to protect the rights? If there are, have the legal and institutional frameworks failed? For example, the pharmaceutical and the personal care products industries are riddled with counterfeits. Millions of dollars of counterfeit pharmaceutical and personal care products manage to move through various authorized and unauthorized channels. These channels make it possible for counterfeit, expired, repackaged and relabelled products which are shipped internationally. Faked drugs rob patients as well as the patentee's profit. Financial Times[6] reported a horror story of a genuine bottle for children's medicine which was refilled with a dangerous liquid and sold in a Nigerian market where many children died.

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[4] Umaru, M.J.: (2006) The Scope and Sources of Intellectual Property Law in Nigeria, A.B.U. Law Journal, Vol.24-25 pp.37-38.
[5] Ladan, M.T. (2007) Materials and Cases on Public International Law Ahmadu Bello University Press Limited p. 795.
[6] Financial Times, 2nd October, 1995, London, p.5

The unauthorized commercial exploitation of author's work, also known as piracy, is a phenomenon that restricts the growth of the very industry by which it thrives. It is a deliberate misappropriation of the fruits of an author's labour and it destroys incentives for creativity. The experience in Nigeria shows that piracy and counterfeit drugs find its way to the market and one wonders whether laws or institutions exist for control or not. Intellectual property law is an expanding field. Intellectual property law is a branch of law which protects finer manifestations of human achievement. Intellectual property (IP) refers to property rights in the creations of the mind, such as inventions, industrial designs, symbols, names, images among others[7]. It allows people to own their creativity and innovation in the same way that they can own physical property and it is indeed the most valued asset owned by a company[8]. The ultimate art of shaping of intellectual property policy lies in securing outcomes that are proportionate to the aim of that protection[9]. There are several problems which necessitated this research such as:

1.2.1 Problem of Imitation

The demand for legal protection against the imitation of Trade Marks and names were made and acceded to from the early years of industrialization[10]. Trade Marks law[11] is principally to ensure that no-one, not being the proprietor of a trademark, or a registered user thereof uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade in relation to any goods in respect of which it is registered. A trade mark is a legally protected name, word, symbol, or design and their combinations used by a manufacturer or seller to identify a product or service to distinguish it from other goods. Examples of such goods are chemical, pharmaceutical and mineral substances, furniture and upholstery, paper, mineral and aerated waters, tobacco and so on. Where the plaintiff wanted injunctions because one trader represented to the public that he was selling the goods or carrying on the business of another was

[7] Nwokocha, U. (2009) Sub-Sahara Africa: Intellectual Property Rights Development, p1
[8] ibid
[9] Cornish, W. and Llewelyn, D, (2007) Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights 6th ed. Thomson Sweet & Maxwell p.606.
[10] Ibid at p.3
[11] Trade Marks Act Cap. T.13, Laws of the Federation of Nigeria, 2004.

enunciated by Lord Hardwicke L.C in **Blanchard vs. Hill**[12]**.** Similar position were held in the cases of **In Hogg vs. Kirby**[13] and **Crutwell vs. Lye**[14] This protection also applies to those who trade in these goods and products, using specified trade marks and trade names.

In Nigeria, there are many fake products with marks imitating the trade marks and names of the genuine foreign manufacturers being smuggled into the country from other countries[15]. Also many fake products are produced within the country which carries marks which imitate often-times the trade marks and names of the genuine Nigeria manufacturer, for example, drugs, drinks, skin products and goods being sold in the country rather than the infringement of trade marks. The names of these fake products and the names of genuine manufacturers are often-times advertised in the national newspapers by the National Agency for Food and Drugs Control without detection. Consequently, they go scot-free without prosecution.

1.2.2 Problem of Counterfeit

The word 'counterfeit' refers to a fraudulent imitation of products with the intention to deceive and mislead the ultimate consumer. The World Health Organization (WHO) defined counterfeit drug as "medicine or medicinal product which is deliberately and fraudulently, mislabelled with respect to identity and/or source. According to WHO, counterfeit can apply to both branded and generic products and counterfeit products may include products with the correct or wrong ingredients, without active or insufficient active ingredients or with fake packaging, for example, GlaxoSmithKline was fined $750 million for adulterated drugs in November, 2010 by U.S government[16]. It pleaded guilty for introducing four types of adulterated drugs for delivery into interstate commerce from March 2003 to October 2004 at its subsidiary SB Pharma Puerto Rico at Cidra. The report stated:

> …GlaxoSmithKline Plc has agreed to pay $750 million to settle Federal Civil and Criminal charges in the nation's fourth largest health care fraud settlement. The False Claims Act settlement was announced at a Boston Press Conference by Assistant United States Attorney

[12] (1742)2 Atk 485.
[13] (1803)8 Ves. 215.
[14] (1810) 17 Ves. Jun 335
[15] Ladan, M.T. op cit
[16] Nigerian Law Times, Vol. I No. 13, November, 2010 edition Column 1, p.6.

General Tony West and U.S. Attorney Carmen Ortiz of the District of Massachusetts.[17]

Section 12 of the Nigerian Counterfeit and Fake Drugs (Miscellaneous Provisions) Act[18], provides for various forms of counterfeit all pointing to fraudulent imitation as follows:

> (a) any drug or drug product which is not what it purports to be, or (b) any drug or drug product which is so coloured, coated, powered or polished that the damage is concealed or which is made to appear to better or of greater therapeutic value than it really is, which is not labelled in the prescribed manner or which label or container or anything accompanying the drug bears any statement, design or device which makes a false claim for the drug or which is false or misleading; or (c) any drug or drug product the container of which is so made, formed or filled as to be misleading; or (d) any drug or drug product the label of which does not bear adequate direction for use and such adequate warning against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods or duration of use; or (e) any drug or drug product which is not registered by the Agency in accordance with the provisions of the Food, Drugs and Related Products (Registration etc Act).

The remarkable advances in information storage and copying technology have made counterfeiting a highly unscrupulous trade in many parts of the world particularly in third world countries like Nigeria. This unauthorized reproduction or selling of faked products is on a very considerable scale in enterprises, organization and the home. For example, counterfeited pharmaceuticals or heath care products are packaged in a genuine wrapper even though faked for consumers to use. By this means many patients have died without knowing that they have taken counterfeited drugs or products. These are problems in the area of intellectual property rights.

1.2.3 Piracy

This refers to the unauthorized and illegal reproduction or distribution of materials protected under intellectual property law[19]. Examples of means of reproduction are: high technology photocopier, scanning machines, duplicating

[17] ibid
[18] Cap. C34, Laws of the Federation of Nigeria (LFN), 2004
[19] Ladan, M.T. op cit. p. 805. See also Se Li, H.H. (2006) Piracy, Prejudice and Profit: *A Perspective from US-China Intellectual Property Rights Disputes*, in the Journal of World Intellectual Property, Vol.9 No.6 pp.727-746

machine, download of materials from internet and materials burned to CDs printed through printing machines. 'Piracy' appears to be more often associated with copyright than other rights. It remains one of the most pervasive abuses to copyright in the world today. It leads to a destruction of the incentives for creativity, and ultimately damages the economy. Copyright generally refers to the exclusive right held by the author or developer of an original work of authorship to make copies of such work and utilize them for commercial purposes. It is one ill that plagues every copyright work and is capable of destroying the host industry. It hurts authors and leaves the consumers short-changed.

In the information and communication technology (ICT) age, piracy has become a global problem to national government and intellectual property based business alike. The principal motivations for piracy have been identified as illegitimate and quick profits, low promotional investments and risk, the ease of production and low costs. Others are opportunity, unsatisfied market demands, weak market links, the strategic location of their operational bases in terms of commerce, the difficulty of detection and proof, the non-deterrent effect of or complete absence of laws and the slow or cumbersome legal processes. All these sum up to be problems of intellectual property rights facing Nigeria today.

The attitude of people to piracy is often dictated by the immediate impact of the phenomenon on their situation. The musician who decries piracy of his musical works may be enjoying an unauthorized cable channel while the renowned writer whose literary work is the toast of pirates may consider himself fortunate to have sourced a pirated copy of the latest worked processing software for far less than the price of a genuine one. The circle of deceit is endless. The concern goes beyond software piracy to the alarming degree of ignorance and disrespect for the intellectual property right of author/producers to reap the fruits of their labour[20].

1.2.4 Ineffective Legal Framework

There are various legal provisions which encourage imitation, piracy, counterfeiting in Nigeria. Thus the imitators, pirates and counterfeiters take undue advantage of them. Some of such provisions are section 20(2)(a)-(d) of the

[20] Sodipo, B. (2012), Trade Marks Protection in Nigeria: Infringement and Remedies Under the Law, Nigerian Law Reform Journal NLRJ, Nigerian Law Reform Commission, p.6.

Copyright Act which exempts an infringer from criminal liability. Section 13 of the Merchandise Marks Act provides for expiration of commencement of action against offender to three years only after the discovery of the commission of the said offence. The limitation is rather impracticable and unjustifiable due several factors. Also Section 1(2) (e) of the Copyright (Collective Management Organizations) (CMO) Regulation, 2007, provides for members that may not be easily achieved. Further, section 44 of the Copyright Act, provided for restriction on importation of pirate copies without corresponding for export. It should be noted that 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. TRIPs in Doha Round Declaration called for flexibility to allow least developed countries (LDCs) to decide on extent of intellectual property protection in the face of public health crises which can constitute national emergencies. It allows LDC member States to grant compulsory licences for the importation of drugs in cases of emergency which is usually determined by these countries subject to notification to the General Council[21].

Section 61 of the Trademark Act imposed meagre 200 Naira for punishment of infringement. Section 67 has inherent statutory problems of definition such as difficulty in understanding the meaning it intends to project. Section 14(1)(2) and (4) of Trade Marks provides enforcement problems.

Section 372 to 380 of the Penal Code create various offences similar to the Merchandise Marks Act, including counterfeiting a property mark (section 375) making a false mark (section 378) and tampering with property marks (section 380). Terms of imprisonment range from one to three years or a fine or both. The punishments prescribed by Penal Code are so mild that it cannot deter infringers.

Section 14(1) Patent and Industrial Design providing for first to register whether or not the real creator. This is a problem because an infringer of design can have access to what the true owner intends to register and put up his application before him.

[21] Nwokocha, U. op cit. p.8

1.2.5 Ineffective Institutional Framework to Enforce the Law

From defective legal framework, efficient institutional framework cannot emerge. In the area of administration, for example, Patents and Industrial Design and Trademark do not have direct agency responsible for its administration and enforcement like Copyright has – Nigerian Copyright Commission. Also there are detached units like Police, Custom and Excise for enforcement that makes each act as if the other is doing it.

1.2.6 The Problem of Lack of awareness of the Populace

Lack of public awareness makes the intellectual property rights law in Nigeria to be dead law. Section 34(3)(d)[22] provides that the Commission shall enlighten and inform the public on matters relating to copyright. The Commission has problem of inadequate outreach programmes to people within the rural areas. Because of this, the multitude of artistes and users of works in the rural areas remained uninformed. The general attitude of the Nigerian public is that of easy and unrestricted use of intellectual works. These attitudes extend to lip service paid to intellectual works issued by private and public institutions including government[23]. Though, the Commission had embarked on public enlightenment activities such as symposia, workshops, seminars and supporting the establishment of intellectual property clubs and visits to some universities, for example, the visit of the Director of Nigerian Copyright Institute and his team to Ahmadu Bello University on 3rd September, 2010 for public enlightenment, yet, only few people know about the Commission and her activities. The situation is compounded by the fact that programmes through print or electronic media are to be paid for. Also, the media services have very limited coverage themselves, in the sense that not many people can afford to purchase them.

The efforts of the Commission in the direction of ensuring the enforcement of intellectual property rights have not achieved the desired result. This is responsible for the innocent infringement of intellectual property rights.

[22] Copyright Act Cap C.28 Law of Federation of Nigeria 2004
[23] Ocheme, P. (2000) The Law and Practice of Copyright in Nigeria Alheri Information Centre, Zaria p.128.

1.2.7 Economic Problems

The utmost aim of copyright law is to protect the property owner of a copyright work by seeing that his labour is not unjustifiably expropriated or reaped by people who are not the producers of such labour. The economic basis of the copyright law is the making sure that people who make inventions secure the pride, reward, encouragement and incentive of their labour[24]. Because of the economic value of the intellectual property, piracy, counterfeit and imitation are on the increase, for example, the reproduction of text books, CDs and DVDs, production of counterfeit drugs and imitation of trade mark and other inventions for quick richness. The Nigerian populace is ready to buy the pirated copies of textbooks, CDs and DVD, possibly, because of the low cost compared to the original one.

1.2.8 Political Problems

Political problem of intellectual property is mostly attributed to the government unwillingness to give effect to the laws relating to IP. The success of governments' concerted efforts, remain to be seen in the practical arena with regards to combination of the evils of intellectual property[25]. The punishment for infringement of the intellectual property has not been implemented to the letter. Therefore, culprits are not deterred by the action of the government.

1.2.9 Problem of Lack of Cooperation among Nations.

Due to the information and communication technology (ICT), electronic recording, broadcasting, and cinematography have brought about international exchange of ideas and works in manifolds. Protection at the international level is needed now more than ever before due to the advancement in global communication such as internet. A book or novel or periodical, for example, may be read, one can listen to music, sound recording in many countries regardless of national boundaries. Films and television programmes reach audiences far beyond the territorial boundaries of their countries of origin by satellite transmission. That goes to say that countries must cooperate to safeguard their intellectual property. According to section 41 of the Copyright Act[26],

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[24] Aboki, Y. Economic and Cultural Bases for Copyright Protection, Op. cit p.78.
[25] Ocheme, P.A Op cit p.149
[26] Copyright Act Cap.C28 LFN, 2004

> where any country is a party to a treaty or other international agreement to which Nigeria is also a party and the Minister is satisfied that the country in question provides for protection of copyright in works which are protected by this Act, the minister may by Order in the Federal Gazette extend the application of this Act in respect of any or all the works referred to in section 1(1) of this Act.

International relations in intellectual property are very essential for enforcement against counterfeiting and piracy. The establishment of World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) brought about the States cooperation. WIPO is set to bring about cohesion and inflow of activities among member States. Intellectual property rights registered in a number of countries could be affected by the same types of infringements. Therefore, information networks could consequently be useful for the exchange of information and infringement cases. A number of Member States have established coordinating or taskforce units involving, *inter alia*, the various relevant ministries and agencies, such as the industrial property offices, customs, police and justice. This is to the effect that countries should cooperate for protection of intellectual property. Cooperation of Member States with international intergovernmental organizations has resulted in the creation of bilateral cooperation and support programs in the field of enforcement. Industrialized Member States are requested to create an international computer network covering the ownership of merchandise that passes through customs.

In Nigeria, intellectual property law is just developing compared to real property law. There is a general lack of awareness of intellectual property laws and regulations. The publicity by the Nigerian Copyright Commission and National Office for Technology Acquisition and Promotion is very low. Education in the intellectual property matters is gradually getting introduced by the agencies through Nigeria Universities Commission. The present research may be useful for researchers of future.

1.3 STATEMENT OF RESEARCH OBJECTIVES

This research is focused on the legal and institutional protection mechanisms for intellectual property rights.

i) The research is aimed at evaluating the success or otherwise of the legal and institutional frameworks for the protection of intellectual property rights in Nigeria.

ii) To critically appraise the adequacy or efficacy or otherwise of existing laws for protection of intellectual property rights in Nigeria.

iii) To examine the institutional framework for the protection of intellectual property rights in Nigeria, such as Nigerian Copyright Commission, National Office for Technology Acquisition and Promotion, Federal High Court, The Nigeria Police, Customs and Ministry of Commerce with the view to ascertaining their efficacy or otherwise for the actualization of the protection of intellectual property rights.

1.4 RESEARCH METHODOLOGY

The dissertation will explore the legal rules that seek to protect the intellectual property creators. In analyzing the rules, the researcher will adopt doctrinal approach. That is, oral interview with some of the stakeholders. The researcher will visit some of the institutions established for the protection of intellectual property rights, such as Nigerian Copyright Commission and National Office for Technology Acquisition and Promotion for first hand information on the subject matter. The secondary method of data collection will also be employed and information harvested via institutions' websites and other relevant sites on the internet. The works of other researchers will be also consulted. This will include standard law texts, journals, articles, seminar papers, magazines and newspapers. Case laws such as decisions of superior courts of records if relevant, will be consulted. The over-all approach will be analytical in nature.

1.5 SCOPE OF THE RESEARCH

The territorial or geographical scope of this research is basically Nigeria. In so doing emphasis would be on the Constitution of the Federal Republic of Nigeria[27], Copyright Act[28], Patent and Industrial Design Act[29], Trade Marks Act[30] and case

[27] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[28] Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[29] Patents and Design Act, Cap. P2, Laws of the Federation of Nigeria, 2004
[30] Trade Marks Act, Cap. T13, Laws of the Federation of Nigeria, 2004

laws as applicable where necessary. However, reference will be made to other jurisdictions at international level too, for comparative analysis, for example, international conventions and protocols.

1.6 LITERATURE REVIEW

Undoubtedly, some research have been conducted on intellectual property rights, particularly, in the last decade, which is very useful in this dissertation. However, to the best of my knowledge none has systematically articulated and presented a detailed analysis of legal and institutional frameworks for protection of intellectual property rights in Nigeria. The present study aims at filling the gaps in the existing literature.

Aboki[31], in his article, analyzed, examined and opined that the purpose of copyright law should protect an owner of copyrightable work. Further the objective of the article was an economic and cultural basis for copyright protection in Nigeria. The author highlighted the concept of 'property' and mentioned that it has changed significantly over the time. That is, property scientifically is the jural relationship between two or more persons in relation to a thing. That it is not the thing itself but the right to use and enjoy the thing. This includes the right to exclude others from using the thing. The learned professor made readers to understand that many laymen hardly think of intangible property such as rights, privileges, immunities, duties and obligations. The author said in many cases both lawyers and laymen rarely think of modern property, such as Trade Marks, copyright, patent, shares, gratuities, pension, labour and expectation. He concluded by saying that in discussing economic and cultural bases for copyright protection in Nigeria, it would be criminal, fraudulent and cheating to do any act or omission which deprive an owner of a copyrightable work the benefit of his labour. In the second segment, cultural bases, he attempted to explore and analyze the Nigeria culture and the kind of interest or property rights which the Nigerian copyright law affords protection. The article is relevant to the dissertation, however, the object of the current research is protection and analysis of the enforcement of intellectual property rights as whole.

[31] Aboki, Y. (2002) Economic and Cultural Basis for Copyright Protection in Nigeria: In: Asein J.O. and Nwauche E.S. (ed) A Decade of Copyright Law in Nigeria, Nigerian Copyright Commission, Nigeria

Ladan[32] discussed the concept and international legal framework on intellectual property giving its meaning and tracing the historical perspective as it relates to international conventions. He emphasized on the development of intellectual property regime at the international level and World Intellectual Property Organization (WIPO). Among others are: the 1967 diplomatic conference in Stockholm, the establishment of WIPO, the administrative and final clauses of all the then existing multilateral treaties administered.

WIPO and World Trade Organnization (WTO) are considered to be complements of engine room of the intellectual property law worldwide. The treaties are classified into three main groups. The first group established international protection. That is to say, they are treaties which are the sources of legal protection agreed, multilaterally, for example, Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration. The second group of treaties consists of those which facilitate international protection, for example, Patent Cooperation Treaty, Madrid Agreement Concerning the International Registration and Marks. The third group consists of treaties which establish classification systems and procedures for improving them and keeping them up to date, for example, International Patent Classification Agreement (IPC), Nice Agreement Concerning the International Classification of Goods and Services for the purpose of the Registration of Marks, Vienna Agreement and so forth. Legal nature of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) their relationship with other international treaties were also highlighted. Issues relating to conventions, registration, acquisitions, maintenance, dispute prevention, settlement, enforcement and remedies were emphasized. Ladan has also appraised the impact of World Intellectual Property Organization (WIPO) as a branch of United Nations Organization and World Trade Organization on member countries. He defined 'intellectual property' broadly as "legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields". The present research specifically analyzes the legal and institutional framework for the protection of intellectual property rights in Nigeria.

[32] Ladan, M.T.: (2007)Materials and Cases in Public International Law, A.B.U. Press

Babafemi[33] discussed the law and practice of Copyright Law in Nigeria. He began with its historical development of the 1911 English Act which was received in Nigeria and the Nigerian Copyright Acts 1970, 1988 and the amendments of 1992 and 1999[34]. Other issues discussed include eligibility of works for copyright, copyright ownership, categories of individuals, companies and others who may claim copyright, the extent of the right conferred upon an owner of Copyright and, statutory exceptions to the exclusive ownership of copyright. Other relevant issues such as infringement of copyright, performers and the expression of folklore, the administration of copyright and other international agreements and treaties, for example, trade related aspects of intellectual property were discussed. The book contains not only the law on copyright, but also the practice of copyright, trademark, patent and industrial design and the procedure for their registration. The writer's work is basically focused on the general principles of law relating to intellectual property. Though, the present researcher agrees with the author on some of the issues raised, however, the present researcher aims at evaluating the protection of intellectual property rights in Nigeria.

Folarin[35] discussed concept of intellectual property, branches and types of intellectual property, convergence and contrast, economic and commercial aspect, rights as monopolies, international system, its development, the constitutional provisions, subsistence of copyright, enforcement proceedings that is civil and criminal prosecution, remedies in both civil and criminal proceedings. Trade Marks and patent registration and its process were explained. However, the present researcher examined and evaluated the legal and institutional frameworks for the intellectual property protection in Nigeria and the effect of the rapid development of computer softwares. The researcher will go further to discuss the new global trends in the intellectual property rights.

Asein[36] discussed the principles and practice of copyright under Nigerian laws. He went further to discuss several topics such as trade secrets, ownership and

[33] Babafemi, F.O. (2007) Intellectual Property: The Law and Practice of Copyright, Trade Marks, and Industrial Designs in Nigeria, 1st ed. Justinian Books Limited, Ibadan.
[34] Cap. C28, Laws of the Federation of Nigeria, 2004.
[35] Folarin, S. (2003) Intellectual Property Law, Studies in Industrial Design, Copyright and Trade Mark, Max Munich Publication.
[36] Asein, J.O. (2012) Nigerian Copyright, Law and Practice 2nd edition, Books & Gavel Publishing, Abuja

transmission. Others include infringement actions and defences, remedies, neighbouring rights, protection of expressions of folklore which the present researcher agrees with. Other issues discussed in the book are: Copyright administration, for example, The Nigerian Copyright Commission and Collective administration of rights. The issue of computer software protection under Nigerian Copyright Law and international aspects of Copyright such as Universal Copyright Convention, Berne Convention, Rome Convention, and the World Intellectual Property Organization were discussed. The thrust of this dissertation is rather different in that it focused on the protection of intellectual property rights in Nigeria whereas the author premised his book on general law of copyright.

Ocheme[37] discussed the nature, genealogy as well an antecedent developments of the legal protection offered to creative works in Nigeria. He highlighted the phenomenon that in Nigeria, despite her political history, the right to use and enjoy private property is one which has been extended even to abstract properties such as copyright. He stressed that as a result of global advancement in science and technology, the legal principles of copyright are however in constant conflict with social, economic and legal practices. The book highlighted the problems associated with the implementation of the copyright legal provisions vis-à-vis these changes in other spheres of the nation's development. While the book is relevant to the current research, however this dissertation focused on protection and enforcement of intellectual property rights in Nigeria which was not the aim of his book.

Kanyip[38] discussed particularly in chapter nine, on institutional framework of consumer protection where he pointed out that Consumer Protection Council reduces fake products from market. That removing hazardous products from market checks imitation or counterfeits. These activities are carried out by National Agency for Food and Drug Administration and Control and Standard Organization of Nigeria through publication and destruction of counterfeit products by burning them. He stated that the fear of publication and destruction of products when confiscated

[37] Ocheme, P.A., (2000) The Law and Practice of Copyright in Nigeria. 1st ed. Ahmadu Bello University Press, Zaria .

[38] Kanyip, B.B., (2005) Consumer Protection in Nigeria: Law, Theory and Policy, Rekon Books Limited, Garki Abuja,.

reduces infringements of patents. He said that, that encourages investors in Nigeria who wish to sustain their genuine business. The subject matter is relevant, however, the focus of the current research is on the protection of intellectual property right which is not the focus of this book.

Cornish and **Llewelyn**[39] have discussed the protection of ideas and information – patents, breach of confidence, copyright, and designs. That has also dealt with trade marks, trade names and the like. They discussed roles of national law of the United Kingdom, regional and international law in the development of intellectual property. They also discussed the use of statute and judicial decision as means of defining intellectual property rights. The search for the interrelation between basic laws and economic principles underlying the objectives of the law relevant to European Union were discussed.

They have also discussed remedies and procedures generally available for the enforcement of rights, growth and purpose of patents, its scope, confidential information, personal privacy, copyright and designs. Others include infringements, trade marks and names, registration, remedies, the European dimensions, new technologies and international conventions under intellectual property law. They also discussed the effect of protection of registered and non-registered design and issues relating to European Union. The present research draws from their work and fills the gap in respect of level of intellectual property protection under Nigerian regime, which they did not even mention.

Though the material is useful, but because its scope does not include Nigeria, it does not focus on Nigeria. Some of these materials will be used as a base for Nigerian situation.

Marett[40] has dealt with the historical development of the concept of copyright, patent, Trade Marks, nature and duration of rights, such as economic rights, moral rights, creation, ownership and transfer of rights. His discussion like Cornish was based on Copyright, Designs and Patents Acts of United Kingdom and limitation of rights such as fair dealing, *priat euse*, compulsory licenses and license of rights. Others include exhaustion, sources of law, limitation and remedies,

[39] Cornish, W. and Llewellyn D. (2007) Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights 6th ed. Sweet & Maxwell, London,.
[40] Marett, P. (1996) Intellectual Property, Copyright, Patent and Trademark, Sweet & Maxwell.

international dimension, European Community of litigation and remedies, general rights under British system and European Community legislation on intellectual property. Also, his discussion included international conventions, registration of patent and trade marks, ownership and licensing , confidential information, intellectual property imports and exports and overview of European Community intellectual property legislation proposals but does not include Nigeria.

Oguamanam[41] made an attempt to sketch features of Nigerian scenario evolving engagement with intellectual property law both as the driver and the currency of new knowledge economic order. The aim of the paper was to join in the conversation of various intellectual property stakeholders in Nigeria for an urgent policy intervention. He achieved these by discussing the points on two fronts – technological breakthroughs, namely in digital (or information communication technology (ICT) and biological technologies which serve as catalyst both for an emergent world without borders, but also for the birth of the new global knowledge economy. He pointed out that as part of the practical ramifications, these new technologies reify the interconnectedness of the political, economic and socio-cultural transformations of the twentieth century. The research work was based on intellectual property development policy for Nigeria, whereas the present dissertation, analyzes the legal and institutional frameworks for the protection of intellectual property rights in Nigeria.

Oyewunmi[42] discussed the impact of digital technology on the creation and dissemination of entertainment works which she argued that it also contributes towards achieving the goals of social and cultural diversity. This, to her provides a medium which affords a worldwide audience - the e-commerce opportunities for the entertainment industry would also help to project cultural heritage, promote socio-economic development, support foreign direct investment and expand the Nigerian market among other benefits. The paper also examined the existing provisions and emerging responses to the phenomenon under Nigerian copyright law. It situated the

[41] Oguamanam, C., (2011) Beyond 'Nollywood' and Piracy: In Search of An Intellectual Property Policy for Nigeria, Nigerian Institute of Advanced Legal Studies Journal of Intellectual Property (NJIP) Maiden Edition.

[42] Oyewunmi, A. (2011) Towards Sustainable Development of Nigeria's Entertainment Industry in the Digital Age: Role of Copyright Law and Administration, Nigerian Institute of Advanced Legal Studies Journal of Intellectual Property (NJIP) Maiden Edition.

discourse by undertaking a preliminary exploration of the meaning, scope and interactions between sustainable development, the entertainment sector and digital technology. This work provides usefulness to the current research but does not focus mainly on the protection and enforcement which is the thrust of the dissertation.

Adedeji[43] discussed the contemporary challenge confronting copyright law to include emergence of digital technology in the late 20th century. He admitted that though digital technology brought about innovation and distributive measures, the negative side of it is devastating. He went on to appraise the Optical Disc Plant Regulation in fight against piracy through optical media. The paper buttressed the point that incidence of optical disc piracy and other intellectual property theft is no longer a new phenomenon in Nigeria. That it has been in the country for quite some time with a number of factors responsible for it. Prominent among them was the absence of regulatory framework like the optical disc plant regulation before 2006 to provide the platform for the effective campaign against piracy. However, that Nigeria joined the league of countries making concerted effort to check the menace of optical disc piracy with the introduction of the Optical Disc Plants Regulation in 2007 as part of the Strategic Action Against Piracy (STRAP) policy of the Nigerian Copyright Commission. This paper is relevant to this research but does not focus on the main theme of the dissertation.

1.7 ADDITIONAL LITERATURE TO THE CONCEPT OF INTELLECTUAL PROPERTY

1.7.1 Additional Literature to the Concept of Intellectual Property Generally

In a research in an emerging field such as intellectual property, some less familiar concepts need to be explained for proper appreciation. In this section, some terms relating to intellectual property such as: 'intellectual property', 'copyright', 'patent', 'trade marks', 'trade name', trade secrets', 'fair dealing', 'utility model', 'unfair competition', 'passing off', 'collecting societies', and 'plagiarism' will be explained.

[43] Adedeji, A.A. (2011) Combating Piracy Through Optical Disc Plants Regulation in Nigeria: Prospects and Challenges, Nigerian Institute of Advanced Legal Studies Journal of Intellectual Property (NJIP) Maiden Edition.

"Intellectual property" is defined as a category of intangible rights protecting commercially, valuable products of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention or trade secret.[44] According to the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) the term "intellectual property" refers to all categories of intellectual property that are the subject of sections 1-7 of Part II of the TRIPS Agreement, namely, copyright and related rights, Trade Marks, geographical indications, industrial designs, patents, layout designs (topographies) of integrated circuits and undisclosed information (Article 1.2).[45]

Intellectual property[46] has been described as the driving force of modern 'western' economic policy, trade, commerce and economic development. A well articulated, focused and appropriately enforced intellectual property system could provide the required push in any process of economic reform, liberalization of economy, industrial and trade policies, restructuring of the industrial and public/private investment sector in the process of economic and technological development. Intellectual property deals with the creation of human intellect and therefore remains a most important stimulus to innovation and a necessary incentive for scientific, technological and intellectual creativity[47].

Generally, intellectual property is protected for two reasons: one is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in assessing those creations. The second is to promote, as a deliberate act of government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development[48].

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[44] Garner, B.A. (2004) Black's Law Dictionary, 8th ed, St. Paul Minn. West Publishing Co, p.284.
[45] Cited in Ladan, M.T. (2007) Materials and Cases on Public International Law, Ahmadu Bello University Press, Zaria, p.788.
[46] Ekpere, J.A. (2002)Nigerian Copyright Law and National Development: Philosophical and Economic Paradigm for the next millennium in the Decade of Copyright Law in Nigeria, Published by Nigerian Copyright Commission, Abuja, p.66-77
[47] ibid
[48] ibid

Intellectual property law regulates the creation, use, and exploitation of mental or creative labour[49]. It is the law that creates rights in a wide and diverse range of things from novels, computer programme, paintings, films, television broadcasts, and performances, through to dress designs, pharmaceutical, genetically modified animals and plants. Also it creates rights in the various insignia that are applied to goods and services[50].

1.7.2 Additional Literature to the concept of Copyright

Copyright relates to artistic creations, such as poems, novels, music, paintings, cinematographic works and so on. In most European languages other than English, copyright is termed author's rights. The expression "copyright" refers to the main act which, in respect of literary and artistic creations, may be made only by the author or with his permission. Generally, it is the expression of the creator's ideas that is protected rather than the ideas themselves.

British Copyright Act ,1911[51] defined "copyright" as involving the sole right to produce or reproduce a work or any substantial part thereof in any material form, whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public, if the work is unpublished, to publish the work or an substantial part thereof. More particularly, it included the sole right to do or authorize the doing of the following acts: to produce, reproduce, perform, or publish any translation of the works. In the case of a dramatic work, to convert it into a novel or other non dramatic work. In the case of a novel or other non-dramatic work, or an artistic work, to convert it into a dramatic work by way of performance in public or other. In the case of a literary, dramatic or musical work to make any record perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered[52].

Copyright is the right of an author to control the reproduction of his intellectual creation. It confers on the author the authority to control his creation

[49] According to Article 2 para viii, WIPO Convention (1967): "Intellectual property includes the rights relating to literary, artistic and scientific works – performances and performing artistes, phonographs and broadcast- inventions in all field of human endeavour, sounds, discoveries, industrial designs, Trade Marks, service marks, and commercial names and design protection against unfair competition and all other rights resulting from intellectual activity in the industrial scientific literary or artistic fields.

[50] Ekpere, J.A, Op. cit

[51] Section 1(2)(d)

[52] Asein J.O. Op. cit.

after disclosure and prevents others from reproducing his personal expression without his consent. In this sense, copyright is usually regarded as a property of a unique kind. It is intangible and incorporeal. The item to which the property right applies – the author's intellectual work – is incapable of possession, except as it is embodied in a tangible object such as a manuscript, book, record or film, and so forth. The tangible object may be in the hand of several people, but copyright prevent them from reproducing it. Copyright encourages creative activity and provides society easily, economically and speedily, with the results of such creativity. It provides protection for the rights of authors in order to encourage further creativity, thus enriching the nations store of literature, drama and music[53]

1.7.3 Additional Literature to the Concept of Patent

The Patent and Design Act[54] is silent as to what is meant by the term 'patent'. Encyclopedia Britannia[55] defined it as a grant of certain rights for the protection of inventions. It is an instrument proceeding from the government and conveying a right, authority, or grant to make and sell a new invention[56]. It is a grant of some privilege, property, or authority made by the government or sovereign of a country to one or more individuals[57]. A patent is a legal protection accorded an article that is new or essentially better, in some way than what was made before or a better way of making it. It is a bundle of monopoly rights granted to an inventor or his assignees for a stated duration permitting him to prevent other persons from exploiting his invention without his consent[58].

Patent[59] is an innovative intellectual property, that is, inventions are protected by patents. A patent is a document issued by a government office, or, regional office acting for several countries, upon application describing the invention. It creates a legal right whereby the patented invention can be put to commercial use only by patent owner or others with his authorization. It is a statutory right conferring a monopoly on the patent holder.

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[53] Ekpere, J.A. Op. cit p.68.
[54] Cap P2, Laws of the Federation of Nigeria, 2004
[55] 15th ed. Vol.13, p.1071.
[56] ibid
[57] Black, H.C., (1990) Black's Law Dictionary, 6th ed,. St. Paul, Minn, West Publishing Co., p.1231.
[58] Olueze, I.M. (1998) Nigerian Copyright Law, Apapa Magink International Ltd, p.86
[59] Bhatia, P.G., (2008) Globalization: Legal Perspective (Unpublished LL.M. Thesis) Faculty of Law A.B.U. Zaria, p.255.

The provisions for patent rights are described in the patent law of the country in which the patent is granted. The rights, usually called "exclusive rights of exploitation" generally consist of firstly, the right to make, use, sell and export the products that includes the invention in the case of product patents for inventions and secondly the right to use the process[60]. A patentable invention consists of new results, improvement or mechanical application for speedy production.

This protection is of tremendous importance to technicians and technologists, to medical scientists and space scientists, to lecturers, researchers and professors in institutions of higher learning, to physicists, biologists, chemists, agriculturists, and pharmacists, to computer engineers, telecommunication engineers, marine engineers, electrical, electronic and mechanical engineers and other professionals[61].

1.7.4 Additional Literature on the Concept of Trade Marks

Trade marks are the "brand names" used by manufacturers to identify their products. The general concept is that a trade mark is not descriptive of the products, but associates with its manufacturer. They are important because they are an effective way for a manufacturer to distinguish his products from competitive ones in the market place. Although, the original intent was to identify the maker for fraud regarding the composition, that is, in mixing of materials for products, trade marks were soon used to identify the quality standards of particular producers. A trade mark is a legally protected name, word, symbol, or design and their combinations used by a manufacturer or seller to identify a product or service to distinguish it from other goods. The Trade Mark Act[62] provides:

> except in relation to a certification, trade mark is a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of this Act.

[60] Folarin, S. (2003) Intellectual Property Law in Nigeria - Studies in Industrial Property, Copyright Law, Max Planck Publication Munich p.6. Cornish et al Op cit. p.115.
[61] Babafemi op cit. p.342.
[62] Section 67(1), Trade Marks Act, Cap. T13, LFN 2004.

It further defines it to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof. Trademark is a monopoly right and it is remittable, which confers on the registered owner the exclusive right to use the trade mark in relation to the goods mentioned in the register[63]. Trade mark identifies the maker of the goods or services. If used in connection with services, it may be called service mark. Section 13[64] provides that a mark identical with a registered trademark belonging to another person in respect of the same goods or description of goods, or which closely resembles such a registered trademark so as to deceive or confuse will not be registered unless the court so permits in the case of an honest concurrent user or to other special circumstances[65].

The Supreme Court of Nigeria had a cause to make a pronouncement on the meaning of trade mark recently in the case of **Ferodo Ltd vs. Ibeto Industries Ltd**[66]. According to the apex court it is:

> …a mark used or proposed to be used in relation to goods for the purpose of indicating or so as indicate a connection in the course of trade between the goods and some person having the right either as a proprietor or registered user to use the mark[67].

1.7.5 Additional Literature on the Concept of Trade Name[68]

Trade names (commercial names and designations) generally serve to identify and distinguish an enterprise and its business activities from other enterprises such as First Bank Plc, Pfizer International Plc, GlaxoSmithKline Plc. Whereas marks distinguish the goods or services of an enterprise, a trade name identifies the entire enterprise, without necessarily any reference to its goods or services and symbolizes its reputation and goodwill. Thus, a trade name is a valuable asset for the enterprise it identifies. It also acts as useful information for consumers. It is in the interest of the business enterprises and consumers that trade names are protected and legal measures adopted to prevent using trade names from confusing or misleading the consumers. Trade names are generally protected under national laws.

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[63] Ibid s.5(1)
[64] Trade Marks Act, Cap T13, LFN 2004.
[65] Section 13(2), Trade Marks, ibid
[66] (2004)5 NWLR (Pt 866)p.317 at 325 per Musdapher JSC
[67] Ibid at p.330
[68] WIPO (1998) Intellectual Property Background Reading Material (Geneva: WIPO,

1.7.6 Additional Literature on the Concept of Trade Secrets

A trade secret is critical information and know-how of a business kept out of the public domain. For example, ingredients for the production of Coca-Cola soft drink. This is always kept from public understanding. Trade secret can be made more effective than patents in slowing competition. However, the owner of trade secrets must take all reasonable precautions to maintain security thereof. For example, chemical formulae, details of technical processes, and hard commercial information, such as prices, are considered in the light of the circumstances.

1.7.7 Additional Literature for the Concept of Fair Dealing

"Fair dealing" means that the dealing with the work must be genuine and reasonable, thus fair dealing with a work for purposes of criticism or review does not infringe. Here it is the dealing with the work that has to be fair in dealing other works, not, for instance, the criticism of it. For example, the taken for the purposes of research, private use, criticism, review or reporting of current event provided the author be acknowledged. The requirement that a performance, playing or showing be in public means that his licence is unnecessary for a private performance, even of the complete work. Lord Denning M.R. in the case of **Hubbard vs. Vosper**[69] stated thus:

> It is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long for being fair? Then you must consider the use made of them. If they are used as basis for comment, criticism or review, that may be fair dealing. If they are used to convey same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. Other consideration may be a matter of impression. The tribunal of fact must decide.

Intellectual property rights are usually expressed as the exclusive rights to do certain things, with the corollary that the rightholder can take action to stop anyone else from doing these. From the above case, where the owner of such work authorizes a person to incorporate the work in a cinematograph film and a broadcasting authority broadcast the film, the owner of the copyright shall in the

[69] (1972) 2 Q.B 84. See also Section 6(2)C.A Cap.C28 LFN 2004

absence of any express agreement to the contrary between the owner and the person be deemed to have authorized the broadcast[70]. The rights are not always absolute. Copyright is perhaps the most far-reaching of intellectual property rights and it is not surprising that the exceptions are numerous. The general limitations are described as "fair dealing" and apply first to private study and non-commercial research. There are some fairly limited exceptions for educational use and use by libraries. The other major limitation to the copyright owner's rights is for use of material in the course of parliamentary or judicial proceedings, for example the Nigerian National House of Assembly or Federal High Court judgement.

1.7.8 Additional Literature for the Concept of Utility Model[71]

Utility model protection differs from patent law, in that, the conditions of protection are less onerous to comply with and it can be usually obtained rapidly and cheaply. The term "utility model" is a generic term, referring to subject matter which hinges precariously between that protectable under patent and design law. In a general sense, the term has been used as second-tier patent system, ostensibly offering a cheap, non-examination protection regime for technical inventions, usually not fulfilling the strict patentability criteria.[72]. The expression, "utility model" is the name given to certain inventions, namely inventions in the mechanical field. This is why the objects of utility models are sometimes described as devices or useful objects. Utility models differ from invention for patents and are available mainly in two respects. Firstly, in the case of an invention called "utility model", the technological progress required is less than the technological progress (inventive step) required in the case of an inventions for which a patent is available. Secondly, the term of protection provided in the law for a utility model is generally shorter than that provided for an inventions where a patent is available, for example, under German and Chinese utility model laws, the maximum duration of protection is ten years from the date of filing. The document, the inventor receives in the case of a

[70] Babafemi, J. Intellectual Property Op.cit p.58.
[71] Used in the European Community such Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Holland,and Hungary. This is given various names such as short-term protection, petty patent, second-tier protection. The variety of names is a first indication of the considerable differences in these rights from country to country.
[72] Suthersamen, 29EI PR (1998) 44, at 44.

utility model may be called a patent, but to distinguish it from patents for invention, it must always be specified that it is a "patent for a utility model".

1.7.9 Additional Literature for the Concept of Unfair Competition

This is directed against acts that are contrary to honest practice in industry and commerce, for instance, reproduction of author's work without prior permission or imitation of the trademark with license. The range of activities and practices, described as unfair competition is very wide. All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor, false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor[73]. Unfair competition law may deal with classical cases of trademark and trade name infringement. It may supplement protection granted by other special industrial property laws, insofar as it may provide for remedies in cases where none are available under such laws. What is unfair or dishonest largely depends on the economic realities at a given time and place.

1.7.10 Additional Literature As to the Concept of Passing-off

This means a calculated attempt to deceive in the course of trade, that is, passing-off goods or business as those of another, for example, by imitating their appearance or selling them under a similar name or trade mark. The essence is deceit practiced on the public. Professional and charitable institutions may have a reputation that will be protected in passing off proceedings, if it is likely to be injured by the defendant's activities. As Lord Halsbury[74] puts it, "nobody has any right to represent his goods as the goods of somebody else". The same has been held of representations about services and a defendant may also be liable for passing off one class of the claimant's goods as another. When a defendant perpetrates the passing off personally, the fact that he does not realize it is no defence to the grant of an injunction. In **Phones 4U Ltd vs. Phone 4U.Co.Uk Internet Ltd**[75]**,** Jacob L.J. held that the question is: "whether what is said to be description rather than mere confusion is really likely to be damaging to the claimant's goodwill or divert trade

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[73] Folarin, S. Intellectual Property Law in Nigeria. Op. cit. p.10

[74] (2006) EWCA Civ. 244 . See Reddaway vs. Banham (1896)A.C 199 at 204. See also Perry vs. Truefitt (1842)6 Beav 66 at 73 per Lord Langdale M.R. Similarly Lord Jauncey in Reckitt & Colman vs. Borders (1990) R.P.C. 340, HL reiterated the point made by Lord Halsbury.

[75] (2007)R.P.C. 83 at para 19.

from him. I emphasize the word 'really'", that depends on the evidence. In the context of passing off, the courts have felt no hesitation in pinning responsibility upon a person who enables the injury to occur.

1.7.11 Additional Literature to the Concept of Collecting Societies[76]

A "collecting society" is a collection of authors engaged in identical works for the purpose of meeting their common challenges, for example, Performing Rights Society Limited, Musical Copyright Society of Nigeria, and Performing Musical Association of Nigeria and African Writers Association or Nigerian Writers Association. The use of collecting society is a more convenient and economical way for individual authors getting their due share from the economies of exploitation to which their works are exposed. These economies accrue by way of royalties' payable by lawful users and levies/damages payable by unlawful users. The legal and economic justification for a 'collecting society' operating in the copyright system may be founded on two or more pillars. First, copyright law provides the basis for authors to receive remuneration and compensation from those who use their works legally or even illegally. Secondly, the fact that these works are likely to be used at different locations and for various reasons, individual authors find it difficult if not impossible, to monitor everywhere and ascertain how their works are being used, let alone, being able to collect the compensation for such uses. The third where the individual author may have known of all the users of his works, lawfully and unlawfully, he still faces no less task in redressing any abuses to his works because there abuses may occur in many forms at different places and at the same or different times. Therefore, the association as group help to detect and report if the work of one of its members is being infringed, for example, reproducing or copying substantial part of another person's work for commercial purpose.

1.7.12 Additional Literature as to the Concept of Plagiarism:

This is a form of ethical misconduct in research and consists of the intentional or unintentional "use of the words, ideas, diagrams of publicly available work without appropriately acknowledging the sources of these materials"[77] Thus, any use of the words, phrases, ideas, or work of others in a substantial way form without

[76] Ocheme, Op cit at pp.133-134.
[77] Asein, J.O.Op cit p.245

acknowledging the original sources constitutes plagiarism. When will sufficient effort be deemed to have been expended on the work to give it an original character? Section 1(2)[78] provides that "the work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device". Similarly in the case of **Offrey vs. Chief S.O. Ola & Ors**[79] the court held that copyright would exist in a given product if that product is the result of some substantial or real expenditure of mental or physical energies of the producer and the labour or skill was not a negligible or commonplace one. It went further to hold that the amount of labour, skill, judgment or ingenuity required to support successfully a claim for copyright was a question of fact and degree in every case.

1.8 SIGNIFICANCE OF THE STUDY

Intellectual property is a valuable property. Therefore, this exposition is justified because it provides adequate information for both private and public institutions. This research provides an ample resource material for students, teachers, judges, counsels and the general public to appreciate the value of contribution of human intellect.

1.9 ORGANIZATIONAL LAYOUT

This research comprises six chapters. Chapter one provides an introductory account of the background of the study, the statement of the research problem, its objectives, significance, scope of the study, methodological approach, literature review and some additional literature to the concepts of intellectual property.

Chapter two dealt with characteristics features of IPRs, scope of IPRs, advantages and negative effects of IPRs and institutional framework such Nigerian Copyright Commission, National Office for Technology Acquisition and Promotion, The Nigerian Police Force, The Nigerian Customs and Excise, the Federal High Court and the General public.

Chapter three focused on Copyright law as a legal framework for protection of the intellectual property rights in Nigeria. The work considered the eligibility for copyright protection such as literary, musical artistic, cinematograph and sound

[78] Copyright Act, Op cit.
[79] Unreported Suit No. HOS/23/68 decided 27th June, 1969.

recordings. It further discussed the exceptions or defences of copyright and challenges of protection of copyright.

Chapter four is centered on another legal framework – Patent and Design Act giving historical development, its patentability, inventions, industrial application, plant varieties, defences of patent right and conventions of biological biodiversity. It discussed the right of patent and its infringement and remedies thereof. It also examined some institutional framework though not directly enforcement of patent process but the product such as Consumer Protection Council, National Agency for Food and Drug Administration and Control and Standard Organization of Nigeria.

Chapter five discussed Trade Marks as another branch of intellectual property law highlighting the sources, criteria for protectability, registration, enforcement, defences and its challenges.

The work was concluded in the sixth chapter, by way of summary, findings and recommendations advancing ways for improvement of the protection of intellectual property rights in Nigeria.

CHAPTER TWO

INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

2.1 INTRODUCTION

The aim of enforcing intellectual property rights is to promote creativity and innovation. It expedites knowledge and technology transfer, rewards the inventors and protects their interest. It is a form of recognition that ensures equitable sharing of economic benefits. Scientists are assured that their works can be disseminated without fear of unauthorized copy. It increases access to new ideas and enhances the quality of life. Institutional framework spells out obligations of all stakeholders in intellectual property rights and commercial exploitation for the benefits of all concerned. The various issues covered include material transfer, ownership rights of publications, marketing and licensing and also promotion of sponsored and collaborative research.

An effective intellectual property management regime will have in-built incentives for inventors/innovators to engage in knowledge creation by increased recognition for their efforts through the medium of licensing fees and royalties. A proportion of the monetary gains flows to the inventors/researchers. The increased creativity encourages technological progress. Commercialization of inventions and other expertise lead to an efficient and more meaningful life and new employment opportunities. The commercialization process of technology transfer ought to be rational in order to cause an increase in sustainable development. Inventions lead to utilization of raw materials and promote sustainable development. Invention is the mother of development, the fulcrum of development. A society without invention is a stagnant society. In fact, services and goods that we enjoy today are on account of inventions of yester years.

Intellectual property emphasizes creative work[80] that has economic value and is protected through a plethora of legislative enactments[81]. These laws enable

[80] S.1(1) of the Copyright Act Cap C28, Law of the Federation of Nigeria, 2004 embraces literary, musical and artistic works, cinematograph films, sound recordings and broadcasts.

[81] Copyright Act Cap. C28, Laws of the Federation of Nigeria 2004, Patents & Design Act Cap. P2 Laws of the Federation of Nigeria, 2004, Trade Marks Act Cap. T13, Laws of the Federation of Nigeria, 2004,

establishment of institutional frameworks[82] for the administration and enforcement of intellectual property in Nigeria. At a Stakeholders Conference on Administration of Intellectual Property in Nigeria, Kehinde[83] stated:

> Traditionally, intellectual property rights were viewed as a private right. It was argued that the grant of a patent, trademark or copyright was a primarily a private grant and thus incumbent upon the grantee to enforce his right. The machineries of government were considered inapplicable in the enforcement of intellectual property rights. However, all that has changed and the enforcement of intellectual property rights is now as much a government responsibility as it is the private sectors.

The above scenario is apt for better appreciation of the growth and development of Intellectual Property. The economic success and associated social and cultural benefits hinge on the generation and management of innovation, information and ideas. This chapter examines the functions of the institutional work forces such as the Nigerian Copyright Commission, National Office for Technology Acquisition and Promotion, Trademarks, Patent and Design Registry, The Nigerian Police Force. Others are the Nigerian Customs and Excise, The Federal High Court and international bodies World Intellectual Property Organization (WIPO), for example, Trade Related Aspect of Intellectual Property Rights (TRIPs) under World Trade Organization (WTO) for intellectual property for their administration and enforcement of intellectual property rights.

2.2 MEANING AND CHARACTERISTIC FEATURES OF INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights are rights conferred by statutes on an individual or a corporate body with respect to the product of his or her intellect, guaranteeing the exclusive control of the exploitation of his work for a limited period[84]. Basically, intellectual property covers two main branches namely, copyright and industrial

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National Office for Technology Acquisition and Promotion Act Cap. N62, Laws of the Federation of Nigeria 2004

[82] Nigerian Copyright Commission, The National Office for Technology Acquisition and Promotion, The Customs and Excise, The Federal High Court, The Nigeria Police and so forth.

[83] Kehinde, A. (2000) Settlement of Intellectual Property Disputes by Alternative Dispute Resolution (ADR): A paper presented at the Stakeholders Conference on Administration of Intellectual Property in Nigeria, held at Abuja Sheraton Hotels and Towers on 14th December, p.4.

[84] Owoseni, C.T. (2001) New Developments and Challenges in the Protection of Intellectual Property Rights (IPRs): A Nigerian Perspective, p.2.

property. Copyright deals primarily with literary, musical and artistic creations such as books, music, arts, films and broadcasts as well as live performances and expressions of folklore and most recently a new genre of work in terms of multimedia production which is made accessible by a computer program. Industrial property on the other hand involves patents, trademarks, industrial designs, geographical indications and appellations of origin utility model and so on.

Intellectual property rights can be dealt with just like any other property right. An intellectual property right can be assigned, mortgaged, owned or licensed. Most forms of intellectual property are choses in action rights that can be enforced only by legal action as opposed to possessory rights. In **Torkington v. Magge**[85]**,** Channell J. described a chose in action as a legal expression used to describe all personal rights which can only be enforced by action and not by taking physical possession. Similarly in **Plateau Publishing Co. Ltd. vs. Adolphy**[86] per Karibi-Whyte, JSC held that "this legal right, though abstract in nature, vests the holder with the sole and exclusive privilege of multiplying copies of his creative work by publishing, selling or disposing of the same as it pleases him for a stated period of time". Intellectual property rights play an important role in the economic life of any nation, especially in this age of technological development. It is indeed meant to protect the right of inventors, writers and also those of artist and the public generally.

The principal characteristics features of intellectual property rights are territoriality, exclusivity, divisibility and volatility.

i) Territoriality

One of the basic characteristics of intellectual property since it is a creation of statutes is that it is confined to the territory where it is created even though the importance transcends national boundaries[87]. It is as a result of this recognition that intellectual property conventions, for example, the Berne Convention and Paris Convention that some of the provisions are reflected in the national legislations like the Copyright, Designs and Patents Act of Nigeria. No intangible subject matter is protected by one uniform right applying world-wide. Instead, technical inventions,

[85] (1902)2 KB 427
[86] (1986) 4 NWLR (Pt.34) at p.205
[87] Peter, G.J.(1997) Source Book on Intellectual Property London: Cavendish Publishing Ltd pp 14-16: In Mukhtar, N. (2013) Nature and Scope of Intellectual Property Law: An Appraisal of Concepts, Issues and Prospects for Developing Economies, p.203.

works of literature and arts, signs, and so on are subject to a bundle of possibly more than 150 territorial rights of national or regional provenance[88]. These rights are independent from each other so that an invention, work and so on may be protected in one country but remain unprotected in another[89]. Nigerian law does not operate outside Nigeria and therefore an IPR can only be considered infringed by conduct which occurs within the territory of Nigeria[90]. However, this territoriality principle has several distinct dimensions on the level of substantive IP law, private international law and international conventions. Whereas it is true that there are examples of an overly rigid territorial thinking, in particular as regards jurisdiction concerning foreign IP rights, one can also observe an opposite trend toward unilateral expansions of national jurisdiction to overcome the territorial limits of IP law, that is, the local IP regime is applied extraterritorial to activity occurring in other territories.

Due to the possibilities of worldwide communication and trade and as a result of the increase of multi-territorial IP cases, the principle of territoriality is coming under increasing pressure of justification. In this regard, one observes that certain results deriving from its function are not in line with the parties interests, such as party autonomy and legal certainty, or IP specific interests. Further, in the attempts to justify territoriality, one observes a shift from a strict understanding of sovereignty toward an emphasis on the economic, social and socio-political dimension of IP law, which is based on a locally determined balance of interests[91].

The above position of strict territoriality changed with the introduction of Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPs) which preaches free market economy as against the earlier practiced by least developed countries (LCDs) of reduction of benefits to innovators (working requirement and compulsory licensing)[92]. WIPO has achieved this result through variety of activities and services that includes establishment of international standard for intellectual

[88] Alexander, P (2011) Territoriality and Extraterritoriality in Intellectual Property law. p1. Electronic copy http:..ssm.com/abstracts. Visited on 24th June, 2014 at 2..00pm.
[89] Ibid p2
[90] Section 2(2)(i-ii) Copyright Act, op cit
[91] Peukert, A (2011) Beyond Territoriality: Transnational legal Authority in an Age of Globalization. Goethe University Frankfurt, Faculty of Law, Cluster of Excellence Normative Ofrders,p.1. See also http:www.ip.mpg.d/en/pub/research_teaching/ip/main_areas/concept_of_terrirtoriality.cfm. Accessed on 18th June, 2014 at 11.00am
[92] Nwokocha, U. (2009) Sub-Sahara: Intellectual Property Rights Development, Aluko & Oyebode p7.

property laws and practices among its member states. It also encourages the growth of international common principles and rules governing intellectual property require extensive consultations with states and other interested groups[93].

ii) Exclusivity or Monopolistic Nature of Intellectual Property Rights

The legal regulations governing an individual's or an organization's rights to control the use or dissemination of ideas or information are known as exclusivity of IPRs. It is the idea of being monopolistic in nature that is the right to exclude others from his work. Present day intellectual property legislation contains many built-in safeguard to ensure that a balance is struck between the rights of the intellectual property owner and free competition, and some of the safeguard requires the owner to pay renewal fees regularly (in the case of trademarks, patent and registered designs) while others require a regular use of the intellectual property right by the owner.

Various systems of legal rules exist that empower persons and organizations to exercise such control. Copyright law confers upon the creators of "original forms of expression" (for example, books, movies, musical compositions, and works of art) exclusive right to reproduce, adapt, and publicly perform their creations. Patents law enables the inventors of new products and processes to prevent others from making, using, or selling their inventions. Trademark law empowers the sellers of goods and services to apply distinctive words or symbols to their products and to prevent their competitors from using the same or confusingly similar insignia or phrasing. Trade-secret law prohibits rival companies from making use of wrongfully obtained confidential commercially valuable information (for example, soft-drink formulas or secret marketing strategies).

Intellectual property can be protected from invasion, it can be assigned or leased but it cannot be taken into physical possession and can only be realized through an action in court. This does not mean that all rights are held as property, there are non-proprietary rights which are also protected by intellectual property law such as confidential information and the acts violating law of passing off. This confers on the owner or producer exclusive rights that can be assigned, licensed, mortgaged and bequeathed. In other words, the creator of an idea and manufacturer

[93] Mukhtar, N. op cit p.212. See also http://www.wipo.int/activities/en/development_iplaw.html

of its embodiment, if different persons, have interests in gaining rewards for their efforts and expenditure and in making profit from the enterprise. This is possible only if there is protection of such ideas against the risks of imitation. The common feature of IPR confers owners the right to stop others from taking their creations. This preserves to a reasonable extend, the integrity of, and reserve the exploitation and representation of such creations for the right owners.

iii) Divisibility

Divisibility is another feature of intellectual property rights different as they exist independently of each other[94]. They are however capable of being divided into many different ways, for example, the rights in different countries can be sold, licensed to different people and each type of intellectual property is itself a bundle of rights[95]. For example, Copyright comprises the exclusive right to authorize reproduction, distribution and others. Whereas Trade mark prohibits forge or falsified any genuine trademark calculated to deceive users[96].

iv) Volatility

Intellectual property is indeed dynamic, for example, before printing was invented, literary works requires no protection they resided in the memory of the author. Trademarks only became important when society moved on from one in which individual traded their products. Technological development has advanced the area of mass production of goods and services. The increasing economic significance of this branch of law to countries with any degree of industrial development is making it both international and more complex[97].

2.3 TRADE RELATED ASPECT OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

An extension of the international 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 an international economic order has fundamentally changed the nature of the global economy, affecting

[94] Mukhtar, N. op cit. p.204
[95] Peter, G.J. op cit: In Mukhtar, N. ibid.
[96] Section 4(a)(b) Merchandise Marks Act, LFN 2004.
[97] World Intellectual Property Organization Handbook (2004) Law, Policy and Use WIPO Publication in Mukhtar, N. op cit.

countries as well as the firms and individuals in every nation and region[98]. The TRIPS Agreement is based on the principles of national treatment and most favoured nation (MFN) status. National treatment under TRIPS provides that "each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with the regard to the protection of IP…"[99]. This provision is similar to the protection afforded by the Berne and Paris Conventions. MFN, on the other hand, requires that in IPR protection, any advantage, favour, privilege or immunity granted by one member nation to the nationals of any, other country shall be conferred immediately, and unconditionally, to the nationals of all other member nations.

The introduction of WTO brought about the start of international economic law which includes 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 on another). This however changed with the introduction of TRIPS Agreement which preaches free market economy as against the earlier practice by lest developed counties (LCDs) of reduction of benefits to innovators (working requirement and compulsory licensing).

In 1883 was Paris Convention and the 1886 Berne Convention for the protection of literary and artistic works embodied the first results of efforts to co-ordinate an international intellectual property agreements to which States would be bound[100]. Countries were interested in extending the scope of IP beyond the Paris and Berne[101] Conventions because of a lack of strong enforcement provisions for national judicial and administrative entities as well as perceived lack of an effective and binding dispute settlement mechanism to which countries could resort to in the event of a dispute.

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[98] Yueh, L.Y (2007) Global Intellectual Property Rights and Economic Growth" Northwestern Journal of Technology and Individual Property, Vol.5 No.3 (Summer), p.436. In: Nwokocha, U. (2009) Nigeria: Sub-Sahara Africa: Intellectual Property Rights Development, p.7

[99] Nasheri, H. (2005) Addressing Global Scope of Intellectual Property law, National Institute of Justice, The International Centre, p.64

[100] Yueh, L.Y op cit.

[101] Nigeria became a party to the Berne Convention in June 1993.

The framework of TRIPS Agreement emphasizes the views 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 countries of the world[102]. Over a period of time, member countries have met to formulate policies further to the implementation of the provisions of TRIPS Agreement. Some of such meetings are the 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 intellectual property protection in the face of public health crisis which can constitute national emergencies. The Doha Declaration allows LDC member States to grant compulsory licences for the importation of drugs in cases of emergency which is usually determined by these countries subject to notification to the General Council[103].

Essentially, the main features of TRIPS, *inter alia*, are: the extension of patents to all inventions irrespective of areas of technology, a minimum term of 20 years for patents and criminal sanctions against infringements. Others include the principle of national treatment, the possibility of exempting moral rights and the payment of reasonable fees for compulsory license. Further it includes the protection of neighbouring rights, better dispute resolution and enforcement mechanism[104]. TRIPS Agreement also covers copyright and related rights, trademarks, geographical indications of source, appellations of origin utility models and industrial designs. Others are patents, topographies of integrated circuits, the protection of trade secrets, and the control of restrictive trade practices in licensing agreements[105]. It sets standards of protection on a very high level in all areas of intellectual property rights. Furthermore, for the first time, the Agreement lays down comprehensive obligations on the members at an international level with respect to enforcing intellectual property rights against infringement.

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[102] Nwokocha, U. op cit.
[103] WT/L/540 and Corr. I: Implementation of paragraph 6 of the Doha Declaration on The TRIPS Agreement and Public Health: Decision of the General Council of 30 August 2003: In Nwokocha U. ibid.p.7
[104] Sodipo, B (1997) Piracy and Counterfeiting, GATT, TRIPS and Developing Countries, Kluwer Law International, London, p24.
[105] Folarin, S. (2003) Intellectual Property Law in Nigeria, Studies in Industrial Property and Copyright Law, vol. 21, Max Plank Institute Munich, p.21.

2.4 SCOPE OF INTELLECTUAL PROPERTY RIGHTS

a) Nigeria

Intellectual Property Rights (IPRs) in Nigeria are a matter of national jurisdiction. A literary or artistic work, or an invention, is protected only in the country where the relevant IPR has been granted. If a company is doing business in many countries, it is compelled to apply for protection in all those countries[106]. If this is not the case, each transaction, which crosses borders, bears the risk of counterfeiting or piracy in absence of remedies. This scenario represents a substantial deterrent for any international trade involving innovative knowledge, eventually impeding a sustainable technology transfer between States. IPR regimes are one of numerous circumstances varying over time and across countries correlated to economic structures. The impacts will vary where countries with different levels of development or diverging economic structures are subject to mutual IPR policy. Hence there is a considerable need for specific national case studies on how various types of IPR systems affect growth.

Intellectual property rights cover copyright and related rights which extend to producers of phonograms and broadcasting organizations and any similar products. Also covered is industrial property such as distinctive signs, innovation, and creation of technology in particular trademarks, geographical indications and trade secrets. Rights are accredited to persons over the creations of their minds. IPR give the creator an exclusive right over the use of her/his creation for a certain period of time within a certain territory, normally that of the State recognizing the protection. Such IP regimes also facilitate the transfer of technology in the form of foreign direct investment, joint ventures or licensing.

b) International

The Paris and Berne Conventions of 1867 and 1871 provided a legal framework for IPRs in the international arena that lasted for more than a century. These embodied the two major doctrines relating to IPRs under public international law. The first is territoriality, stating that property rights are to be honoured by each state's rules. The second is the doctrine of independence which states that the grant of property rights within one country does not have force in another. These two

[106] Section 2(1) Copyright Act, op cit.

doctrines were rendered irrelevant with the advent of international economic law. It is premised instead on the norm that the harmony or uniformity of laws is the ideal for the free flow of goods and services globally.

Since 1995, the least developed countries (LDCs) have been compelled to eventually adopt TRIPS, which are closer to U.S. standard of protection. World Trade Organization (WTO) enforces a set of internationally recognized standards for intellectual property into national laws, while providing both a dispute settlement mechanisms, the Dispute Settlement Understanding under the WTO (DSU) and consultation process, the Dispute Settlement Body to resolve disputes among nations over these international norms. However, difficult problems remain, particularly in terms of implementation for developing countries. Common features of LDCs legal system are that IPRs are subject to inconsistent coverage, uncertain terms of protection, arbitrary transferability, and inadequate enforcement.

2.5 ADVANTAGES OF PROTECTION OF INTELLECTUAL PROPERTY RIGHTS:

When intellectual property rights are protected, rights are conferred on their owners to enable them derive maximum benefits from the products of their labour and thereby have opportunity to recoup their investment in terms of efforts, time, labour and money. It also plays a dominant role in provoking innovative, creative and inventive activities thus inducing inventors to disclosed work their inventions and or grant exclusive or non-exclusive licenses to exploit the inventions for the benefit of mankind[107]. Further protection of intellectual property rights encourage transfer of technology through the security it offers to patent owners. It attracts national and foreign investment. Also serves as a means by which cultural values and traditions such as folklore are preserved.

Intellectual property protection generally plays an important role in industrialization, world international trade and market-oriented economies. Patents protection ensures fair practices among competitors by protecting individuals whose commercial well being, moral right and intellectual integrity must be realized as

[107] Owoseni, C.T (2001) New Development and Challenges in the Protection of Intellectual Property Rights (IPRs): A Nigerian Perspective. pp.2-3

necessary indices before any improvement of standard of living can be claimed[108]. A resultant increase from this is not only on the per capita net of the national income but also in real income per head. Patents also encourage investment which in turn galvanizes the wheels of development.

Trademarks encourage investment especially in the manufacturing industry. This is only possible where there are institutional measures put in place to ensure and assure investors that their trademarks or goods cannot be traded with nor falsified by another competitor. This inspires a sense of security in the investor. As a focal point of economic development, trademarks when protected, are one way of encouraging entrepreneurial talent especially in the private sector and enhancing creativity and productivity and leads to economic emancipation both for the individual and the nation at large, this can help raise leaders of quality with the right attitude n ranks of government and help increase the per capita standard of living. This is because there is a close relationship between productivity and real income per worker and since a nation must produce more goods and services per worker to enjoy more goods and services which means a limited domestic market lack of demand for most non-agricultural goods, this could hamper with industrialization and make it difficult for one country to compete favourably with another country.

Designs protection also encourages technological advancement which is one of the hallmarks of industrialization. Technological advancements in this case involved the development of new and improved techniques for the manufactured goods which is based on invention and innovation. For example, in communication and information network through the development of nuclear weapons, micro-computers, e.-mail and internet services. Other areas are aviation, petrochemicals, maritime, literary, musical, artistic, cinematographic works, sound recording, pharmaceutical and bio-technological inventions, business methods and software, electronic filling of patent applications. These suggest that there could be no real industrialization in a country where there is absence of adequate intellectual property protection. This protection helps to ensure fair return of investment and inadvertently benefit the consumers and the public at large by promoting fair

[108] Folarin, S. (2003) Intellectual Property Law in Nigeria, IIC Studies in Industrial Property and Copyright Law. Max Plunck Insitute and Tax Law, Munich, p.5

competition and honest trade practices. In this way effective system of design protection encourages creativity and promotes more aesthetically attractive products.

Copyright is one of the fastest growing sectors of economies especially the developing ones, creating considerable employment generation and having an increasing export performance and potentials. The contribution of this industry to the Gross National Product (GNP) is also bound to increase in the years to come in a number of rapidly growing developing economies, which are taking up both the new challenges and the new opportunities thrown up by the increasing borderless dimension of trade and economy[109]. The internationalization of socio-economic activities and the fillips it has provide to the information technology industry has made some developing economies active participation both as agents and the beneficiaries of the change.

2.6 NEGATIVE EFFECTS OF INTELLECTUAL PROPERTY RIGHTS

Notwithstanding the positive connotations of IPR, some negative effects are inevitable. Particularly governments of developing countries express doubts about the introduction of a strong international IPR regime in the framework of negotiations on mutual IPR policy.

2.6.1 Raises Costs of Technology Acquisition to Developing Countries:

Developing countries frequently base their economy and scientific research on the employment of foreign basic technology imported from industrialized countries. Both areas may be negatively affected by strong IP protection. The granting of the respective rights allows the inventor to receive high economic rents for the use of the invention. This results in higher end-product prices and leakages from the domestic economy in the form of royalty payments, license fees, and others.

Likewise, subsequent innovation will be deterred by unaffordable foreign basic technology. Companies holding IPR will see their capital value rise and will be in a position to buy out competing firms to consolidate their market positions[110]. Industrial innovation eventually becomes a developed country monopoly

[109] ibid
[110] Silva, R.R and Cavalcanti, M. Basic Concepts of Intellectual Property Rights. Accessed on 18th June 2014 through http://www.fao.org/docrep/003/x7355e/x7355e01.htm

countervailing the purpose of technology transfer, that is, the widespread diffusion thereof.

2.6.2 Damages Basic Scientific Research

Other problems may be encountered where scientific institutions, for example, universities are confronted with IPR regimes. In many countries, any advanced disclosure of an invention, for instance, by publication, precludes patentability and thus any means of protection[111]. Strong IPR thus creates an incentive for confidential handling of innovative knowledge and the development in several scientific fields would be adversely affected by such a policy. Knowledge where or exchange is of substantial importance for technological innovation in several fields of public relevance such as pharmaceutical, medicine, surgery, agriculture and so on. It becomes therefore a substantial task for IPR policy to avoid such side-effects.

2.6.3 Distorts Technological Choices

The introduction of strong IPR may also result in a focusing of efforts on only economically valuable knowledge. This would eventually result in neglecting several technological fields, casing a "market-niche development".

2.6.4 Need for Detailed Case Studies on IPR Impact on Growth

It is difficult to make predictions as to the nature of IPR-related implications. Defining the role of IPR or predicting any retarding or driving effects thereof on international trade relations or technological development is extremely difficult. IPR regimes are one of numerous circumstances varying over time and across countries correlated to economic structures. The impacts will vary where countries with difficult levels of development or diverging economic structures are subject to mutual IPR policy. Hence, there is a considerable need for specific national case studies on how various types of IPR systems affect growth.

Whether private incentives would be sufficient to generate the optimal flow of additions to the stock of scientific and technological knowledge must be considered. Practice shows that private contracts for technology transfer often succeed in sustainable knowledge exploitation coupled with sufficient public availability of

[111] Wallerstein, M.B, Mogee, M.E and Schoen, R.A (1993) Global Dimension of Intellectual Property Rights in Science and Technology p.7 Washington DC, National Academy Press: In Silva ibid.

invocative information. However, in the absence of special provisions, any result remains unpredictable and substantially subject to the equitable trade-related conduct of concerned parties[112]. The abuse of strong market position remains an inherent risk. Public intervention thus remains necessary.

2.7 CLARIFICATION OF KEY TERMS

a) Copyright

Copyright apply to creative works such as books, journal articles, research reports, novels, poems, piece of music, computer software, proceedings of a conference, artwork and so on. Section 51 of the Act[113] states that "copyright" means copyright under this Act. This is not a sufficient definition, but, however it suggests that copyright protection in Nigeria can only derive its force from the provisions of the Act. That is, no copyright claim exists outside the statute. However, there are other sections of the Act, discussed infra, that provide for nature and scope of the specific rights conferred on different kinds of work which copyright deals with.

Hornby[114] states that if a person or an organization holds the copyright on a piece of writing, music, etc, it means that they are the only people who have the legal right to publish, broadcast, perform it. Other people must ask their permission to use it or any part of it. and that it expires seventy years after the death of the author.

Curzon et al[115] defined "copyright" as a property right which is transmissible by assignment or will as personal property which subsists in original literary, dramatic, musical or artistic works, sound recordings, films, broadcasts or cable programmes, and the typographical arrangement of published editions.

Roger[116] defined it as the exclusive right of printing or otherwise multiplying copies of *inter alia*, a published literary work; that is, the right of preventing all others from doing so. This extends to original, artistic, dramatic and musical works, and to recordings, films, and broadcast.

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[112] ibid
[113] Copyright Act, Cap.C28, L.F.N. 2004.
[114] Hornby, A.S. (2007) Oxford Advanced Learner's Dictionary of Current English, 7th ed, Oxford University Press p.325
[115] Curzon, L.B. and Richards P.H. (2007) The Longman Dictionary of Law 7th ed. Pearson Longman p.138.
[116] Roger, B . (1983) Osborn's Concise Law Dictionary, 7th ed. London, Sweet & Maxwell, p,94

b) Patent and Industrial Design

According to Hornby[117] a patent is an official right to the only person to make, use or sell a product or an invention. Similarly, Curzon[118] defined patent as an exclusive right conferred on one who invents or discovers some process, machine, and so forth to make, use, sell or assign it for a certain period of time usually twenty years which may be extended.

Osborn[119] sees it as the right conferred by letters patent of the exclusive use and benefit of a new invention capable of industrial application. Inventions are protected by patents, also called "patents for invention". If a person makes what he thinks is an invention, he or if he works for an entity, that entity, asks the government – by filing an application with the Patent Office – to give him a document stating what the invention is and that he is the patent's owner.

c) Trademarks

Hornby[120] defined Trade marks as a name, symbol or design that a company uses for its products and that cannot be used by anyone else. Curzon et al[121] defined trademark as "any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings" It may, in particular, consist of words including personal names, designs, letters, numerals, or the shape of goods or their packaging.

A trade mark has also been defined as a symbol which is applied or attached to a goods offered for sale in the market, so as to distinguish them from similar goods, and to identify them with a particular business, as being made, worked upon, imported, selected, certified, or sold by him or them, or which has been registered under the Act as the trade mark of a particular trade[122]. It is a mark used by a trader in the course of trade to distinguish the goods on which it is applied from other goods of the same description[123].

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[117] Op cit p.1057
[118] Op cit p.430
[119] Op cit p.247
[120] Op cit p.1568.
[121] Op cit p.581.
[122] White, J.A.B., Jacob R. Kerly's (1972) Law of Trade Marks and Trade Names 10th ed. London, Sweet & Maxwell, p.15.
[123] Okany, M.C. (1986) Nigerian Law of Property, Enugu Fourth Dimension Publishers, p.333

2.8 NIGERIAN COPYRIGHT COMMISSION

Section 34(1) of the Copyright Act[124] provides for the establishment of the Nigerian Copyright Commission which has dual capacities of administration and enforcement of the law. It also provides for the establishment of a Governing Board for the Commission and the appointment of a Director-General and other supporting staff for the Commission[125]. According to section 34(2) of the Act, the Commission shall be "a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name subject to the proviso"[126]. Copyright Act is the principal legislation in respect of copyright matters setting out provisions for protection of the rights of owners in the protected works. The Act has also identified and involved various bodies[127] to ensure compliance.

2.8.1 Enforcement Mechanism of the Nigerian Copyright Commission

The incidence of infringement and violation of copyright especially in the nature of counterfeiting and piracy has been on the increase in Nigeria. Activities of infringers/counterfeiters have ripped off many manufacturers, artists, marketers and stakeholders of the benefits of their creativity and also prevented the industry from rapid financial growth and development. On the basis of these ugly situations, several laws[128] have been put in place to checkmate them. The enforcement of copyright is primarily the responsibility of the copyright holder[129]. Nigerian Copyright Commission as noted above has dual capacities of administration and enforcement of copyright. Copyright law, while by no means perfect, provides a solid basis for enforcing copyright and combating piracy in Nigeria. These

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[124] Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[125] S.35(1) ibid
[126] Section 47(1)-(3) ibid
[127] Such bodies include the Nigeria Police Force, the Judiciary, the Nigeria Customs and Excise Department, the Nigerian Copyright Commission and the Collective Management Organizations (Collecting Societies).
[128] Copyright Act Cap. C28, Laws of the Federation of Nigeria 2004, Copyright (Security Devices) Regulation 1999, Copyright (Video Rental) Regulation 1999. Others are Copyright (Optical Discs Plants) Regulation 2006, Copyright (Collective Management Organizations) Regulation 2007, Copyright (Dispute Resolution Panel) Rules, 2007, Copyright (Reciprocal Extension) Order 1972 and Copyright (Levy on Materials) Order, 2012 with effective from 2013.
[129] Correa, C.M. and Li, X. (2009) Intellectual Property Enforcement: International Perspectives, Edward Elgar Publishing p.211. http://books.google.com/books . Accessed on 22nd July, 2011.

enforcement powers as provided by different sections of the copyright law[130] are aimed at reducing the level of piracy in the country and ensuring the right of owners to receive the due reward for their works. The Copyright Act empowers the Copyright Commission as follows:

> (i) to receive and grant compulsory licences[131], (ii) to constitute Copyright Licensing Panel[132], (iii) to appoint Copyright Inspectors[133] as it may deem fit, (iv) to approve and regulate the operations of collecting society[134], (v) to prescribe, design, label, mark impression or any other anti-piracy device for use in connection with any work for which copyright subsists[135].

From this provision the Nigerian Copyright Commission is charged with the responsibility of both administration and enforcement of copyright. The enforcement mechanisms are through the following agents:

2.8.2 Copyright Inspectors

The enforcement of copyright law in Nigeria is being discharged by the Copyright Commission through Copyright Inspectors. A Copyright inspector shall, for the purpose of this Act have power[136] to:

> (a) enter, inspect and examine at any reasonable time any building or premises which he reasonably suspects is being used for any activity which is an infringement of copyright under this Act[137], (b) arrest any person who he reasonably believes to have committed an offence under this Act[138], (c) make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act are complied with[139], (d) require the production of the register required to be kept under section 14 of this Act and to inspect, examine or copy it[140], (e) require any body who he finds in such building or premises to give such information as it is in his power to give in relation to any purpose specified in this Act[141],

[130] Sections 21-23, Copyright Act op cit.
[131] Section 37 ibid
[132] Section 37(2) ibid
[133] Section 38, ibid
[134] Section 39, ibid.
[135] Section 21(1), ibid
[136] Section 38(2)(a)(g), ibid.
[137] Section 38(2)(a) ibid.
[138] Section 38(2)(b) ibid.
[139] Section 38(2)(c) ibid
[140] Section 38(2)(d) ibid
[141] Section 38(2)(e) ibid

The section goes further to provide:

> (f) carry out such examination, test or analysis within or outside the premises as is required to give effect to any provisions of this Act and to make instant photograph where such examination, test, analysis or photograph shall be required to be endorsed by the occupier of the premises or his agent, but a refusal by an occupier to endorse any document containing the result of an examination, test analysis or photograph shall not invalidate the result or finding of the examination test, analysis or photograph[142] and (g) exercise such other powers as the Commission may delegate it to give effect to the provisions of this Act[143].

Section 38(3) of the Copyright Act also empowers Copyright inspector to prosecute, conduct or defend before a court any charge, information, complaint or other proceedings arising under this Act. In the **Nigerian Copyright Council vs. Musical Copyright Society of Nigeria & Ors**[144], the issue for determination was whether the power of Copyright Inspector to prosecute criminal matters as empowered by section 38(3) of the Copyright Act was not in conflict with the powers of the Attorney-General under section 174 of the Constitution[145].

Dismissing the preliminary objection, the court held that inasmuch as section 174 gives the Attorney-General power to institute and take over criminal proceedings that were "instituted by any other authority or person", it presupposes that any authority or person "authorized by law" may institute or undertake criminal proceedings. The court was persuaded by the decision of the Court of Appeal in **Olusemo vs. Commissioner of Police**[146] where it was held that the Police had powers to institute criminal proceedings notwithstanding the powers of the Federal and States Attorneys General under the 1979 Constitution. This matter has now been laid to rest by the Supreme Court in case of **Federal Republic of Nigeria vs. Osahon**[147] upholding the power of police officers under section 23 of the Police Act to prosecute in superior courts so long as they had right of audience in such a court, for example as legal practitioners by virtue of being called to the Bar. The same

[142] Section 38(2)(e) ibid
[143] Section 38(2)(g) ibid
[144] (1999) F.H.C.L 419
[145] 1999 Constitution of the Federal Republic of Nigeria (as amended).
[146] (1998)11 N.W.L.R. (Pt.575) at 475.
[147] (2006)5 N.W.L.R. (Pt.973) at 261.

principle would apply to a Copyright Inspector who is a lawyer, that is, he can prosecute.

A Copyright inspector shall have all the powers, rights and privileges of a police officer as defined under the Police Act and under other relevant enactment pertaining to the investigation or defence of a civil or criminal matter under this Act[148]. Its powers under the Act include the powers of investigation, arrest and prosecution which are limited to offences arising from the Act itself. The Federal High Court in **Ayika vs. Nigerian Copyright Commission**[149], held that the Commission has no power to arrest, detain or prosecute any person or persons for any offence not covered by the Act. This should be without prejudice to the incidental powers of the Commission and its Inspectors to pursue matters that arise from the offences that are expressly provided for in the Act. Example where copyright inspector goes on raid without police, he could arrest the infringer immediately.

2.8.3 Anti-Piracy Activities of the Copyright Inspectors

The Copyright inspectors through the activities of STRAP have inspected plants and outlets for CDs, optical discs and video productions and rentals all over the country to verify their compliance with the law[150]. Ezekude[151] pointed out that over 160 operations were carried out against music, book, film, software and broadcast infringers across the country and more than 400 suspects were arrested[152]. Pirated works worth over N1,458,255.00 were removed from the market nationwide and some were intercepted at the border in conjunction with Standard Organization of Nigeria (SON), the police and Customs. Mr. Ezekude went on to say that seized product estimated at N1,263,000.00 were destroyed and 15 Optical Disc plants were brought under regulation. With these developments, the burden on the Police and the Office of the Attorney-General of the Federation both which contend with copyright cases in addition to the other crimes with graver consequences than piracy will reduce.

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[148] Section 38(5), Copyright Act. op cit.
[149] FCT/HC/M/5222/2011
[150] Asein, J.O. op cit.p 356.
[151] Ezekude, A (2011), Director-General's Report the Activities of Nigerian Copyright Commission, p9.
[152] ibid

Enforcement activity resulted in public burning of 722 million units of pirated works and contrivances estimated at N6.5 billion, comprising literary, musical, film works and contrivances, including those from the broadcast industries, which were confiscated between 2007 and 2011[153]. The purpose was to demonstrate the Commission's commitment to its zero tolerance policy on piracy and to send out a warning signal that piracy would no longer be a profitable venture. Within the period, the Commission conducted over sixty (60) anti-piracy surveillances in the endemic locations across the country. It further carried out fifty-five (55) strategic anti-piracy operations against book, software, broadcast and audio-visual piracy in different piracy hotbeds across Nigeria, such as Alaba International Market, Ojuelegba and Ijora in Lagos, Ariara Market Aba, Onitsha, Kano, Benin City and so on. Within 2007 and 2011, 84 suspected pirates were arrested. The Commission removed 3,621,787 quantities of assorted pirated copyright works, comprising of books, software, DVDs, CDs etc from different piracy outlets and seaports across Nigeria with an estimated market value of four billion, three hundred and seventy-nine million, four hundred and thirty-one thousand Naira (N4,379,431,000.00).

The Commission in collaboration with Custom and Excise Department, the Nigeria Police, other enforcement agencies, right owners, anti-piracy committees and national anti-piracy crimes go out from time to time to residents of book pirates, those indulging in piracy in music and film, software, visual art upon receipt of information, to raid suspects. Accordingly, infringing materials have been confiscated, suspects arrested and prosecuted in the law courts. Below is the table of summary of recent anti-piracy activities detected by Nigerian Copyright Commission for the period of June, 2012 to May, 2013.

[153] This is Nigerian Copyright Commission Report.

ANTI-PIRACY ACTIVITIES OF NCC BETWEEN JUNE 2012 AND MAY 2013[154]					
S/NO	**DATE**	**ACTIVITIES/ACTION**	**AMOUNT INVOLVED**	**ACTION TAKEN**	**REMARK**
1.	16/6/2012	Arrested over 145 suspected pirates	Not reported	Trial in progress	
2	6/7/2012	7 containers - loads of suspected pirated books intercepted.	N1.5 billion	Confiscation of containers	Case pending
3.	17/7/2012	Intercepted 7 containers of suspected pirated books imported from China. Seized 10,000 cartons of pirated books	N1.5 billion	Confiscated the materials	Case pending
4	21/9/2012	Arrested 5 suspects, Lagos	Not reported	Trial in progress	
5.	8/11/2012	Confiscated 11 containers of suspected pirated books and 1 container of pirated compact discs of sound recordings and movies products in Lagos	N4 billion		Case pending
6.	21/12/2012	Arrested 26 suspects and confiscated pirated products in Enugu	N2.3 million.		Case pending
7	26/12/2012	Arrested 8 broadcast piracy suspects and impounded illegal gadgets	N3 million		Case pending
8.	30/1/2013	Impounded broadcast facilities at Onitsha, Anambra and Port Harcourt	N9.5 million		Case pending
9.	1/2/2013	Seized Broadcast gadgets and arrested 6 suspects	Not reported	Trial in progress	
10.	4/2/2013	Impounded 14 containers (3,613,315 units of pirated products)	N5.05 billon		Case pending
11.	7/2/1013	Arrested 3 suspects and confiscated 225 units of pirated film works in DVDs	45,000.00		Case pending
12.	9/2/2013	Arrested 3 piracy outlets Nyanya Abuja	Not reported	Trial in progress	
13.	6/3/2013	Seized 612,000 copies of suspected pirated DVDs and 45,900 units of DVD jackets	N300 million		Case pending
14.	21/3/2013	Arrested 2 broadcast pirates and impounded gadgets	2 million		Case pending
15.	9/4/2013	Arrested 13 suspects, seized pirated books	N130,000.00		Case pending
16.	11/4/2013	7 Musical Copyright Society of Nigeria dragged to court for illegal operating a collecting society	Not reported	Trial in progress	
17.	12/4/2013	Arrested 6 book piracy suspects in Abuja	Not reported	Trial in progress	
18.	18/3/2013	Seized broadcast gadgets at Omoku, Okposi, Obrikom in Port Harcourt	N2 million		Case pending
19.	8/5/2013	Impounded pirated products and arrested 7 suspects	N6 million		Case pending
20	20/5/2013	Impounded DSTV Broadcast signals at Onitsha and Port Harcourt	N9.5 million		Case pending

[154] Nigerian Copyright Commission. http://www.copyright.govs.ng. Accessed on 20th May, 2013 at 10.00pm

The above table disclosed that the sum of Twelve billion, three hundred and thirty million, eight hundred thousand Naira (N12,330,800,000.00) worth of materials were lost to pirates between June 2012 and May 2013. The number of arrests within the period stood at two hundred and twenty four (224) suspects at various stages of trial. It should be noted that between 1st January to 8th May, 2013, alone number of arrested pirates is forty-seven (47) while worth of materials seized stood at Five billion, three hundred and eleven million and eighty thousand Naira (N5,311,080,000.00). Piracy activities are more rampant with compact discs (CDs) or DVDs, that is, on digital media. The sites of most of these activities are Lagos, Port Harcourt and Onitsha.

2.8.4 Copyright Licensing Panel

Compulsory Licensing is based on the need to have access to protected works on practicable terms. Realizing the difficulty or impossibility of obtaining licenses from copyright owners and desire to avoid the creation of monopoly at the expense of the public the grant of a compulsory licence appears to be the solution[155]. Without facilities like compulsory licence, scarcity of books will obviously attract more pirates. Section 37(1) of the Copyright Act provides that the Commission shall have power to grant compulsory licences in accordance with the provisions of this Act.

Compulsory licence is a feature that is present in most jurisdictions and for other forms of intellectual property as well. Section 37(2) of the Copyright Act provides that in the exercise of Commission's powers to grant a Compulsory Licence, it shall, where an application is made to it, constitute a Copyright Licensing Panel consisting five persons, three of whom shall be members of the Governing Board of the Commission with one of them designated as the Chairman[156]. Section 37(4) provides that a person shall not be appointed as a member of the panel if he has any interest in any matter which is required to be determined by the panel. Any person aggrieved by a decision of the Panel shall have a right of appeal to the Federal High Court.

[155] Babafemi, F.O. (2007) Intellectual Property: The Law and Practice of Copyright, Patent and Industrial Design in Nigeria, Justinian Books Ltd, p.53.
[156] Section 37(3), Copyright Act, Op cit

2.8.5 Tariffs Arbitration Panel

Where there is a dispute between a collecting society and a user over the tariffs payable by the user, such dispute is to be referred to the Commission which may set up a Tariffs Arbitration Panel for the purpose of resolving the dispute[157]. The provision of the Act appears to be a mandatory requirement of submission to arbitration. In that wise, it may be argued that a dispute between users and an approved society cannot proceed directly to the court without first being heard by the Panel[158]. Subject to the right of any of the parties to appeal to the Federal High Court, on points of law, the decision of the Panel would be final and binding on the parties before it[159].

Subject to payment of prescribed fees, a person may initiate proceedings under these Rules for the settlement of a dispute arising from the Copyright (Collecting Societies) Regulation 2007 by a notice as in Form 1 (Applicant's Notice) of the First Schedule, together with a statement of the applicant's case to the Commission[160]. Within 7 days of the receipt of the notice in Form 1, the Director General of the Commission shall cause to be served on the person named as Respondent therein, a notice of the reference of the dispute in Form 2 (Respondent's notice) together with a copy of the applicant's statement[161]. Except where otherwise directed, the respondent shall, within 14 days of the service of the applicant's notice serve on the Director General of the Commission his written answer to the Applicant's statement and any counterclaim, and the Director General shall cause a copy of the Respondent's answer and counterclaim to be served on the applicant.

Upon this, the Director General of the Commission may at any time before the constitution of the Panel decide whether the dispute is such that should be referred to a Panel. If, after considering the reference the Director General decides to entertain the reference, he shall refer same to a Panel, and if he declines to

[157] Section 14, Copyright (Collective Management Organization) Regulations 2007,
[158] Asein, J.O. op cit p.377.
[159] Paragraph 15, Copyright (Collective Management Organizations) Regulation 2007. The Commission may make regulations providing for the procedure of the Panel.
[160] Paragraph 1(1) Copyright (Dispute Resolution Panel) Rules, 2007
[161] Paragraph 2, ibid

entertain the reference, he shall direct that no further proceedings shall be taken by any party in connection with the reference[162].

Subject to the decision to refer a dispute to a panel, the Director General of the Commission shall, within 10 days after the receipt of the last statement or answer from the parties, appoint a Panel in accordance with Regulation 15 of the Copyright (Collecting Societies) Regulations 2007. The Panel shall have power to regulate its own procedure. Disputes under these Rules may be determined on the basis of documents filed only. However, the Panel may, having regard to the exceptional nature of the case, or at the request of a party, order a hearing. A party may be represented at any hearing by a legal practitioner, or by any other person allowed by the panel to appear on his behalf or may appear in person. The notice of representative shall either be stated in the notice to the Director General referring a dispute for settlement required to be given in rule 2(1) or an answer thereto, or made in writing and shall not be effective until notice thereof has been served on the Director General, and a copy of same has been served on every other party and the proof of such service delivered to the Panel[163].

The panel's final decision shall be communicated to the Director General of the Commission who thereafter shall inform the parties of the decision. It should be noted that an application for settlement of a dispute shall be subject to the payment to the Commission of an administration fee which shall not be refundable. Where it is not paid within 7 days, the applicant is deemed to have withdrawn his application. The amount covers the Panel's fees and any properly incurred outgoing of the members of the Panel and such other expenses as are necessary for the conduct of the proceedings, such as the cost of hearing facilities[164].

2.8.6 Copyright Litigation and Mediation Programme (CLAMP[165])

Nigerian Copyright Commission is saddled with the responsibilities of administration and enforcement of copyright in Nigeria. The functions of the agency are well spelt out in its mandate which involve keeping of databank of works and their respective authors in order to monitor the rights and for the authors to benefit

[162] Section 5(1)(2), ibid.
[163] Section 8(1)(2) op cit.
[164] Section 14(1)(2)(3), ibid.
[165] DETAILS. Commercial Solicitors Nigeria's Copyrights Regime: A New Dawn http//www.detail-solicitros.com/index.php?. Accessed on 25th May, 2013.

maximally from their sweats. Various initiative and policies are developed to ensure that the agency live up to the expectation in terms of right administration in the country. One of these initiatives is Strategic Action Against Piracy (STRAP) which so far has been effective but not enough to tackle the menace of piracy in the country. STRAP was introduced by the Nigerian Copyright Commission as the national anti-piracy campaign for effective protection against piracy and all forms of intellectual property theft in 2005. The aims of the initiative are to combat all forms of piracy of music, film, software, books and all other protected works, create a conducive environment for copyright protection for all categories of works, empower local industries, create opportunities for legitimate distribution of protected works and attract foreign investment and through a sustained campaign, to restore the image of Nigeria as a country that upholds the ideals of creativity[166].

The Commission also under the STRAP carries out an enlightenment progamme to create the awareness of the copyright and educate the public on the dangers of piracy to the right holders and the economy at large. Likewise the Commission in their enlightenment campaign claimed that they have put in place a means to intensify their efforts to enforce the rights through Copyright Litigation and Mediation Progamme (CLAMP). Over the years the numbers of copyright cases handled by the Commission have not been made public while several raids had been carried out to curb illegal rental clubs operating almost at every corners of the country.

From May 2005 STRAP activities resulted in the inspection of plants and outlets for CD, optical disc and video productions and rentals all over the country to verify that they operated within the law. In addition, several operations were carried out against book, music, film, software and broadcast pirates. The outcome was arrest of suspects of pirated works, seizures of pirated works and prosecution of pirates in courts. For example, in 2012, there was total prosecution of 78 piracy cases at the Federal High Courts across the country, out of which 29 criminal convictions were secured against copyright offenders. Two significant milestone were recorded in the annals of the Commission's prosecutorial efforts in these convictions, namely the imposition of a fine of N250,000.00 which was the highest

[166] NCC websites visited 11th December, 2014.

ever imposed on copyright piracy cases in Nigeria and the mandatory six years, six months imprisonment of one of the broadcast pirates without the option of fine[167].

2.8.7 Creation of Collecting Society (Collective Management Organization) (CMO)

Under section 39(1)[168] of the Copyright Act, a Collecting Society may be formed in respect of any one or more rights of copyright owners for the benefit of such owners and the society may apply to the Copyright Commission for approval to operate as a Collecting Society for the purpose of the Act. Section 17 of the Copyright Act states:

> …no action for infringement of copyright or any right under this Act shall be commenced or maintained by any person(s) carrying on the business of negotiating or granting license (b) collecting and distributing royalties in respect of copyright works or representing more than 50 owners of copyright in any category of works protected by this Act unless it is approved under section 39 of this Act to operate as a collecting society or is otherwise issued with a certificate of exemption by the Commission.

According to section 39(8)[169] the term "Collecting Society" refers to "an association of copyright owners which has as its principal objectives, the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works". According to Ezeilo[170], 'Collecting Society' may also involve the act of copyright owners surrendering their rights to an association of right owners with a mandate to such body to act on their behalf. Such mandate includes the negotiation of tariffs, grant of licenses and the collection of agreed royalties that are a sequel to their right of the owners either directly or through their associations. This is an indirect and cost-effective way of enjoying the fruits of one's intellectual property. Firstly, the owners of protected works come together under an umbrella organization and constitute some of their members into a committee that will assume administrative responsibility for collecting appropriate royalties on behalf of such members. Secondly, the committee seeking a legal right to use copyright material

[167] Copyright Report 2012 p.8
[168] Copyright Act, C28, LFN 2004
[169] ibid
[170] Ezeilo, B.O. (2002), Collective Administration of Copyright in Nigeria. In Asein J.O. and Nwauche E.S. (ed) A Decade of Copyright Law in Nigeria, Nigerian Copyright Commission, p.7.

for commercial gains may negotiate with ease with the copyright owners on mutually agreed terms of payment.

The Copyright Act confers upon the Commission the power to grant approval for the formation of collecting societies subject to the terms and conditions specified therein[171]. Accordingly, whereas the Performing and Mechanical Rights Society of Nigeria, (PMRS) and more recently, Musical Copyright Society of Nigeria (MCSN) have been approved as collecting societies for musical works, the Reproduction Rights Society of Nigeria (REPRONIG) has been authorized to handle rights in the literary works. It is an endeavour to further enhance the earnings of right owners that the Commission encourages the formation of collecting societies pursuant to section 32B of the Nigerian Copyright Act. According to section 39(4)[172] a Collecting Society that has not been approved and registered by the Nigerian Copyright Commission cannot exercise the duties and powers as such. In **Musical Copyright Society (Nigeria) Ltd vs. Ade Okin Records & Another**[173]**,** Ukeje J, after an extensive and exhaustive consideration of the legal term *locus standi* held that the plaintiff being a Collecting Society and not being registered and recognized by the Nigerian Copyright Commission could not initiate the action. The court, therefore, also lacked the jurisdiction to entertain the action. Similarly, in **Musical Copyright Society Ltd vs. Details Nigeria Ltd**[174] Odunowo J, held *inter alia*:

> … I have come to the inexorable conclusion, after deep reflection, that the plaintiff is a Collecting Society. Not having been registered pursuant to section 32(b)(4) of the Copyright (amendment) Act 1992 it cannot be permitted to operate as such a body. To do so would be tantamount to subverting not only the letter, but also the spirit of the Copyright laws of this country. That being so the proper order to make is one striking out the suit for lack of *locus standi* to initiate the action.

From the ruling of the court, absence of registration is fatal to the success of collecting society in the pursuit of its right in a court of law. The combined import of sections 17 and 39 is simply that the right of legal representation cannot be exercised by any society without the Commission's approval. After the inclusion of

[171] Section 39 (1) & (2) op cit.
[172] Copyright Act, ibid
[173] (1992) FHCLR 313
[174] (1996) FHCLR 473. The Musical Society (Nigeria) Limited has however now been appraised and recognized as a Collecting Society by the Nigerian Copyright Commission

the requirement for the formation of collecting societies in the amended Copyright Act of 1999, any unregistered Collecting Society purporting to institute legal action on behalf of its member is likely to be challenged as shown in the cases above.

In **Nigerian Copyright Council vs. Musical Copyright Society of Nigeria & Ors**[175] the Collecting Society was charged for infringing the provisions of the Nigerian Copyright Act which bars any person or Society from carrying on business as a collecting society without obtaining a Collecting Society's licence from the copyright regulatory framework under Nigerian Copyright Commission. The court held on the interlocutory application of the accused contending that the complainant prosecution that is, (Collecting Society) lacked the legal authority to sustain the charge, and that the right to freely associate is not an absolute right but a restrictive one. The court further held that the Nigerian Copyright Commission is granted power similar to that of the Nigerian Police to prosecute offenders of statutory offences provided for under the Act.

Regulation of the activities of the Collective Management Organization (CMOs) is to guard against possible abuse of their dominant position and to safeguard the interest of its members and users of Copyright works. Thus, if there are too many there would be chaos and right owners lose out. The fewer they are the better improvement, competitiveness and development in the market environment.

2.8.8 Approval of Copyright Society of Nigeria (COSON)

Musical Copyright Society of Nigeria (MCSN) was the first indigenous collective management organization to operate in Nigeria. It was incorporated on 20th July, 1984. On 20th May, 2010, the Nigerian Copyright Commission announced the approval of Copyright Society of Nigeria Ltd/Gte (COSON) as the nation's sole copyright collective management organization for musical works and sound recordings. By that announcement, COSON joined Reprographic Rights Organization of Nigeria (REPRONIG) which has been the sole copyright collective management organization for literary works in Nigeria. It should be noted that the law clearly states that, the Commission shall not approve another society in respect of any class of copyright owners, if it is satisfied that an existing approved society

[175] (1999) F.H.C.R 419

adequately protects the interest of that class of copyright owners[176].

However, some criticized this position on the basis it creates a monopoly in collective management, therefore, depriving right owners of the option for another association. Other are of the option that if allowed it could bring out confusion at the point of negotiation and licensing. This may consequently weaken the collective bargaining position of right owners as users are likely to reject double membership. It would further generate unhealthy rivalry, raise administrative costs and deplete available royalties for distribution to right owners and lead to unnecessary disputes between owners of musical works and the recording companies that own the sound recordings[177].

Royalty is the percentage of income arising from a book, a piece of music, or an invention paid to the author, composer or inventor[178]. Copyright owners in subscribing to the membership of any collecting society must as a fundamental requirement surrender his/her or their rights as per sections 6-9, 11, 12 and 13 of the Copyright Act. What these sections cover are 'economic rights', whereas moral rights ever remain with the creators. The monies collected are to be distributed to respective member after deducting administration costs.

2.9 NATIONAL OFFICE FOR TECHNOLOGY ACQUISITION AND PROMOTION (NOTAP)

Decree No.70 of 1979 established the National Office of Industrial Property (NOIP), an agency under the Federal Ministry of Science and Technology. It is a corporate body with a mandate to implement the acquisition, promotion and development of technology and at the same time correct certain imperfections in the acquisition of foreign technology into the country. In 1992, the name of the Office changed to National Office for Technology Acquisition and Promotion (NOTAP) through Decree No. 82 of 1992. It is a body corporate with perpetual succession and a common seal and may sue or be sued in its corporate name. This was to give efficacy and ensure that the name adequately reflects the entire functions of the

[176] Section 39 (3) Ibid.
[177] Okoroji, T. (2010), "The Monopoly Powers of a Collective Management Organization Under the Nigerian Copyright Act" being a paper delivered at Intellectual Property Law Association of Nigeria (IPLAN) meeting held at Lagos Boat Club, Lagos, p.4.
[178] http://www.punchng.com/Artcle .aspx . Accessed on 29th October, 2010.

Office to remove any ambiguity and misconception that may arise in relation to any other government agency. Again, it was established to monitor, on a continuing basis, the transfer of foreign technology to Nigeria and to provide for other related matters.

2.9.1 Establishment and Composition of the National Office for Technology Acquisition and Promotion

Section one of the Act[179] states thus "there is hereby established a body to be known as the National Office for Technology Acquisition and Promotion which shall have the functions conferred on it under or pursuant to this Act". It is body corporate with perpetual succession and a common seal and may sue or be sued in its corporate name.

Section 2(1) of the Act[180] provides: "There will be as the governing body of the National Office a council to be known as the Governing Council of the National Office for Technology Acquisition and Promotion which shall be responsible for the formulation of policy for the National Office and for the discharge of the other functions conferred on it by this Act". Sub-section two provides that "the Council shall consist of a Chairman and the following other members that is:

(a) one representative each of the following Federal Ministries- (i) Finance, (ii) Internal Affairs, (iii) Justice, (iv) Commerce and (v) Works and Housing".

(b) one representative of the National Science and Technology Development Agency.

(c) one representative of the universities in Nigeria to be appointed by the Minister after due consultation,

(d) one representative of Polytechnics and Colleges of Technology in Nigeria to be appointed by the Minister after consultation with the Rectors and Principals thereof; and

(e) the Director.

The Chairman shall be the Permanent Secretary of the Federal Ministry of Industry or such other officer of that Ministry not below the rank of Assistant Director as the Permanent Secretary may designate in that behalf. The

[179] National Office for Technology Acquisition and Promotion Act, Cap. N62, L.F.N. 2004
[180] ibid

supplementary provisions in the Schedule to this Act shall have effect with respect to the proceedings of the Council and the other matters therein mentioned[181]. The Minister may give to the Council directions of a general character or relating generally to particular mattes but not to any individual or case with regard to the exercise by the Council or the National Office of its functions under this Act and it shall be the duty of the Council and the National Office to comply with the directions or cause them to be complied with[182].

The National Office for Technology Acquisition and Promotion is headed by a Director General as the Chief Executive and comprised of three Technical Department and one Service Department namely - Technology Transfer and Agreement (TTA), Technology Acquisition and Research (TAR), Technology Promotion and Commercialization (TPC) and Human Resources and Finance (HRF) Department[183]. Each of the four departments is headed by a director, who reports directly to the Director General (DG) on matters or issues pertaining to their respective departments. In addition, six other units, Information Technology and Consultancy Services, Public Relations and Protocol, Legal Unit, Internal Audit, Procurement, and, Lagos Zonal Office are attached to the office of the Director General[184] located at Federal Secretariat Abuja, Nigeria.

2.9.2 The functions of the Office

The functions of the Office according to section 4(d)(i-vi)[185] *inter alia* relate to trademarks and patents. Upon examination, it will be inferred whether the Office has lived up to its functions or not in respect of:

i) The use of trademarks
ii) The rights to use patented inventions;
iii) The supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever
iv) The supply of basic or detailed engineering
v) The supply of machinery and plans;

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[181] See Schedule on the Proceedings of the Council section 1(1)(2) and section 2(1)(2)(3)(4) of the National Office for Technology Acquisition and Promotion Act, Cap N62, Laws of the Federation of Nigeria, 2004.
[182] ibid
[183] Interview with the Director, Human Resources and Finance (HRF) Department 30th January, 2011. See also see http://notap.govs.ng/content/organizational-structure, assessed on 10th February, 2011.
[184] ibid
[185] ibid

vi) The provision of operating staff or managerial assistance and the training of personnel

In line with globalization and liberalization of the world economy, NOTAP has shifted its emphasis from regulatory and control activities to include promotional and development roles. The new areas of focus aim at attracting foreign technologies and investment and the development of indigenous technology. NOTAP was therefore established as one of the main institutions to carry out the National Policy on Technology Development. Part of this policy stipulates the encouragement of the flow of technology into the country in order to strengthen industrial development and encourage domestic enterprise to acquire foreign technologies that are suitable to the local environment[186].

The main objectives of the NOTAP are to (i) ensure the effective assimilation and diffusion of foreign technology within a specific time-frame at fair and equitable contractual terms[187], (ii) create better understanding in the implementation and interpretation of the NOTAP Act to enhance the capabilities of Nigerians[188], (iii) improve the equality of agreements submitted to the office in order to facilitate their evaluation and registration within the shortest time[189] and (iv) serve as a guide in the drafting of technology transfer agreements by Nigerian parties[190]. This contains the new policy on trade mark and the revised registration fee charged by the office for its services.

The mandate of NOTAP include promotion of locally generated technologies; promotion of generation of intellectual property, promotion and encouragement of the development of creative and inventive skills among Nigerian scientists, researchers, inventors and innovators[191].

2.9.3 Directory of Foreign Technology suppliers and Nigerians Users

The National Office for Technology Acquisition and Promotion (NOTAP) was set up to facilitate and encourage technology transfer, stimulate the promotion of indigenous technology and develop local technological capability. In pursuance of

[186] http://notap.govs.ng/content/organizational-structure, assessed on 10th February, 2011.
[187] Umar, B.B. the current Director General of the NOTAP briefing the public on the activities of Office. See http://notap.govs.ng/content/director-general. Accessed on 2nd October, 2011.
[188] ibid
[189] ibid
[190] ibid
[191] NOTAP News publication 10th February, 2011.

the mandate, the Office embarked on many programmes to promote the growth and acquisition of technology by industrial enterprises. The publication of this Directory from Headquarters Abuja is one of the efforts made to provide access to foreign technology suppliers in order to stimulate economic growth and development.

2.9.4 Activities of the NOTAP

NOTAP has established forty-two Intellectual Property Technology Transfer Offices (IPTTOs) in Universities, Polytechnics and Research Institutions in Nigeria[192], to promote interaction and strengthen the linkage between university/research institutions and industries. Consequently NOTAP encouraged that the forty-two institutions should appoint Heads of each IPTTO who should be a person of acclaimed research efforts in innovation creation as well as with strong links with industry and the market, in order to ensure successful execution of the mandate of IPTTO.

The IPTTO is designed to develop a robust intellectual property rights portfolio licensing and to support the institution's initiative in developing patent culture. It sets into motion for the formal system of incentives and rewards that encourage individual researcher to be involved in partnerships[193]. IPTTO will facilitate the utilization of intellectual property system in tertiary institutions. It will enable the universities/Research and Development institutions to use IP system as a source of technology information and a source of generating income.[194] Both functions of the IP system go hand in hand towards organizing the management of IPRs. Universities/R&D institutions focus on both functions even though they are two independent organization. Patent documents mainly consists of realities of searches and documentation on technical matters while the exploitation of the institutions IPR portfolio requires quite an amount of legal work and considerable commercial activity[195].

The commercial aspect of IPR management, that is, the licensing operations and the acquisition of R&D contracts, consultancy agreement and joint venture

[192] http://notap/govs.ng/content/activities accessed on 10th May, 2014
[193] NOTAP News Publication 2010
[194] ibid
[195] ibid

contracts, may even raise special problems since universities/R&D institutions, unlike enterprises, do not usually have a sales or marketing department that could assist them in handling the exploitation of IPRs. Therefore, universities/R&D institutions may consider that all or some of their IPRs management services and issues may be handled by the IPTTO in collaboration with technology transfer agencies like NOTAP, or other license brokers or relevant government agencies. In this regard, factors to be considered include the nature of the universities/R&D institutions, the volume of the activities to handled and the availability of external services.

Therefore, in institutions where patent documents are predominantly used as a source of information, search activity may be contracted out to credible search organization, until unless the universities/R&D institutions accomplish an appropriate IPR documentation centre. Also, the task of identifying and resolving conflicting patent applications can be left to external services provided by patent agents or patent attorneys. Where a University and R&D institutions has a sufficiently large volume of IP activities and technology transfer contracts say a rate of 10 internationally protected IPs per year, it is necessary to manage and exploit all the IP activities through the IPTTO which will undertake the selection of IPs, and evaluation of their technological and commercial potentials. In the bid to improve production and efficacy of traditional herbal products, the National Institute for Pharmaceutical Research and Development (NIPRD) is collaborating[196] with the NOTAP to improve its strategies in pharmaceutical technology[197].

2.10 TRADEMARKS, PATENT AND DESIGN REGISTRY

The Nigerian Intellectual Property Office, also known as the Trademarks, Patents and Designs Registry regulates the administration of Industrial Property in Nigeria. The IPO is set up as a department under the Ministry of Trade and Investment (formerly Ministry of Trade and Commerce) and is responsible for the management of Trademarks, Patents and Designs applications in Nigeria.

There are two principal officers namely Minister of Trade and Investment, and, the Registrar of Patents and Design appointed by the Civil Service Commission

[196] Speech of the Director General on the occasion of Partnership Agreement with NIPRD. Accessed through internet: http://notap.govs.ng/content/niprd-partner-notap-imrove-herbal-products on 10th February, 2011.
[197] ibid

for the effective management of the patent administration. The Minister is charged with responsibilities which empowers him to monitor the Department. The Minister may make rules by regulating the manner in which the Registrar of Patents and Designs shall maintain and make entries in the register, and containing such administrative or procedural provisions as appear to him to be necessary or expedient in order to facilitate the operation of this Act.

The Minister of Industries, with the approval of the President, may make rules establishing schemes to encourage inventive activity. Further, without prejudice to the generality of the foregoing, any such scheme may include provision for the payment of grants to persons who have or perfected a thing. Similar power is granted if it appears to have reasonable prospects of inventing or perfecting, important inventions which cannot be further developed for financial reasons[198].

The Federal Ministry of Trade and Investment is committed to providing prompt and satisfactory services delivery consistent with modern innovation and technology as well as raising the profile of Nigeria in the area of intellectual property protection, in a way consistent with best practices across the globe. Nevertheless, the Registry only has power of examining applications for registration as relates to conformity with legal requirements and not the substantive examination of the patent. The Registry is under the direction of the Minister in-charge of Trade and Investment, who has power to make rules relating patents. Paragraph 16 of the First Schedule to the Patent and Design Act provides:

> The authority of a Minister under paragraph 15 of this Schedule may be given (a) before or after the relevant patent has been granted (b) before or after the doing of the acts in respect of which the authority is given and (c) to any person whether or not he is authorized directly or indirectly by the patentee to make, use, exercise or vend the relevant articles or invention.

Paragraph 15-17 of the First Schedule of Patent and Design Act jointly read provides:

> (a) the government (b) any person authorized under those paragraph as above (c) any supplier of the government or of any such persons, and

[198] Patent and Designs Act, Cap. P2, Laws of the Federation of Nigeria, 2004

(d) any agent of any such supplier from liability for the infringement of any patent relating to the relevant article or invention and from liability to make any payment to the patentee by way of royalty or otherwise.

The paragraph also denies the patentee benefit of royalty to keep the patent afloat especially as was the case of **Wellcome Foundation Ltd vs. Lodeka Pharmacy Limited & Anor**[199] where the court held that though the letter of the minister was that of exemption and not authority but went ahead to give judgment to the defendant for supply of articles for the government use. Both provision and the judgment was not favourable for patentee rather a denial of benefit. Patentee needs money or resources to pay for yearly renewal of the patent and enjoying his creativity but with these provisions and case law he is handicapped.

2.11 THE NIGERIA POLICE FORCE

The general duty of the Police Force is to maintain law and order in the society. Section 35(1)(e)[200] has expressly listed the Force among those organs charged with the responsibility of copyright administration in the country. It is also for maintenance of public safety and public order. Section 214(2)(b)[201] stipulates that the Nigeria Police Force shall have such powers and duties as may be conferred upon them by law. According to the Constitution of the Federal Republic of Nigeria 1999[202] the Nigeria Police Force is designated as the national police of Nigeria with exclusive jurisdiction throughout the country. Section 214(2)(c)[203] also provides for the establishment of separate Nigeria Police Force branches "forming part of the armed forces of the Federation or for their protection of harbours, waterways, railways and airfields." Section 4 of the Act[204], provides *inter alia:*

> The Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall

[199] (1970)NLR 536
[200] Copyright Act, Laws of Federation of Nigeria 2004
[201] Constitution of the Federal Republic of Nigeria, 1999
[202] section 214
[203] ibid
[204] Police Act, CAP P19, Laws of the Federation of Nigeria, 2004.

> perform such military duties within or outside Nigeria as may be required of them by, or under the authority of this or any other Act.

Through the collaborative strategies of the Copyright Commission, the Nigeria Police is expected to play a vital role in curbing the activities of pirates. As a measure towards improving the enforcement of copyright law, the Police Force has developed training modules designed to educate the corps on their responsibilities in copyright matters[205]. Section 38(1) of Copyright Act provides that "the Commission may appoint copyright inspectors as it may deem fit". The aim of this provision is to complement the duties of the police force. It should however, be noted that before the amendment of the copyright law, Police Force had the sole authority, upon warrant to search and seize any property relating to copyright infringement. This responsibility is now being shared by them while police still retain the general powers to maintain law and order in the society. Appointment of supernumerary Police officers to 'protect property' as provided by Section 18(1) of the Act[206] states thus:

> any person (including any government Department) who desires to avail himself of the services of one or more police officers for the protection of property owned or controlled by him may make application therefore to the Inspector-General, stating the nature and situation of the property in question and giving such other particulars as the Inspector-General may require.

Though the Police is expressly charged with the responsibility of enforcement of all laws including Copyright Law, section 18 lays down a proviso that must be met by the owner of copyright who desires the service of the Police, must as matter of statutory provision make an application to Inspector-General of Police before the Police could act. Section 18(1) of the Act is in conflict with Section 4 of the same Act.

2.12 THE NIGERIAN CUSTOMS AND EXCISE

Section 44 of the Copyright Act specifically provides for a procedural intervention by officers of the Customs and Excise Department against illegal

[205] Ocheme, P. Op. cit. p.141
[206] Police Act Op.cit.

importation of more than two infringing copies of a copyright work into Nigeria.[207] In fact, the Act stipulates that this interventionary regulation shall have the same effect as if it had formed part of the Customs and Excise Management Act. According to section 35(1)(f)[208] membership of the Governing Board of the Nigerian Copyright Commission shall consist of "one representative of the Nigerian Customs Service, not below the rank of a Comptroller of Customs". Section 44[209] provides procedural details.

The role of the Nigerian Customs and Excise Department in the administration of intellectual property rights is guided by the provision of section 44 of the Copyright Act, 2004. The essential duty of this department in the administration of copyright is to treat as prohibited, and restrict the importation of any goods or copies of a work, upon receiving notice from the copyright owner whose right is threatened by the importation of any such goods or copies of a work which is made outside Nigeria and for which the person giving the notice has a right under the law to protect.[210]The Customs department can only act to restrict the importation of any copy of a copyrighted work (whether infringing or not) upon receipt of a written notice from an injured or threatened copyright owner. The department cannot on its own volition either treat as prohibited or restrict the importation of any infringing copy of a work. It depends upon the complaint lodged by an aggrieved party before it can do anything.

The required written notice must state that the informant is the owner of the copyright in the work to which the infringing copy being imported relates. He should request the department for a period of not more than 5 years to treat as prohibited, copies of such work which if it had been made in Nigeria would have been an infringing copy of his work. This procedure may require the asserting party to prove to the satisfaction of the department, his title to the said work in respect of which he is seeking the restriction of the alleged infringing copies. The vex questions then are: what happens when the owner is unaware of the infringement on his work? What about the time frame for arrest or outright seizure of the infringed

[207] Section 44, ibid.
[208] Copyright Act ibid.
[209] ibid
[210] Ocheme, P. Op. cit p.145.

materials? What if the infringer disappears? What is the essence of the enforcement of law if the enforcer has to wait for owner to act? What of if the owner knows of the activities outside the country?

The Customs and Excise in the exercise of its general duties of guarding against the economic adversity of the country in the importation and exportation of goods and services, may extend to prevention of smuggling of such goods which attract customs duties either when coming in or when going out of the country's shores. In the process of collecting duties for such goods, the department may exercise its right to restrict or prohibit such copyright goods for which the required tariffs are not paid. This is, to some extent, quite different from the specific duty of treating as prohibited and thereby restricting the specific duty of importation of an infringing copy as may be complained of by the copyright owner.

2.13 THE ROLE OF THE FEDERAL HIGH COURT

Sections 251(1) and (3)[211] of the Constitution of the Federal Republic of Nigeria (CFRN) provides that civil and criminal proceedings for enforcing intellectual property rights have to be brought in the Federal High Court. This was not always the case prior to the establishment of the Federal Revenue Court (the original name of the Federal High Court) in 1973. The State High Courts, particularly the Lagos High Court had jurisdiction in intellectual property matters. Now, the Federal High Court has exclusive jurisdiction in intellectual property matters. The Copyright Act[212] has two provisions with regard to enforcement proceedings. First, Section 16(1) of the Act provides, *inter alia,* that copyright infringement shall be actionable at the suit of the owner, assignee or exclusive licensee of the copyright, as the case may be, in the Federal High Court, exercising jurisdiction in the place where infringement occurred. Secondly, Section 46 goes further to stipulate that the Federal High Court shall have exclusive jurisdiction for the trial of offences and disputes under the Act. Section 16(1), however, has been modified by the recently promulgated Rules of Procedure[213] of the Federal High Court, prescribing that "all suits and actions relating to copyright, patents, designs,

[211] Constitution of the Federal Republic of Nigeria, 1999.
[212] Sections 16 and 46 Copyright Act, Cap C28 Law of Federation, 2004
[213] Order 11, Rule 1(8) Federal High Court (Civil Procedure) Rules 2000

trademarks and merchandise marks shall be commenced and determined in the Division in which the defendant resides."

It is doubtful whether the Chief Judge of the Federal High Court has the authority to change the venue of trial from the place where the infringement occurred to where the defendant resides with regard to copyright actions. This is because section 254 of the 1999 Constitution provides that the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court, "subject to the provisions of any Act of the National Assembly." In the case of copyright, an Act of the National Assembly, has clearly and unambiguously located trial of copyright matters in the place where infringement occurred. It is therefore submitted that Order 11, Rule 1(8) Federal High Court (Civil Procedure) Rules 2000, is void to the extent that it is consistent with section 16(1) of the Copyright Act, 1988.

The vesting of original jurisdiction in intellectual property matters in the Federal High Court to the exclusion of all other courts[214] has produced two advantages: First, it has ensured specialization and acquisition of skills by court judges. During the operation of Copyright Act 1970, State High Courts gave conflicting decisions as to whether they had jurisdiction in copyright matters. In **Achebe vs. Drum Publication**[215] the High Court of the then East-Central State ruled that it had no jurisdiction to determine a copyright action. However, in **Gentil vs. Tabansi Agencies**[216], the High Court of Lagos State held that it had jurisdiction to hear a copyright infringement suit. Worse still, in **Yusuf Ladan vs. Sha Kallo Publication**[217], in a decision of the then High Court of the North-Central State, the court (and counsel) applied the Imperial Copyright Act 1911. They were unaware of the existence of Copyright Act 1970 which had repealed the operation in Nigeria of the 1911 Act. Although the Copyright Act, 1970 came into operation on 24 December, 1970, on 4th April 1972 Judge Hassan, Ag. P.S.J. said:

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[214] The Supreme Court in Patkum Industries Ltd. vs. Niger Shoes Manufacturing Co. Ltd (1988)5 NWLR 138 held that with regard to trade marks the jurisdiction of the Federal High Court is limited to registered trade marks, and State High Courts have jurisdiction to hear unregistered trademarks suits. Patkum Industries was followed by the Supreme Court in Avman Enterprises Ltd. vs. Akuma Industries Ltd (2003)12 NWLR 22

[215] (1974) ALR Comm 277

[216] (1977) ALR Comm. 344.

[217] (1972) N.C.L.R. 428.

> At the very outset it is germane to point out that there is no Nigerian law of Copyright. However by virtue of Order in Council No. 912 on June 24, 1912 the Copyright Act 1911 was made applicable to the then Northern Nigeria Protectorate, later known as the Nigerian Protectorate. So far as I am aware, and indeed learned counsel were also agreed, the Imperial Copyright Act 1911 was and still is applicable to present day Nigeria. I therefore hold that for the purposes of this trial the relevant legislation applicable to the facts in the case would be the Copyright Act, 1911[218].

The second advantage is that the Federal High court will be better able to appreciate the problems of rights owners and therefore can better assess damages and other relief to be awarded in proven infringement cases[219]. In this regard, mentioning some recent decisions of the Federal High Court is pertinent. The Federal High Court, Maiduguri, in charge numbers FHC/MG/CR/36/2003 and FHC/MG/CR/9/2003 sentenced two accused persons to six months imprisonment each for piracy of copyright protected works in the form of texts books owned by Longman, Heinemann, Macmillan, Lantern and University Press Plc. Similarly Federal High Court Calabar No.FHC/CA/31C/2003, sentenced the marketing manager of a Calabar based cable satellite station to eighteen months imprisonment for a broadcast piracy. The pirate station itself was also convicted and fined. Ajakaiye J. in his judgement expressed displeasure over the activities of the convicted which he said posed serious danger to the economy of Nigeria. He hoped that his decision will serve as deterrence to pirates who infringe and thrive on the creative works of others[220].

These decisions are in sharp contrast to the outcome in **Commissioner of Police vs. Nwaiwu**[221] where the convicted pirate was happy to pay the fine of 62 Naira for a pick up truck load of pirated books without more. The role of the Nigerian Copyright Commission should be appreciated in sensitizing the judiciary. For example, the Commission organized in collaboration with the Federal High

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[218] (1972) N.C.L.R. 428 at p.431

[219] In Masterpiece Investment vs. Worldwide Business Media Ltd &Ors (1997) FHC, 477. Odunowo J. awarded N200,000.00 naira as special damages, N300,000.00 Naira as general damages and N100,000 as additional damages, bringing the total amount to N600,000.00 naira. Also in Ukaoha vs. Broad-Based Mortgage Finance unreported case FHC/L/CS/270/92, the court awarded N20,000 naira as damages because "the acts of the defendants constituted a violent infringement of the plaintiff's Copyright.

[220] WIPO Bulletin Vol. 3 NO.6 (2006) pp.26,34.

[221] Unreported case. Charge No. FHC/CA/31D/2003

Court a seminar for the Judges of the court[222]. Also in October 1996, an international symposium sponsored by WIPO was held in Abuja[223], on adjudication of copyright cases for Federal High Court, Court of Appeal and Supreme Court judges and justices in Abuja. The improvement is already noticeable even outside the country. Whereas in 1989, the year the Nigeria Copyright Commission came into existence, Nigeria was included in a story in the World Intellectual Property Report, among twelve countries most responsible for pirating copyrighted works, the same journal six years later in 1995, and during a dark period in Nigeria history assured its reader that:

> The Federal High Court, which has jurisdiction over industrial property suits, continues to deal with its cases with commendable efficacy and dispatch. Proprietors and professional associates should not be deterred by rumours of chaotic conditions in Nigeria, from taking measures for the registration and enforcement of trade mark and patent rights in this highly populous and important jurisdiction[224].

Federal High Court is the only single avenue for original judicial interpretation of the law on this subject matter. To carry out this function, the court is divided into various judicial divisions across the country. The court relies not only on the substantive law but also on the adjunctive laws in the course of its adjudication. Thus, it employs the civil procedure rules[225] of its court in civil actions and for all criminal proceedings. It also has recourse to such other rules, as, the Criminal Procedure Act, for such offences triable in any of its divisions in the southern states of Nigeria and the Criminal Procedure Code[226] for the offences triable in any of its divisions in the northern states of Nigeria and including the Federal Capital Territory Abuja.

2.13.1 Civil Action and Criminal Prosecutions

The enforcement standards instituted by the Copyright Act are principal measures, civil enforcement and criminal penalties. There are two types of action that can be brought for copyright infringement: civil proceedings or criminal

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[222] Folarin, S (2009) Conference paper on Enforcement of Copyright: Building Strategies for Effective Protection and Enforcement in the 21st Century organized by World Intellectual Property Organization (WIPO) and the Nigerian Copyright Commission Abuja, May 5-6.
[223] ibid
[224] Copyright Bulletin Vol.3 No. 6 (2006) 26, 34.
[225] Sections 1 and 3 and Order 10 of the new Federal High Court (Civil Procedure Rules) 2000
[226] Criminal Procedure Code of Northern Nigeria, 1960.

prosecution. Section 24 Copyright Act provides that a claimant has the option of pursuing either or both simultaneously. In the case of **Smith v. Selwyn**[227] it was held that both civil and criminal prosecution may be instituted simultaneously. However, most claimants make use of the civil process, partly because its technique and atmosphere are appropriate to the assertion of private property rights among businessmen, partly because the types of remedy – particularly injunction (interlocutory and permanent and damages – are more useful than punishment in the name of the State[228]. The right owner usually prefers the civil route for two further reasons. First, there is no possibility in the criminal procedure of securing an interim order to desist from a conduct pending the trial which could take years, nor are there pre-trial procedures, such as discovery, for extracting information from an accused. Second, there is a high burden of proof on the prosecution in criminal proceedings. The accused must be shown to be guilty beyond reasonable doubt, not merely (as in most civil issues) on a balance of probabilities. This quantum of proof may be especially hard to demonstrate if the type of offence requires proof of *mens rea* in the defendant, for example, he knew, or had reason to believe, he was committing an infringing act or other offence[229].

2.13.2 Civil Enforcement

The rights of a copyright owner are infringed when one of the acts requiring the authorization of the owner is done without any his consent. Pirates make no investment whatsoever in the production of original copyrighted materials. They simply misappropriate copyrighted materials, reproducing and selling them for quick profit[230].

2.13.3 Inspection and Seizure (Anton Piller) Order

Unlike the various remedies available for intellectual property right, an Anton Piller Order belongs to a class of its own. It is more than a remedy especially in

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[227] (1914) 1 KB 655

[228] Cornish, W. and Llewelyn, D: (2007) Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 6th ed. Sweet & Maxwell, London.

[229] In Federal Republic of Nigeria vs. Asika, unreported case FHC/K/2CR/92, Auta J. held that the prosecution had failed too prove beyond reasonable doubt that the first accused person knew the books he was selling were pirated books.

[230] Folarin, S. (2009) Conference paper on Enforcement of Copyright: Building Strategies for Effective Protection and Enforcement in the 21st Century organized by World Intellectual Property Organization (WIPO) and the Nigerian Copyright Commission Abuja, May 5-6,.

view of the state and the manner of its intervention. It is granted when it is very likely that an infringer who is alerted that a complainant is proceeding against him in court may hide his infringement activities by disposing of any incriminating materials that could prove the nature and level of the infringement. Thus Anton Piller Order is a secret weapon which attacks an infringer before he knows it, preventing him from destroying or otherwise disposes of evidence and compelling him to disclose his source of supplies as well as the channel of his own distribution.

Injunction granted before trial can either be interim or interlocutory. The distinction between these two forms of injunctions was drawn by the Supreme Court in the case of **Kotoye vs. Central Bank of Nigeria (CBN)**[231] where Nnamemeka Agu JSC held:

> I think it is correct to say that "*ex-parte*" in relation to injunction is properly used in contradistinction to "on notice" and both expressions, which are mutually exclusive, more strictly rather refer to the manner in which the application is brought and the order procured. …they are made without notice to the other side, to keep matter in *status quo* to a named date, usually not more than a few days, or until the respondent can be put on notice…

The most important civil remedy available to the victim of intellectual property right infringement is an injunction restraining the infringer from ever repeating the infringement. However, it has been found in practice that the valuable injunctive remedies available are those used in interlocutory proceedings before the trial. Such orders include orders for interim injunction, detention of infringing articles, the Mareva injunction detaining the property of the infringer within jurisdiction to ensure that it available to satisfy aware of damages when eventually made mandatory order of Anton Pillar compelling the infringer to allow ingress into his premise for the purpose of the plaintiff securing concrete evidence of his infringement in order to aid the court in arriving at a just award of damages. Of all those injunctive remedies, the Anton Piller has proved to be the most efficacious, and has indeed became an indispensable tool of the intellectual property rights lawyers use in the pursuit of his client's remedies.

[231] (1989)N.W.L.R. Pt 98 at 419

Surprise is a potent tool for the complainant who would need to secure evidence of the infringement before the infringer gets to know of the action against him. Section 25 of the Nigerian Copyright Act provides for an aggrieved party the right to apply *ex parte* (that is without notice to the adverse party) for an order of inspection and seizure.

The classical Anton Piller Order, as originally formulated in **Anton Piller K.G vs. Manufacturing Processes Ltd. & Ors**[232] is directed at the defendant to permit or allow the plaintiff (and usually with his solicitors) to enter and inspect the defendant's premises as well as to seize, make copies of or photograph materials that are relevant to the alleged infringement. In the case of **Ferodo Limited & Anor vs. Ibeto Industries Limited**[233] the plaintiffs were sole distributors in Nigeria of Ferodo product and certain products said to be Ferodo brake linings were being sold by the defendants who were not customers of the plaintiffs. The application was filed along with the action for infringement and brought under Order 20 rule 3 of the Federal High Court (Civil Procedure) Rules 1976. The applicant showed that if the respondents became aware of the proposed action or of the motion, the infringing goods and documents might disappear from their premises hence the need of the *ex parte* motion. The court ordered that the plaintiff should, pending the trial and determination of the substantive action, enter into bond in the sum of N20,000.00 with liberty to apply for either an increase or reducing of the amount. Anyaegbunam, J. admitted that this order resembled another form of a search warrant but made a distinction between it and a search warrant. The court granted the order having satisfied itself that the case met the three essential pre-condition laid down by Ormrod L.J in Anton Piller case.

In **Universal City Studio Inc. vs. Kukhtar & Sons Ltd**[234], the plaintiffs acquired the copyright in a drawing of a shark's mouth with the slogan "Jaws" and exploited this by making and selling what was popularly known as "Jaws" T-Shirts. This right was infringed by a wholesale company which admitted selling a few of such shirts. Shortly thereafter, the plaintiff found the T-Shirts on sale. Fearing that the defendants might dispose of the goods if challenged, they sought an order that

[232] (1976)F.S.R 129; (1976) Ch.55
[233] (2004)5 NWLR Part 866 at 235.
[234] (1976)1 W.L.R. 568

the defendant should hand over the infringing copies for safe custody. The order was granted although the court admitted that it was "a form of relief which the court will grant with great reluctance and which should seldom be sought and more seldom granted

The Federal High Court in the case of S**olignum Ltd vs. Adetola**[235] has in fact pronounced that the Anton Piller order is inconsistent with the fair hearing provision of the section 36 of the 1999 Constitution of the Federal Republic of Nigeria. The applicant's *ex parte* motion was brought under the High Court Civil Procedure Rules. The trial Judge dismissed the application and wondered whether the decision in Anton Piller and Ferodo could stand in the light of the Constitution. He based his argument on the supremacy of the Constitution and the fair hearing provision thus held that they could not.

Similarly in **Rokana Industries Plc vs. Mauri**[236], the applicants sought an Anton Piller order with respect to an alleged trademark infringement. The learned trial judge observed that the order was in grave danger in view of the constitutional guarantee of fair hearing. The court however accepted the continued validity of the order under the Copyright Act, on the ground that the status (in that time a Decree) was superior to the unsuspended provisions of the Constitution. In **7Up Bottling Co. Ltd vs. Abiola & Sons (Nig) Ltd**[237], Adio J.S.C. remarked that "an interlocutory injunction cannot generally be granted without giving prior notice of the application to the respondent. He further said that a grant of an application for an interlocutory injunction without notice to the respondent or behind the respondent is void by virtue of the provision of section 36(1) of the Constitution[238].

Fortunately, this judicial trend has been cautiously qualified by the Court of Appeal in **Akuma Industries Ltd. vs. Ayman Enterprises Ltd**[239], first the court acknowledged that Anton Piller orders, by their very nature, are against the Constitution of the Federal Republic of Nigeria and that courts should be circumspect before granting an order made *ex parte* which by its very nature allows

[235] (1992)F.H.C.L.R. 157
[236] (1993)F.H.C.L.R. 243
[237] (1995)3 N.W.L.R Pt.383 at 257
[238] See also Provisional Liquidator, Tapp Industries vs. Tapp Industries (1995) 5 N.W.L.R. 9; Ololakashunvs. Governor of Kwara State (1996)1` N.W.L.R. 453; Enekwe vs.IMB (1997) 10 N.W.L.R. 601.
[239] (1999)13 N.W.L.R. (Pt.633) 68

one party to invade the privacy of another. It nevertheless endorsed it for use in extreme cases having regard to the urgency of the situation, concluding that it must not be granted where no appreciable harm would be done if the parties are given to argue the merit of the case.

The court should be fully informed of all relevant facts for it to weigh them in deciding whether or not to grant the *ex parte* order sought as pointed out in the case of **Wardle Fabrics Ltd. vs. G. Myristis Ltd**[240]**.** This is because the defendant may bring a motion to have the order discharged where the plaintiff had obtained the order without disclosing material facts to the court which if he had could have influenced the exercise of the court's discretion in granting the order.

Anton Piller Order has been frequently sought in intellectual property rights in Nigeria courts however, the courts have been cautious in granting the order due to constitutional provision on fair hearing.

2.13.4 Freezing Order

The development of the "Anton Piller" order in England coincided with another, more general evolution of the interlocutory procedure, the *Mareva* injunction now known in the United Kingdom as a "freezing injunction", which is not directed to uncover and preserve evidence of infringement. *Mareva* injunction is granted *ex parte* to restrain the defendant from disposing or alienating his property so as not, to frustrate or render useless the judgment that the plaintiff may obtain in the case before the court. It is available both as a pretrial or post trial relief. In the case of **Mareva Compania Naviera S.A. vs. International Bulk Carriers S.A.**[241] the Court of Appeal in England per Lord Denning laid down the general guiding principle that:

> where a plaintiff can show a good arguable claim to be entitled to money from a defendant and there is a risk that the defendant will remove assets from the jurisdiction or dispose of them as to render them unavailable or untraceable, the court may grant an injunction to retrain the defendant from disposing of the assets or removing them from the jurisdiction.

By granting a freezing order of injunction, an applicant is able to bind the defendant before the defendant remove the assets out of reach of the courts; a

[240] (1984) F.S.R. 263
[241] (1975)2 Lloyd's Rep. 501

jurisdiction, which may be used by the police as well private parties to litigation[242]. This preemptory remedy grew from the ingenious creative mind of Lord Denning as an equitable remedy to scale over the technical barriers of fair and just administration of justice. Although the remedy and procedure may not be called 'mareva injunction' under our laws in Nigeria, the Civil Procedure Rules of Courts allows for the preservation or interim custody of the subject matter in dispute. Accordingly, the provision of the High Court (Civil Procedure) Rules of Kaduna State on interim preservation of property was invoked to secure a 'mareva injunction' in a case involving a negligent driving. For example, in **Femi Olufokunbi vs. Chidi-Ebere Transport service Ltd**[243] the defendant's luxurious bus passing through Zaria pushed the plaintiff's car from the rear of from the road into a ditch totally damaging it beyond repairs. The plaintiff relying on the Court of Appeal of England's decision in the mareva case, successfully got mareva injunction per Donli J. to seize the bus which was the defendant's only asset within the Zaria Court's jurisdiction as a result of which the defendant paid for the damaged car before the matter could go into trial.

This procedure helps in retaining assets belonging to the defendant, needed to satisfy judgment in the action, particularly if assets may be removed from the jurisdiction. In **Anton Piller KG vs. Manufacturing Process Limited**[244], the defendants, an English company and their two directors, were the United Kingdom agents of the plaintiffs, German manufacturers of frequency converters for computers. The plaintiffs claimed that the defendants were in secret communication with other German manufactures and were giving them confidential information about the plaintiff's power units and details of a new converters, the disclosure of which could be most damaging to the plaintiffs. In order to prevent the disposal by the defendants, before discovery in an action, of documents in their possession relating to the plaintiffs' machines or designs, the plaintiffs applied *ex parte* for an interim injunction.

This was to restrain the defendants from infringing their copyright and disclosing confidential information. An order for permission to enter the defendants'

[242] See Derby & Co. vs. Weldonn (NOs 3 and 4) (1990) Ch.65
[243] (1983) Unreported Suit No. KD/Z/132/83
[244] (1976) CH 55; (1976) RPC 719.

premises to inspect all such documents and to remove them into the plaintiffs' solicitor's custody on the plaintiffs undertaking to issue a writ forthwith was made. Brightman J. granted the interim injunction but refused to order inspection or removal of documents. The plaintiffs' *ex parte* appeal, which was heard in chambers with judgment later in open court, the court, allowed the appeal. That in most exceptional circumstance, where plaintiffs had a very strong *prima facie* case, actual or potential damage to them was very serious, and, there was clear evidence that the defendants possessed vital material, which they might destroy or dispose of to defeat the ends of justice. before any application *inter partes* could be made. The court had inherent jurisdiction to order defendants to "permit" plaintiffs representatives to enter defendants' premises to inspect and remove such materials. Again, in the very exceptional circumstances the court was justified in making the order sought on the plaintiffs' *ex parte* application.

The conditions for the grant of Anton Piller order are set out by Ormond L.J. in the Anton Piller case are: "first there must be an extremely strong *prima facie* case, secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence from the defendants having in their possession incriminating documents or things, and, that there is a real possibility that they may destroy such material before any application *inters partes* are made. The order may relate to bank accounts and other financial assets. In addition, there have been orders directed at seizing of specified valuables, such as cars, in which, according to evidence, proceeds of infringement have been invested. *Mareva* orders are granted subject to the following conditions. (a) the applicant must have a good case (b) the applicant must have satisfied the court that there are assets belonging to the respondent within the court's jurisdiction[245]. (c) there is a real risk of dissipation or secretion of those assets which would make judgment nugatory[246] and (d) the

[245] From 1988, there was a change of judicial attitude in England allowing for a freezing order to be made in respect of assets, which were outside the jurisdiction of the court, in order words, outside England and Wales. This order, which came to be known as the Worldwide Freezing Order(WFO) could be made either after judgment or before judgment. See Republic of Haiti vs. Duvalier (1990) QB 202,. Also in **Babanaft International vs. Bastne**, there were dicta to the effect that worldwide orders should be granted only in "extreme and "very rare" cases indeed, or in "exceptional cases". However in Derby vs. Weldon (1990) Ch.65 decided later, Lord Donaldson M.R. held that "once the court is concerned with an international operator the position may well be different" . This means that in such a case a worldwide freezing order would readily be granted.

[246] Kufeji vs. Kogbe (1961)1 All NLR 113 at 114.

applicant is required to give an undertaking in damages, given the ex-arte nature of the procedures.

Under Order 17 rule 1(1) (a) of the Federal High Court (Civil Procedure) Rules 2000, an equivalent of the *Mareva* injunction can be made. The rule provides that if the defendant in any suit with intent to obstruct or delay the execution of any decree passed against him is about to dispose of his property, or any part thereof, or to remove it from the court's jurisdiction, then the court may grant an order for the property's interim attachment.

At the international level we may refer to the European Union Directive of 29th April, 2004 on the Enforcement of Intellectual Property Rights. The Directive requires all members States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy. An example of a case where the provisions of the Directive was applied is the 2007 **Princo Corporation Ltd vs. Koninklije Philips Electronics** before the Court of Genoa, Italy. The Dutch company Phillips, owners of patents on CD-R technology, requested an order of precautionary seizure over all Princo's movable and immovable property, including its bank accounts, with a view to ensuring the recovery of damages to be awarded at the end of the liability proceedings.

2.13.5 Criminal Enforcement

In the field of intellectual property, offences are most prominent with regard to infringement of trademarks and copyright, where there is a long history of conferring special remedies against pirates[247]. The Copyright Act, in section 20 provides for criminal copyright infringement. Also, the general crime of conspiracy exists under the Criminal Code (Southern states) and Penal Code (Northern states).

The 1970 Copyright Act did not directly provide for criminal sanctions against Copyright infringement[248]. Such sanctions were available only in the southern states under sections 491-493 of the Criminal Code. There was no

[247]Dworkin and Taylor, ibid, p.61

[248] Section 15 of the Act provided that the copyright owner in any published literary, dramatic or musical work may give notice in writing to the Board of Customs and Excise that he is the copyright owner in the work and requests the Board, during a period not exceeding five years, to treat as prohibited goods copies of his work made outside Nigeria which if it had been made in Nigeria would be an infringing copy of the work. As long as the notice subsists, the importation into Nigeria of any copy of the work is prohibited. The section had effect as if forming part of the Customs and Excise Management Act 1958. The 1988 Act at section 44 has a much more detailed provision on importing printed copies which are to be treated as contrabands.

equivalent provision in the Penal Code for the northern states. Since the maximum fine was 100 naira, or two months imprisonment offenders were prosecuted by the police in the magistrate's Court. It was difficult to convince the police to conduct raids or to prosecute a crime which they did not believe was stealing *per se*. Very few offenders were prosecuted and those successfully prosecuted laughed their way out of court, for example, the defendant in **Commissioner of Police vs. Nwaiwu**[249] was happy to pay only 62 Naira fine for a pickup truck load of pirated books[250]

Section 491-493 of the Criminal Code have been repealed and replaced by section 20 of 1988 Act. The section sets out a range of offences committed by those who infringe copyright, generally for commercial purposes. Under section 20(1),

> any person who makes or causes to be made for sale, hire, or for trade or business purposes, any infringing copy of a work in which copyright subsists, or imports or causes to be imported into Nigeria a copy of any work which, if made in Nigeria would be an infringing copy, or makes, causes to be made, or has in his possession, any plate, master tape, machine, equipment or contrivance for making an infringing copy of any such work, is guilty of an offence. It is a defence if he can prove to the court's satisfaction that he did not know and had no reason to believe the copy was an infringing copy of any such work or that the plate, master tape, machine, equipment or contrivance was not for the purpose of making infringing copies of such a work.

An offender under the subsection is liable on conviction to a fine not exceeding N1,000 for every copy dealt with or to a term of imprisonment not exceeding five years or both. Section 20(2) deals with a person guilty of an offence if he:

a) sells or lets for hire or for trade or business purposes, exposes or offers for sale or hire an infringing copy of any work in which copyright subsists.

b) distributes for trade or business purposes an infringing copy of any such work;

c) has in his possession other than for his private or domestic use an infringing copy of any such work;

d) has in his possession, sells, lets for hire or distribute for trade or business purposes or exposes or offers for sale or hire a copy of a work which, if made in Nigeria, would be an infringing copy.

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[249] Unreported case Charge NO. DW/225C/86

[250] Sodipo, Copyright World (July/August, 1993) p.38. In Folarin, S (2009) op cit.

It is a defence for the defendant if he can prove to the court's satisfaction that he did not know, and had no reason to believe, that the copy in question was an infringing copy of the work concerned[251]. In **Federal Republic of Nigeria vs. Asika**[252], the accused person, a bookseller in the city of Kano was charged with the offence of unlawfully offering for sale infringing copies of a work in which copyright subsisted contrary to section 20(1) of the Act. This was a case of infringement under the section. The work in question was *The Integrated Science book II* published by the West African Book Publishers ltd (WABP). Pirated copies of the book were discovered in the accused's shop by the sales representative of WABP who then purchased a copy. The court held that the fact that the books were sold in public, not in an obscure place and not at under value or in any suspicious manner, raises a presumption that the accused person did not know that he was selling or had in his possession pirated books. Section 20(2)(d) provides:

> has in his possession, sells, lets for hire or distribution for the purposes of trade or business or exposes or offers for sale or hire any copy of a work which, if it had been made in Nigeria, would be an infringing copy of any such work, guilty of an offence under this Act and liable on conviction to a fine of N100 for every copy dealt, with in contravention of this section, or to a term of imprisonment not exceeding two years or, in the case of an individual, to both such fine and imprisonment.

Similarly section 20(3) is to the effect that:

> any person who, without the consent of the owners, distributes, in public for commercial purposes, copies of a work in which copyright subsists by virtue of sections 6(1)(a)(vi), 6(1)(c)(iv), 7(1)(b) or 8(1)(c) of this Act, by way of rental, lese, hire, loan or similar arrangement, is guilty of an offence under this Act, and liable upon conviction to a fine of N100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment.

From the above provisions of the Act, it seems to differentiate them but at close look, the ingredients are similar, therefore the punishment ought to be very close or same to deter offenders. If an offence under the Act was committed by a legal entity, the person(s) in charge of the entity, would be held liable for the offence. But a person shall not be liable to any punishment if he proves that the

[251] Section 20(1)(c)
[252] Unreported FHC/K/2CR/92

offence was committed without his knowledge or that the exercised all due diligence to prevent the commission of the offence. Notwithstanding the foregoing, however, if an offence under the Act has been committed by a legal entity and it is provided that the offence was committed with the consent or connivance of any director (or a partner), manager, secretary, or other officer of the legal entity, such officer shall also be guilty of that offence, liable to be proceeded against and punished accordingly[253].

A court, before any proceedings are taken for any of the offences discussed above and whether the alleged offender is convicted or not, may order all copies to be destroyed or delivered up to the copyright owner or otherwise dealt with as it may think fit[254]. Also if an article has been seized by a police officer, copyright inspector or any other authorized officer in connection with a suspected offence under the Act, a court may order that the article be destroyed or delivered up to the copyright owner or otherwise dealt with as the court may think fit, notwithstanding that no person has been charged with the suspected offence[255]. The seizure and subsequent burning of the materials reduces the pirated works in the market.

Section 30 on the other hand provides for criminal liability in respect of infringement of performer's right. The sanction in the cases of the conviction of an individual is a fine not exceeding N10,000 and in the case of a corporate body the fine is N50,000. Finally, mention should be made of the criminal protection of a specific form of related rights folklore. The largely unwritten and unrecorded cultural expressions of many developing countries generally known as folklore or traditional cultural expressions is now receiving the attention it deserves.

Section 31(5) of the Act defines folklore as a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means. These include (a) folk tales, folk poetry and folk riddles (b) folk songs and instrumental folk music (c) folk dances and folk plays, and (d) drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, handicrafts, costumes and

[253] Section 22(2)Copyright Act, Cap C28, Laws of the Federation of the Nigeria, 2004
[254] Section 20(4) ibid
[255] Section 20(5) ibid

indigenous textiles[256]. These expressions of folklore are protected against (a) reproduction, (b) communication to the public by performance, broadcasting, distribute by cable or other means, and (c) adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context[257].

Section 33 provides *inter alia,* that any person who willfully misrepresents the source of an expression of folklore, or willfully distorts an expression of folklore in a manner prejudicial to the honour, dignity, or cultural interests of the community in which it originates commits an offence, and is liable on conviction in the case of an individual, to a fine not exceeding N100,000 or to imprisonment for a term of 12 months or to both such fine and imprisonment, and in the case of a body corporate, to a fine of N500,000.

The criminalization or misappropriation of folklore may appear drastic but it can be justified in view of the ravages that careless and irreverent adaptation, reproduction and communication of folklore have proved on the integrity, continuity and legitimacy of folklore and folk traditions. It is an attempt to protect the economic well being of the country and producers. When the United States felt it necessary, it did not hesitate to enact the Digital Millennium Act, 1998 to give effect to two 1996 WIPO treaties, thereby criminalizing production of dissemination of technology, devise, or services intended to circumvent measures commonly known as Digital Rights Management that control access to copyrighted works.

It is worth mentioning, however, that at the international level, even though as mentioned earlier in trademarks and copyright matters, there is a long history of national laws conferring special remedies against pirates, there has been strong resistance to internationalizing criminal remedies. Thus even though there was not much difficulty adopting and implementing the 2004 European Union civil measures directive on the enforcement of intellectual property rights, there has been intense opposition to the proposed draft directive on criminal measures aimed at ensuring the enforcement of intellectual property rights in European Union countries. Even in the United States, the Prioritizing Resources and Organization of Intellectual Property

[256] Folarin S. Op cit.
[257] ibid

Act (PRO-IP Act) 2007 which increases both civil and criminal penalties for trademarks and copyright infringement met strong opposition. A white paper published by Public Knowledge, the consumer electronics association argued against the passing of the PRO-IP Act, describing the measure as dangerous and unnecessary.[258]

It is doubtful if the provisions of criminal liability under the Copyright Act necessarily foreclose all other criminal action under the general law. Even if a particular set of facts does not constitute criminal infringement under the Copyright Act, an appropriate criminal charge may be formulated outside the Act, for example, in **Scott vs. Metropolitan Police Commissioner**[259] the accused, who was alleged to have bribed employees of a cinema house to induce the release of copyright films for illegal copying was charged with the offence of conspiracy to defraud. It may also be argued with some force that such offences that do not arise from the provisions of the Act may be prosecuted by State High courts.

There is no reason why the law would encourage the destruction of a contrivance that is not directly related to the offence alleged. Besides, it is a rule of statutory interpretation that any law that appears to encroach on a vested right be interpreted strictly. The presumption is against the divesting of a proprietary interest in properties unless by express and unambiguous provisions. Section 44(1) of the Constitution of the Federal Republic of Nigeria, 1999, stipulates that no movable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner prescribed by law. Where it is clear intention to deprive a person of his property, then there is a further presumption that adequate compensation would be paid. Courts generally lean in favour of a construction, which preserves, rather than the one that destroys such a vested right[260].

From above analysis, it is sad to note that despite the stringent criminal provisions and penalties in our legal system, the piracy of books, films, music, tapes

[258] Folarin, S. (2009) Civil and Criminal Enforcement of Copyright and the Role of the Judiciary being a paper delivered at Conference on Enforcement of Copyright: Building Strategies for Effective Protection and Enforcement in the 21st century organized by WIPO and the NCC, Abuja May 5-6 .
[259] (1975) A.C. 819
[260] Chukkol, K.S. (2010) The Law of Crimes in Nigeria Revised ed. Ahmadu Bello University Press, Zaria Nigeria p.341.

and records still goes on unabated in this country. By the combined effects of section 20(2) of Copyright and sections 372-380 of Penal Code, punishment meted out are not sufficient for deterrence of criminal activities.

2.14 THE GENERAL PUBLIC

For the general public benefit from the creative of works of other intellects and in order to sustain those creators and encourage future artistes, the general public has the duty towards the administration of the Copyright.

Firstly, public has the duty to recognize and respect intellectual works in the same degree as in real property. Most people who excelled in creative arts, music and folklore developed out of personal self effort and sheer necessity. It is the work of these creative minds that enliven the society and propel them to grater heights in international relations. The public therefore owe them the duty of recognition and should respect the works of such creative minds to boost their careers and corporate image.

Secondly, the public owes the duty to compensate for honest commercial use of others' work of arts, while retaining the right to freely use the same for private purposes. The law has allowed free possession and use of such works of arts available for private use, but for commercial purposes compensation for their transaction is encouraged[261].

Thirdly, public has a moral duty to discourage, disapprove and resist the commercial abuse of others' works[262]. This is to prevent abuse of the copyright of the owners and encourage creativity. This is achieved by refusing to buy counterfeit products and insisting on originals. A phenomenon where traders introduce their products as 'original' and others sub-standards, is to be disapproved by the public. This will invariably promote ideals of national psychology.

Fourthly, the public has duty to cooperate with law enforcement agents in the exercise of their role in checking counterfeit and imitation. No individuals or group has the ability of detecting all lawful and unlawful works exposed in the market. Therefore the public generally has the civic responsibility of prompt intervention,

[261] Ocheme, P. Op.cit.
[262] ibid

reporting and assisting in the protection and prosecution of intellectual property abuses within their knowledge.

The general public also has duty to promote, protect and preserve the values contained in others' creative works, thereby upholding and promoting collective cultural heritage by way of setting public standards and consciousness to develop reverence for creative works.

2.15 CHALLENGES OF ENFORCEMENT OF INTELLECTUAL PROPERTY

Largely, piracy has a negative impact on the development of the copyright based industries. Currently, the levels of piracy in the music industry are very high in countries like Nigeria, Kenya and others developing countries. There are various challenges for enforcement of copyright law in Nigeria such as discussed below:

2.15.1 Difficulty Of Enforcement Of Emerging Digital Technologies

A contemporary challenge confronting copyright law and indeed copyright based industries globally is the emergence and application of digital technology in the late 20th century. **Digital technology and the attendant digital convergence of information products now mean that different categories of works and data such as texts, sound, pictures and moving images, which used to be reproduced and used independently, can now be complied in one single medium of fixation such as CDs, VCDs, CD-ROMs, CD-Rs, DVD-Rs and DVD[263]. It has capacity for reproduction and ease of transmission without loss of quality which has brought about new copies identical to the originals stored in CDs or DVDs.** Although digital technology has turned into reality, the promise of innovative ways of distributing creative works on a global scale and the making of higher quality copies of works such as sound recordings, film products, and even books to lower unit cost. It also has a serious down side for content producers in the copyright based industries[264]. The greatest challenge in this area include the difficulty in the control of information sharing, the getting admissible evidence to convict infringers. Previous worries about widespread piracy may have proven to be exaggerated, but with the advent of digital technology and its

[263] Oyewunmi, A. (2011), Towards Sustainable Development of Nigeria's Entertainment Industry in the Digital Age: Role of Copyright Law and Administration. Nigerian Institute of Advanced Legal Studies. Journal of Intellectual Property (NJIP), p.80.

[264] Adedeji, A.A. (2011) Combating Piracy Through Optical Disc Plant Regulation in Nigeria: Prospects and Challenges, Nigerian Institute of Advanced Legal Studies Journal of Intellectual Property, p.135.

application in optical disc production and storage in the optical media, the magnitude of the threat of piracy has become unprecedented.

Another challenge confronting the enforcement of copyright includes the use of internet which is difficult to trace the infringer who commits the offence. For example, an Internet Service Provider (ISP) could be in South Africa[265], the site in London, the user in Nigeria and could upload the work to a friend in America. Thus identifying the source of infringement or the system from which the infringement occurred becomes complex. Oladipo[266] once remarked that "the internet combines the capability of the mails, the fax, the phone, video, graphics, credit card, archive systems and more in a single, low cost, world-wide interactive computer network". This network brings together the clients, professionals, dealers, brokers, market quote vendor, banks, government and more in an electronic environment that knows no sovereign. This is beyond the reach of any single regulator, respects no geographical boundaries and applies no special law. The use of new technologies not only on the internet, but also on cellular phones, palm devices, flash drives and other mobile technologies pose threats for copyrights protection. Some of these devices are pre-loaded with illegal content before they are sold. These new technologies are used to pirate music, films, ring tones, games, telecasts, artistic works and scanned books. This is a global challenge and it has been reported that countries with significant problems of piracy using new technology include China, India, Indonesia and Malaysia among others[267]. Copyright legislation in Nigeria has not kept pace with technology, particularly with the digitalization of global networks, digital super highways, digital deliveries and use of copyright products[268].

Also, use of advanced photocopiers such as industrial photocopier, scanners and other devices capable of producing volumes of materials

[265] Haruna, Z.A. (2012) Implementation of Copyright Law in Nigeria: Issues, Challenges and Prospects. Unpublished LL.M. Thesis, A.B.JU. Zaria p.166.
[266] Oladipo, B., (2003) Information Technology and The Law, The Nigerian Perspective Book 2, *Legal Digest Publishing* p.116.
[267] Haruna, A.Z. (2012) Implementation of Copyright Law in Nigeria: Issues, Challenges and Prospects, Unpublished LL.M. Thesis, A.B.U. Zaria, p.166. See also WIPO (2010), Advisory Committee Report on Enforcement Presented at its 6th Session in Geneva.
[268] Haruna, A.Z,. ibid

within the shortest time also pose threat to copyright protection. The frequency in which both public and private individual's patronage business centres for photocopy of protected materials is alarming. The claim that there is either scarcity of such materials or low income is not acceptable for pirating copyrighted works.

The issue highlighted above has given rise to law reform initiatives in Nigeria including Copyright (Amendment) Bill of 2009, which makes provision prohibiting certain conduct such as making, importing, selling and distribution of technological protection measure circumvention device used or likely to be used to infringe copyright in a work protected by technological protection. This Bill unlike the Ghanaian counterpart is silent on enforcement issue. The Nigerian Cyber Security and Data Protection Agency Bill, 2008 criminalizes the use of computer to violate any intellectual property rights protection under any law or treaty applicable in Nigeria, and makes such acts punishable upon conviction[269]. The Bill provides in section 19 that:

> whoever on the internet, intentionally takes or makes use of a name, business name, trademark, domain name, or other word or phrase registered, owned or in use by any individual body corporate or belonging to either the federal, state or local governments in Nigeria without authority or right, or for the purpose of interfering with their use in the internet by the owner registrant or legitimate prior user, commits an offence, punishable on condition by payment of a fine/or term of imprisonment.

This Bill is charged with the responsibility to secure computer systems and networks and liaison with the relevant law enforcement agency for enforcement of cyber crime laws and for related matter. This Bill has merit if passed into law. It is important to note that Nigeria has neither ratified nor domesticated the WIPO and WCT Internet Treaties. The country is also yet to amend its copyright laws to expressly extend protection to the new forms of exploitation online, made possible by advances in digital technology.

The Copyright (Optical Discs Plants) Regulations 2006 generally empowers the Nigerian Copyright Commission to monitor the operations of all optical discs

[269] These are Bills before National Assembly awaiting passage into law. If however it is passed it would enhance copyright protection.

manufacturers and replicating plants, as well as the imports of such products with a view to checking the rising tide of piracy through optical medium in the country. The Regulation was introduced by the Nigerian Copyright Commission in 2007 pursuant to section 46(4) of the Copyright Act which empowers it "to make regulations specifying the conditions necessary for the operations of a business involving the production, public exhibition, hiring or rental of any work in which copyright subsists under the Act[270]. The power to suspend registration can be exercised by the Commission on three grounds namely: if the registered person has been charged with an offence under the regulation or involved in an infringement of copyright, trademark and neighbouring right or an offence in these regards has been committed in the registered premises and the offender has not been identified or another person has been charged with an offence committed in the registered premises[271]. The Regulation prescribes penalties for the contravention of any of its provisions. Where no penalty for an infraction is stated, it stipulates a penalty of a term of imprisonment not exceeding three years or a fine of N1,000,000.00 or both.

Further, NCC had made an effort in fight against piracy, by launching a Reform of the Copyright System in Nigeria in Abuja on 8th November, 2012 and held a consultative meeting with stakeholders in the music and broadcast industries with respect to the Reform on the 5th and 6th December, 2012 respectively in Lagos. The goals of the reform process include: to update and upgrade the Copyright Act for the digital age, to facilitate new innovation and new models of access to knowledge, to encourage and reward new forms of creativity, to enable Nigeria's creative and cultural industries to adapt and leverage new technological platforms for distribution and enforcement of rights in global markets and to improve the system of copyright administration.

Again, NCC signed a Memorandum of Understanding (MoU) in 2012 on strategic cooperation with the National Information Technology Development Agency (NITDA) to create an effective framework for implementing the National Information Technology Policy in relation to enforcing copyright and related laws in Nigeria. This is to create incentives for investment in creative ventures and boost

[270] Adewole, A. (2011), Combating Piracy Through Optical Disc Plant Regulation in Nigeria: Prospects and Challenges, Nigerian Institute of Advanced Legal Studies Journal of Intellectual Property (NJIP), p.135
[271] Section 10(2) Nigerian Custom Service Act, LFN, 2004.

information technology development in the Nigerian creative industry. It also established a protocol with the Nigerian Customs Service which makes it mandatory for any importer of goods protected by copyright to obtain a letter of clearance from the Commission before such goods can be cleared and released to the importer by the Customs[272]. The 2009 Bill is yet to be passed by the National Assembly, therefore not a law for enforcement for now. Even the existing law has problem of enforcement either due to lack of trained personnel or inadequate equipment and facilities for the operations.

Further in response to this menace of optical disc piracy, Copyright (Optical Disc Plants) Regulation 2006 was introduced as part of the Strategic Action Against Piracy (STRAP) policy of the Nigerian Copyright Commission launched on 3rd May, 2005. Section 7 of the Regulation provides mandatory inscription of Source Identification Code (SID) on all optical discs introduced in Nigeria in May 2010 onwards. Nevertheless the issue is that of non compliance to regulations by the stakeholders, the Copyright (Optical Disc Plant) Regulation, 2006 provides for the use of SID on all Optical Discs at the point of production. However, even some legitimate plants still produce CD without the code. On 22nd May 2010, the Director General of the Commission had to announce 1st June, 2010 as the deadline for the application of the code.

2.15.2 Shortcomings of Some of the Legal Provisions

There are some legal challenges which hinder effective enforcement, for example, section 20(2)(a)-(d) of the Copyright Act provides that any person who

> (a) "sells or let for hire or for the purposes of trade or business, exposes or offers for sale or hires any infringing copy of any in which copyright subsists, or (b) distributes for the purposes of trade or business any infringing copy of any such work or (c) has in his possession, other than for his private or domestic use, any infringing copy of any such work, or (d) has in his possession, sells, lets for hire or distribution for the purposes of trade or business or exposes or offers for sale or hire any copy of work which if it had been made in Nigeria, would be an infringing copy unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, is guilty of an offence under this Act and liable"

[272] Ezekude, A. (2012) Nigerian Copyright Commission Report of Activities of the year under Review.

From the above provisions an infringer is exempted from criminal liability if he can show that he did not know and had no reason to believe that the materials his possession are infringing copies. This test makes the proof of infringement against the accused difficult and encourages most infringers to evade punishment. The test should have been that of reasonable man who engaged in the business of such circumstances who should know the difference between pirated copies and legitimate ones and the credibility of his sources of materials so as to establish the guilty. Also section 1(2)(e) of the Copyright (Collective Management Organizations) Regulation, 2007, provides for minimum one hundred (100) members to enable them register as Collective organization. To get this number from onset would not be easy especially in broadcasting organizations and artistic works.

Further, section 44(1) of the Copyright Act, provides: "the owner of the copyright in any published literary, artistic or musical work or sound recording may give notice in writing to the Nigerian Customs Service (a) that he is the owner of the copyright in the work, and (b) that he requests the Nigerian Customs Service during the period specified in the notice, to treat as prohibited goods, copies of the work to which this section applies...". This restrict importation of printed copies of literary, artistic, musical works or sound recordings, however, there is provision for exportation of same. This is probably the reason why infringing materials are exported to other countries from Nigeria with ease. Under Berne and Universal Copyright Conventions, Nigeria has an obligation to accord national treatment to foreign authors and their works.

2.15.3 Corruption of Some Officers of the Agencies

Corruption and weak enforcement are some of the significant factors responsible for the high rate of piracy in the country. Weak enforcement may be due to inadequate human and other relevant resources on the part of the NCC and other law enforcement agencies, including the police[273]. The issue of corruption has negative effect on intellectual property enforcement in Nigeria. Responsible agencies are rarely, if ever, audited or probed, which results in weak enforcement in the country's intellectual property laws. For example, Nigerian ports are the

[273] Oyewunmi, A. (2011) Towards Sustainable Development of Nigeria's Entertainment Industry in the Digital Age: Role of Copyright Law and Administration, NIALS Journal of Intellectual Property, p.94.

principal gateways through which pirated imports come into the country and pirated exports leave[274]. What has been the record of the Nigerian Custom Services in terms of interdiction? Bribery and corruption undermine the enforcement capacity of the Nigerian Custom Service or the police? This undermines the collaborative efforts of agencies for enforcement of copyright in Nigeria. The result is lack of intra and inters agency communication and networking failure which gives room for the pirates to successfully operate.

2.15.4 Lack of Public Awareness and Cooperation

There is little public awareness or understanding of the intellectual property laws in the country. Existing laws are not readily accessible even to the educated class. The average man on the street is also ignorant of touted benefits of intellectual property. Also There is lack of cooperation among the Nigerian citizenry as regards enforcement of intellectual property, for example, public engage in download from internet, buying and condoning pirated materials even when it is known to them. Public failure to support an initiative in reporting illegal clandestine activities in private neighbourhoods is also factor to poor enforcement and activities of the NCC. The deliberate attitude of walk away when illegal reproduction or printing is known is against public morality. This results in many of the pirates of go scot free.

2.15.5 Lack of Funds and Facilities

The Director-General of the Nigerian Copyright Commission in 2012 lamented on issue of funding thus "the key challenges experienced in the execution of the Commission's mandate includes…paucity of funds to execute programme"[275]. The funding of enforcement agencies and their collaborators (especially government parastatals) has not been adequate[276]. He went further to say that lack of release of funds is responsible for dearth of technical tools for anti-piracy operations and inadequate personnel in the Commission. This brings about lack of facilities such as vehicles and instrument of investigation and detection which hinder the Nigerian Copyright Commission from effective operation sometimes. The Director-General of the Copyright Commission said the non prompt release of budgetary allocation for

[274] Ladan, M.T. op cit.
[275] Ezekude, A. emphasized that some of the approved Nigerian Copyright Commission's budget sometimes were not released for the use of the Commission. He said this on the presentation of 2012 Annual Report on p.4
[276] ibid

the Commission hampers enforcement activities. The Commission cannot achieve much if it suffers inaccessibility of funds. There are laudable programmes and policies such as strengthening proactive enforcement interventions, conducts surveillance on suspected piracy locations and prosecutorial activities put in place by the Nigerian Copyright Commission for the enforcement of copyright laws but it must be emphasized that, funding is the core of the enforcement, enlightenment, training and infrastructure of any organization.

CHAPTER THREE

LEGAL FRAMEWORK FOR THE PROTECTION OF COPYRIGHT

3.1 INTRODUCTION

Generally, intellectual property law deals with the law relating to literary works. Here in Nigeria like many countries of the world, apart from international laws regulating intellectual property relations amongst civilized nations, there are local laws, which regulate relationships amongst individuals in relation with intellectual property. Copyright is a legal recognition granting the authors the exclusive right to produce, publish, distribute, perform, broadcast or display their creative works[277]. The goal of copyright law is to encourage authors to invest effort in creating new works of art and literature. Law ensures copyright and sanctions for the breach of any of the provisions relating to the right.

In chapter two we discussed the institutional framework for regulation of intellectual property. However, in this chapter the legal framework for the regulation of copyright in the country would be the focus. What we mean here is that, we will look into the structure, provisions and substance of the various laws relating to copyright and see whether those laws have provided for proper protection of individuals and corporate organizations in relation to intellectual property.

3.2 WORKS ELIGIBLE FOR PROTECTION UNDER COPYRIGHT LAW

The first question under this sub-section is what 'works' are eligible for protection?' The Act stipulates the kind of works that are eligible for protection and the requirements that must be satisfied to enjoy copyright status. It is not unusual to find persons laying claim to copyright over materials that either do not qualify under the Act or with respect to which sufficient skill, judgment and labour have not been expended to give it an original character. S.1(1)(a)-(f)[278] provides thus: "Subject to this section, the following shall be eligible for copyright: (a) literary works, (b) musical works, (c) artistic works, (d) cinematograph films, (e) sound recordings and (f) broadcasts". Aside from the neighbouring rights, therefore, there can be no copyright in any work that does not come expressly or impliedly within the six

[277] Section 6(1)(a)(c), Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[278] Copyright Act, Laws of the Federation of Nigeria, 2004.

categories of works enumerated. The Act[279] defines work to include "translations, adaptation, new versions or arrangements of preexisting works, and anthologies or collection of works which by reason of the selection and arrangement of their contents present an original character".

3.2.1 Literary works

> The word "literary works" includes, irrespective of literary quality, any of the following works similar thereto: novels, stories, poetical works, plays, stage directions, film scenarios and broadcasting scripts. Others include choreographic works, computer progarmmes, textbooks, treaties, histories, biographies, essays and articles. Further, it includes encyclopedias, dictionaries, directories and anthologies, letters, reports and memoranda. It further more includes lectures, addresses, sermons, written tables or compilations, and law reports, excluding decisions of courts and written tables or compilations[280].

Similarly, Peterson J. in the case of **University of London Press vs. University Tutorial Press**[281] expressed thus:

> work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word literary seems to be used in a sense somewhat similar to the use of the word "literature" in political or electioneering literature, and refers to written or printed matter.

It should be noted that under Nigerian Copyright Act, the items that qualify as literary works are set out in a long list that includes computer programmes. Secondly, nowhere is the word "writing" used in relation to literary works generally, except in the case of "written tables and compilations"[282] and so no definition of the word is necessary or even offered. All that is required for a literary work to be eligible is that it be "fixed in any definite form of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device"[283]. There is no reason why a literary work that is fixed in a tape recorder or other recording device, for instance, should not be protectable as such under the Nigerian Copyright

[279] S.51, Copyright Act, ibid
[280] Ibid
[281] (1916)2 Ch.601 at 608. See also Masterpiece Investments Ltd & Anor vs. Worldwide Business Media Limited & Ors
[282] Ibid.
[283] Section 1(2)(b), ibid.

Act, so long as it can still be classified under the ten sub-heads of literary work or works similar thereto.

This was a statement made in 1916, which would not stand now due to advancement of technology in the 21st century. In **Masterpiece Investments Ltd & Anor vs. Worldwide Business Media Ltd & Ors**[284], the main issues for determination was whether the article in which copyright was alleged had violated in a literary work, and, if so, whether there was an infringement of the work. The evidence before the court revealed that sometime in 1989 one of the plaintiffs' clients commissioned them to do a write up on the image of companies known as the Edison Group of Companies. The plaintiffs published the article in the Business Magazine owned by the defendants. A few months later, however, another article on the image of the third defendant, Ugochukwu & Sons Ltd appeared in the same Business Magazine. The two articles contained many similarities and it was obvious that the contents of the second write up were copied mainly from the write up on the image of the plaintiffs' client company. When efforts by the plaintiff to seek redress from the defendants yielded no positive results, the plaintiffs took this action against the defendants. The court held that the write up by the plaintiffs in the business magazine was a literary work. Odunowo J. stated *inter alia* "…there is no doubt in my own mind that the said article is a literary work which is eligible for copyright under section 1of the Copyright Act".

3.2.2 Musical Works

A musical work is defined in the Copyright Act as any musical composition, irrespective of musical quality and it includes works composed for musical accompaniment[285]. This consists of songs, choruses, operas, musicals, and may be composed for one instrument (solos)[286]. The Supreme Court in Ghana, in the case of **C.F.A.O. vs. Archibold**[287] the court held that copyright with respect to musical works implies the subsistence of a manuscript of written matter setting out the distinctive combination of melody and harmony or either of them. That mere words or verses with no intelligible musical notation indicating the melody did not qualify

[284] (1997) F.H.C.L 496
[285] Section 51, ibid
[286] Asein, J.O. Op cit. p.44.
[287] (1964) G.L.R. 718.

to be called musical works. The views in this case are relevant in the case of mere visual representation. The composer who is illiterate in music would be well advised to put his music on audio tape or some other recording device in order to gain protection. Otherwise, he stands the risk of being denied copyright, if he merely improvises a tune from memory without having reduced it to intelligible notation or a sound recording.

3.2.3 Artistic Works

Section 51 of the Copyright Act[288] defines "artistic works" to include, irrespective of artistic quality:

> any of the following works or works similar thereto: paintings, drawings, etchings, lithographic, woodcuts, engravings, prints, maps, plans, and diagrams. Others are works of sculpture, photographs not comprised in a cinematograph film, works of architecture in the form of building models. Further, it includes works of artistic craftsmanship also (subject to subsection (3) of section 1 of this Act) pictorial woven tissues, articles of applied handicraft and industrial art.

Under section 1(3), an artistic work is not eligible for copyright, if at the time when the work was made, it was intended by the author to be used as model or pattern to be multiplied by any industrial process. However, the Act provides no guide on what would qualify as industrial multiplication. Nevertheless, it should be taken to mean no more than that it should "be possible as reproduce the design upon articles *en mass"*. It needs not always involve the use of a machine. In as much as the artistic work is not intended for industrial exploitation or to be industrially multiplied, it is protectable under copyright irrespective of whether it could be a proper subject of a registered design or not[289]. Since the Act expressly defines artistic works to include "works" of architecture in the form of building models" such architectural models are not to be confused with other models or pattern intended for industrial application. In the case of **Maurice Ukaoha vs. Broad-Based Mortgage Finance Limited & Anor**[290] in an infringement of an artistic work, the plaintiff led evidence to show that he constructed 17-storey architectural model and lent it out to the defendants to display temporarily in their conference

[288] Cap C28, Laws of the Federation of Nigeria, 2004.
[289] Asein, J.O. op cit. p.47
[290] (1997) 2 FHCLR 477

room, but, he saw the architectural model in a newspaper without permission. The defendants had claimed that the model was their proposed headquarters in Abuja. Jinadu J. held that copyright exists in the model work, which is an artistic work of art made and constructed by the plaintiff.

However, in the case of **Merchandising Corporation of America Inc. vs. Harpbond**[291]**,** the issue for determination was the plaintiff's claim for infringement of facial make-up**.** The plaintiff had devised a new look involving paint marks on his face and apart from wearing this look, he also had a sketch of his face made with the facial painting. The defendant had used the photographs of the plaintiff's face with the paintings superimposed, thereby obtaining the new look of the plaintiff. The court held that make-up, such as this, could not possibly be a painting for the purposes of the copyright Act. The issue of "fixation" and "permance" was examined since the painting on the face could not be taken to be fixed and permanent.

3.2.4 Cinematograph Films

A cinematograph film is defined to include the 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 sound track associated with the cinematograph film[292]. This definition will cover any picture in motion, whether silent or with sound irrespective of the purpose, genre or length and whether fixed on transparent films or electronic videotapes. Although not expressly mentioned, it may be deduced from the definition of a cinematograph film that both celluloid and video films are categorized together as cinematograph films.

Each frame of a sequence forms part of the film, and the taking of still photograph would amount to an infringement. The definition of a cinematograph film excludes slide shots, which are incapable of being shown as moving picture. In **American Motion Picture Export Co. Nig. Ltd vs. Minnesota Nigeria Ltd**[293]**,** the plaintiff carried on the business as hirers, lessors, sellers, distributors of all kinds of still and motion pictures in Nigeria. The plaintiff sued the defendant for the sum of One Million Naira for infringement of copyright in its cinematograph film titled

[291] (1983) F.S.R. 32
[292] Section 51, Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[293] (1981)FHCL 64

"Saturday Night Fever". He also sought to restrain the defendant from reproducing and distributing copies of the said film to the public without the license of the plaintiff. The court held that the defendant committed an infringement of copyright of the plaintiff. The definition which include 'first fixation' may pose evidentiary problems if it is interpreted to mean the original copy (or copies, if the first fixation involves multiple copies) and not the copies released into the market. Copies in circulation are derived from a master tape and if that only is protectable, then the plaintiff is put to unnecessary hardship where he is unable to produce it in evidence.

3.2.5 Sound Recordings

Sound recording is defined as the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a sound track associated with a cinematograph film. In other words, a movie sound track is protected as part of the film but any recording made therefrom or simultaneously as the track will qualifies as a sound recoding. The issue of infringement of copyright of a sound recording was considered in the case of **Island Records Ltd & Ors vs. Pandum Technical Sales & Services Ltd & Anor**[294]. The court held that for an infringement of a copyright to take place, there must be a copy amounting to a theft of the work created by an author or of one who records or owns the record at the time of recording. In this case, the plaintiff failed to show any evidence of any phonograph. He could not give evidence when any of the sound tapes were first made to determine whether they were within infringement period limit. Further, he failed to lead evidence of registration of any of the rights in Nigeria.

3.2.6 Broadcast

A broadcast is defined under the Act[295]

> to mean sound or television broadcast by wireless, telegraph, wire, or both, or by satellite or cable progarmmes and includes rebroadcast. It covers any transmission of visual images, sounds or other information by electronic means (that is, whether wired or wireless). It must be capable of lawful reception by the public (in particular through use of decoding equipment made available through the person transmitting in encrypted form), or which is for presentation to the public[296].

[294] (1993)FHCLR 318
[295] Section 51, Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[296] Asein, J.O. op cit.

The definition includes a rebroadcast, that is, a simultaneous or subsequent broadcast by one broadcasting authority of the broadcast or another broadcasting authority. These are protected as such, implying that the need for a separate recording is only for evidentiary purposes and is not a requirement for the enjoyment of copyright. However, "broadcasting" does not extend to making material available on demand on an internet or similar service. The latter creates no copyright, although it is an activity which falls within the scope of copyright belonging to others, for example, in music and films made available through this media.

From the discussion on the "works" for copyright protection, it is clear that the Act protect original content of work of authorship for a computer program, text, images, softwares, audio and visual works. However, it does not provide for internet and websites, for example, the Act does not describe protection or infringement of internet activities. These are *lacuna* in Nigerian Copyright Act. Nigeria needs to borrow a leaf from other jurisdiction like United States of America. This is because America had recognized the need to accord special protection to "digital works" (a new species of traditional innovation that straddle sound and picture electronic signals) by the enactment of several legislation including the 1998 Digital Millennium Copyright Act that addressed the entire shortfall which have improved the growing jurisprudence[297]. The Act implements two 1996 treaties of the World Intellectual Property Organization (WIPO). It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures (commonly known as digital rights management that control access to copyrighted works. It also criminalizes the act of circumventing an access control whether or not three is actual infringement of copyright itself.

In addition, the Act heightens the penalties for copyright infringement on the internet and finally limits liability of the providers of on-line services for copyright infringement by their users[298]. Nigeria has only succeeded in recopying the 1990

[297] Hemen, P.F. (2011) Limits of Copyright Protection in Contemporary Nigeria: Re-Examining the Relevance of the Nigerian Copyright Act in Today's Digital and Computer Age. http://www.ajol.info/index.php/naujilj/article/download/82405/2560. Accessed on 15th J une, 2011

[298] United States Digital Millennium Copyright Act 1998.

Copyrights version into the 2004 version of the Laws of the Federation of Nigeria, which does not add any value to the contemporary issues like internet.

3.3 LIABILITY OF INTERNET PROVIDERS FOR COPYRIGHT INFRINGEMENT

The internet is becoming an increasingly prevalent medium for personal communication and an essential means of commerce. As it grows, the unfortunate by-products of traditional commercial and personal interactions become more and more prevalent on-line. Ever more business deals (ranging from simple purchases of goods to complicated contracts) are done on the internet. Various forms of harassment, slander, fraud and other "informational" torts and crimes may be committed on the internet. As part of their services Internet Service Providers (ISPs) often give their clients the means to make documents available over the internet to the public at large.

ISPs services are based on their functional character: an access provider, which concerns an end user's computer to the Internet, using cables or wireless technology or also facilitating the equipment to access the Internet. Secondly, a transit, provider which allows interaction between a computer and the access provider and hosting providers, and its function is merely the transmission of data. Thirdly, a hosting provider has one or several computer with available space or "servers" with access to transit providers, which may be used for its own purpose or for use by third parties. Finally content provider refers to those who use the above infrastructure to make available to end users the most diverse information, including web pages, services, email, connection between different end users and as many other possible as the mind can conceive by delivering content created by the provider itself or by intermediaries or third parties[299]. For example, an ISP may provide its clients with more than just an email account and access to the web; it may give them the right to upload files (including web pages) to the ISP's publicly accessible servers. These files may be accessed or of necessity be copied by members of the general population.

[299] Claudio, R.G and Carlos, L.G (2011) Liability of Internet Service Providers (ISPs) and the Exercise of Freedom of Expression in Latin America, p.2.

Acts of communication through internet, regardless of content, pass through a complex technological infrastructure, consisting of very different physical and logical elements, each controlled by an operator. The participation of these operators is subject to the regulations of each relevant territory, whether the rules concerning general communications services or the specific rules governing the provision of internet-related services.

Online copyright infringement occur when a copyright work, such as, a song, movie, artwork, or text is copied, modified, displayed or performed without the copyright owner's authorization. The plaintiff holds ISP as contributed to the infringement (contributory infringement) or the ISP supervised and profited from the infringement (vicarious infringement).

In the case of **Oriental Press Group Limited & Ors vs. Fevaworks Solutions Limited**[300], the Hong Kong High Court found the host of a popular online forum liable on one occasion for failing to remove defamatory statements posted by its subscribers. This landmark case in Hong Kong extends the legal principles and rules that regulate information communicated in oral and printed forms to digital communication in the realm of cybersphere. The plaintiff in this case relied on the English Case of **Godfrey vs. Demon Internet Ltd**[301] which held that the defendant internet service providers (ISPs) was liable for anonymous postings of defamatory statements on a newsgroup accessed through the ISP. The ISP did not remove the postings until about 10 days after the request made by the plaintiff to do so. The court in Godfrey was of the view that the transmission of a defamatory posting from the storage of a news serve constituted "publication" of that posting to any subscriber who accessed the newsgroup containing those postings.

However, the defendants relied on English case **Bunt vs. Tilley**[302] in which the defendants (ISPs and website hosts) succeeded in striking out a claim against them. The court in Bunt was of the view that ISPs do not participate in the process of publication but merely act as facilitators in similar way to postal services It was held that publication is a question of fact that depends on the circumstances, in particular, the knowledge on the part of the defendant of the defamatory words.

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[300] (2008) HCA 2140
[301] (2001) QB 201
[302] (2007)1 WLR 1243

It should be noted that under the theories of vicarious liability or contributory infringement, ISPs that allow clients to place unauthorized, copyrighted information on the internet might be liable for infringement, even though their only contribution to the infringement was the provision of computer equipment used by other to make and distribute unauthorized copies. Because the internet is exploding popularity in a relatively recent phenomenon, there have not been a large number of court decisions concerning ISP liability for copyright infringement.

3.4 QUALIFICATIONS FOR COPYRIGHT PROTECTION

Earlier, "works" have been categorized according to eligibility and certainty for copyright protection under Nigerian law. For a claimant to succeed in the infringement proceedings, the Act[303] stipulates additional requirements for literary, musical and artistic works to be established. A literary, musical or artistic work shall not be eligible for copyright unless, that is, there will be no protection for these "works" until it complies with the established legal provisions. For an appreciation of the protection offered by copyright, the principle under which the Act affords protections shall be appraised.

3.4.1 Originality of Work

Copyright protection gives the author an exclusive right of exploitation and a sort of limited monopoly. It is proper than that he should have done something more to deserve that exclusive control. That is to say that he requires to show that the work is the product of his skills, judgment and labour. This gives the reason for the Copyright Act[304] provision that: A literary, musical or artistic work shall not be eligible for copyright unless:

> (a) sufficient effort has been expended on making the work to give it an original character.
> (b) the work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device

In the case of **Yusuf Ladan vs. Sha Kallo Publication Company Ltd**[71] where the plaintiff 's dramatic literary work titled 'Sisi Lagos' was published by the

[303] Section 1(2) Copyright Act, ibid.
[304] Section 1(2)(a)(b) and 1(3)
[71] (1972) NCLR 428

first defendant , printed by the second defendant and edited by the third defendant, in the first defendant's Hausa magazine Sha Kallo. In addition, the plaintiff claimed for royalty on all the printed copies of the three issues of the magazine and an injunction to restrain the defendants from further publishing the work. The court gave judgement for the plaintiff and in considering the meaning of originality the court held that, the word 'original' does not mean that the work must be the expression of original or inventive thought. The Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.

Also in the case of the **University of London Press Ltd. vs. University Tutorial Press Ltd**[305]. Peterson J. held that:

> The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought and in the case of "literary work' with expression of thought in print or writing. The originality, which is required, relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work, that is it should originate from the author…"

The question of "originality" was further considered by the Privy Council in the case of **Macmillan vs. Cooper**[306] in which it was alleged that there was copyright in a selection or abridgment of a non-copyright work. Lord Atkinson held thus:

> It will be observed that it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if we may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for the product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material aid not possess, and which differentiates the product form the raw material.

It is deduced from the Act that "originality" seems to have the notion of ingenuity rather than novelty. Thus, in **Francis Day & Hunter Ltd vs. Bron**[307]**,**

[305] (1916) 2 Ch. 601
[306] (1923) 40 TLR 186
[307] (1963)Ch. 587.

where the defendant copied the musical work of the plaintiff unconsciously, the court held that the defendant was liable for copyright infringement because his work lacked originality. However, in **Offrey vs. Chief S.O. Ola & Ors**[308] the court held that the copyright would exist in a given product if that product is the result of some substantial or real expenditure of mental or physical energies of the producer and the labour or skill used was not a negligible or commonplace one. It further held that the amount of labour, skill, judgment or ingenuity required to support successfully a claim for copyright was a question of fact and degree in every case.

From the foregoing it is quite clear that an artistic, musical and literary work will attract the nomenclature, copyright only if there is in the work sufficient input of industry and knowledge and the work was not copied from another person's work.

3.4.2 Fixation or Reduction of Works into Permanent Form

A copyright work exists only when embodied in some physical form. Reduction of a work into a permanent form is a precondition for copyright. This is the assumption of Nigerian copyright legislation that all subject matter requires to exist in some permanent form before it gains copyright. Thus, in the case of most artistic works it is only when the particular painting, photograph or other work is executed that the idea for it is transmuted into expression, the act of creation and the "fixation" of the work are indivisible[309]. The Act[310] requires that "every literary, musical and artistic work should be fixed in a definite medium of expression now known or later developed, from which it can be perceived, reproduced or otherwise communicated, directly or with the aid of any machine or device". This principle postulates that the ideas as a unit of thought cannot be appropriated by copyright, until that idea is published[311]. The principle to protect only form emanates from the necessity to safeguard the public against an individual's claim of proprietary ownership over his ideas[312]. First, this requirement has obvious evidentiary value since a work that is not fixed in a perceptible or retrievable format would be difficult to produce in court in order to compare it with an allegedly infringing copy. This flexible definition eliminates the prospect of foreclosing protection because of mere

[308] Unreported, Suit No. HOS/23/68 decided 27th June, 1969.
[309] See the case of Merchandising Corporation of America Inc. vs. Harpbond (1983)F.S.R. 32 (supra)
[310] Section 1(2)(b), Copyright Act, Op cit.
[311] UNESCO Paper No. UNESCO/PRS/COPY/CME.11/14 Paris. 15th August, 1987, p.9
[312] Ocheme, P.O. Op cit. p.18

changes in the technology of fixation. It is possible to look upon this as a corollary of the principle that protection goes only to the particular expression of ideas[313].

The fixation requirement serves the purpose of defining the scope of the claimed protection in objective terms[314]. It is possible to conceive a speech in one's mind and deliver it from memory without writing it down. However, such memory work without permanent form has no copyright. In the case of **Albernethy vs. Hutchinson**[315]**,** the court refused to grant an injunction to prevent the publication by unauthorized persons of oral lectures delivered by the plaintiff since he could not produce the notes from which he prepare and delivered the lectures. **Eldon L.C.** stated *inter alia* that "the court must be satisfied that the publication complained of was an invasion of the written work, and this could only be done by comparing the composition with the piracy". Similarly, in **Macklin vs. Richardson**[316], the defendant was prevented from publishing his copy of the plaintiff's play, which the former had taken down from the mouth of actors at a private performance. A court will more readily come to the aid of the plaintiff where it can be shown that there is a recording of his composition[317].

In the United States of America, Copyright Act provides for the situation by stipulating that the fixation of the work must be done "by or under the authority of the author"[318]. The composer who is illiterate in music would well be advised to put his music on audio tape or some other recording device in order to gain protection. Otherwise, he stands the risk of being denied copyright if he merely improves a tune from memory without having reduced it to intelligible notation or a sound recording.

Fixation would imply something more than a transient projection. The medium must allow for some sustained presence of a permanent nature. The definition of the medium is sufficiently elastic to include any medium of expression that is presently known, for example, writing on paper, painting on canvas, and any other that may be developed in future. In addition, it includes medium from which the materials can be perceived or reproduced. This may be either directly with

[313] Cornish, W and Llewellyn, D. (2007)Intellectual Property: Patents, Copyright, Trade marks and Allied Rights Sixth edition, Sweet & Maxwell, p.437.
[314] Raskind, K. (1998) Copyright in Newman (ed), The New Palgrave Dictionary of Economics and the Law.
[315] (1825) 47 E.R. 1313.
[316] (1770) 27 E.R. 451.
[317] S.1(2)(b).Copyright Act, op.
[318] S.1(2)(b) ibid

human senses or indirectly with the aid of any mechanical, electronic or other device. For example, microfilm or computer program would be considered fixed for this purpose since they are machine legible. According to the Act[319], an unrecorded story, lecture or performance of a dramatic work is not eligible for copyright protection though the performance itself may be protected as a performer's right.

3.4.3 Author's Territorial Relationship to Nigeria

Copyright is actually conferred by sections 2, 3 and 4 of the Act. Each of them dealing with a distinct connection between the author or work and the territory of Nigeria. For copyright to subsist in a work, there must be a connecting factor linking it with the country. Either the author or the work itself must have substantial connection or, in the alternative, the work must have been made by a governmental authority or a prescribed international body. These requirements translate to three possible connecting factors, these are: the status of the author, the fact of first publication or making and the fact that the work is a government or quasi-government work.

Section 2(1) of Copyright Act[320] provides with respect to authors' relationship to Nigeria that:

> copyright shall be conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is at the time when the work is made, a qualified person, that is to say: (i) an individual who is a citizen of or is domiciled in Nigeria or (ii) a body corporate incorporated by or under the laws of Nigeria.

This principle of copyright states that there should be a relationship between the author or the work to Nigeria before the work can qualify for protection[321]. The qualification for an individual is that he must be a citizen or domiciled in Nigeria. Where the author of the work is a body corporate, it must be incorporated in Nigeria under Nigerian law. Citizenship of Nigeria is as defined under the 1999 Constitution[322], that is, by birth, registration or naturalization. This position limits

[319] Section 26, Copyright Act, op cit.
[320] Cap C28, Laws of the Federation of Nigeria, 2004.
[321] ibid
[322] Sections 25, 26 and 27 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

the protection of the copyright of the owners who have relationship with Nigeria, either as a citizen or domiciled.

3.5 RIGHTS OF COPYRIGHT OWNERS

Copyright is a specie of property, that is, owner has the various rights akin to tangible property. The rights the owner of copyright owner has depend solely on the type of work concerned. There are some rights given to the owners of creative works such as reproduction and exploitation rights, motion picture and broadcast rights. Others are translation, adaptation and exhibition rights. The author of copyright work enjoys these rights for the period of lifetime and 70 years after the end of the first year of the death of the author,[323] if the work is a literature, musical and artistic work[324]. Where the work is cinematography films, sound recordings and broadcast, it is 50 years after the first year that they were produced or broadcasted to the public[325]. After the aforementioned years, right of the owner of the work ceases and the work falls into public domain. According to section 6(1)(a)(c) the copyright owner has an exclusive rights to the following acts:

There are two types of right under copyright namely, "economic rights", which allow the owner of some rights to derive financial reward from the use of his work. The second is, "moral rights", which allow the author to take certain actions to preserve the personal link between him and the work.

3.5.1 Economic Rights

In the modern conception of property, works such as literary, musical, artistic, cinematograph film, sound recording and broadcast[326] are property and, therefore, deserve to be protected. They properly belong to the broad division of the institution of private property. By private property, it means property in which the proprietary interest is vested in an individual for his use and enjoyment[327]. The owner of a private property has the right to exclude anybody from the use and enjoyment of his property[328]. Economically, therefore, property means wealth, power, capital, office and so on. For example, an owner of a copyrightable literary

[323] Asein, J.O. op cit.
[324] ibid
[325] ibid
[326] Section 1(1)(a)-(f) Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[327] Aboki, Y. (2002) Economic and Cultural Bases for Copyright Protection in Nigeria: In a Decade of Copyright Law in Nigeria p.76
[328] .ibid

work has wealth in the book he wrote. One of the cardinal objectives of copyright protection is to prevent unjust enrichment by one from the sweat of another. That is to say, copyright frowns at a freeloader. It encourages creativity, innovation, craftsmanship, originality, labour and productivity[329].

The utmost aim of the copyright law then is to protect the property owner of a copyright work by seeing that his labour is not unjustifiably expropriated or reaped by people who are not the producers of such labour. The economic bases of the copyright law is the making sure that people who are inventors secure the pride, reward, encouragement and incentive for their labour. Thus, intellectual properties are primarily economic rights and in most cases the right owner can get pecuniary compensation for breach of his rights, though he will also want to stop anyone else from cashing in on these rights and making money which should lawfully be his. To exploit the subject matter of the owner's copyright, patent or trademark without the owner's authority is an infringement and the owner can enforce such right through civil proceedings. The right of a copyright owner is deemed to be infringed by any person, who, without the licence or authorization of the owner of the copyright, does any of the acts contained in section 15(1) of the Copyright Act, except as provided in section 15(2)[330] thus:

> Notwithstanding subsection (1) of this section, or any other provision of this Act, where any work in which copyright subsists, or a reproduction of any such works, is comprised in
> (a) the archives stored in the National Archive established under National Archives Act or
> (b) the public records of a state, being records for the storage or custody of which provision is made by law the copyright in the work is not infringed by the making or the supplying to any person of any reproduction of the work in pursuance of that Act or law.

Under Nigerian laws, a copyright owner in a work can use the law to stop anyone else from stealing the fruit of his intellectual labour by copying the work, publishing it, selling or importing unauthorized copies, or (in certain cases) hiring it out. This also applies to a translation or adaptation of the work. Modern technology as provided in computer programs, videos and sound recordings are profitable targets for the copyright pirates. In addition, technical means of copying, for example,

[329]. ibid
[330] Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.

photocopier, scanner, duplicating machines, printers and others have increased pirates activities considerably**.** Infringement, which is the denial of the owner,'s right of economic benefit does not always have to be for commercial purpose. Even private copying will normally be infringement unless it falls within certain specific exemptions. Unauthorized recording of concerts (bootlegging) can be commercially lucrative for the bootlegger, but will cause loss of sales of the performer's authorized tapes.

Private and personal confidence may not be of economic value, but revealing them may cause embarrassment to the owner. The sufferer should be able to obtain pecuniary compensation.

3.5.2 Moral Rights

Generally, copyright refers to the economic rights of the author. But, many copyright systems, including Nigerian Copyright Act, recognize the existence of a parallel species of rights known as "moral rights". A moral right was introduced at the Rome Revision of the Berne Convention for the Protection of Literary and Artistic Works. Most of the countries have recognized for a very long time that the author of a book or other creative works have rights beyond his purely economic ones. The moral rights are three. The first is the right to be identified as author (or director of a film) whenever the work is published commercially, issued to the public in a film or sound recording, or made public in certain other specified ways. Secondly, the author has the right not to have his work subjected to derogatory treatment.

This means distortion, mutilation or anything else prejudicial to his honour or reputation as an author. Thirdly, moral right is not to have a work falsely attributed to himself as author. Moral right includes the right to privacy in a copyright film or photograph, which a person has commissioned for private and domestic purposes, copies, may not be issued to the public, and it may not be exhibited or shown in public, or broadcast or included in a cable programme service[331]. In France, particularly, there is an almost mystical regard for an author's moral rights[332]. In the United Kingdom, by contrast, Copyright law took little notice of anything beyond

[331] Cornish, op cit
[332] ibid

the economic interests of the author until the Copyright Act, 1988 recognized moral rights for the first time. In Nigeria, section 12 of the Copyright Act[333] provides for moral right. The author of a work in which copyright subsists has right.

3.5.3 Right to Claim Authorship

The author is the creator of the work. He is sometimes also the copyright's owner, but if an employee, the owner of the copyright could be his employer. The Act[334] has definitions of authorship for the different categories of work. Authorship is conferred on the entrepreneur bringing the subject matter into existence. Accordingly, section 12 of the Copyright Act provides the right of an author as:

> to claim authorship of his work, in particular that his authorship be indicated in connection with any of the acts reserved for the right owner in section 6 except when the work is included incidentally or accidentally when reporting current events by means of broadcasting .

This provision undercut the author by including "incidentally or accidentally" when reporting current events by means of broadcasting. A reporter should acknowledge the author and not blanket statement without reference. The researcher opines that journalist report without reference makes the public or readers not to believe their statement. In addition, when statement is quoted out of context the real author will be disadvantaged. It would amount to infringement where current events is used for commercial purposes, for example, through television where people pays for through buying service cards before watching such channel.

3.5.4 Right to Object to Derogatory Action

The Act further provides that an author may seek relief where he is connected to distortion, mutilation or derogatory in relation to his work. Section 12 of the Copyright Act provides that:

> to object and to seek relief in connection with any distortion, mutilation or other codification of any other derogatory action, in relation to his work, where such action would be or a prejudicial to his honour or reputation.

[333] Cap C28, Laws of the Federation of Nigeria, 2004.
[334] Section 51, Copyright Act, ibid

These give efficacy to moral right in Nigerian law. The two types of moral right are: (a) the right of paternity and (b) the right of integrity. The rights are available to the authors and they are in relation to "works" in which copyright subsists. This implies that the work must come within the list of copyright works and it must meet all the other eligibility requirements as defined under the Act.

3.5.5 Right to Create a Trust

Copyright in Nigeria is a statutorily granted right exercisable by certain group of persons[335] over some designated works of arts[336] and upon specified terms and conditions as provided by law. Thus, a person who has been granted this right by virtue of his creation or invention can through the machinery of law create a trust for administering such property right. Section 11of the Act[337] indirectly created room for this kind of arrangement. The section provides "subject to the provisions of this section copyright shall be transmissible by assignment, by testament, any dispositions or by operation of law as movable property". In other words, ownership of intellectual property, like ownership of any other property is transferable from one person to another *inter vivos* by way of assignment. In addition, at death by way of testamentary dispositions, that is, through a Will or by way of operation of law. For example, when an owner of an intellectual property dies interstate, that is, without a Will, the ownership of the intellectual property devolves on his heirs according to his personal law.

Whoever so appointed to administer the trust properly becomes a trustee. When a trust is created, the trustee is expected to discharge his duties in accordance with the ethic of his profession as a trustee. Furthermore, where the copyright holder creates a trust, any one, who wants to use this copyright material, seek for leave or authority. For example, an educational body requiring permission to photocopy, a theatre or broadcaster desirous of using a copyright play or a restaurant arranging to have piped music for the pleasure of its customers, all need to seek for permission. A trustee charges a fee and uses the proceeds in accordance with the trust instrument for the administration of the property. This encourages legal protection of copyright even at death. This provision is laudable because the heirs benefits from the

[335] Sections 10 and 11, Copyright Act, Op cit.
[336] Section 1(1) ibid
[337] Section 11, ibid

copyright of the deceased. This is how trust law is relevant in the administration of copyright.

3.5.6 Right of Copyright Owner in Literary Works

Literary works involves words or characters that are written, spoken or song and does not apply to single words no matter how unique. The Copyright Act[338] provides that copyright in literary or musical works is the exclusive right to do and authorize the doing in Nigeria of any of the following acts:

> Subject to the exceptions specified in the Second Schedule to this Act, copyright in a work shall be the exclusive right to control the doing in Nigeria of any of the following acts: (a) In the case of a literary or musical work, to do and authorize the doing of any of the following acts - (i) reproduce the work in any material form, (ii) public the work, (iii) perform the work in public (iv) produce, reproduce, perform or publish any translation of the work, (v) make any cinematograph film or a record in respect of the work (vi) distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement, (vii) broadcast or communicate the work to the public by a loudspeaker or any other similar device, (viii)make any adaptation of the work (ix) do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-paragraphs (1) to (vii) of this paragraph.

This Act provides for the other rights such as distribution of copies of works. Obviously, the right of reproduction would be of little economic value, if the owner of copyright could not authorize the distribution of the copies made with his consent. Finally copyright laws include a right to control importation of copies as a means of preventing erosion of the principle of territoriality of copyright. That is, the economic interest of the copyright owner would be endangered if he could not exercise the rights of reproduction and distribution on a territorial basis. The reproduction right and exploitation enables the owner to reap the economic benefit that accrues to it. However, where he elects to assign the reproduction right to an assignee, this is often done with economic considerations. He can assign "right of time" to different people, that is, to one person, two years to reproduce the work, to another five years while to the third person ten years respectively. In the case of literary work that has comic, poetry and prose or drama part, he may still assign these different parts of his work to different people or to a single person.

[338] ibid

An author of literary works, is protected under section 6 of the Act. That is to say, nobody else has the right to use it without the permission of the owner. However, the literary works are often opened to infringement largely because of the modern advancement in technology, such as printing technology, for example, photocopier, scanner, easy copying of works through flask drive, compact discs. This right is one of the most abused by the infringers because of the simplicity of printing technology.

3.5.7 Right of Copyright Owner to Perform

The right involves the performance of a work in a public place. The author is the one who performs it to the public or authorizes the performance of it to the public. This is the absolute right of the author. Section 15(1)(g) Copyright Act prohibits the performance of work to the public of any literary or musical work without the consent of the copyright owner. The section provides:

> Copyright is infringed by any person who without the license or authorization of the owner of the copyright performs or causes to be performed, for the purposes of trade or business or as supporting facility to trade or business any work in which copyright subsists.

A work protected may be performed or communicated to a large number of people without that work being copied or reproduced. For some works the right of performing them to the public constitutes the most fundamental economic right. This is because, it is through this way that the public in attendance of such performance or audience pays for watching the performance, for example, attending a concert of an artiste. In some works like literary, dramatic, motion pictures and other audiovisually related works viewing them or where the works are played to the public all that constitute "performing" or communicating them to the public. What constitutes performance touches a wide range of activities, such as public recitation of poetry or speech, the playing of musical work during commercials, the broadcasting of a work by radio or television, the playing of photograph records for workers, in factory to enhance their productivity or to the public etc[339].

This right stops where the performance is made free, like the family or to group of cohorts or friends or even in an educational institution. For example, during Awards Night of a Law Society of a University provided the performance is

[339] Folarin, S. Op cit.

mainly for educational purposes. The audience does not have to pay gate fee, and students must be the majority. However, it would be an infringement when the purpose of the performance is commercial. For example in **Turner (Ernest) Electrical Instrument Ltd vs. Performing Right Society**[340] an English Court of Appeal held *inter alia*, that the performance of musical works given by relaying the broadcast via the BBC television channels, were performance in public within the meaning of section 1 of the English Copyright Act, 1911. What really guided the Courts in its decision were such factors as the profits made out of broadcast, the size and character of the audience, nature of the place the performance was held and so forth.

Another issue with regards to public performance of a literary, artistic or musical work is the relationship of the audience to the copyright owner instead of the performance in question. In the case of **Performing Right Society Ltd. vs. Harlequin Records Shops Ltd**[341], Performing Right Society (PRS) administered performing rights in musical works. PRS licensed the performance of recording of the musical works it controlled. In 1976 PRS required owners of public shops to obtain license before they can play records over loaded speaker systems. The PRS sought for royalty. The defendants refuse to pay for the license and continued to play PRS controlled musical works over their loud speaker in their shops. The court rejected the argument by the defendants that their shop activities positively benefited the authors (who are members of PRS) through increase of sales and their action was not public performance. The Chancery Court held *inter alia* that the playing of records amounted to a public performance within the meaning of Section 5 of the Copyright Act of England 1956[342]. The court added that a performance to members of a public to enter the shop to purchase records could only be a performance to the public. Some agencies which operate such shops and the composers of such musical work have no interest in performing to such people.[343]

[340] (1943) 1 CH 167
[341] (1979) 2 ALL ER 828
[342] Equivalent to sec 26 (d) of the Nigeria Act
[343] Ocheme P.A. op cit

In the case of **Performing Right Society vs. Nawthorns Hotel Ltd**[344] , the defendants company caused two musical works, the copyright of which was controlled by PRS, to be performed in the course of a program of entertainment by an orchestra trio in the lounge of its hotel. However, unknown to the defendant there was also present an official of PRS. The Chancery Court held that the performance in the hotel lounge was a performance in the public within the meaning of Section 1 (2)[345] of the English Copyright Act and there was an infringement of copyright vested in the PRS since the performance was unauthorized by the plaintiff.

3.5.8 Right of the Copyright Owner to Broadcast

A broadcaster has the right to disseminate information to the public. Similarly, the person who has the right to broadcast has the right to communicate and distribute. It is an offence for somebody to disseminate the same information to the public or to the world at large without the owner's authorization or permission[346] Thus broadcast entails communication and distribution in order that the third party may be reached. This is done through wire, wireless, satellite and so on. In the case of **Ubi Bassey Eno vs. Nigerian Copyright Commission**[347], it was held that broadcasting without owner's permission amounts to violation of his right. The most important thing is that broadcast is property just like any other property is capable of being own like any tangible property such as a care, television, house, gown, suite, etc. Another major category of acts restricted by copyright includes the acts of broadcasting works and of communicating works by wire or cable. The Act[348] provides for the copyright owner right of broadcasting thus:

> Subject to this section, copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is
> (a) the recording and the re-broadcasting of the whole or a substantial part of the broadcast[349].
> (b) the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original; and
> (c) the distribution to the public, for commercial purposes, of copies of the work by way of rental, lease, hire, loan or similar arrangement.

[344] (1933) 1 CH 855 Per Benneth J
[345] That Act was applicable to Nigeria by virtue of Extension
[346] Section 20, Copyright Act, Cap. C28, LFN 2004.
[347] (2010)All FWLR 604-804 Part 547
[348] Section 8(1)(a to c) Copyright Act, op cit.
[349] 8(1)(a)

3.5.9 Right of Recording and Re-broadcasting

The right to broadcasting covers sounds of television broadcast by wireless, telegraph, or wire or both, or by satellite or cable programs and includes rebroadcast[350]. Section 6(1)(a)(vii) of the Nigerian Copyright Act gives this exclusive right to the owner of a literary or musical work to "broadcast or communicate the work to the public by a loud speaker or any other similar device". The author in this case is the only person that has the exclusive right of authorizing broadcast to the public of the work. This exclusive right to authorize broadcast is replaced in certain circumstances by the right to equitable remuneration. . For example section 8(1)(b)(c) of the Nigerian Copyright Act provides:

> Subject to this section, copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original and the distribution to the public, for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement.

In recent years, as a result of technology telecommunications and computers the right to broadcast or communicate to public have been threatened. The result is that the author looses financial remuneration over his work since rebroadcast has taken place thousands of miles away. It was in the light of the above that the Copyright Act of 1988 (as amended**)** created for the first time the regulatory framework for the Collective Administration in Nigeria.[351] That framework flows from part III of the principal Copyright Law in Nigeria.

3.5.10 Right of Communication to the Public

With modern technology, for example, internet usage, the category of broadcasting and cable-casting has been further generalized in communication to the public. That is, copyright works can be infringed by any unauthorized communication. Section 8(1)(b-c) states thus: subject to this sections copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is:

[350] Section 51 ibid
[351] Section 34 (2) ibid

> the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original; and

The possibilities of infringement in this field have become complex. If, for instance, a copyrighted musical work is performed to a public audience at the same time as being televised, both the performance and the broadcast require a licence if the broadcast is received and shown publicly. This calls for a licence of the copyright in the music, save where the showing is free. If the original performance was recorded, this will be either in the form of a sound recording or a film with associated soundtrack each of which will be a form of reproduction. If either the recording or the film is broadcast, this needs a licence[352]. However, the owner of copyright in the sound recording or film (as distinct from that in the musical work) has no right in respect of free public playing or showings of the broadcast. Performance and communication to the public are too always brief for it to be easy for copyright owners to enforce their performing right individually.

The approval of the COSON which is only a collecting society represents the interest of owners of copyright and neighbouring rights in musical works and sound recordings. The motto is 'let the music pay. This is an incorporated company limited by guarantee representing a substantial number of owners from different groups in the Nigerian music industry. In addition to the role of negotiation and granting of licenses, collection and distribution of royalties, it also institutes legal action on behalf of its members. Section 16 of the Act provides that infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee. Rights owners association(s) may request the Nigerian Copyright Commission to carry out an inspection without giving prior notice on any registered premises, where it has reason to believe an infringement of its members' rights have taken place[353]. This provision clearly recognizes the collaborative role which right owners can play in the enforcement.

[352] Cornish et al Op. cit. p.470.
[353] S9(5), Copyright (Optical Disc Plants) Regulations, 2006.

3.5.11 Right of Distribution

The distribution to the public, for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement is that of the owner. The Act clearly provides that it would amount to an infringement of copyright in a literary, musical or artistic work if such work, without the license or authorization of the copyright owner, was distributed by way of trade, offer for sale, hire or otherwise for any purpose prejudicial to the owner of copyright.[354] Section 6(1)(vi) of the Act gives this exclusive right to the owner of copyright. It provides that: anybody who "distributes to the public for commercial purposes, copies of the work by the way of rental, lease, hire purchase, loan or similar arrangement without the consent of the author shall be guilty of infringement". In a curious way however, the Act defines a 'communication to the public' to includes, "in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or re-broadcast"[355]. This tends to permit an inclusion of a literary, musical or artistic works. Now, the art of broadcasting in Nigeria comprises private, state and federal government owned or controlled. However, the Act does not provide for private owners like AIT and Raypower channels. It only provides for literary, musical or artistic works to receive fair compensation from broadcasting authority or the maker in the event of such inclusion[356] .

3.5.12 Right to perform Cinematograph

Cinematograph film includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction. It also includes the recording of a sound track associated with the cinematograph film[357]. For instance, a drama originally written for performance to an immediately present audience "live performance" can be acted, visually records (filmed) and shown to far larger audiences than those present at a live performance. Such audiences can see the motion picture far away from the place of a live performance and much later, too. Section 15(1)(c) of the Act provides that:

[354]Section 15(1)(d), Copyright Act, Cap C28, Laws of the Federation of Nigeria2004
[355] ibid
[356] Sec 9 (2) Ibid
[357] Section 51, Copyright Act Cap C28, Laws of the Federation of Nigeria, 2004

> a copyright is infringed by any person who without the licence or authorization of the owner of the copyright (c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection.

Therefore, direct infringement of a cinematograph film occurs when any of the following acts is done without the copyright owner's consent: (a) copying it; (b) showing the film, (c) recording of the sound track, and (d) distributing it for commercial purposes. For example, in the case of **Fernald vs. Lewis Production Ltd**[358], the plaintiff served in a ship "HMS New Market" during the Second World War and wrote a novel about his experiences. The defendant company caused a screen play to be written called the Gift Horse for a film which was eventually exhibited to the public under that name. It contained similarities between it and the plaintiff novel called "The Destroyer From America". He claimed copyright infringement in that the episode copied was a substantial replica of his work.

If a person makes a literary work, the work of substantial part of it cannot be transformed into a cinematographic film without authority or license. This would amount to infringement. The author has the exclusive right to transform his work into a cinematographic film. For instance, there was a case of the infringement of cinematograph film involving **American Motion Picture Export Co. (Nigeria) Ltd. vs. Minnesota (Nigeria) Limited**[359] where Justice Ekikunam-Bassey held that a master will be held liable for any infringement of copyright committed by his employee in the course of his employment. That it was not a defence that he had given a general warning or prohibition against the doing of the acts which might amount an infringement.

However, it should be noted that immoral or indecent work cannot be protected by copyright law. For example, in the case of **Glyn vs. Feature Company Ltd**[360]**,** the plaintiff was an author and owner of a copyright in a novel titled "Three Weeks". The defendant had sold and authorized a public performance in a film which the plaintiff alleged is a substantial reproduction of parts of her novels. She brought an action for injunction and damages. It was held that the novel would have

[358] (1960) 2 ER 978
[359] (1981) F.H.C.L. 64.
[360] (1916) 1 CH 261

been protected by copyright law except for the fact that the novel had a highly immoral tendency. Her action also failed because the film contained incidence on an indecently offensive characters which would have allowed them to be protected by the courts.

3.5.13 Right in Performance Sound Recording

Copyright in a sound recording is the exclusive right to control in Nigeria[361]. A sound recording is defined in section 51 to mean "the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a soundtrack associated with a cinematograph film".

The Act provides thus:

> Copyright in a sound recoding shall be the exclusive right to control in Nigeria – (a)the direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original (b) the distribution to the public, for commercial purposes, of copies of the work by way of rental, lease, hire, loan or similar arrangement.

In other words, a movie sound track is protected as part of the film but any recording made therefrom or simultaneously as the track will qualify as a sound recording. A sound recording may involve more than one author, for example, the performer may have his authorship in the performance fo the sound, which is recorded while the producer has a right to the actual recording and processing fo the sound. The copyright may subsist n only one of them where the other makes little or no input to the resultant work. The sound recorded may not have been from a human performance, for example, the sound of waterfall or a computer generated sound or the producer's contribution to the recording may have been so insignificant as not to warrant a separate copyright[362].

3.5.14 Right of Translations and Adaptation

The acts of translating or adapting a work protected by copyright also require the authorization of the owner of the rights. Accordingly, the Act in section 6(1)(a)(viii-ix) provides that:

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[361] Section 7(1), Copyright Act, Op cit.

[362] Asein, J.O. (2012) Nigerian Copyright Law and Practice, Nigerian Copyright Commission p.49.

> subject to the exceptions specified in the Second Schedule to this Act, a work shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is in the case of literary or musical work, to do and authorize the doing of any of the following acts:
> (a) in the case of a literary or musical work, to do and authorize the doing of any of the following acts (viii) make any adaptation of the work and (ix) do in relation to a translation or an adaptation of the work, any of the acts, specified in relation to the work in sub-paragraphs (i) to (vii) of this paragraph.

"Translation" means the expression of a work in a language other than that of the original version[363]. "Adaptation" is generally understood as the modification of a work to create another work. For example, adapting a novel to make a motion picture, or the modification of work to make it suitable for different conditions of exploitation. For example, adapting an instructional textbook originally prepared for higher education into an instructional textbook intended for students at a lower level[364]. By this provision, the copyright owner is empowered by law to authorize the translation and adaptation of his work if he so wishes. In the case of **Okediji vs. Osaneyin**[365] the plaintiff alleged that the defendant's performance of a play titled "The Shattered Bridge" was an infringement of the copyright in his published literary work entitled "Rere Run". The court agreed that "The Shattered Bridge" was in fact an adaptation of the plaintiff's work, granted an injunction against the second defendant restraining them from staging the first defendant's play, either in the Yoruba version or in any other language, without the prior authorization of the plaintiff.

This judicial pronouncement has added strength to the provision of the Act as regard adaptation. Therefore, translations and adaptations are works protected by copyright. In order to reproduce and publish a translation or adaptation, authorization must be obtained from both the owner of the copyright in the original work and of the owner of copyright in the translation or adaptation. Economic rights of the type mentioned above can be transferred or assigned to other owners usually for a lump sum of money or royalties depending on the proposed usage of the work. However, the second type of rights, namely moral rights can never be transferred. It

[363] S.51(1), Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004.
[364] Ocheme, P.O. (2000) The Law and Practice of Copyright in Nigeria, ABU Press p.79.
[365] Unreported decision of the Federal High Court, Ibadan (Suit No. FHC/IB/12/90)

is the right of the owner to translate or adapts his work into any language or into any genre. Most creative writers get economic gains from their works through the granting of the rights of translation and adaptation. Ocheme[366] reported that Chinua Achebe made a lot of money (fortunes) from granting of the right to translate his work "Things Fall Apart" into French, Germany and Arabic languages respectively. In practice, once a licence has been granted for the translation of an existing copyright work, the licencee/translator acquires copyright in the translated work.

3.5.15 Right of Public Exhibition of Artistic Works

The author of an artistic work such as sculptures, paintings, portraits and others has the exclusive right for public exhibition. Section 15(1)(c) of Copyright Act provides: "copyright is infringed by any person who without the licence or authorization of the owner of the copyright (c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this sub-section". Exhibition can only constitute an infringement if it is an act controlled by the copyright owner in his work. He has the right to exhibit his work in art gallery, public exhibition, and exhibition in public gatherings. Another right the author or artistic work of this nature has it to grant the permission for his work to be film and included in cinematography films as background settings. It is his right to permit his work being photograph and included in newspaper, magazines, and television commercials and so on.

It is an infringement of the author's right of public exhibition where the exhibition is done by someone else without the authorization of the owner. Where the author assigns the exhibition right to an assignee, the assignee has the right to exhibit the works, but he must acknowledge the author by indicating the author's name by the side of the work in a vintage position, where it can be easily recognized. For instance, where a newspaper, magazines, uses his paintings, or television stations, such paintings should bear the name of the author. The reasons for this are that where he assigns copyright, the assignee only shows the assigning of his rights in the work but not the authorship. The authorship however is never assigned or transferred to another person(s) other than the real author.

[366] Ibid at p.80

3.6 INFRINGEMENT OF AUTHOR'S MORAL RIGHTS

Copyright generally, is understood to refer to the economic rights of the author. But, many copyright systems, including the Nigerian Copyright Act, also recognize the existence of a parallel species of right. An author has two rights in connection with his 'works' namely, Moral and Economic rights. In this section, both rights shall be discussed for proper analysis.

Infringement of the right of the owner are basically in two forms, namely "moral right" and "economic right" infringement.

3.6.1 Infringement of Right of False Attribution

Right of attribution is the right of the author of a work to be identified as such whenever the work is used in one of the ways corresponding to the exercise of economic rights, including reproduction[367]. The identification of the author must be in accordance with the author's wishes. Or, if these wishes are not known, in a form that is "reasonable". Section 12(a) of the Copyright Act[368] provides for the right to claim authorship, which is the fact of attribution thus:

> the author of a work which copyright subsists has the right (a) to claim authorship of his work, in particular that his authorship be indicated in connection with any act referred to in section 6 of this Act except when the work is included incidentally or accidentally when reporting current events by means of broadcasting.

This right unlike economic right cannot be granted to another person, but the author can waive it. These rights can be infringed. In the case of **Meskenas vs. ACP Publishing Property Ltd**[369], the respondents purchased the right to publish the appellants photograph. They wrote on the painting that 'Jiawei Shen' published it, but in fact, it was by the appellant. He saw the photograph and asked his son to contact the respondents to obtain a correction and an apology. After many phone calls there was no apology. It was held that the appellants' moral rights relating to the portrait has been infringed. His right of attribution has been breached. He was awarded damages. The Copyright Act calls infringement of moral rights a breach of statutory duty that is actionable. Sections 19 (1) and (2) of the Act provides:

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[367] Article for World Moral Rights Legislation in Force. Virginia Morrison, January 2001.
[368] Cap C28, Laws of the Federation of Nigeria, 2004.
[369] (2006), FMCA 1136

(1) An infringement of the rights conferred by sections 10 and 12 of this Act is actionable as breach of statutory duty owned to the person entitled to the right.
It further provides that "in proceedings for infringement of the rights conferred by the said sections 10 and 12, the persons whose rights have been infringed shall be entitled to an award of damages, injunction and any other remedies as the court will deem fit to award in the circumstance.

The right of attribution can be infringed in the following ways: failure to acknowledge the author where phrases or passage are taken verbatim (word for word) from a published or unpublished text. Also the use of a summary of a work which contains the idea of others and presents the essence of an argument in language that compresses the original language of the source without acknowledgment[370]. It also means the reproduction, publication, public performance, communication (transmission electronically or making available online) or adaptation of the work. In the case of **Archibold vs. Sweet**[371] the plaintiff published a book in his own name "a summary of the law relating to pleading and evidence in criminal cases with precedents of indictments etc". He sold the copyright of the second edition to the defendant and subsequently the third edition.

The plaintiff complained that there were mistakes in the third edition and that his moral rights (paternity) has not been attributed. He instituted proceedings for damages and injury to his reputation, because the writer of the third edition was ignorant of criminal law. It was held that he had the moral right of attribution which he could enforce even after he had parted with copyright and could seek relief if attribution of paternity would be injurious to his reputation.

3.6.2 Infringement of the Right to Integrity.

The right to integrity of authorship is the right of an author not to have his or her work subjected to "derogatory treatment". Derogatory treatment would involve doing anything in relation to a work that is "prejudicial to the author's honour and reputation", including mutilating or materially distorting or altering a work[372]. These rights are enjoyed by literary, dramatic, musical or artistic works. The right of integrity encompasses adding to, deleting from, altering or adapting the relevant

[370] UNISA, Policy for Copyright Infringement and Plagiarism
[371] 172 E.R. 947
[372] Section 12(1)(b)

work. Or, by dealing with a work that had been subject to derogatory treatment in ways that broadly correspond to the exercise of economic rights in a work such as by reproduction. Section 12(1)(b) of the Act provides:

> The author of a work in which copyright subsists has the right: (b)to object and seek relief in connection with any distortion mutilation or other modification of any other derogatory action in relation to his work, where such action will be prejudicial to his honour and reputation.

It does not require assertion in writing. For example, in the case of **Joseph vs. National Magazine Co. Ltd**.[373], the plaintiff was an expert in the subject of jade. He agreed to write an article for a prestigious magazine. The editor of the magazine did not like the style which the plaintiff wrote the article and sent it to a freelance journalist to review. The freelance journalist was not a specialist in jade. He objected to the revision and declined to allow his name appear in the article. It was held that his moral right of integrity has been breached because of the revision. He was not entitled to specific performance but awarded damages. The right to integrity can be infringed by doing of something to the work which results in a material alteration of a work. It is an infringement of the right to integrity if a person subjects or authors a work or substantial part of the work to derogatory treatment. It is also an infringement to commercially deal with an infringing work.

The right to object to derogatory treatment does not depend upon any precondition, such as assertion. The plaintiff in the case of **Frisby vs. British Broadcasting Corporation (BBC)**[374], an author of a television play commissioned by the defendants, had a line in it which he considered central to the play. The head of plays of the defendants objected to the line on artistic grounds, considering it would give offence. Therefore, he removed part of the line from the recorded play. The plaintiff, considering the complete line to be of basic importance, sought and obtained injunction restraining the defendants from broadcasting any performance of the play without the line's inclusion.

[373] (1959) 1 Ch. 14
[374] (1967)2 All E.R. 106

3.6.3 Infringement of the Right Not to Have Authorship Falsely Attributed

This means that an author may prevent the insertion or affixing of his/her name on a work which implies falsely that he/she is not the author of the work. This is also the right of an author not to be attributed authorship where the work has been altered without the permission of the author. This right is recognized in the Berne Convention[375], which Nigeria is a signatory to. The right not to have authorship falsely attributed can be infringed in the following ways: It is an infringement to do or authorize an act of false attribution in respect of a work or substantial part of the work. It is infringement to perform in public or communicate an infringing work or to commercially deal with such work. It is not infringement where the alteration is insubstantial or necessary to comply with any law. In the case of **Ridge vs. English Illustrated Magazine**[376]**,** the plaintiff was a well known author. The defendant's magazine printed a short story called "The man who had a conscience". It gave the name of the plaintiff as the author. It was not written by Ridge but by someone else, the style was so poor in comparison to the usual work of the plaintiffs, and its publication was damaging to his reputation. The plaintiff drew the attention of the defendants, but no steps were taken to rectify the situation or compensation. He then sued and the court held that he was entitled to damages for false attribution.

3.7 DEFENCES TO COPYRIGHT INFRINGEMENTS

Work eligible for copyright protection as contained in section 1(1) are literary, musical, artistic works, cinematograph films, sound recording, and broadcasts[377]. The defences available for copyright infringements vary in nature and degree just as the instances of infringement may differ from one type or work to another. Various rights are conferred on the authors or creators of these works and there are several acts any of which may constitute an infringement of any of such rights. Any of such infringements may attract civil liability and in some cases,

[375] Article 6 Bis, Berne Convention.
[376] (1911) MACGCOP CAS 150
[377] Copyright Act, Cap C 28, Laws of the Federation of Nigeria, 2004.

criminal sanctions[378]. The violation of these rights would be actionable at the instance of the author or owner of the copyright as a breach of statutory duty[379].

A defendant who is able to show that the nature or circumstances of his action falls within any of these exceptions[380], may be absolved from liability. The Copyright Act of 1988(as amended) provided the general nature and scope of the rights in a particular work subject to some or all of the exceptions. Some relates to education, private research or use, criticisms, review and others. The original plan had been to make the limits restrictive. These exceptions are discussed below. Efforts were made to find out whether these exceptions have watered down the copyright efficacy.

3.7.1 Innocent Permission:

Section 15(1)(f)[381] provides that:

> Copyright is infringed by any person who without the licence or authorization of the owner of the copyright - permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright.

This defence only exonerates a person who innocently permits a place to be used for a performance in the public without any reference to the other act enumerated in the section. This means that other paragraphs do not apply except where they fall under the permitted acts contained herein. That is, it is only available in respect of innocent permission to use public entertainment for performance. In **Performing Right Society Ltd. vs. Ciryle Theatrical Syndicates Ltd**[382]**,** it was held that a proprietor of a place of public entertainment is not responsible for the unwarranted performance of an independent contractor which resulted infringement of the work. In this case, the plaintiffs claimed that the defendants without the consent either authorized the performance or permitted the use of their theater by a band for the performance of copyright music of the plaintiffs. The defendants

[378] For example, Section 20, ibid
[379] Section 19, ibid
[380] Second and Third Schedules of the Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004.
[381] Copyright Act, Cap C28 Laws of the Federation of Nigeria, 2004.
[382] (1924)1 K.B 1, Court of Appeal (CA), in ABULJ Vol. 21-22, (2003-2004), p.154.

successfully contended on appeal that they were not liable for the unwarranted performance on the ground that the band was an independent contractor. But, it is to be noted that the position would have been different if the band members were the servants of the proprietor in which case the copyright owners would have successfully proceeded against the proprietor vicariously for the infringement.

3.7.2 Archival Materials:

One of the copyright owner's rights is the reproduction of his literary, musical and artistic works with his consent. However, section 15(2) of the Nigerian Copyright Act provides a defence thus:

> Notwithstanding subsection (1) of this section, or any other provision of this Act, where any work in which copyright subsists, or a reproduction of any such works, is comprised in: (a) the archives stored in the National Archives established under the National Archives Act, or (b) the public records of a State, being records for the storage or custody of which provision is made by law, the copyright in the work is not infringed by the making or the supplying to any person of any reproduction of the work in pursuance of that Act or law.

The effect of this provision is that where the reproduction is that of a copyrighted archival material stored in the National Archives or any State public record kept pursuant to any law in force amounts to no infringement. This defence is not available for defendant who reproduced the work for commercial purposes or in any manner other than in pursuance of the Public Archives Act or any other applicable law.

3.7.3 Absence of Knowledge of Subsistence of Copyright in the Work:

Section 16(3)[383] provides a defence for absence of knowledge thus:

> where in an action for infringement of copyright, it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this section.

[383] Section 16(3) Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.

This provision is against the maxim: *ignorantia juris neminem* excusat (ignorance of the law does not afford any excuse) for any act or omission which would otherwise constitute an offence as codified in section.22 of the Criminal Code. The infringer should not be excused for any ignorance to avoid mischievous action in the name of ignorance. However, here in the section 16(3) of the Copyright Act, innocent infringer is not totally absolved from civil liability, but exonerated from paying damages, which is one of the reliefs. This defence is limited and only capable of alleviating the civil liability of the infringer. The infringer must show that he was not aware that copyright subsists in the work at the time of the infringement. It may be difficult to rely on this because of the mode of the copyright law in Nigeria, which makes copyright come in effect without notice either by registration or by deposit. The defence may be successfully only if the infringer can successfully prove the expiration period of the copyright. This defence will not avail an infringer where he knows that copyright subsists in the work, but makes a mistake as to the owner of the copyright[384].

3.7.4 Absence of Knowledge that a Copy was an Infringing Copy:

Section 20(1)(a) of the Nigerian Copyright Act is to the effect that a person who without the consent of the author makes or causes to be made for sale, hire, or for the purposes of trade or business or imports or causes to be imported into Nigeria or has in his possession an infringing copy of a work in which copyright subsists or equipment for making the infringing copy of such a work is guilty of offence under the Act.

> unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, or that such plates, master tape, machine, equipment or contrivance was not for the purpose of making infringing copies of any such work…

This is a defence for a criminal liability if successfully canvassed including performer's right. For example, in the case of **Federal Republic of Nigeria vs.**

[384] Plateau Publishing Co. Ltd and Ors vs. Chief Chucks Adophy (1986) 4 NWLR (Part 34) 205,.where the Supreme held that a person who, knowing or suspecting that copyright exists makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner, is liable under an action for the infringement of copyright

Asika[385], the accused person, a bookseller in the city of Kano was charged with the offence of unlawfully offering for sale infringing copies of a work in which copyright subsist contrary to the Act. The work in question was The Integrated Science Book II published by the West African Book Publishers, Ltd (WABP). The sales representative of WABP who then purchased a copy discovered pirated copies of the books in the accuser's shop. The court held that it had not been proved beyond reasonable doubt that the accused person knew that the books he was selling or had in his possession were pirated books or had been printed by unauthorized person.

3.7.5 Expiration of Copyright: Copyright in a work does not subsist in perpetuity. When the duration of a copyright expires, the work goes into public domain and it will therefore afford a complete defence in an action for infringement of the copyright.

3.8 ACTS EXEMPTED FROM COPYRIGHT CONTROL

These acts, which are dealt with under the Second Schedule to the Copyright Act are exemption to the copyright control.

3.8.1 Fair Dealing

There is no definition of the term "fair dealing" under the Act. Neither nor has any rule been stipulated determining fair dealing under Nigerian law. However, Babafemi[386] defined "fair dealing" as "the dealing with the work that must be genuine and reasonable". Thus, fair dealing with a work for purposes of criticism or review does not infringe. Any extract may be published, if its publication is genuinely intended to enable the reviewer to make his comments, and not to enable the reader of the review to enjoy the work concerned without buying it. Lord Denning, M.R. in the case of **Hubbard & Anor vs. Vosper & Anor**[387] said whether Mr. Vosper's treatment of Mr. Hubbard's books was a "fair dealing" of them "for the purposes of criticism or review". He concluded that it is impossible to define what "fair dealing". He however went on to say that:

> … if they are used as basis for comment, criticism or review, they may be fair dealing. If they are used to convey same information as the

[385] (Unreported) Suit No. FHC/KI/2CR/92
[386] Babafemi, F.O. (2007) Intellectual Property: The Law and Practice of Copyright, Trade Marks, Patens and Industrial Design in Nigeria, 1st ed., p.54.
[387] (1972) 2 Q.B 84

> author, for a rival purpose, that may be unfair. Next you must consider the proportions. To take long extracts and attached short comments may be unfair. However, short extracts and long comments may be fair.

The researcher defines "fair dealing" as dealing that is just, equitable, reasonable and acceptable with the work of another author or creator for purpose of fair comment. That is to say that the intention is not to infringe the exclusive copyright of the author or owner.

The Act stipulates that the right conferred in respect of any work does not include the right to control the doing of any of the acts mentioned by way of fair dealing for purposes of research for private use, criticism review or the reporting of current events[388]. Section 6(1) provides that:

> Subject to the exceptions specified in the Second Schedule to this Act, copyright in a work shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is:
> (a) in the case of a literary or musical work, to do and authorize the doing of any of the following act:
> i) reproduce the work in any material form
> ii) publish the work,
> iii) perform the work in public
> iv) produce, reproduce, perform or publish any translation of the work
> v) make any cinematograph film or a record in respect of the work
> vi) distribute to the public, for commercial purposes, copies of the work by way of rental, lease, hire, loan or similar arrangement,
> vii) broadcast or communicate the work to the public by a loudspeaker or any other similar device,
> viii) make any adaptation of the work,
> ix) do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-paragraph (1)to (vii) of this paragraph.

However, the Second Schedule paragraphs (a)-(s) provide exceptions to the rights of the copyright owner. Particularly paragraph (a) of the Schedules provides that the right conferred in respect of a work by section 6 of this Act does not include the right to control.

> the doing of any of the acts mentioned in the said section 6 (exclusive right of the copyright owner) by way of fair dealing for purpose of research, private use, criticism or review of the reporting of current

[388] Copyright Act, Schedule 2, para (a) op cit.

events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgment of the title of the work and its authorship except where the work is incidentally included in a broadcast.

It is not fair dealing for a rival in trade to take copyright material and use it for his own benefit. Therefore, fair dealing is available as a defence for the following purposes (a) research or private study (b) criticism or review, and (c) reporting current events. These provisions do not define the exact quantity to be taken for 'fair dealing'. This is because the quantity may not matter, if a sentence or some key words may suffice to amount to infringement. It should be noted that fair dealing should only be used for purpose of eliciting facts or principles.

3.8.2 Research or Private Study

The mere fact that a work is reproduced for the purpose of private study will not, by itself, mean that such use amounts to a fair dealing. For example, when the **University of London Press**[389] published examination papers the Tutorial Press took several of the papers publishing them in their own publication for students use. It was held to be an infringement. It is no defence to reproduce a work in the form of study notes to be used by students for an examination. The students were not the alleged infringers. In case of **Walter vs. Steinkopff**[390], the St. James Gazette copied a number of extracts from The Times almost word for word including some two-fifth of an article by Rudyard Kipling. This was held to be an infringement on The Times' copyright in its pieces. It made no difference that The Times had itself borrowed some of the information, that the St. James' Gazette was not a direct competitor (since it gave the news only later), that the source was acknowledged or that the editor of The Times did not at once object. North J. sought to dispel any implication that copyright might confer exclusive rights in the news itself by stressing the dichotomy between unprotectable idea and protectable expression.

There are other exceptions in the schedule with which the exemption must be read[391]. These include using a work in an approved educational institution for educational purposes. The use of a work for the purpose of judicial proceedings or

[389] University of London Press vs. University Tutorial Press (1916),2 Ch. 601.
[390] (1892)3 Ch. 489.
[391] Folarin, S. (2003) Intellectual Property Law in Nigeria, IIC Studies Max Planck Institute, Munich p.100.

of any report of any such proceedings, reproducing, for the purpose of research or private study. Others are an unpublished literary or musical work kept in a library[392], museum or other institutions to which the public has access[393]. Communicating to the public a work on premises where no admission fee is charged by a club whose aim is not profit making[394]. Reproducing a published work in Braille for the exclusive use of the blind[395]. In addition, sound recording made by institutions or other establishment approved by the government for promoting the welfare of the blind or disabled persons[396]. Exception applies to literary, dramatic, musical and artistic works. Private study, it has been suggested it is limited to use by the student himself and does not include circulation of the same materials to other students[397]. In our opinion, it should be a question of fact whether the circulation of the material to one or more other students derogates from "private study".

3.8.3 Criticism or Review

The second fair dealing exception is the most general of all. It allows works to be used for the purpose of criticism or review. One precondition of fairness being that the source is sufficiently acknowledged. Despite its potential range, the defence has not been much upon elucidated in case law. In **Hubband vs. Vosper** (supra), Lord Denning remarked that: there is very little in our law books to help on what is fair dealing for the purpose of criticism or review. He then proceeded to clarify fair dealing[398]. Megaw, L.J in the above case held that criticism or review may concern the ideas expressed as well as the mode of expression. Therefore, the courts will not permit wholesale borrowing to be dressed up as critical quotation. The objective of the exception is to protect a reviewer or commentator who may want to use extracts from a work to illustrate his review, criticism, or comment. It is therefore important to look at the defendant's motive in using the plaintiff's work. If the purpose was clearly not so much criticism or review but the provisions of a (rival) listing service, the defence will fail[399].

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[392] ibid
[393] Asein, J.O. Op cit.
[394] ibid
[395] ibid
[396] ibid
[397] Copinger and Skone Op cit.
[398] See his quotation above.
[399] See Independent Television Publications vs. Time Out (1984) F.S.R. 64.

Similarly, in **Sillitoe vs. McGraw Hill**[400], the publishers of "Study Notes" on various set of texts for students reproduced passage from original works. The extracts, about 5% of the works, were held to be unnecessarily long for comment. It was also said that it may be material that the defendant stands to enrich himself substantially by such use.

3.8.4 Reporting Current Events

This category of fair dealing is similar to the one just discussed, in that it is likely to involve not merely a single copy, but the dissemination of several copies. In general, it also must be accompanied by a sufficient acknowledgment. The exception permits all works other than photograph to be used for reporting current events. This may be in a newspaper or magazine, in which case sufficient acknowledgment is required. Or in a sound recording, film, broadcast or cablecast, not requiring acknowledgement. Photographs have been differently treated in order to preserve the full value of holding a unique visual record of some person or event. To come within the exception, the event itself must be current and not a pretext for reviving historical information.[401]

In all these categories, copying must be "fair". In assessing fairness, the amount or proportion of the works copied will be important and whether usage competes with the copyright owner.

3.9 EXCEPTIONS TO COPYRIGHT

The exceptions to the exclusive right of ownership of copyright.

3.9.1 Parody, Pastiche or Caricature

"Parody" means "a piece of writing, music, activity that deliberately copies the style of somebody or something in order to be amusing"[402]. Pastiche refers to a "literary, musical or artistic work in the style of another author, composer and so forth. Similarly, a caricature is defined as a "picture, description or imitation of somebody or something that exaggerates certain characteristic in order to amuse or

[400] (1983)F.S.R 545.
[401] Cornish et al, Op cit.
[402] Hornby, A.S. (2007)The Oxford Advanced Learner's Dictionary of Current English 7th edn, Oxford University Press, , p.1060.

ridicule"[403]. These exceptions apply only to literary, musical, artistic and cinematograph films. It does not apply to sound recording and broadcasts.

The Second Schedule of the Act paragraph (b)[404] provides that the right conferred in respect of a work by section 6 of this Act does not include "the right to control the doing of any of the aforesaid acts by way of parody, pastiche, or caricature". This is another exception to the exclusive right of the copyright owner. The court may uphold a plea of parody, pastiche or caricature where the defendant engages in complete or almost verbatim copying or where the defendant has borrowed more than is necessary to conjure the object of the parody. This was the position in the case **Benny v Loew's Inc**.[405] where it was said, that, the defendant should not be allowed more than is necessary "to place firmly in the reader's mind the parodied work and those specified attributes that are to be satirized". According to the court in **Berlin vs. E.C. Publication,**[406] a plea of parody should be upheld where the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodial does not appropriate a greater amount of the original work than is necessary to recall or conjure up the object of his satire.

It should be noted that parodists will seldom get permission from the owners of the works to be parodied hence the defence exists "to make possible a use that generally cannot be bought.

3.9.2 Ephemeral Use of Artistic Works

Other exceptions which, on the face of fair dealing would appear to apply to all works excluding sound recordings and broadcasts, but are in fact specifically meant for artistic works are instances of ephemeral or incidental use. These are cases where the work used is not the primary target. The following ephemeral uses of artistic works are exempted from the control of the copyright owner. The inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public[407]. This exemption is justifiable since a work that is situated in a public place may, for purposes of filming and telecast, be treated as forming a part of the environment. The work in question must be situated in a public place and

[403] Asein, J.O. (2012) op cit p.263
[404] Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[405] (1958) 356 U.S 43S
[406] 379 U.S 82 2 1964
[407] Copyright Act, Schedule 2, para (c)

a public place for this purpose should be a place that is freely accessible to members of the public.[408]

Secondly, it must be the reproduction and distribution of copies of any artistic work permanently situated in a place where the public can view it[409]. Unlike the exception mentioned in the previous paragraph, this exception applies to an artistic work, that is, permanently situated in a place where the public cannot view it. In view of the express requirement of permanency here, there is a reason to believe that different criteria apply. The artistic work must have the character of a fixture. For instance, a statue or wall painting that is displayed in a public place would fall under this exception, but not where the painting, although at an exhibition stand open to the public is not the object of the exhibition or is not of a permanent nature. The highest requirement here is understandable since the acts exempted are otherwise more serious. A person may make picture on postcards from such permanently displayed artistic works and sell them without the consent of the original artist. This he cannot do with an artistic work that is not permanently situated in a public place.

Thirdly, the incidental inclusion of an artistic work in a film or broadcast[410]. This exception is close to the first one but, a defendant would have to show that the inclusion of the work was incidental, that is, that it does not form the major part of the film or broadcast. The work, however, does not necessarily have to be in a place where it can be viewed by the public.

3.9.3 Use for Educational Purposes

The Act makes special exceptions for certain uses which are educational or instructional in nature. Firstly, the inclusion in a collection of literary or musical works that includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgment of the title and authorship of the work[411]. Another exception in this regard is the broadcasting of a work, if the broadcast is approved by the broadcasting authority as an educational broadcast[412]. Again, any use made of the work in an approved educational institution for the educational purpose of the institution subject to the

[408] Asein, J.O. (2012) op cit
[409] Ibid, para (d)
[410] Ibid, para, (e).
[411] Ibid, para (f).
[412] Ibid, para (g).

condition that it be destroyed before the end of the prescribed period, or if there is no prescribed period, within 12 months after it was made. The prescription of the period under this paragraph would have to be made by the minister charged with responsibility for culture and so far, no such regulations have been made[413]. The statutory period of retention under this exception is therefore still 12 months.

The reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgment is another exception. The reading or recitation must not, however be for commercial purposes[414]. It is a considered opinion of the writer that competition where award are given should be regarded as commercial. Therefore, it will be infringing on the copyright if recited in the public. This exemption clearly applies only with respect to literary works which have been legitimately published.

The question of what degree of extract would be considered reasonable is a question of fact which would depend on the circumstances of the case. The court will take into consideration the quality and quantity of the extract made. Any use made of the work by or under the direction or control of the government, or by such public libraries, non-commercial documentation centers and scientific or other institutions as may be prescribed. Also excluded are uses in the public interest, where no revenue is derived therefrom and no admission fee is charged for the communication, if any, to the public of the work so used[415]. No public libraries, documentation centres or other institutions have been specifically prescribed as a requirement. The making of not more than three copies of a book including a pamphlet, sheet music, map, chart or plan by or under the direction of the person in charge of a public library for the use of the library, if such a book is not available for sale in Nigeria[416] is also exempted. The reproduction for the purpose of research or private study of an unpublished literary or musical work kept in a library, museum or other institution to which the public has access[417] is also exempted.

Reproduction of published works in braille for the exclusive use of the blind, and sound recordings made by the institutions or other establishments approved by

[413] Ibid, para (h).
[414] Ibid, para (j).
[415] Ibid, para (k).
[416] Ibid, para (q).
[417] Ibid, para (r).

the government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons[418].

The various exceptions concerning use for educational purposes discussed above are generally applicable only to literary, musical and artistic work as well as cinematograph films.

3.9.4 Use for Judicial Proceeding or Law Reporting:

Judicial proceeding or law reporting are exempted from copyright control. That is to say, that judicial proceeding does not confer on the reporter any copyright[419]. For example, in the case of **Wheaten vs. Peters[420]**, the plaintiff, a journalist, had edited and published series of court proceedings. The defendant copied and published the plaintiff's reports without his consent. The court held that no person has any copyright in the written opinions delivered by the court. It follows, therefore, that no copyright can be conferred on a reporter of judicial proceedings as far as it concerns the written decisions and dicta of the court. However, a law reporter is entitled to copyright in respect of any comment or criticism on the decision or opinion of the court.

On the other hand, the Copyright Act provides that, Copyright shall be transmissible as moveable property[421]. It also provides that in the case of infringement, all such relief shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights[422]. Clearly, this puts copyrights on the same sphere as other property rights. Since copyright is property, and property is subject of human right protection, copyright is therefore a subject of human right protection.

To buttress this point further, Article 27 of the Universal Declaration on Human Rights, provides that:

> Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; and the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.

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[418] Ibid, para (s).
[419] Second Schedule paragraph (p)
[420] (1920) 2 KB 321.
[421] Section 11(1) Copyright Act, op cit.
[422] Section 16(1) ibid

The comparative analysis of the copyright owners' rights and both the exemptions and exceptions revealed that the owner is left with little or even nothing as his right. After all, the literary, dramatic, musical, artistic, cinematograph film, sound recording and broadcasts are meant to benefit the owners whether used for public purposes and government departments or commercial. However, the Copyright Act through the taken away those rights. One wonders then what benefits the copyright owners have after these clauses.

3.10 CHALLENGES OF THE PROTECTION OF COPYRIGHT IN NIGERIA

The enforcement, administration, regulation and enlightenment efforts for the protection of copyright such as confiscation and burning of infringing materials, prosecution of offenders, introduction of security devices and so forth are commendable. However, the issue of piracy has not declined particularly as it relates to books, music and film, for example, in public functions such as weddings, naming ceremonies and other public gatherings where pirates charge fee for music, films and so on without authorization from the right owners. Also corporate bodies like broadcasting organizations and advertising agencies infringe on the copyright. This section examines the challenges such as statutory provisions, lack of national policy, lack of commitment of personnel, non-collaboration among agencies, cheaper technological advancement and financial constraints as factors that militate against effective copyright protection in Nigeria.

3.10.1 Lack of Adequate Personnel and Facilities

With the high population of this country, the total numbers of staff personnel of Nigerian Copyright Commission (NCC) yet remain insignificant. This means that low level of personnel posted to the units outside headquarters. The Director-General of the Commission commented on this inadequacy in his report of 2012 thus. "this is grossly inadequate to cope with the menace of piracy in this country". The copyright inspectors who are responsible for investigation, inspection, raiding, arresting and prosecution of offenders remain few too The purpose of copyright inspectors was to augment the regular workload of the police force in tackling copyright infringement, but the number on ground cannot do much.

There is inadequate infrastructure and equipments for its operations. In terms of offices, there are scattered in different floors at the Federal Secretariat Complex. Some of its zonal offices are situated in different buildings such as ministries. It is difficult to easily identify the offices. The only landed property which the Commission owns based in Lagos which serves as the operations headquarters of the Commission. Another one is two pieces of parcels of land in Gwagwalada Area Council, Abuja[423]. Added to this is insecurity of the personnel which unscrupulous infringers or offenders launch attack to discourage the officials from raiding and arresting them is yet another challenge.

3.10.2 Lack of Unity of Commands

Collaborations form the bases for effective and efficient enforcement of copyright. However, there are issues among agencies in collaboration, for example, the Police and the Customs Service may not view copyright infringements as serious crimes compared to the other crimes, which they combat. Also, many members of the public do not see the implication or negative effect of piracy especially as it relates to works materials. Challenges also exist among the different groups of stakeholders, for example, publishers sells books to seller only to return round and accuse them of selling pirated materials thus invoking Nigerian Copyright Commission raids in some cases[424]. There is lack of intra and inter agency communication and networking facilities which enables the infringers to promote their illegal activities.

3.10.3 Easy Access to Technology

This is a global challenge and it has been reported that countries with significant problems of piracy using new technology include China, India, Indonesia and Malaysia among others[425]. The new technologies such as internet, cellular phones, palm devices, flash drives and other mobile pose threats to copyrights protection. In some countries these devices are pre-loaded with illegal content before they are sold. These new technologies are used to pirate music, films, ring tones, games, telecasts, artistic works and scanned books.

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[423] Ezekude A. op.cit.

[424] Saka, R (2008) Kano-Between Censors Board and Writers. Daily Trust 2/8/2008: In Haruna, Z (2012) Implementation of Copyright Law in Nigeria: Issues, Challenges and Prospects, p.162.

[425] WIPO Advisory Committee report on Enforcement (2010), Presented at its 6th Session in Geneva.

Copyright legislation has not kept pace with technology, particularly with the digitalization of global networks, digital super highways, digital deliveries and use of copyright products[426]. The greatest challenge in this area includes the difficulty in the control of information sharing, admissibility of evidence to convict infringers. Transnational or border issues, for example, an internet service providers (ISP) could be in South Africa, the site could be in America, the user could be in Nigeria and he could upload the work to a friend in Saudi Arabia. Identifying the source of the infringement or the system from which it occurs poses serious challenge. For instance, internet service providers, operators of bulletin boards, news group administrators, owners of search engines on the World Wide Web and writers of specialised counter- programs which overcome copyright protection. For example, the law is not clear as to whether an artistic or musical work generated by a computer should be classified as literary work or not and who may be the author thereof. There are no prescribed penalties for such class of infringements.

3.10.4 Inadequate Financial Empowerment of Agencies

The funding of enforcement agencies and their collaborators especially government parastatals are grossly inadequate. The Agencies are mostly starved of funds to purchase vehicles and other equipment for smooth operation. For example former Director General of Nigerian Copyright Commission in presentation of 2011 budget said that in 2008 and 2009 the budget was not accessible and particularly in 2010 figures showed amended versions. All shows clearly that there is no commitment to funding the agencies to equip the organizations for the assignment.

[426] Olueze, I.M. (2002) op.cit

CHAPTER FOUR

THE ROLE OF PATENT AND DESIGN ACT IN PROTECTING INTELLECTUAL PROPERTY RIGHTS IN INVENTIONS AND INDUSTRIAL DESIGNS

4.4 INTRODUCTION

The direct product of research is knowledge. This can be in the form of a new technology, new product or process and improvement in existing product, process or technology[427]. This is economically useful only if its products can lead to economic development, industrialization, job creation and poverty reduction. Application of intellectual property rights in patents improve the overall research environment and provide an impetus for greater creativity and knowledge generation. Intellectual property rights protect technologies by way of licensing, transfer to end users through private, cooperative, non-governmental and public channels[428]. Patent law is a branch of the larger legal field known as intellectual property law, which also includes trademark and copyright law.

Patent is a legal document granted by the government giving an inventor the right to exclude others from making, using, selling, offering to sell, or importing an invention for a specified number of years, for example, in Nigeria it is 20 years from the date the application is first filed[429]. The goal of the patent system is to encourage inventors to advance the state of technology by awarding them special rights to benefit from their inventions[430].

Patent provides reward not only for the creation of an invention, but also for the development of an invention to the point at which it is technologically feasible and marketable. A patent[431] is granted under the law to protect an invention that is new or essentially better in some ways than what was made before, or for a better way of making it. This protection is of tremendous importance to technicians and

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[427] Alegbejo, M.D. (2010) Intellectual Property Rights in the National Agricultural Research System in Nigeria: A paper presented at the Workshop on "Creating Awareness on Intellectual Property: Issues, Rights and Obligations organized by the National Cereals Research Institute Badeggi, Niger State, Nigeria December, , p.2.

[428] ibid

[429] Section 7, Patent and Design Act, Cap P2, Laws of the Federation of Nigeria 2004. Schechter, R.E. Microsoft Encarta 1993-2007 Microsoft Corporation (2008), p.1.

[430] ibid

[431] There are three types of patents: Utility patents, design patents, and plant patents. Commonly, when people refer to a patent, they are referring to a utility patent, which allow the creator of useful, novel, non-obvious inventions to stop others from making, using, or selling that invention for a statutory period of 20 years.

technologists such as electricians, mechanics and engineers. The objective of patent therefore is to make the patent system work more effectively in order to give the necessary impetus and protection to our nationals to embark on industrial and technological research and development, to stimulate innovation and the adaptation of existing technology to our peculiar needs.

This chapter examines the legal and institutional frameworks for patents and design protection in Nigeria to wit the efficacy and enforcement thereof.

4.2 HISTORICAL DEVELOPMENT OF PATENT LAW IN NIGERIA

Before the advent of the modern technological advancement there were local technologies. For example, in the Northern Nigeria there were products such as metal working, textiles, dyeing, weaving and tanning. Similarly, South East was famous for craft of iron working, for example, cutlasses, hoes, and other agricultural implements. In the South West particularly Yoruba kingdom witnessed traditional medicines, wood and ivory designers and so forth. Middle Belt region had smithing, weaving, carpentry and dyeing as occupations. These local products and process of producing them dominated the pre-colonial era in Nigeria[432].

Traditionally, Nigerians are not capitalist in nature. Therefore, intellectual property rights particularly patent was seen as demonstration of craftsmanship rather than for pure economic values. Most of these products were for individuals or community use and therefore no infringement proceeding was attached to it. Some of them were deposited at the chiefs, emirs or obas' residence for preservation for the traditional community. Products are usually identified by inventor or maker in particular way. Therefore, such products from same individuals has an identify. However, as technology advances, the inventors became conscious and require apprentice under them before producing similar products.

When the British Government introduced their colonial administration, some changes occurred which brought about the concepts of 'patent and design' in Nigeria. The year 1900 witnessed the first enactment of Patent law in Nigeria

[432] Babafemi, F.O.B. (2007) Intellectual Property: The Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria, First Edition, Justinian Books Limited p.3

through the British Patents Ordinance[433] and Patents Proclamation[434] for the Colony of Lagos and Southern Nigeria respectively.[435] It was introduced in Northern Nigeria in 1902 by the Patents Proclamation[436] of that year. Each of these enactments contained full-scale provisions for granting and controlling of patents and were comparable to the English enactment on the subject at the time. Patent offices were set up under the control of a Registrar and his deputy. The Registrar exercised the functions which in the United Kingdom (UK) were carried out by the Comptroller-General of the Patents Office. Applications for patents were made to the Patent Office and appeals from decisions of the Registrar went to the Attorney-General who had the power to secure the assistance of experts in considering such appeals. The High Commissioner in the name of the Crown[437] granted a successful applicant with a patent.

After the amalgamation of Northern and Southern Protectorates in 1914, all these enactments were repealed and replaced by the Patents' Ordinance 1916[438], which applied throughout the country. The title of the Statute was altered in 1925[439] to "Registration of United Kingdom Patents Ordinance"[440], and, except for minor modifications, it remained the law on the subject until 1970. According to the Ordinance, application for a patent could no longer be made in Nigeria, instead, it provided that "a patentee in the U.K. or a person claiming through him, could within three years of the grant apply to the Registrar of Patents in Nigeria to have his patent registered"[441]. This means that Nigeria then had merely to register the patents granted by British government. This position had changed since Nigeria now grants patents on its own. A certified copy of the specifications (including drawings) of the patent and a certificate of the Comptroller-General, giving full particulars of the

[433] No.17 of 1900. Note that all Ordinances and Proclamations are now Acts by virtue of Designation of Ordinances Act 1961, following independence in 1960. For purpose of clarity, however the terms 'Ordinances and Proclamations' are retained.
[434] No.27 of 1900.
[435] Folarin, S.. (2003) Intellectual Property Law in Nigeria, Studies in Industrial Property and Copyright Law, Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich, p.140-143. Also Cornish & Llewelyn: (2007)Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 6th edition Sweet & Maxwell, London p.113ff)
[436] No. 12 of 1902
[437] In the Colony and the North, the Governor granted a patent in the name of the Crown.
[438] Cap 141 of 1923 edition of Laws of Nigeria (No.30 of 1916)
[439] No. 6 of 1925.
[440] Cap. 182 of 1958 edition of Laws of Nigeria.
[441] S.3

issue of the patent on such specifications, are accompanied with every such application.

The Act to have comprehensive provisions for the registration and proprietorship of patents and designs in Nigeria and other matters ancillary thereto came to being in 1970, but became effective from 1st December, 1971[442].

4.3 PATENTABILITY OF INVENTIONS

Before a patent is granted for an invention, three basic conditions are considered. That means that for an invention to be patentable, it must be new, involve in inventive activity and be capable of industrial application. Section 1(1)(a)-(b) of the Patent and Design Act[443] provides that:

> Subject to this section, an invention is patentable:
> (a) If it is new, results from inventive activity and is capable of industrial application, or
> (b) If it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application[444].

The concepts of "newness", "inventive activity" and "industrial application" as they relate to patentable inventions are expatriated upon in subsections (2) and (3). These presupposes that an invention "does not form part of the state of the art" paragraph (a) of subsection (2). In other words an invention is deemed to be new or novel if it was not known or available to others knowledgeable in that field at the date of the application for a patent. There is an "inventive activity" when the invention does not obviously follow from any prior state of the art (paragraph (b) of subsection (2). And an invention is regarded as "capable of industrial application" if it can be manufactured or used in any kind of industry, including agriculture (paragraph (c) of subsection (2).

This provision brings us to the problem of definition of the word 'invention'. Under the Nigeria law, there is no definition of an "invention". However, some persons defined an invention as "the act of devising or contriving as a result of purpose or forethought, an original contrivance or the construction of that which has

[442] Babafemi, F.O.B. Op cit.
[443] Cap P2, Laws of the Federation of Nigeria, 2004
[444] Section 1(1)(b), ibid.

never existed before"[445]. Invention has also been defined "as a step forward in an art"[446]. These definitions relate more to novelty rather than to an invention. Further definition states that "invention means the act of bringing ideas or object together in a novel way to create something that did not exist before"[447]. Hornby[448] defined as "the ability to have new and interesting ideas". Bhatia[449] says that an invention "is a new solution to a technical problem". Indeed, as Rinfret J. said in the Canadian case of **Crossley Radio Corporation vs. Canadian General Electric Company Ltd**[450]. **"**It would be ideal to attempt a comprehensive definition. In certain cases, the decision must necessarily be the result of nicety. It is a question of fact and degree depending upon on practical considerations to a large extent rather than upon legal interpretation". The researcher sees "invention" as advancement on product or process which adds value to the existing one.

Patentable inventions are inventions in respect of which the law will grant a patent. All patents embody inventions but not all inventions are patentable. To qualify for patentability an invention must comply with the requirements of section of the Patents and Designs Act 1970. There are several characteristics that a patent office will look at to determine whether the invention is patentable. By international agreement[451], patents are available for any inventions, whether process or product, in all areas of technology. An invention may be a product, something which is produced by manufacture, or it may be a process, a method of making or doing something. A chemical compound, machine and so on can be patented[452]. Processes for developing or making things may be patented[453].

However, there are things that cannot be patented, and are usually excluded from the scope of patentability. Human genes, for instance, cannot be patented[454].

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[445] Babafemi, F.O.B. supra
[446] ibid
[447] Encyclopaedia Britannia Ultimate Reference Suite, Chicago, Encyclopaedia Britannia (2012).
[448] Hornby, A.S. (2007) Oxford Dictionary, 7th edition, Oxford University Press, p.786
[449] Bhatia, P.G. et al (2010)An Introductory Discourse on the Concept of Patents for Nigerian Researchers Nutrients p.2.
[450] (1936) D.L.R. 508
[451] Article 27 Trade Related Intellectual Property System Agreement.
[452] Bhatia, P.G. et al, Op cit.
[453] ibid
[454] Araba, F. (2010) Intellectual Property Rights in Nigeria: Patent Issues and Benefits. A paper presented at a Workshop on Creating Awareness on Intellectual Property: Issues and Rights and Obligations NCRI, Badeggi, p.2.

Things that already exist in nature, with very few exceptions, cannot be patented[455]. A perpetual motion machine, which goes against the laws of nature, cannot be patented unless someone can show it working[456]. Then, of course, the old rules are set aside and something new is created. Some inventions may be excluded from the scope of patentability for public order or morality grounds, for example, biotechnological instruments, generic animals design, human tissue etc[457]. The developments occurring in a given area of technology that are patentable may be great developments, like the invention of penicillin, or very small improvements, such as a new lever on a machine that enables it to work just a little faster[458].

Subsection 2 of the Patent and Design Act[459] states:

> For the purpose of subsection (1) of this section:
> (a) an invention is new if it does not form part of the state of the art.
> (b) an invention results from inventive activity if it does not obviously follow from the state of the art, either as to the method, the application, and the combination of methods, or the product, which it concerns, or as to the industrial result it produces, and
> (c) an invention is capable of industrial application if it can be manufactured or used in any kind of industry, including agriculture.

Generally speaking, an invention is novel or new if it is not known or made available to others. Under section 1(2)(a) and subsection (3) an invention is new or novel if it does not relate to the art or field of knowledge which had been made available to others anywhere before the date of the filing of an application for a patent or in the case of a foreign invention, before the date on which the foreign priority date is validly claimed.

As noted earlier, there are basically three criteria for patentability of invention. The first of these criteria is that it has to be new (novel), meaning that the invention must never have been made before, carried out before or used before. Secondly, it must have been an inventive activity. In other words, it must represent an original improvement in relation to the state of the art before it will be considered for a patent. The third criterion is that it needs to be industrially applicable. It has

[455] World Intellectual Property Organization Manual on Patent Module 7.
[456] ibid
[457] Cornish, W, and Llewelyn, D. (2007) Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights 6th edition, Thomson Sweet & Maxwell pp.232,882 and 883.
[458] ibid
[459] Patents and Design Act, Cap P2 Laws of the Federation of Nigeria, 2004.

to be susceptible of use in some way. This is a very broad criterion. Almost anything can be used, even if it is in the research stage, but that does not apply to a perpetual motion.

4.3.1 Novelty: The Invention Must be New

The first criterion for patentability is that it has to be new (novel), meaning that the invention must never have been made before, carried out before or used before. Novelty involves a comparison between the inventions, in any of its embodiments, and the thing that is revealed by the prior publications or use[460]. The invention must be new, must result from inventive activity and must be capable of industrial application. Therefore, newness or novelty as it is commonly referred to, is a *sine qua non* of patentability.

The field of knowledge against which the novelty of a patent monopoly is judged is referred to as the 'state of the art'[461]. The Patent and Designs Act provides:

> In subsection (2) of this section, "the art" means the art or field of knowledge to which an invention relates and "the state of the art" means everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever (by means of a written or oral description, by use or in any other way) before the date of the filing of the patent application relating to the invention or the foreign priority date validly claimed in respect thereof, so however that an invention shall not be deemed to have been made available to the public merely by reason of the fact that within the period of six months preceding the filing of a patent application in respect of the invention, the inventor or his successor in title has exhibited it in an official or officially recognized international exhibition[462].

This means everything which had been made known in any way to the public anywhere in the world before the application's priority date. The general rule is that an invention cannot be patented unless it is really new, that is, in the term used in the Act. Therefore, apart from the singular exception of the invention being exhibited in an official or officially recognized international exhibition within the period of six months preceding the filing of the patent application, prior use will invalidate novelty and render the product unpatentable. This means that the inventor must keep

[460] Subsection 2, Patents and Design Act, ibid.
[461] ibid
[462] Section 1(3) Patent and Design Act, Op cit.

the invention under wraps until the patent application has been filed. He must particularly resist the temptation to tell the world about it in a lecture or journal article. Of course, once the application has been filed and published it is there for the whole world to know.

In considering novelty, therefore, it is important to look at the prior publication which exists from two points of view. First, was the publication available to the public before the relevant date? Secondly, does it disclose the invention? In this latter connection our law is silent as to whether to destroy novelty a prior publication must itself disclose the entire invention and to only a part of it. In the case of **Windsurfing International vs. Tabur Marine**[463], the issue was whether prior publication could invalidate the patent. The plaintiffs' invention was a sailboard having a vertical mast or spar fixed at the bottom by a universal joint leaving it free to move in all directions. A triangular sail was attached to the spar and kept taut by a wishbone (arcuate) boom. This was grasped by the user, enabling him to control the set of the sail and hence the direction and speed of sailing. The defendants challenged the patent on the grounds of lack of novelty as well as lack of an inventive step. Two instances of anticipation were cited. The first was an American popular science journal, which had been reproduced in a British publication. The second was sailboard like the plaintiffs' that was constructed and sailed by Peter Chilver in Hayling Island. The court held that the patent was anticipated by the prior published article and by young Peter Chilver's home made sailboard.

Another example was in the case of **Vander Lely vs. Bamford**[464]**,** where a patentee on mechanical product claimed a hayraking machine in which the rake-wheels were turned not by an engine, but by contact with the ground. The patent was held to have been anticipated by a photograph in a journal which showed a hayrake with this feature. Again, in **Fomento vs. Mentmore**[465]**,** the patentee claimed a ball-point pen in which the housing around the ball had a groove running in a ring below the equatorial plane of the ball, which produced a smooth flow of ink. One allegation of anticipation it was held that only when instructions might

[463] (1985) R.P.C. 59
[464] (1963) R.P.C 61, HL
[465] (1956) R.P.C. 87, CA

produce the same effect. For novelty to stand there must be technological development which is the bedrock for commercial production that is the pre-requisite for infringement of patent and designs.

4.3.2 Inventive Activity

According to section 1(b) of the Act, an invention must constitute an improvement upon a patented invention and must also be new, must result from inventive activity and must be capable of industrial application[466]. This means that the inventive activity must not be obvious to somebody skilled in the particular field, having regard to the state of the art at the priority date of the patent application. The term "non-obvious" as used, if it were obvious to a person of ordinary skill in the field concerned it would not progress to the stage of qualifying for patent protection. This is closely connected with the requirement of novelty, but there is a difference. If the prior art clearly shows that the invention is not new, then, it fails the first tests. This is where the second test comes in. This is to say, did it require an inventive activity forward from the prior art. That is, would the activity forward be obvious to the skilled person? It is clear from this second condition that an invention will also be deemed patentable, if it constitutes an improvement upon an existing patented invention. In other words, if does not matter that a process similar to has already been invented. As long as this new process constitutes an improvement on the old process and it satisfies all the requirements of novelty, as earlier discussed will be deemed patentable.

In the case of **James Oitomen Agbonrofo vs. Grain Haulage and Transport Ltd**[467]**,** the plaintiff sued the defendants for infringing his patent grant The plaintiff had invented a harmless electric water boiler which unlike the imported ring boiler, would prevent fire disasters. It does not shock, but will glow red and hot like the imported ring boiler. The plaintiff's device was capable of preventing fire disasters, because it would not work if it is not filled with water. Water was made one of the components in its working mechanism. The plaintiffs also mentioned two identification characters of the Oitomen harmless boiler. One is the perforation of the filter. The second one is the material used, a stainless steel product, which he

[466] S.1(1)(b) Patents and Design Act, Cap. P.2, Laws of the Federation of Nigeria, 2004.
[467] (1998)F.H.C.L 236.

claimed, no one has ever used before in a hearting device. The plaintiff was granted a patent for his invention on the ground that he satisfied the requirements of novelty and industrial applicability, which are the key requirements of patentability.

4.3.3 Industrial Application

Patents are awarded for practical inventions, not for theories or ideas. So, to be patentable an invention must be capable of industrial application. This requirement is quite wide, as is made clear in Patents and Design Act which provides "subject to this section, an invention is patentable: (c) an invention is capable of industrial application if it can be manufactured or used in any kind of industry, including agriculture[468]"

Patentable under 'industrial application, the invention must be able to be used on a certain scale in practice. It should be noted that industrial application excludes methods of medical treatment of humans and animals[469]. This means that not all products or processes are patentable according to Nigerian law. However, it should be noted that modern trend is towards a protection of plants and animals varieties too. For example, some countries both in the developed and developing world are interested in the Union for the Protection of New Varieties of Plants (UPOV) Convention or taking steps to accede to it. Still others are enacting or have already enacted legislation on plant variety protection, which is in conformity with or influenced by the UPOV Convention[470]. For example, the formulations of Intellectual Property Rights by the Agricultural Research Council of Nigeria to protect its interest and research institutes is aimed at generating income for inventors and enhance technology transfer.

4.4 EXCEPTIONS TO PATENTABLE INVENTIONS

Patent law has to define the types of subject-matter to which it accords protection. In accordance with the provisions of the Act[471], patents are not granted for some inventions such as follows:

> Section 1(4)(5) provides: patents cannot be validly obtained in respect of (a) plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological process

[468] Section 1(1)(c), Patent and Designs Act, Cap P2, Laws of the Federation of Nigeria, 2004.
[469] Cornish, W and Llewellyn, D, Op cit, p.213.
[470] United Kingdom Patent Law 1994
[471] Section 1(4) Parents and Designs Act Cap P2, Laws of the Federation of Nigeria, 2004.

and their products) or (b) inventions the publication or exploitation of which would be contrary to public order or morality (if being understood for the purposes of the paragraph that the exploitation of an invention is not contrary to public order or morality merely because its exploitation is prohibited by the law).
(5) principles and discoveries of a scientific nature are not inventions for the purposes of this Act.

It should be noted that protection of plant and animal varieties are emerging areas of patents. Also, traditional knowledge, traditional medicine and biodiversity are emerging issues in the grant of patent in some jurisdictions.

4.4.1 Human and Animal Treatment

Apart from statutory provision, discoveries such as scientific theories and mathematical methods do not qualify for patent. Similarly, ideas and schemes are not patentable though they may qualify for copyright protection. Methods of diagnosis and treatment of human beings and animals are not patentable but the products for use in such methods are patentable, for example, drugs. It should be noted that United States of America and Australia hold that the methods of diagnosis and treatment of humans and other animals can also be patented. This may highly restrict treatment since licence or authority had to be sought from patentee who may refuse for self interest.

In the United States of America, microorganisms isolated from a consortium of microorganism, modified organisms, processes using such organism are all patentable. For example, in the case of **Frank Brothers Seed Co. vs. Kalo Inoculant Co.**[472], the United States Supreme Court held that the respondent's discovery regarding harmlessness of mixing certain strains of certain species of bacteria (Rhizobium) was merely a discovery of their qualities of non-inhibition and not improvement on their natural functioning and therefore not patentable. Other non-patentable inventions include schemes for performing mental acts, business methods, presentation of information or even playing games.

Biological processes are not patentable essentially because it is difficult to grow cells of multicellular organisms[473], for example, humans outside their natural

[472] 547 U.S.305 (2004)
[473] Bhatia, P.G. (2008)Globalization: Legal Perspective, an LL.M Thesis, Faculty of Law, Ahmadu Bello University, p.136.

habitat. When grown genes become locked on, cells proliferate wildly and become a cancer. This is regarded as immoral and unacceptable to any community even though cancerous cells tend to do better in artificial environment of laboratory culture. However, it should be noted that microbiology constitutes patentability. In the case of **Diamond vs. Chakrabarty**[474] the patentee claimed a genetically engineered bacterium capable of degrading oil spills. The US Supreme Court upheld patentability, holding that the microorganism constituted a 'manufacture' or a 'composition of matter' within the meaning of the Patent Act – a product of human ingenuity having a distinctive name, character and use.

Harvard Onco Mouse was held in three jurisdictions, that is, USA, Europe and Canada to be patentable. Onco mouse has made a deep impact on legal theories on biotechnology patenting – activated oncogene sequence. In the case of **Harvard College vs. Commissioner of Patents**[475] Rothstein J. held thus: "the use of laws of nature by inventors does not disqualify a product from being an invention, provided inventions or ingenuity is also involved. Onco Mouse was a result of marriage between human ingenuity and the laws of nature.

4.4.2 Public Order or Policy and Morality

The Act prohibits patent for invention which is contrary to public policy or morality. That means that whatever that does not encourage moral standard, government will not grant patent for it. For example, section 1(4)(b) of the Nigerian Patent and Design Act provides that:

> Patent cannot be validly obtained in respect of: (b) inventions the publication or exploitation of which would be contrary to public order or morality (if being understood for the purposes of the paragraph that the exploitation of an invention is not contrary to public order or morality merely because its exploitation is prohibited by the law.

This is to the effect that offensive, immoral or anti-social inventions are generally excluded from grant of patent. However, in modern society, perhaps a method of production for hard drugs would be an extreme probably. Similarly public order in this context may mean things that would promote good governance and for the

[474] 447 U.S.303 (1980)
[475] 2 SCR 45 (2004)

betterment of the masses. Therefore, granting patent for invention that promotes good of the society is normally encouraged.

4.5 THE RIGHTS OF A PATENTEE

Generally, ownership of a patent is conferred on the statutory inventor, his heirs, employer or commissioner, assignee, licensee and co-owners as the case may be. Upon the grant of patent to a patentee, the invention is precluded from use without authorization. This means that a patent confers upon the patentee the right to exclude others from making, importing, selling, stocking or using without permission. Section 6(1) of the Act[476] provides that:

> A patent confers upon the patentee the right to preclude any other person from doing any of the following acts: (a) where the patent has been granted in respect of a product, the act of making, importing, selling or using the product, or stocking it for the purpose of sale or use; and (b) where the patent has been granted in respect of a process, the act of applying the process or doing, in respect of a product obtained directly by means of the process, any of the acts mentioned in paragraph (a) of this subsection.

The scope of the protection conferred by a patent will be determined by the terms of the claims, and the description (and the plans and drawing if any) included in the patent shall be used to interpret the claims whether it is by product or process.

The Act further provides in section 6(3) that:

The right under a patent:

> (a) shall extend only to acts done for industrial or commercial purposes, and (b) shall not extend to acts done in respect of a product covered by the patent after the product has been lawfully sold in Nigeria except in so far as the patent makes provision for a special application of the product, in which case the special application shall continue to be reserved to the patentee notwithstanding this paragraph.

These provisions make mandatory that for grants in respect of making, importing, selling or using the product, or stocking such would be an infringement of the patentee's right. Similarly, it should be noted that rights are subject to use for commercial and industrial purpose only. Apart from the patentee rights of precluding others from doing certain acts, the patentee has the following powers:

[476] Patent and Design Act, Cap P2, Laws of the Federation of Nigeria, 2004.

4.5.1 Assignment, Transfer by Succession or Joint Ownership:

A patent may be assigned to someone else for an agreed term or it may be mortgaged. An assignment must be in written and signed by or on behalf of all parties to the transaction. The Section 24(1)(2)(3) Nigerian Patent and Design Act provide thus:

> (1)Subject to this section, a person's rights in a patent application, in an application for the registration of a design, in a patent or in a registered design may be assigned, transferred by succession or held in joint ownership. (2) An assignment under subsection (1) of this section shall be in writing and signed by the parties; (3) An assignment or transfer by succession under subsection (1) of this section shall have no effect against third parties unless it has been registered and the prescribed fees paid.

4.5.2 Assignments of a patent

Within the context of patent law, an assignment is when the rightful owner of a patent, often the inventor of the invention protected by the patent, transfers all of his rights in the invention to another person. It is a document that transfers a patent owner's rights in exchange for money payable in a lump sum or royalties on future sales of the invention. That other person then has all of the legal rights granted by owing a patent, meaning he can prevent others from making, selling and using the invention. An assignment in this instance is done by having the patent holder prepare a formal assignment which is filed at the Patent and Trademark Office. The formal paper work for the patent will then be altered to indicate that the patent has been assigned to a new person or entity.

Many inventors assign their invention, either to the company they work for under an employment agreement or in the case of independent inventors to outside development or manufacturing companies. These assignments typically transfer ownership of any patent that issues on the invention and may (although usually not in the case of employed inventors) provide for compensation for the inventor, although employed inventions often receive little or no additional compensation, because they are getting paid to invent.

Under this, subhead, invention either in part or whole whose application for patent has not yet been made, may be sold or assigned in the same manner as any other chose-in-action. When granted, the patent and all or part of the rights

comprising its totality may pass by an act of the owner or by operation of the law to the assignee or transferee. This is to the effect that once inventor assigns it, the ownership devolves on the patent holder, that is, the assignee. It should be noted however that where the assignment is not registered and prescribed fees paid it has no effect on the third party[477]. For example, in the case of **Arewa Textiles Plc & Ors. vs. Finetex Limited**[478] Salami J.C.A. held that "the right to apply for letters patent in respect of an invention by an assignee thereof under his own name is not a mere moral adjuration. That registration is prerequisite including payment of prescribed fees…". Once an assignment occurs, the owner can maintain an action against all, who infringes or does any act that is inconsistent with his right of ownership including the former owner.

4.5.3 Succession of patent

According to section 24(3), the Act provides "An assignment or transfer by succession under subsection (1) of this section shall have no effect against third parties unless it has been registered and the prescribed free paid". This means that the patentee can leave it in his Will or in any case, it will be dealt with after the death in the same way as any other piece of the deceased personal property is handled.

4.5.4 Joint Ownership

A joint owner is a situation where an invention is attributable to the creative effort of more than one person, everyone who makes a creative contribution to the invention (as described in at least one claim in the patent application). For example, Ibrahim and Adewale jointly conceive of and design a machine for grinding. To make sure the concept is viable, Ibrahim and Adewale got their engineer friend, Okoro to build a test model according to their specifications. Ibrahim and Adewale would be listed as "co-owners" of the invention because they were the sole creative contributors to the invention structure. Okoro would not be considered a co-inventor, assuming his model was made according to set specifications and did not encompass creative additions to the invention. If on the other hand, Okoro had significantly altered the invention's basic specifications and design while building the test model, he also might qualify as a co-inventor.

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[477] Section 24(3), Patent and Design Act, Cap P2, Laws of the Federation of Nigeria, 2004.
[478] (2003)7 NWLR 322,

When filing a patent application, it is extremely important to accurately identify the inventor or co-inventors. Leaving an inventor out or listing someone who does not qualify may later cause an issued patent to be declared invalid and unenforceable (if an action is brought in court to enforce the patent) because an accurate description of the true inventors in the patent application is one of the basic requirements for a valid patent.

4.5.5 Grant of License

The patentee may by a written contract grant a licence to any person to exploit the relevant invention. The Patent and Design Act[479] provides that:

> Subject to this section: (a) a patentee or design owner may by a written contract signed by the parties grant a licence to any person to exploit the relevant invention or design, and, (b) in the absence of any provision to the contrary in the contract, the licencee shall be entitled to do anywhere in Nigeria in relation to the patent or design any of the acts mentioned in section 6 or 9 of this Act, as the case may be.

The process by which an owner gives permission to another party to make, use, or sell his or her patented invention is most often given in the form of a written document called a license. A license of patent rights can be either an exclusive licence (only the licensee is entitled to exercise the rights set out in the licence) or a nonexclusive license the licensee may exercise the rights set out in the license but cannot prevent others from exercising the same right under a different license). There is a proviso that where a licence has been granted as provided by the Act then it must be registered and will be of no effect against third parties until registration is effected and the prescribed fee paid[480]. Any clause in a contract for a licence will be deemed null and void if it imposes on the licencee restrictions which do not derive from the rights conferred by the relevant patent or are unnecessary for the safeguarding of those rights.

4.6 DEFENCES TO THE RIGHT OF A PATENT

A patentee has exclusive right to the use of a patent granted and that nobody can use it without licence or his authorization. However, the law provides for the

[479] Section 23(1)(a)(b), op cit.
[480] See section 23(2) ibid

use if situations warrant even without patentee's authority. Paragraph 1 of First Schedule[481] provides:

> Subject to this Part, at any time after the expiration of a period of four years after the filing of a patent application or three years after the grant of a patent, whichever period last expires, a person may apply to the court for the grant of a compulsory licence on one or more of the following grounds-
> (a) that the patented invention, being capable of being worked in Nigeria, has not been so worked.
> (b) that the existing degree of working of the patented invention in Nigeria does not meet on reasonable terms the demand for the product
> (c) that the working of the patented invention in Nigeria as been hindered or prevented by the importation of the patented article, and
> (d) that, by reason of the refusal of the patentee to grant licenses on reasonable terms, the establishment or development of industrial or commercial activities in Nigeria is unfairly and substantially prejudiced

At this juncture, it is necessary to make brief comment on matters raised by this statutory provision.

4.6.1 Compulsory Licence

The law provides that at any time after the expiration of a period of four years after the filing of a patent application or three years after the grant of a patent, whichever period last expires, a person may apply to the court for the grant of a compulsory licence on one or more of the grounds set out in the Act[482]. The compulsory licence entitles the licencee to do any act which a patentee is entitled to do under the Act, but does not entitle the licencee to grant further licences. The court may cancel the licence on application by the patentee if the licencee fails to comply with the terms of the licence or the conditions which justified the grant have ceased to exist. Compulsory licence is a deprivation of the patentee's right of protection because whoever applies for patent expects to work out the invention. Three or four years, within which compulsory licence may apply, works hardship for the patentee. He needs more time and logistics to put his invention in the right perspective. Mobilization of resources and materials for reasonable production normally take some time. Nevertheless patent law encourages rapid development of new industries, it would be unwise to allow the inventor of patent to prevent others

[481] First Schedule of the Patent and Designs Act, Cap. P2, Laws of the Federation of Nigeria, 2004.
[482] ibid

by not making the invention available to the public where indeed the patentee may eventually fail to do.

From this provision, it is noted that the patentee does not have absolute protection over the patent. This is because the right can be taken away by the desperate individuals by applying to court for compulsory licence even when the patentee is grappling with resources and materials for commencement particularly in Nigeria where issue of electricity, insecurity and unsteady policies are the order of the day.

4.6.2 Government Use

First Schedule Part II (15) of the Act[483] provides thus:

> Notwithstanding anything in this Act, where a Minister[484] is satisfied that it is in the public interest to do so, he may authorize any persons to purchase, make, exercise or vend any patented article or invention for the service of a government agency[485] in the Federal Republic.

A patent has the same effect of exclusive of use against the Government as against an individual. This, however, is subject to very wide rights of use by federal and state governments, ministries departments, as well as voluntary hospitals, local authorities, statutory corporations and any company owned or controlled by the government. There are also provisions giving the Minister wide powers in terms of any supplier to the government and any agent of the supplier, from liability for having infringed any patent relating to the article[486] or inventions. He is also exempted from liability to make any payment to the patentee by way of royalty or otherwise.

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[483]Patent and Designs Act Cap P2, Laws of the Federation of Nigeria, 2004.

[484] 'Minister' here means a Minister of the Federal Government and includes a State Commissioner.

[485] 'Government agency' means any Federal or State Ministry or Department of Government and includes: (a) a voluntary agency hospital, that is to say, any hospital in Nigeria not being a hospital operated by the Government which is wholly or partly maintained by the Federation or a State by way of grant in aid of otherwise. (b) a local authority, that is to say, any administration, council or other authority exercising limited governmental powers in a defined area within a State, (c) a statutory corporation, that is to say, a body corporate directly established by law to which in the performance of its functions the Government or a Minister is empowered by law to give directions, and (d) any company which is owned or controlled by the Government.

[486] 'Article' includes (a) any drugs or pharmaceutical preparations, substances or materials, and (b) any plant, machinery or apparatus, whether fixed to the land or not after importation patented under the law of a country other than Nigeria.

From the above provisions the protective right of a patent is being eroded by the powers of the minister to order for the government and its agencies without infringing the patent law. To concentrate such powers on an individual, it is likely to be abused. In such a situation the essence of patent protection is taken away by this provision.

4.6.3 Minister's Power to grant Authority

Paragraph 16 of the First Schedule provision also compounded the desire of the patentee to patent his invention. It provides

> The authority of a Minister under paragraph 15 of this Schedule may be given (a) before or after the relevant patent has been granted (b) before or after the doing of the acts in respect of which the authority is given and (c) to any person whether or not he is authorized directly or indirectly by the patentee to make, use, exercise or vend the relevant articles or invention.

This provision which gives unfettered power to the minister is therefore likely to result in an abuse of the power especially where he desires not the patentee to benefit. This stipulates that minister's directive to supply to government or its agency does not amount to infringement. Paragraph 15-17 of the Patent and Design Act jointly read provides:

> (a) the government (b) any person authorized under those paragraph as above (c) any supplier of the government or of any such persons, and (d) any agent of any such supplier from liability for the infringement of any patent relating to the relevant article or invention and from liability to make any payment to the patentee by way of royalty or otherwise.

The paragraph also denies the patentee benefit of royalty to keep the patent afloat especially as was the case of **Wellcome Foundation Ltd vs. Lodeka Pharmacy Limited & Anor**[487] where the court held that though the letter of the minister was that of exemption and not authority but went ahead to give judgment to the defendant for supply of articles for the government use. The Government under this type of situation like compulsory acquisition of land for public interest yet pays compensation to the owners. This principles should be the case here, that is, the patentee be given royalty for his invention. But in the above case both provision and

[487] (1970)NLR 536

the judgment was not favourable for patentee rather a denial of benefit. Patentee needs money or resources to pay for yearly renewal and enjoying his creativity but with these provisions and case law he is handicapped.

4.6.4 Supplies in Time of Emergences

Paragraph 20 of the Schedule conferred on the minister with powers to deals with the situation without infringing the right of the patentee.

The paragraph provides:

> During any period of emergency the powers exercisable in relation to a patented article or invention on the authority of a Minister under paragraph 15 of this Schedule shall include power to purchase, make, use, exercise and vend the article or invention for any purpose which appear to the Minister necessary or expedient.
> a) for the efficient prosecution of any war in which the Federal Republic may be engaged, or
> b) for the maintenance of supplies and services essential to the life of the community, or
> c) for securing a sufficiency of supplies and services essential to the well-being of the community, or
> d) for promoting the productivity of industry, commerce and agriculture, or
> c) for fostering and directing exports and reducing imports (or any class or classes of imports) from all or any countries and for redressing the balance of trade, or
> f) generally for ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community.

By the provisions above, the patentee's right has been watered-down through exemptions and exceptions. Patent system fully granted will contain nothing that fetters a patentee's power to act as a monopolist if the market allows it. He will be able to hold production of his invention to the level of maximum profit. But many countries have felt the urge to qualify this full potential in the name of some other policy objective, such as local working of the invention or the satisfaction of consumer demand. This brings about compulsory licence, which will prevent the patentee from acting as sole producer.

The patentee will be obliged instead to face direct completion subject only to a royalty or other fee on the licensee's sales. It is most intense where a clear national need arises, such as defence or health care. For example, in the awake of attack of

New York by the Al-Qaeda there were cases of anthrax being sent through the post. The anti-anthrax drug was patented in many countries and the United States, the US had to apply the principle of compulsory licence[488]. It should be noted that even the system of compulsory licence proved cumbersome, since the terms of the licence had still to be settled before the licensee could begin to act, and that could prove slow and expensive.

Article 31 of the Trade Related Aspects of Intellectual Property System (TRIPS) Agreement subjects the granting of compulsory licences (or any other use without the patentee's authorization, including use by governments and their collaborators) to a plan of conditions. That each has to be considered individually and must be preceded by attempts at voluntary negotiation. The scope and duration of the licence must be confined to its purpose and must be open to review when circumstances change. The licence must be non-exclusive, non-assignable and predominantly for supply to the domestic market. Adequate remuneration must be provided for. Any decision, whether about authorization or remuneration, must be open to judicial review. The Nigerian Patents and Designs Act differs from TRIPS Agreement, in that it does not provide for remuneration or royalty, duration or even subject of judicial review for the compulsory licence[489]. On the whole, it is be safe to say that patent rights are eroded by these exceptions to the protective right claimed to be set out for the encouragement of inventors or designers.

4.7 INFRINGEMENT OF PATENTS AND DESIGNS

A patent confers upon the patentee the right to preclude any other person from doing any of the acts which may relate to products or process. So, infringement could either be through products or process of manufacturing. Anyone who makes, uses, offers to sell, sells, or imports a patented invention without the permission of the patent holder is guilty of infringement. Patent infringement does not have limit, therefore, it could be at international, regional, country, organization, companies and individual levels. A party can be guilty of infringement even if his or her device is

[488] Cornish et al Op. cit p.295.
[489] Paragraphs 17 and 19 of the First Schedule totally exempt the government or its agencies from liability of infringement.

not identical to the item described in the patent. Section 25(1) of the Act[490] provides that:

> The rights of a patentee or design owner are infringed if another person, without the licence of the patentee or design owner, does or causes the doing of any act which that other person is precluded from doing under sections 6 or 9 of this Act as the case may be.
> 25(2) An infringement of the rights of a patentee or design owner shall be actionable at the suit of the patentee or design owner in question, and in any action for such an infringement all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as is a available in any corresponding proceedings in respect of the infringement of other proprietary rights[491].

This is because the patentee precludes any other person from making, importing, selling, using the product or stocking the product for the purpose of sale or use.

4.7.1 Infringement through Process

Where the patent has been granted in respect of a process, the patentee can also prevent any other person from the act of applying the process, or doing, in respect of a product obtained directly by means of the process any of the acts mentioned in the Act.

It should be noted that a person shall infringe only if his acts relate to commercial or industrial activities[492]. In the case of **Comandclem Nigeria Ltd vs. Twenty-two Infringing Companies**[493], the level of organized infringement of patents in Nigeria by process was brought to bear.

Similarly, in case of **Arewa Textiles Plc and Others vs. Finetex Limited**[494] the respondent claimed an infringement by the appellants in respect of "method and apparatus" of producing textile materials. The process was registered under the Patent Act. The court granted the claims of the respondent and awarded damages against the appellants.

4.7.2 Infringement through Products

[490] Patents and Design Act, Cap P2, Laws of the Federation of Nigeria, 2004.
[491] Section 25(2) Patents and Designs Act ibid
[492] Section 6(3) Patents and Designs Act, Cap P.2 Laws of the Federation of Nigeria, 2004.
[493] Suit No. PHC/CA/CS/92/2000 and SC/69/2012.
[494] (2003) 7 N.W.L.R. 322

Again, the case of **Alcatel-Lucent vs. Microsoft Corporation**[495] resulted in what was believed to be the largest damages ever awarded for patent infringement. A United States jury found that Microsoft had violated patents held by Alcatel-Lucent for technology relating to the Music Player (MP3) music format and awarded the later company $1.52 billion in damages.

Under Order 17 rule (1) (a) of the Federal High Court (Civil Procedure) Rules 2000, an equivalent of the *Mareva* injunction can be made. The rule provides that:

> if the defendant in any suit with intent to obstruct or delay the execution of any decree passed against him is about to dispose of his property, or any part thereof, or to remove it from the court's jurisdiction, then the court may grant an order for the property's interim attachment.

At the international level we may refer to the European Union Directive of 29th April 2004 on the Enforcement of Intellectual Property Rights. The Directive requires all Members States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy. An example of a case where the provisions of the Directive have been applied is the 2007 case of **Princo Corporation Ltd vs. Koninklije Philips Electronics**[496] before the Court of Genoa, Italy. The Dutch Company Philips, owner of patents on CD-R technology, requested an order of precautionary seizure over all Princo's moveable and immovable property, including its bank accounts, with a view to ensuring the recovery of damages to be awarded at the end of the liability proceedings. The court upheld the plaintiff's plea.

Patent is regarded as a catalyst for technological and socio-economic development. Therefore once granted the patent rights are activated and, thus, the inventor is free to exercise those rights as he may choose. He may if he so chooses, decide to assign his proprietary rights over the invention to any person he wishes in any geographical location. He may also upon consideration or payment, grant a patent licence to another party on terms agreeable to both whether by oral, written description or by public use. That grant qualifies the patent holder to preclude any other person from doing any of the acts specified in sections 6 and 9 of the Patent

[495] (2007) US 456
[496] (2007)F.S.R 204

and Design Act. The issue of enforcement is very vital after the grant has been issued. The patent holder whose patent is infringed initiates action against the infringer at the Federal High Court to recover damages, or obtain an injunction. It should be noted that a person shall infringe only if his acts relate to commercial or industrial activities[497]. In a majority of situation, a polite letter giving notice of the existence of the patent is sent to the infringer, stating the implication that a lawsuit might follow. This may suppress the infringement or a conclusion of a successful licensing arrangement. There are, however, cases in which no mutually advantageous negotiated solution can be found, even after lengthy attempts.

4.8 ENFORCEMENT OF PATENT RIGHTS IN NIGERIA

Patent is a legal document granted by the government giving an inventor the right to exclude others from making, using, selling, offering to sell, importing or exporting an invention for a specified number of years, for example, in Nigeria it is 20 years from the date the application is first filed[498]. This section examines the enforcement mechanisms for patent law in Nigeria to wit the sufficiency and efficacy thereof.

4.8.1 LEGAL PROVISIONS

The Patents and Design Act (PDA) of 1971[499], is the substantive law governing affairs of patents in Nigeria while the Patents Rules[500] regulates the procedures adopted at the Patent Registry[501]. The Rules oversee the payment of fees, the use of forms and other documents, the procedure for application, procedure for examination, registration and publication of patent grants, the use of evidence and the judicious exercise of the Registrar's discretionary powers among others. Also Patents and Designs (Convention Countries) Order 1971 provides a list of 76 countries declared to be convention countries for the purpose of claiming foreign

[497] Section 6(3), Patent and Design Act op cit.
[498] Section 7, Patent and Design Act, Cap P2, Laws of the Federation of Nigeria 2004. Schechter, R.E. Microsoft Encarta 1993-2007 Microsoft Corporation (2008), p.1.
[499] Cap.P2, Laws of the Federation of Nigeria, 2004. PDA serves the dual function of providing for the procedure for the administration and registration of both Patents and Industrial Designs in Nigeria.
[500] These are Rules enacted by the Minister of Trade and Investment pursuant to section 30 of the Patents and Designs Act to serve as the administrative and procedural framework regulating the registration of Patents in Nigeria.
[501] Industrial Property Offices, otherwise called "Trademarks, Patent and Designs Registry" is located at Commercial Law Department of Federal Ministry of Trade and Investment, Abuja, Nigeria.

priority in the registration of patents and industrial designs under the PDA[502]. Sections 1-11 of the PDA provide the general legal framework governing the registration and administration of Patents in Nigeria, from the requirements for patentability to compulsory license. Section 30 of the PDA empowers the Minister for Trade and Investment to make Rules for the administrative and procedural regulations necessary to facilitate the registration of Patents under the Act.

Under section 26 of the Patent and Designs Act, the jurisdiction to hear and dispose of legal proceedings under the Act is vested in the Federal High Court and subject to this Act, the provisions of the Trade Marks Act[503] applicable to legal proceedings under the Act shall apply with necessary modifications to legal proceedings under the PDA. Subsection 2 of PDA further provides "the court hearing proceedings under this Act may sit with and be advised by two assessors having expert knowledge of matters of a technological or economic nature". The Chief Judge of the Federal High Court may make rules of court for the regulation of legal proceedings under this Act if he thinks it necessary to do so[504]. The Act however does not provide for administration and enforcement of patent and design in the spirit as captured in section 34 of Copyright law.

4.8.2 The Trademark/Patent Tribunal

The Registrar of Trademarks sits as a Tribunal to adjudicate over the disputes and applications arising from the operation of the Trademarks Act. The Registrar has the power to hear and decide on contentious and non-contentious applications including applications arising from Trademark Opposition proceedings. The Registrar may make, expunge or vary an entry into the trademark register at the application of an interested person. The Tribunal also adjudicates on appeals against the refusal of trademark application by Trademark examiners. The Trademarks Act also permits an applicant to apply to the Federal High Court to exercise the powers of the Trademark Tribunal.

4.8.3 Standard Organization of Nigeria (SON)

[502] See Schedule 1 (section 1) Subsidiary Legislation of PDA, 2004.
[503] Cap T13, Laws of the Federation of Nigeria, 2004.
[504] Section 26(3) of Patent and Design Act, op cit.

The Organization[505] came into being through Decree No. 56 of 1971 as an integral part of the Federal Ministry of Industries. SON is the sole statutory body that is vested with the responsibility of standardizing and regulating the quality of all products in Nigeria. The mandate of the Organization includes preparation of standards relating to products, measurements, materials, processes and services and their promotion at national, regional and international levels, certification of products, assistance in the production of quality goods and services, improvement of measurement accuracies and circulation of information relating to standards.

The Organization in a bid to maintain standards and product quality in line with its mandate in section 5 has devised a certification procedure whereby companies that meet the minimum standards of quality set are awarded gold, silver or ordinary certificates in respect of brand products depending on the number of years the award has been won consistently. The Gold certificate is for firms that have won the award for ten or more years, the Silver is for five to nine years and the Ordinary below five years[506]. The award, called the Nigerian Industrial Standard's (NIS) award, permits, for a fee, a firm to use the "NIS" mark on the award winning product of the firm in question[507].

In order to consolidate on its achievement in the last two years, the organization has reiterated its commitment towards ensuring that the Agreement which is initiated in respect of trade relations between the government of China and Nigeria is signed is honoured. Also in 2010, the organization endeavoured to see that there is improved implementation of its Conformity Assessment Programme (SONCAP). As a step further, SON is set to ensure greater implementation of the Manufacturers Conformity Assessment Programme (MANCAP). It has reassured all brands owners and stakeholders that it still maintains its zero tolerance and shall prosecute perpetrators of sub-standards goods, particularly in its importation, manufacture, distribution and sales. Protection of patent rights is formed by such a development.

4.8.4 Consumer Protection Council (CPC)

[505] Standards Organization of Nigeria Act, Cap S9, Laws of the Federation of Nigeria, 2004.
[506] Kanyip, B.B. (2005) Consumer Protection in Nigeria, Law, Theory and Policy Rekon Books Ltd, p.304.
[507] ibid

Consumer Protection Council is another regulatory agency responsible for the standardization of products, elimination or removing hazardous products and causing offenders to replace such good with safer and more appropriate alternatives[508]. It was established in 1992 with the current status as Consumer Protection Council[509]

From the functions and powers of CPC it can be discerned that it has mandate for reducing fake or counterfeits products from circulation which patent law too seeks to achieve, that is, fight against counterfeiters. Reduction of infringement of products is an advantage to inventor. In the discharge of these functions, the CPC establishes State Committees charged with the duty of receiving and examining complaints of consumers, negotiation and, where appropriate, recommend for compensation. Through these Committees the activities of counterfeiters are monitored at the State and national level thus reducing infringement on patent rights. While the standardization functions of the SON suggests and supports a preventative model that of the CPC is redressal[510].

The regulatory agency does the role of providing for consumers' rights in the light of the Act. The proper mix between these two models, namely SON and CPC goes a long way in ensuring the effectiveness of the consumer protection regime. The desire to make meaningful impact on individual consumers in terms of personal satisfaction accounts for the allowance of compensation orders to redress or remedy personal losses, injury or damage even where the initiation of action is the prosecution of an offence under the CPC Act[511]. Similarly, Section 10 of the CPC[512], where it appears to the Council or the State Committee that a person carrying on a business has in the course of that business persisted in a course of conduct which is detrimental to the interest of consumers, that is, counterfeit or unauthorised imitation of patented products, the Council or the State Committee shall use its best endeavour to obtain from him a satisfactory written assurance that he will refrain from a continuation of that course of conduct. This is synonymous

[508] Section 2(b), Consumer Protection Council Act, Cap C25, Laws of the Federation of Nigeria
[509] Cap C25, Laws of the Federation of Nigeria 2004.

[510] Kanyip, B.B. Op cit. p.313.
[511] Section 13(1), Consumer Protection Council Act, Cap C25, Laws of the Federation of Nigeria, 2004.
[512] Consumer Protection Council Act,, ibid.

with the spirit of patent law that demand, that stoppage of infringement would first be communicated to the infringers.

4.8.5 National Agency for Food and Drug Administration and Control (NAFDAC)

The National Agency for Food and Drug Administration and Control (NAFDAC) is Nigeria's sole body that regulates and controls the manufacture, importation, exportation, advertisement, distribution, sale and use of food, drugs, cosmetics, medical devices, chemicals and locally produced packaged water. It is a parastatal of the Federal Ministry of Health and came into existence on 1st January, 1994. The Agency is restricted to only "regulated products" meaning "food, drugs, cosmetics, medical devices, detergents, bottled water and chemicals"[513]

The functions of the NAFDAC are examined, hereinafter, in order to assess its contribution to the fight of the menace of fake, counterfeit and imitated "regulated products". The Agency is mandated to regulate and control these regulated products to avoid fake, counterfeit or imitated of such. This function brings about relevant quality assurance system including their production process to be considered. The Agency also conducts appropriate tests in order to ensure compliance with standard specifications designated and approved in respect of the control or the effective control of the quality of food, drugs, cosmetics, medical devices, bottled water, chemicals and their raw material as well as their production processes in factories and other establishment. The aim of patent law is protection of the inventor from counterfeits, imitation or fake products. An appraisal of the functions of the agency indicates that its objective is eliminating fake, counterfeit products for the healthy development of economy and individuals. The Agency does this through public enlightenment, inspection and enforcement activities.

There has been a phenomenal increase in seizures and destruction exercises of fake drugs carried out by the agency. So far, the agency has carried out a total of 60 destruction exercises valued at over N4 billion ($28 million) and has placed about

[513] Section 30, National Agency for Food and Drug Administration and Control Act, Cap. N1, Law of the Federation of Nigeria, 2004

3,760 metric tones of regulated products on "hold"[514]. In the Port Harcourt zone alone, NAFDAC has put on hold 229 containers of regulated products.[515]

Other measures taken by the Agency include arresting and prosecuting counterfeiters, that is, those that peddle fake pharmaceutical products. Sometimes, the Agency outrightly raids and seizes counterfeited goods and publicly burns them. Millions of dollars of counterfeit pharmaceutical and personal care products are reported to move through various authorized and unauthorized channels[516]. These channels make it possible for counterfeits, expired, repackaged and relabelled products to be shipped internationally[517].

It is clear that there the activities of the Agency go a long way in reducing the incidence of patent infringement through faking, counterfeiting and imitation in Nigeria. There are however, many loopholes for the counterfeiters to exploit and to continue their nefarious activities especially pharmaceuticals business. That accounts for the increase in fake products like food, drugs, medical devices, detergent, and cosmetics. Thus fake or sub-standard products continue circulating in our markets not because there are no regulations but individual or corporate disobedience to these regulations multiplied the incidence. Finally, there is also overlapping or duplication of same functions or powers within these institutional frameworks, for example, SON have power to standardize products, NAFDAC is performing same functions, likewise CPC. These duplications enables the regulatory agencies abrogate their functions either consciously or otherwise.

4.9 PROTECTION OF INDUSTRIAL DESIGN

The importance of new ideas, inventions, researches, designs and innovation can never be overemphasized. In any economy be it developing or developed, for a new idea to flourish and have a positive impact on the populace, it needs some quantum of protection. To ensure this protection under the law, the creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them. Industrial designs just like any other forms of arts, are fundamentally an expressions

[514] www.nigerianafdac.org. accessed on 12th August, 2013 .
[515] ibid
[516] Ladan, M.T. (2007)Materials and Cases on Public International Law , ABU Press Ltd p.810.
[517] ibid

of style or form that is distinct from a known or already existing works of art. Industrial designs consist of shape, configuration, and pattern or ornament that give the manufactured articles an eye appeal. It must be noted, however, that while the subject matter of industrial designs is relatively straight forward, the legal issues that come into play in protecting new designs are among the most complex in the field of intellectual property in Nigeria. In this section of the dissertation, protection of the industrial design is examined.

Globally, industrial designs are part and parcel of intellectual property[518]. The history of registration of design began with a scheme which took shape in the late eighteenth century. As the law developed, the right of the owner of the registered design was treated as good against the entire world. The design therefore had to be shown to be novel at the priority date of the application. Under the TRIPS[519] Agreement, Industrial Designs must be protected for at least 10 years. The application was also subject to an examination before registration. For example, Patent and Design Act[520] provides:

> The registration of an industrial design confers upon the registered owner the right to preclude any other person from doing any of the following acts: (a) reproducing the design in the manufacture of a product, (b) importing, selling or utilizing for commercial purposes a product reproducing the design, and (c) holding such a product for the purpose of selling it or of utilizing it for commercial purposes.

In other words, owners of protected designs must be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design. The Act[521] further provides that the production is deemed to be unlawful even if it differs only in essential way from the original design. The right conferred above extends only to acts for commercial or industrial purposes. This right shall however not extend to acts done in respect of a product incorporating a registered industrial design after the product as been lawfully sold in Nigeria[522].

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[518] Article 2(viii) of the World Intellectual Property Organization wherein Industrial Designs is categorized as a component of intellectual property.
[519] Also known as Uruguay Round Agreement. See also http//www.wto.wto.org/English docs, e/legal e/37 trips 04 ehtm4/. Accessed on 12th August, 2012.
[520] Section 19(a)(c), Patent and Design Act, Cap P2, Laws of the Federation of Nigeria, 2004.
[521] Section 19(2), ibid
[522] Section 19(3)(a)(b), ibid

4.10 RIGHTS OF A PROPRIETOR OF AN INDUSTRIAL DESIGN

The registration of an industrial design confers upon the proprietor the right to preclude any other person from doing any of the following acts[523]:

a) reproducing the design in the manufacture of a product
b) importing, selling or utilizing for commercial purposes a product reproducing the design, and
c) holding such a product for the purpose of selling it or of utilizing it for commercial purpose.

The Act further provides that the reproduction is deemed to be unlawful even if it differs only in minor or inessential ways from the design[524]. The reproduction will also be deemed to be unlawful even if, it concerns a type of product different from the type with which the design is concerned[525]. The right conferred above extends only to acts done for commercial or industrial purposes[526]. This right shall, however, not extend to acts done in respect of a product incorporating a registered industrial design after the product has been lawfully sold in Nigeria[527].

4.11 Exceptions to the Exclusive Rights to Use Industrial Design

The combined effect of section 13(3), 19(3), and 19(2)(b) of the Patent and Designs Act shows that the right of exclusiveness conferred on by the Act is taken away by section 19(2) of the same Act, where the product has been lawfully sold in Nigeria before the application for registration.

In the case of **Peter E. Venture (Nigeria) Ltd. vs. Gazassonner Industrial Limited & Anor**[528]**,** the appellant purchased from a company in Hong Kong, "Mould and Franchise" for the manufacture and sale in Nigeria Lamp burners 275. Thus became the first manufacturer in Nigeria. After several years of test runs, the appellant took the requisite step to protect its industrial property by registering the trademark and design, and was issued the Certificate of Registration of Design Nos. 5063 and 5064 in June, 1994. Based on an alleged infringement of the said design, the appellant sued the respondents at the Federal High Court, claiming among other relieves, an order of interlocutory injunction to restrain the respondents from

[523] Section 19(a)-(c) ibid
[524] Section 19(2), ibid
[525] ibid
[526] Section 19(2)(a), ibid
[527] Section 19(2)(b), ibid
[528] (1998)6 N.W.L.R. 619.

infringing their registered designs pending the hearing or determination of the suit. The trial judge dismissed the prayer for an interlocutory injunction on the ground that the balance of convenience did not weigh in favour of the appellant. Dissatisfied, the appellant appealed to the Court of Appeal, which in determining the appeal construed section 13 and 19(2)(a) and (b) of the Patent and Design Act, 1970. Unanimously, dismissing the appeal, Ubeazuonu JCA said inter alia[529]:

> It is clear from the averments in the aforementioned paragraphs of the reply that from 1987 the appellants had been importing and selling to the public, 275 lamps with burner designs, which design is subsequently registered in 1994 under the Certificate of Registration of Design No. S.5603 and 5604 dated 13th June, 1994. In the light of its pleadings, the appellant is deprived of the legal right of exclusiveness to the 275 lamp burners design conferred on it by section 19(1), as the result of the combined effect of section 19(2)(b) and section 13(3) of the Patens and Design Act, 1971.

4.12 INFRINGEMENT OF INDUSTRIAL DESIGN

The rights of a design owner or patentee is infringed if another person without the authority or license of the proprietor of the design, does or cause the doing of an act which the other person is precluded from doing under the Act[530]. An infringement of the right of the proprietor of a design is actionable at the suit of the proprietor of the design and in any action for such infringement, all such relieves by way of damages, injunction, accounts or otherwise will be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of their proprietary rights[531]. For example, in the case of **Sumal Foods and Confectionary Limited vs. Wholesome Processing Co. Ltd**[532], the plaintiffs who were manufacturer of the chewing gum marketed under the trademark "TWIST" alleged that the defendants also later began to produce a chewing gum, using similar label as that of plaintiff and called it "TOOTSIE, thus infringing their registered design. The plaintiffs also alleged that when they called the attention of the defendants to the infringement, they changed their label but when they could not make a good sale under the new label, they reverted to the same offending label, hence this action.

[529] ibid at 633.
[530] Section 26(2) of Patent and Design Act
[531] Section 25(1), ibid, See also Babafemi, F.O. Op cit. at p.447.
[532] (1999) F.H.C.L 143

The defendants however, totally denied the said infringement of the plaintiffs' design. The Court upheld the plaintiffs claims of infringement against the defendants.

Similarly, in the case of **Sarg Aims Aluminum Products Limited vs. Stanley Akagha & Anor**[533] the issue for determination was infringement. The plaintiffs claimed that the defendants had breached their exclusive right to the production, manufacture and marketing of the products carried under the certificate of registration of design issued to them. The Court upheld the plaintiffs' claims against the defendants for copying the designs from their own almanacs into the defendants' almanacs.

4.13 CHALLENGES OF PATENT ENFORCEMENT

There are various challenges of the enforcement of patent law in Nigeria such as discussed below:

4.13.1 The Impact of Colonial Administration Policy

The colonial and historical past of the country and the introduction of patent law were not based on the justifications for patent law, but for the beneficial interest of the colonial masters which was the sustenance of the raw material needs of the industrial West[534]. This lopsided objective heralded Nigerian independence, leading to inconsistency in policy articulation, formulation and implementation, and remains a factor that continues to affect the nation's economy due to non industrialization policy. The impact of colonization on the development of patent law continues to influence patent and design protection in Nigeria. This flows from the mandatory provision of the Paris Convention which allowed the patent laws of the colonial masters to regulate the issue of patents in the various colonies.

This consolidated the imposition of patent law on the colonies and enhanced the beneficial interest of the industrial nations to the detriment of the colonies including Nigeria. In this respect, Nigeria was pressured to adopt a patent law system at a time when there was a total absence of invention or industrial activity. In effect, the patent law system failed to spur inventions, innovations, research and

[533] (1994) F.H.C.L 188. See also the case of **Controlled Plastics Limited vs. Black Horse Plastics Industries Limited** (1990) F.H.C.L 180

[534] Umahi, T.O. (2011) Access to Medicines: The Colonial Impacts on Patent Law in Nigeria, Benson Idahosa University Law Journal, Benin City Vol.1 No.1 September, p.1.

development and the Nigerian societal growth remained backward. This resulted in inordinate policy articulation, formulation and implementation and exacerbates backward economic policy in a country endowed with enormous human and natural resources.

The English patent laws was part of the standardized approach (or a template approach) of extension of administration to the colonies. This standardized approach for patent law can be criticized both as unnecessary as there were no inventions or industrial activities in Nigeria at the time of this extension and also because these laws were carefully crafted to favour inventors and promote their inventions. By so favouring inventors, they favoured the industrialized Britain not Nigeria, a nation still focusing on peasant farming based on the use of rudimentary tools. Moreover, even at Nigeria independence, the imposition of foreign laws removed from the country the status of a sovereign and independent state which should "order its international and domestic affairs".

This manifest as tension within the polity in the case of **Rhone Poulence S.A. and May & Baker Ltd. vs. Lodeka Pharmacy Ltd**[535] resulting in the enactment of the Patents Right (Limitations) Decree in 1968. This enactment came when there was no national technology planning in place. However, Nigeria acceded to Amendment of the Paris Convention in 1963. The absence of national planning agenda in the enactment of the law could be seen from the low level of implementation it has enjoyed over 40 years of operation.

4.13.2 Some Deficiencies in the Enactment

The ambiguity in the wordings of Section 14(1) of Patent and Industrial Design which gives ownership of industrial design on any person... "who whether or not is the true creator, is first to file, or validly to claim a foreign priority for an application for the design" is a barrier to protection of industrial design. The wordings of this section seems to be too open ended and a counterfeiter who is smart or fast can capitalize on this provision by being the first to file. Another factor is the criminal attitude of some Nigerians which also bars protection of industrial designers and their works in Nigeria. Many strategies and *modus operandi* have been

[535] (1965) Lagos Law Report (LLR),9

employed by the copiers in a bid to duplicate or produce another person's work illegally.

Further, challenge for the protection of Patent and Design is lack of formal examination of patent granted under the Patent and Designs Act which makes no requirement for substantive examination[536]. Since patents are granted without guarantee of their validity, they may be set aside for invalidity at any time. Substantive examination requires that the invention sought to be patented is measured against the state of the art, that is, the current state of knowledge as is existing in the field concerned. It involves using current technology to access the technology being patented. Successful patenting requires that a firm understands the existing state of the art technology well enough to improve upon it, albeit perhaps in incremental ways[537]. Formal examination does not foster the challenge involved in understanding the existing state of the art by patentees.

Substantive examination lies at the heart of important patent systems in the world. Unlike in Nigeria where the Registrar who is required to conduct the formal examination does not have the requisite knowledge of the prior art involved[538], substantive examination is conducted by trained examiners with requisite knowledge of the prior art who can competently determine the issues of validity of the invention being sought to be patented.

4.13.3 Neglect of the Operational System for Patents and Designs

In addition to the issues is the total neglect of the operations of the patent system. Patent ought to play a vital role in the development of the economy yet, the Patent, Design Trademark Office is a department within the Ministry of Commerce. The records in the office are manually kept, making it almost impossible to search and retrieve such records from the Registry. Furthermore, the Ministry of Commerce has a Library that is supposed to service the Registry. The state of the Library is indeed very unfortunate and is virtually disused. The Registry up till now does not have a useable website. Moreover, it is unlikely that patent information has

[536] Section 4(1), Patent and Design Act, Cap. P2, Laws of the Federation of Nigeria, 2004.
[537] Cornish W and Llewellyn D, Op cit, p.168.
[538] Babafemi, F.O. Intellectual Property, OP cit. p.378.

ever been published. The near total neglect of the Patent, Designs and Trademark Registry is a reflection of esteem in which the patent system is held.

Another challenge is in the protection of industrial design is the absence of a distinct commission or agency that will be saddled with the responsibility of ensuring the protection of industrial design materials in Nigeria. At present the Nigerian Copyright Commission seems to be the only authority in charge of both copyright and industrial designs matters even though the two are not the same.

4.13.4 The Missing Link in National Policy on Science, Technology and Innovation

The Federal Ministry of Science and Technology recently published the National Policy on Science, Technology and Innovation approved by the Federal Executive Council[539]. However, there are many committees and bureaucratic structures at all levels capable of slow down business flow as witnessed in privatization and commercialization programmes. This is because Nigeria bureaucratic culture is at variances with flow of innovation. Secondly, there is no mentioned of restructuring of the existing legal framework dealing with intellectual property rights generally or patent in particular. Intellectual Property Commission should be preferable to National Council for Science, Technology and Innovation.

Other fresh matters like software patents, biotechnology, nanotechnology, and training of intellectual property right practitioners such as examiners, attorneys, judges and even structures that are required for the running of modern IPR system. These structures take precedence over the myriad of bureaucratic structures that the policy seeks to establish.

4.13.5 Other Prevailing Situations

Other challenges to patent, trademarks and industrial design are poverty, power generation systems (generation, transmission, distribution etc), unemployment, dominance of rural life, weak Physical infrastructure, weak Socio-economic system, weak Education system, insecurity and corruption.

From the above, it can be gleaned that the legal schemes to protect industrial designs under Nigerian law is typically premised on both, copyright and patent concepts. The purpose of innovation/design, that is, to improve the living condition

[539]See http://www.fmst.govs.ng/progarmme/publication. Accessed on 20th April, 2013

of humanity is being impaired due to lack of adequate enforcement mechanism on the part of government and lack of knowledge on the provision of the law on the part of the designer.

Since the dawn of the industrial revolution, the use of patents has been one of the veritable tools harnessed by innovators in various fields for the protection of their inventions, particularly inventions that are considered to have commercial value and appeal. Patents afford protection for a limited time to the inventor of a product to the exclusion of others with the few exceptions. Intellectual property rights promote creativity and innovation, expedite knowledge and technology transfer, reward the inventor for inventiveness and protect their interests.

This is because no one is likely to invest huge sums of money for research and development such as software, drugs or transfer technologies in the absence of adequate protection of intellectual property rights. Such protection encourages technology transfers by safeguarding the resources of investors. It is a form of recognition that ensures equitable sharing of commercialized benefits. Scientists are assured that their works can be disseminated without fear of unauthorized counterfeiting, increase access to and enhances the enjoyment of culture and knowledge. It spells out obligations of all stakeholders in intellectual property generation and commercial utilization and enhance the quality of human life.

CHAPTER FIVE

AN APPRAISAL OF LEGAL FRAMEWORK FOR THE PROTECTION OF TRADEMARK RIGHTS IN NIGERIA

5.1 INTRODUCTION

Trademark counterfeiting and its devastating effects raise alot of concern for the lapses in an economy because of a strong desire of unscrupulous individuals for quick wealth which makes infringers to cut corners in order to be rich. In Nigeria some major places and markets where counterfeits are generally found include Onitsha market in Anambra State, Aba market in Abia State, Alaba market Lagos State, Ibrahim Badamasi Babangida market in Minna town, Abubakar Rimi market in Sabongari Kano town which are allegedly dominated by counterfeiters, creating barriers of entry for the producers of the genuine products[540]. The situation is so bad that trademark counterfeiting is fast becoming a full time vocation or profession for some individuals, and they even have apprentices to take over from them. The demand for general legal protection against unfair imitation of marks and names is a product of industrial production which the manufacturers were identified with. Thus, distinguishing products from others by trademarks became very important. Most advertisements teach the consumers to buy by product mark or manufacturing, house name and keep reiterating the message in the hope of persuading buyers not to deviate to rivals.

As Nigeria advances industrially, there is indeed a great need for the protection of trademarks rights. However, this is met with a lot of challenges for enforcement. In this country, there are many fake products with marks imitating the trademarks and names of the genuine manufacturers being smuggled into the country from some foreign countries. Apart from these fake products which are imported, many other counterfeit products which are produced locally within the country also carry marks which imitate often times the trademarks and names of the genuine Nigerian and non-Nigerian manufacturers. This chapter, therefore, is to appraise the legal and institutional frameworks for the protection of trademarks in Nigeria.

[540] Waziri, K.M. (2009) The Law of Trademark and the Economic Implication of Counterfeiting in Nigeria, Kogi State University Anyigba, Bi-Annual Journal of Public Law KUSBJPL Vol.2, p.288.

5.2 MEANING OF TRADEMARK

Intellectual property rights are those legal rights associated with creative effort or commercial reputation and goodwill. Trademark is an aspect of intellectual property which deals with the protection of goodwill attached to marketing products. Trademarks are diverse and familiar features in both industrial and commercial markets. It has long been used by manufactures and traders to identify their goods and distinguish them from goods made or sold by others.

Trademark is also defined as "a word, logo, phrase, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others"[541]. World Intellectual Property Organization (WIPO) defines it as follows: "a trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors"[542].

According to section 67 of the Act[543] 'trademark' is defined as follows:

> Trademark means, except in relation to a certification trademark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of this Act.

Similarly, the Supreme Court of Nigeria in the case of **Ferodo Limited & Anor vs. Ibeto Industries Limited**[544] defined it as:

> Trademark is a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate, a connection in the course of trade between the goods and some persons having the right either as a proprietor or a registered user to use the mark. A trade mark can also be defined as a distinctive picture which would indicate to a purchaser of an article bearing it, the means of getting the same article in future, by getting an article with the same mark on it.

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[541] World Intellectual Property Organization, Introduction to Intellectual Property Theory and Practice, Kluver Law International Ltd, (1998), p.184.
[542] Ibid,
[543] Trademark Act, Cap T13, Laws of the Federation of Nigeria, 2004
[544] (2004)5 NWLR Part 866 at 235.

Also in the **SmithKline Beecham Plc vs. Farmex Limited**[545], Court of Appeal defined trademark as:

> A Trademark or Trade name is a name protected by law (Trade Marks Act). It could a name, word, design or symbol used by a manufacturer to identify his product and also to distinguish it from other products made by other manufacturers and sellers.

In both the statutory and judicial definitions the words "used or proposed to be used" and "a connection in the course of trade" was included. Firstly, "used or proposed to be used" in this context it means to clearly indicate that the actual use of a mark is not required before the mark can be accepted for registration. Indeed, as most traders are normally anxious, before adopting a mark as a trade mark to ascertain whether it will be registrable, they will certainly find this provision useful[546]. Trademark according to the researcher is 'a feature that differentiates a product from others by use of symbols or signs to enable the consumer makes a choice'.

From the above definitions, in order to individualize a product for the consumer, trademark must indicate the differences. However, this does not mean that it must inform the consumer of the actual person who has manufactured the product or even the one who is trading in it. Thus, it is sufficient that the consumer can trust in a given enterprise, not necessarily known to him, being responsible for the product sold under a particular trademark. The distinguishing function and the origin of a trademark cannot be separated, as it goes hand-in-hand. Therefore, for practical purpose, one can simply rely on the distinguishing function of trademark thereby defining trademark as a 'sign' which serves to distinguish the goods of one enterprise from those of other enterprises[547].

5.3 TRADEMARK IN PRE-COLONIAL NIGERIA

In pre-colonial Nigeria, marks[548] were used to identify agricultural implements such as hoes, cutlass, sickle and local industrial products, such woven

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[545] (2010)1 NWLR 285

[546] Babafemi, F.O.B. (2007) Intellectual Property: The Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria, First Edition, Justinian Books Limited p.180.

[547] Philips and Alison Firth (fourth edition) Butterworth's, 2001 p.1

[548] In that period proprietor do not register their trademark as practiced today but recognized by the consistency of the products. Also issue of infringement did not arise but rather the proprietor would be proud of people imitating his products.

cloths of particular manufacturers in certain parts of the country distinguished by the signs woven on them[549]. For instance, a Ghanaian writer confirms that Kano cloth from Nigeria could and still can be identified by its deep blue or indigo characteristic. Many works of art in brass, bronze, gold, clay or wood had characteristics which were used to identify their origin, that is, the part of the country where they were made. Examples are works of art from Nok that often had two holes made in the head, while those from Ife had two or more heads at the top of the works and both were naturalistic in form. In the south-eastern part of Nigeria, stone carvings of antiquity exist with the characteristic of being carved in low relief with human features and a protuberant navel. Pottery and other handicraft from producing areas of the country could also be identified and distinguished by various characteristics. Cotton woven in different areas could also be identified and distinguished by the characteristics features[550]. In those times there was no registration system, and it is doubtful whether there was any remedy for infringement of rights. What the marks did was to denote the sources of products and identify their manufacturers. They served as goodwill of the producers.

The Trade Marks Act 1965[551] is the current legislation regulating the registration and maintenance of trade marks in Nigeria. It repealed and replaced the Trade Marks Registration Ordinance 1914[552]. It was based on the United Kingdom's Trade marks Act, 1938, which differs only in terms of section numbering and the omission of certain administrative sections in the Act which are not applicable in Nigeria. Registration of service marks is not allowed under the Trademark Act 1965 (2004 edition). Section 43 allows the registration of certification marks, but there is no statutory protection for, or registration of collective marks. Neither does the Act recognize packaging and presentation of goods as a trade mark device. Provision for convention application is contained in section 44, but so far no convention country has been designated by the President as required by law.

[549] Sodipo, (1997) Piracy and Counterfeiting, GATT, TRIPS and Developing Countries, Kluwer Law International Ltd, Sterliing House, London, United Kingdom, p.39.
[550] ibid
[551] now in the edition of LFN 2004 as Trademark Law, Cap T13, Laws of the Federation of Nigeria, 2004.
[552] Babafemi, F.O.B Op. cit

5.4 PROTECTION OF TRADEMARKS

Protection of Trademarks are based on the following conditions:

5.4.1 Registrability and Validity of Registration of Trademarks

In Nigeria, a trademark can either be registered in Part A or Part B of the register of trademarks. A trademark proprietor may decide to register under both parts. If registration is made under Part A, the application must contain the proprietor's name or entity' name, his/her signature, invented word(s). Registrability and validity of registration are covered under sections 9-16 of Trade Mark Act[553]. In order that trade marks might receive protection, it must be (a) distinctive rather than descriptive, (b) it must be affixed to a product that is actually sold in the market place and (c) it must be registered with the Patents and Trade Mark Office. The different kinds of requirements need to be distinguished, firstly requirements that relates to the basic function of a trade mark. First is the function to distinguish the products or services of one enterprise from the products or services of other enterprises. That is, a trade mark must be distinctive or capable of distinguishing different products. The second kind of requirement relates to the possible harmful effects of a trade mark, if it has a misleading character or if it violates public order or morality[554]. Section 9(1) of the Act[555] provides

> In order for a trademark (other than a certification trade mark) to be registrable in Part A of the register, it must contain or consist of at least one of the following essential particulars.
> (a) the name of a company, individual, or firm, represented in a special or particular manner,
> (b) the signature of the applicant for registration or some processor in his business,
> (c) an invented word or invented words,
> (d) a work or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or a surname and
> (e) any other distinctive mark

[553] Trademark Act, op cit.
[554] World Intellectual Property Organization, Op cit. p.188.
[555] Trademarks Act op cit.

The proviso to it reads:

> Provided that a name, signature or word or words other than such as fall within paragraphs (a) to (d) of this section, shall not be registrable under paragraph (e) of this section, except upon evidence of its distinctiveness.

The above section refers to the conditions for the registrability of trademark under our law. Section 9(1) provides five essential particulars at least one of which must be present for a mark to be registrable in Part A of the register. The first four particulars as listed in paragraphs (a) to (d) of the subsection are fairly straight forward from the point of view of their application to particular cases being considered for registration, but the fifth particular as stated in paragraph (e) which reads "any other distinctive mark" has presented difficulties. The term "distinctive" is defined in section 9(2) to mean, for the purposes of this section "adapted…to distinguish goods with which the proprietor of the trademark is or may be connected in the course of trade from goods in which no such connection subsists…"

Factors to be taken into account by the Registrar or the Court in determining whether a trademark is so adapted to distinguish are specified in subsection (3) and these are the extent to which the mark is inherently adapted to distinguish and the extent to which, by reason of the use of the trademark or of any other circumstances, the trademark is in fact adapted to distinguish. One fact to be discerned in section 9 is that as in the laws of all other countries the fundamental pre-requisite for registrability is distinctiveness of a mark. For example, in the case of **Ferodo Ltd. and Anor vs. Ibeto Industries Limited**[556], the appellant sued the respondents claiming that the respondents were infringing their trademark by way of graphic representation of their product contained in a packet being marketed and known as "Ferodo". The appellants further claimed that a graphic design which is configurative in nature belong to it. The respondents argued that for such graphic design to amount to trademark it must have been registered separately. Justice Pats-Acholonu, JCA held thus:

> A careful and analytical consideration of the registered trademark of the appellants impresses me that in actuality what was registered was Ferodo. Where a name or a graphic representation or any word is used

[556] (1999)2 N.W.L.R. 509

> and intended that it be registered as a trade name but the proprietors of the company, that is, manufacturers decided to garnish the intended trade mark with other colouration or devices which make it appealing and decorative, it cannot be assumed or taken that those fanciful and ornamental characters which colour the face of the package form part of the trademark. In the instant case, the registered trade name of the appellants is the name "Ferodo" and not the chequered mark which was merely decorative of the name".

He went to hold:

> In my view the respondent has not done anything that can be said to have infringed on the trademark of the appellants. The two trademarks are away from each other in character and design and mechanics who mostly buy those products from the owners known the difference and are not easily deceived.

The main difference between registration in Part A and Part B is that in Part A registration of trademark must be "distinctive" whereas in Part B the trademark must be capable of becoming distinctive in use[557]. This means that from onset trademark must be distinctive before accepted for registration in Part A whereas in Part B, the issue of distinctiveness is postponed till further time. In connection with a trade mark's distinctiveness, there are three different situations. The first situation is characterized by the fact that the sign selected to serve as a trade mark is distinctive as such, this is called "inherent distinctiveness". The second situation relates to a trade mark, not distinctive as such, but which has acquired distinctiveness through use. The third concerns a trade mark having lost its distinctiveness because, for example, it has become a designation of the product for which it was adopted.

5.4.2 Inherent Distinctiveness

A distinctive trademark is one that is capable of identifying the source of goods because it is either inherently distinctive or has acquired distinctiveness by acquiring secondary meaning. In **International Tobacco Company Ltd & Ors vs. British American Tobacco (Nigeria) Ltd & Anor**[558] the court held that "…certain marks are inherently distinctive while others only acquire distinctiveness over time. A distinctive mark may lose its distinctiveness over time and become 'generic'[559]".

[557] Section 10(2), Trademark Act, op cit.
[558] (2009)6 NWLR part 1138 at 584
[559] The word 'generic' as held in Smithkline Beecham Plc vs. Farmex Ltd (2010)1 NWLR part 1175 at 285 states that "A generic name is a name shared by many/any manufacturer. It is a scientific, chemical, or

Generally a trademark is understood to be inherently distinctive if it is arbitrary or fanciful[560]. This means that it does not relate to the product or service for which it is to be used but consists of a word or design which invokes a particular ideas different from the product or service, or consisting of a completely new word or design not invoking any particular idea. For example, in **Lever Bros. Ltd vs. Sunniwhite Products Ltd**[561], the court held that in deciding whether two marks are confusingly similar, the marks alone must be considered, divorced from associated features or get up and the like. Further examples are: In **International Tobacco Company Ltd & Ors vs. British American Tobacco (Nigeria) Ltd & Anor**[562] the court held that in determining whether two trademarks are identical or of close resemblance, two senses of the human being are employed. These are senses of ear and the eyes to arrive at a conclusion o the average memory arising from the general recollection. That in the exercise of comparison, not only the visible inspection is important, the sound is equally important.

It went on to hold that distinctiveness is proved by reputation/goodwill, that it is not enough to show that there is resemblance of goods, the plaintiff has to further prove a reputation or goodwill attaché to the goods under the trademark/name sufficient for members of the public to be misled by the defendant's conduct into thinking that they are securing the goods of the plaintiff. It will have to demonstrate the volume of its ales and supplement that by evidence from traders and public of the meaning that they attach to the distinguishing features of the plaintiff's goods saying for instance that they have long understood the trademark to denote the mark of the plaintiff[563]. In the exercise of comparison, it is wrong to take the two trademarks side by side to determine whether they are identical or some close resemblance exists.

The issue is whether the person who sees or has seen the proposed trademark will confuse it with the existing trademark, as to create confusion and be deceived

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common name. It relates to or is characteristic of a whole group or class. It is general as opposed to specific. It further means as "a generic term is one which is commonly used as name or description of a kind of goods and it is generally accepted that a generic term is incapable of achieving trade name protection".

[560] Ferodo Ltd vs. Ibeto Industries Ltd (2004)5 NWLR Part 866 at 235 and Smithkline Beechman Plc vs. Farmex Ltd (2010)1 NWLR part 1175 at 285.

[561] (1949)66 RPC 84.

[562] (2009)6 NWLR pt. 1138 at 577

[563] Alban Pharmacy Ltd. vs. Sterling Products International Incorporated (1968) All NLR 300

that the proposed trademark is the same as the existing one. It went further to give meaning of 'distinctiveness' as relates to trademark and designs thus: "an essential element of a device claimed to be a trademark that identifies the goods of a particular merchant and distinguishes them from the goods of others. A word, symbol, shape or colour serving this purpose is aid to be distinctive". The Court went on to say that in determining distinctiveness of a trademark or design, on seeing the mark, one's mind should immediately go to the person or company who sells or the manufacturers of the article and not to others.

The court in the same case expressed that 'duty on Court to consider only essential features for infringements of trademark' thus: in deciding whether two marks are confusingly similar, the marks alone must be considered, divorced from associated features or get up. Evidence is however, admissible to show which of the features shown in the register of trademark are essential and which are inessential so as to be unimportant in deciding questions of infringement. In effect, it is not all the features that are contained I the register f trademarks that are important for the purpose of deciding the infringement of the trademark.[564]

Similarly, in **Beecham Group Ltd vs. Essdee Food Products Nigeria Ltd**[565] where the issue for determination was whether the appellants mark 'Glucos-Aid' infringes the respondent's trademark 'Lucozade'. The Court held that in infringement of trademark, the criterion for determination, that is, distinctiveness, is that the "mark to be registered must not, when compared with what is already registered, deceive the public or cause confusion". Also in **Alban Pharmacy Ltd. VS. Sterling Products International**[566] the Supreme Court held that the criterion for distinctiveness is that the mark to be registered must not when compared with what is already registered, deceive the public or cause confusion. Ademola, CJN particularly held in that case that the apprehensions of the appellants were founded, for if the proposed trademark mark 'Casorina' be registered, the syllable 'CAS' will no doubt form the essential part of the name of the medicine and was likely to cause confusion in the minds of the public. Furthermore, the end of the 'CASORINA'

[564] See Ferodo Ltd vs. Ibeto Industries Ltd (2004)5 NWLR pt. 866 at 317
[565] (1985)3 NWLR pt. 11 at 112
[566] (1968) All NLR 300

namely 'RINA' in itself was not free from causing confusion with "RIA" in CASTORIA.

5.4.3 Acquisition of Distinctiveness through Use

Lack of inherent distinctiveness, however, does not mean that a trademark is for ever excluded from protection. Nevertheless, such a trademark may become eligible for protection if it has acquired distinctiveness through use, that is, notoriety. This is a principle of a trademark, not only recognized in a large number of national laws but also in the Paris Convention which provides for protection of industrial property.

To acquire "distinctiveness through usage of product", the case **Ferodo Ltd vs. Ibeto Industries Ltd**[567] illustrative. The appellants in this case instituted an action against the respondent on allegation of continued infringement of their trademark by use of graphic representation of its products which markedly becomes almost indistinguishable from the appellant trademark duly registered and not merely the name of the product, 'Ferodo', contained in the packet. On the strength of this, the appellants sought among other reliefs, an injunction restraining the respondent from infringing the registered trademark. The Court held in that case thus:

> The element of distinctiveness is consonant to or predicated on some age by way of long extensive user. What constitutes long or extensive user is a question of fact to be determined in the light of the circumstances of the case. It is certainly not the age of Methuselah. Once the Trademark by frequent use, has acquired notoriety in the trade to the common knowledge and easy identification of persons in the trade, it will be said to have acquired the character of distinctiveness[568].

In the instant case he[569] went further to hold that:

> It is not enough for the appellants to claim that the components or chequered device formed part of the Trademark but they have the onus to prove further that the components or chequered device were in fact registered. I do not see any such evidence, and here I do not find Exhibit D useful to the appellants. I have carefully examined D and I am clearly of the opinion that what was registered as a Trademark is 'Ferodo' and all other elements are mere beautifications,

[567] (2004)5 NWLR pt. 866 at 317 and Smithkline Beechman Plc vs. Farmex Ltd (2010)1 NWLR part 1175 at 285
[568] Per Niki Tobi, JSC in the case of Ferodo Ltd & Anor. vs. Ibeto Industries Ltd op cit.
[569] ibid

ornamentations, embellishments, flourishes or what the Court of Appeal called garnishes.

Finally the court held that it has been shown that long or extensive use of the Gold colour Pack since 1973 for about 33 years is more than enough time for it to acquire distinctiveness "…it can be seen that there is more than sufficient evidence of ACQUIRED DISTINCTIVNESS, resulting from sales and heavy advertising throughout Nigeria from 1973 going by exhibit".

5.5 NON-REGISTRABLE MARKS

Although a mark may be distinctive (or, where registration in Part B is concerned, capable of distinctiveness) registration will not be automatically granted. The Registrar not only has the discretion to refuse, but the Act also contains specific prohibitions upon registration. The most important are in sections 11, 12 and 13 of the Act[570] as explained below.

5.5.1 Deceptive or Scandalous Matters

Registration of trademark may be refused on ground that it is deceptive or scandalous. Section 11 of the Trademark Act provides thus:

> It shall not be lawful to register as a trademark or part of a trademark:
> a) in any matter, the use of which would be reason of its being likely to deceive or cause confusion or otherwise be disentitled to protection in a court of justice or be contrary to law or morality.
> b) any scandalous design.

It is unlawful to register as a trademark or part of a trademark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice or be contrary to law or morality or any scandalous designs. Protection of a trademark is the question whether the use of similar signs constitute an infringement. Thus in action for infringement, the plaintiff's trademark would be compared with that of the defendant to ascertain whether it could confusion to the consumers. It is not the differences between two trade marks, but their similarities which have to be taken into account.

[570] Trademark Act, op cit.

The similarity may be on three levels: visible, audible, or a pronunciation in the country's language where the trademark is to be protected[571].

Here the court of justice i.e law court would consider whether it is contrary to law of the land or against the moral virtues of the society. That is to say, the curt determines whether it is scandalous in nature or design.

5.5.2 Identical and Resembling Trademarks

No trademark can be registered in respect of any goods or description of goods that is identical with a trademark belonging to a different proprietor and already on the register in respect of the same goods or description of goods or that so nearly resembles such a trademark as to be likely to deceive or cause confusion.[572] In the case of **Bubble Up International vs. Seven-Up**[573], Kasim J. held that one of the grounds of opposition is that the trademark applied for is not registrable because it had a direct reference to the character or quality of the goods in respect of which registration is sought. Similarly, it was held by the Supreme Court of America in **American Cyanamid vs. Vitality Pharmaceuticals**[574] that the proprietor or registered user of a trademark is not entitled to interfere with an existing trademark even if identical with or closely resembling his own, if it has been in continuous use before the use or registration of his own trademark.

5.5.3 Names of Chemical Substances

The Act contains a restriction on registration relating to the names of chemical substances. Accordingly, "no word which is commonly used and accepted name of any single chemical element or single chemical compound, as distinguished from a mixture, is to be registered as a trade mark in respect of a chemical substance or preparation[575]. However, the foregoing subsection will not apply in relation to a word which is used to denote only a brand or make of such an element or compound as made by the proprietor or a registered user of the trademark as distinguished from that element or compound as made by others and in association with a suitable name or description open to the public use[576].

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[571] Folarini S. Op cit. p.213.
[572] Section 13(1) Trademark Act. op cit.
[573] (1971)1 U.I.L.R 154 at 160.
[574] (1991)2 N.W.L.R 15.
[575] Section 12(1) of the Trademark Act, Op cit.
[576] Section 12(2) ibid.

5.5.4 Immorality or Public Policy

Any marks which have corrosive effect upon public morality or one which is otherwise contrary to public policy may not be registered, for example, a mark showing private part of an adult. Eventhough, they may be applied to goods and services without attracting any criminal penalty. However, it should be noted that what constitutes an immoral mark in the current dispensation is a matter of speculation. Thus, it is only in cases where it is plain, that an accepted principle of morality is being offended that the registration should be refused.

5.5.5 Coat of Arms

The Coat of Arms of Nigeria may not appear on a trademark, nor any arms so closely resembling it as to be misleading nor a representation of the national flag, words such as President or Governor. Also any mark likely to lead persons to think that the applicant is or has been employed by or supplies goods to the President or a Governor. Without authorization of the appropriate authority, it is an offence for any person in connection with any trade, business, calling or profession to use the Coat of Arms of Nigeria or that of a state (or arms so closely resembling the same as to be calculated to deceive) in any manner calculated to lead to the belief that he is duly authorized to use the Arms of Nigeria or that of a state.

Section 62 of the Act provides:

> If in connection with any trade, business, calling or profession any person, without the authorization of the appropriate authority:
> (a) uses the Arms of Nigeria or the Arms of a State (or arms so closely resembling the same as to be calculated to deceive in any manner calculated to lead to the belief that he is duly authorized to use the Arms of Nigeria or the Arms of that State, as the case maybe, or
> (b) uses any device, emblem or title in any manner calculated to lead to the belief that he is employed by or supplies goods to the President or the Governor or a State in his official capacity as such he shall be guilty of an offence and liable on summary conviction to a fine not exceeding forty naira.

Subsection 2 further stated: "Nothing in the foregoing subsection shall be constructed as affecting the right, if any of the proprietor a trade mark containing any such arms, device, emblem or title as aforesaid to continue to use that trademark". From the foregoing, the use of Coat of Arm or emblem as trademark though prohibited by the Act, does not have adequate sanction. A business or commercial

use of such trademark would have earned a lot to the infringer, but finally only fined N40.00. The position of the law is an encouragement to the infringers and should therefore be amended.

5.6 REGISTRATION OF TRADEMARK UNDER PARTS 'A' AND 'B'

Registration of trademark is vested in the owner namely, proprietor, joint proprietors, corporate bodies, registered users and assignees. These categories of person can apply to register their mark. It should be noted that Trademark Act provides a guide for registration and other conditions for such a mark. It should be noted that registration of trademark has territorial limitations[577]. The Court held in this case thus "Trademark registration is territorially limited. Accordingly, a trademark registered in one country has effect only within the territorial boundaries of that country"[578].

The Trademarks Act provides that a record to be called the register of trademarks shall continue to be kept by the Registrar of Trademarks. Section 2(1) provides thus:

> There shall continue to be kept the record called the register of trademarks, in which shall be entered all registered trademarks with the names and addresses of their proprietors, the date on which applications were made for their registration, notifications of assignments and transmissions, the names and addresses of all registered users and such other matters relating to registered trademarks as may be prescribed[579].

The effect of the above statutory provision is that the Registrar in considering an application to register a trademark, must consider both its inherent adaptability to distinguish and also the extent to which it is shown by evidence (if there is such evidence) to be distinctive. Sections 5 and 6 of the Trademarks Act provide for the rights given by registration in Part A and Part B respectively. A joint reading of sections 5(1) and 6(1), are to the effect that registration of a trademark under any of the parts 'shall, if valid, give or be deemed to have given to the proprietor the exclusive right to the use of that trademark in relation to the marked goods"[580].

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[577] Smithkline Beecham Plc vs. Farmex Ltd (2010)1 NWLR part 1175 at 285
[578] ibid, per Lord Bode Rhodes Vivour, J.C.A at p.299
[579] By virtue of section 2(2) of the Trademark Act, the register shall be kept under the control and management of the Registrar of Trademarks at the Registrar's office.
[580] Section 5(1) of the Trademark Act, Cap T13, Laws of the Federation of Nigeria, 2004.

Section 6(1) in fact gives the proprietor of a trademark in Part B "right in relation to those goods as if the registration had been in Part A of the register, and section 5(2) to (4) of the Act shall apply in relation to a trademark registered in Part B accordingly: The only difference in terms of effect of registration in Part B of the register appears to be provided under section 6(2) of the Act in an action for infringement.

Capability of distinguishing trademark from Part A is needed for registration in Part B. Section 10(1) of the Trademark provides:

> In order for a trademark to be registrable in Part B of the register, it must be capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods with which the proprietor of the trademark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trademark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.

Unlike the Part A mark, a Part B mark does not have to be distinctive when registered[581]. All that is required is that it should be capable of becoming distinctive in use[582]. As soon as it becomes distinctive the owner of the mark could make a fresh application to register it in Part A. Generally, it is provided in the Act that a trademark may be registered in Part B notwithstanding any registration in Part A in the name of the same proprietor of the same trademark or any part or parts thereof. The basis for registration in Part A and Part B of the register, namely, "adapted to distinguish" and "capable of distinguishing" are much as the courts have tried to interpret them, very imprecise terms. These terms introduce some measure of uncertainty into the qualification for registration of trademarks. They also create room for the Registrar of Trademarks to use his discretion in determining which trademarks to register. The discretion appears too wide having regard to the terms that there is a possibility of abuse or arbitrariness on the part of the Registrar.

[581] Babafemi, Op cit. p.185.

[582] Section 10(2) provides that in determining whether a trademark is capable of distinguishing as aforesaid, the tribunal may have regard to the extent in which (a) the trademark is inherently capable of distinguishing as aforesaid, and (b) by reason of the use of the trademark or of any other circumstances, the trademark is in fact capable of distinguishing as aforesaid.

Again, the view has been expressed that the effect or registration in either Part A or Part B is almost the same. This is also confirmed by the law[583]. The position seems to be that of English law. This then buttresses the point that it is a duplication of efforts and a source of confusion to have a Part B of the register. It seems from the foregoing provision, that the division of the register into two parts has not served any purpose, instead, it has created problems for mark owners or prospective mark owners. Here, the powers vested upon the Registrar of Trademarks especially section 4 of the Act "A trademark must be registered in respect of particular goods and classes of goods, and any question arising as to the class within which any goods fall shall be determined by the Registrar, whose decision shall be final" . This is opened to abuse or arbitrariness. The above provision gives the impression that even when the decision of the Registrar was not made judiciously, no appeal to the Federal High Court shall lie to set aside the decision of the registrar. This is contrary to section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which provides:

> The judicial powers vested in accordance with the foregoing provisions of this section, shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligations of that person.

Differences Between Parts A and B in Registration

To sum up discussion on registration, there are abundant provisions of the Act which show that trademarks registered in Part B of the register are inferior. Though, section 6(1) of the Act provides that registration of trademarks in Part B of the register confers same rights as that under Part A, section 6(2) of the Act, thereof provides that in an action for infringement of a trademark registered in Part B, the court should not grant an injunction or other relief if the defendant thereto establishes to the satisfaction of the court that the use of which the plaintiff complain is not likely to deceive or cause confusion or to lead to the belief in a connection in the course of trade between the goods and a person entitled as proprietor or as a registered user to use the trademark.

[583] Sections 5 and 6 of the Trademarks Act Cap T.13, laws of the Federation of Nigeria, 2004.

The above provision, to say the least, negatives any measure of protection available to a trademark registered in Part B of the register. The aid provision seems like an open sesame, an invitation to traders to infringe a trademark duly registered, and turn round to show that nobody was misled by their conduct. This hardly accords with the spirit of the law. It makes a caricature of the very fact of registration. Section 14(2) of the Act stated earlier is another provision pointing to the inferior status of Part B registration. To recapitulate, section 14(1) of the Act provides *inter alia*, that a trademark registered in Part A shall after seven years, be deemed as "valid in all respect: unless the registration was obtained by fraud or the trademark is scandalous or deceptive. Now section 14(2) expressly excludes Part B trademarks from the benefit of the said provision. In other words, the validity of a Part B trademark can be challenged at any time.

5.7 FUNCTIONS OF TRADEMARK

It is widely recognized that trademarks are indicators of origin. In the case of **Hanover Star Milling Co vs. Metcalf**[584] the United States Supreme Court articulated what has been referred to as the primary and proper function of trade mark as to identify the origin or ownerships of goods to which it is affixed. Trademarks are used by enterprises as marketing tools in variety of ways. The most common is in consumer advertising to promote product sales, but trade mark use has become increasingly sophisticated. The functions of the trademark are as follows:

5.7.1 Reduction Of Customer Search Cost

The benefits of trade marks in reducing consumer search costs require that the producer of a trade marked goods maintain a consistent quality over time and across consumers. Hence trade mark protection encourages expenditures on quality. Suppose a consumer has a favourable experience with brand X and wants to buy it again. Or suppose he wants to buy brand X because he has had a unfavourable experience with brand Y, another brand produced by the same producer. Rather than investigating the attributes of all goods in order to determine which one is brand X or is equivalent to X, the consumer may find it less costly to search by identifying the relevant trade mark and purchasing the corresponding brand.

[584] 240 US 403, 412 (1916)

Thus a trade mark conveys information that allows the consumer to say to himself, I need not investigate the attributes of the brand I am about to purchase because the trade is a shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier[585]. In Nigeria, people rely on trade marks as symbols distinguishing goods, or services provided by different enterprises and indicating products features and qualities. For example, when buying automobiles trade marks like 'H' for Honda, 'three circles' for Audi or 'Star' for Mercedes Benz would come to mind.

5.7.2 Increasing Customer Sale

Another obvious benefit of trade marks and service marks by businesses is that it promotes the sale of products and services. Customer brand recognition increases sales in terms of numbers of units sold, as along as the message of the trademark communicates is a positive one. An example is in the case of Nigeria Bottling Company's Coca-Cola™ trade mark. This has helped the company to obtain the top market share in Nigerian bottling industries[586]. Also it is estimated that Coca-Cola Incorporated has a stock value of about 160 billion dollars, with the value of the physical assets being put at around 20 billion dollars[587].

5.7.3 Introducing new industries and their products or repositioning an existing product

Trademark is used to introduce an emerging company as well as the products and services of a new company. Trademarks facilitate the introduction of new products and new company to the market place to acquire recognition by consumers or users of their products or services respectively[588]. For example, the trade mark *Zinox*™ was used to introduce a Nigerian computer manufacturing company which has since then been a valuable asset to boost the Nigerian economy and image in the information Technology world.

5.7.4 Motivation of Industries for Improvement

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[585] Grooves, P.J. (2009) Source Book on Intellectual Property Law, Cavendish Publishing Limited (1997): in Waziri, K.M. *The Law of Trademarks and the Economic Implication of Counterfeiting in Nigeria* . p.288 Bi-Annual Journal of Pubic Law, Kogi State University, Anyigba, Nigeria. p.288

[586] Popoola, D.O. (2008) *Trade Marks as an Aid to Industrialization in Nigeria*. Seminar paper presented at the University of Abuja in November,.

[587] http//www.piperpat.com/Pinformation/Introdutioon/Whatisa Trademark/tabid/90/Default.aspx.

[588] Grooves, P.J. Op. cit.

Trademarks that have become positively popular are often good indicators of the level of quality of the product or service to which they relate and the public's general satisfaction with them. Therefore, industries in Nigeria that are successfully using their trade marks are encouraged to provide more service or produce more products. Thus, trade marks encourage firms to invest in product or service quality maintenance and improvement which benefit the entire country. Trade marks such as Bournvita™, Coca-Cola™, Lux™ soap have become popular in Nigeria.

Apart from the fact that these concerned industries employed the recognition of their trade marks to produce more products, more industries are engaged in similar production thus providing a conspicuous form of identification. Trade marks create accountability and way of expressing a promise. The trade mark of various products is of immense economic benefit to both the company and the country of origin of the product. Trademarks have become an indispensable aspect for the efficient and effective development of various economies around the world. It has a wide range of variety and quality combination demanded in a modern economy.

5.8 RIGHTS OF TRADEMARK PROPRIETOR

A trademark is a right in favour of a person in respect of any unique expression relating to his goods and services. The rights of proprietor includes, right of registration in any of the parts A or B, right to exclude others, right to sue and be sued, right of assignment, right of transmission and right of licensing. Proprietor may be individual, registered corporate body, or firm[589]. At this juncture it is pertinent to highlight the rights that accrue to the proprietor upon registration of trademark.

5.8.1 Right of Registration

Section 49 of the Trademark Act provides that: "in all legal proceedings relating to registered trademark, the fact that a person is registered as proprietor of the trademark shall be *prima facie* evidence of the validity of the original registration

[589] Section 9(1) of the Trademark Act, LFN 2004. See also the case of **A.B. Chami & Co. Ltd. vs. W.J. Bush & Co. Ltd** (1996)F.H.C.L.R 115.

of the trademark and of all subsequent assignment and transmission thereof". A proprietor of trademark has a right to register his mark either in Part A or Part B of the register. In Part A the mark must be distinctive on registration whereas in Part B the mark should be capable of becoming distinctive in use. Registration of trademark confers on registered owner with exclusive right to the use of trademark in relation to goods mentioned in the register[590]. The Supreme Court in the case of **Dyktrade Ltd vs. Omnia Nigeria Ltd**[591] held that unless a trademark has been registered, the proprietor cannot maintain an action for infringement of a trademark. Therefore, registration confers right of action on registered owner. An application for trademark registration may be made by proprietor himself or his agent[592]

5.8.2 Right to Exclude Others

The registered owner has the exclusive right to use the trademark. This is anchored in section 5(1) of the Act[593] which states that "…registration of a person in Part A of the register as proprietor of a trademark in respect of any goods, shall if valid, give or be deemed to have given to that person the exclusive right to the use of that trademark in relation to those goods". The case of **A.B. Chami & Co. Ltd. vs. W.J. Bush & Co. Ltd**[594] is very relevant to this provision. Justice Mustapha in that case held that it is the registration of a trademark that gives the proprietor exclusive right to the use of the mark in relation t the goods in respect of which its registered so is evidence of title. This means that the right of the owner of the trademark to affix it on goods, containers, packaging labels and so on or to use it in any other way in relation to the goods for which it is registered is guaranteed.

In the case of **Seven-Up Co. & Anor vs. Warri Bottling Co**[595], it was held that the section 5(1) gives to the proprietor of a registered trademark, a comprehensive and far reaching right much more than the right the Common Law of passing-off provided. Similarly in **Dyktrade Ltd vs. Omnia Nigeria Ltd**.[596], the Court held that nobody acquires the status of the 'proprietor' unless that person, in relation to the trademark, is the owner, importer, exporter, shipper or any other

[590] Sections 5 and 6 of Trademark Act, op cit.
[591] (2000)12, NWLR (Part 680) 1.
[592] **Ducross S.A. vs. Silas Industries & Trading Co. Ltd** (2003) F.H.C.L.R. 215.
[593] Trademark Act, op cit.
[594] (1996)F.H.C.L.R 115
[595] (1984) F.H.L.R. 75
[596] (2000) 12, NWLR (Part 680) 1

person for the time being, possessed of or beneficially interested in the goods to which the trademark is applied.

The proprietor can object or prevent any other registration of mark that will cause confusion or deceive or nearly resemble his mark. In the case of **Alban Pharmacy Ltd vs. Sterling Products International Incorporated**[597] the appellants were the proprietors of the trademark 'Castoria' registered in Nigeria. They raised objection to the registration of another one proposed by the respondents 'Casorina' on the ground that it is similar to their registered trademark and that it was calculated to deceive consumers. The Supreme Court upheld the objection of the appellants. The decision was based on the principle that a consumer not seeing the two marks may be deceived or confused by the trademark. Similarly, in the case of **NABISCO Incorporated vs. Allied Biscuits Co. Ltd**[598], the proceedings originated from the applications of both parties for registration of a Trade mark 'Ritz'. Earlier the Respondent filed an application to register "Ritz' as a trademark after conducting searches in the Trademark Registry and the application was accepted. Thereafter, Nabisco Inc. the appellant made an application for the same "Ritz' to be registered as their Trade mark. The application of the appellant was advertised in the Trademarks Journal at the instance of the appellant. When the Respondent noticed the advertisement, it commenced opposition proceedings in the Trademark Registry. The Registrar refused to register 'Ritz' device for appellant. The Supreme Court upheld the decision of the Registrar.

5.8.3 Right of Assignment and Transmission

A registered trademark may be assigned in the same way as other personal property such as houses, vehicles, land and so on. Section 29 of the Trademark Act provides that:

> Subject to the provisions of this Act, the persons for the time being entered in the register as proprietor of a trademark shall, subject to any rights appearing from the register to be vested in any other person, have power to assign the trademark, and to give effectual receipts for any consideration for an assignment therefor.

[597] (1968)All N.L.R. 292
[598] (1998) 10 N.W.L.R (Part 568) 16.

One of the judicial authorities relating to this provision is **A.B. Chami & Co. Ltd. vs. W.J. Bush & Co. Ltd**[599] where it was held that in the event of assignment of a registered trademark, there must be evidence of the fact of assignment. Application made to the Registrar to register the Deed and the certificate of assignment issued by the Registrar. The details of the assignment will then be registrable (although the document evidencing the assignment need not be adduced provided the assignor and assignee sign the form) and will be subject to essentially the same rules concerning registration. The mark may be assigned in whole or in part, for all or some of the specified goods or services, or for the use of the mark in a particular manner or a particular locality.

The proprietor of a trademark also has a right of transmission. According to section 26(1) and (2) a registered trademark is transmissible either in connection with the goodwill of a business or not. Subsection (2) further provides that: "a registered trademark shall after the commencement of this Act be assignable and transmissible in respect either of all the goods in respect of which it is registered, or was registered, as the case may be, or of some (but not all) of those goods".

5.8.4 Right of Licensing

A proprietor may grant license because he is unable to provide all the relevant goods and services from its own resources. The grant enables the licensee to use the trademark for specified goods or services without occasioning an infringement. A trademark license is a permission to do an act that would otherwise be prohibited without the consent of an owner of a trademark. That means when the owner of a trademark allows another to use the mark, a license is granted. The license granted may be express or implied, general or limited, informal or in writing, exclusive, sole or non-exclusive. Restrictions on the "sale of trademarks have gradually been eased" per Lord Nicolls in **Scandecor Development AB vs. Scandecor Marketing AB**[600].

However, under trademark law a license amounts to much more than a mere permission to use a mark. In the absence of an agreement to the contrary, a

[599] (1996)F.H.C.L.R. 115
[600] (2001) F.S.R 122, HL at 130

trademark license binds a successor in title to the grantor's interest[601]. A license to use a trademark does not of itself confer any proprietary interest but amounts to permission to use which prevent any allegation of infringement. However, concurrently with the rights of the registered proprietor, an exclusive licensee is given rights and remedies as though he were an assignee[602]. A license must be in writing signed by or for the grantor[603]. The licensing of trademarks, which facilitates merchandising, franchising, and distribution, agreements more generally, is at the heart of a multi-billion pound industry that pervades the way goods and services are distributed, marketed and sold both domestically and internationally[604].

5.9 INFRINGEMENT OF TRADEMARK RIGHTS

The rationale for the registration of a trademark is, of course, the prevention of the unauthorized use of the registered mark. A trademark is a registered brand or trade name. It may include any combination of a name, slogan, logo, sounds, or colours that identify the company or its products or services. A service mark can be described as a design, symbol, word, character, colour, shape, slogan which identifies a particular service of one's undertaking as distinct from those of another's undertaking. In Nigeria service marks used in e-commerce in form of word, logo, phrase, or device to indicate the source, quality and ownership of a service does not exist[605]. Trademark provides that only registered marks can seek redress for trademark infringement. Unregistered brands an however seek redress through the law of Passing-Off. The right of a trademark holder is infringed in the following circumstances:

5.9.1 Unauthorized Use of Trademark

The right to a trademark is infringed if another person without the licence of the proprietor does or uses any mark that other persons are precluded from registration under the

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[601] Bentley, L. and Sherman B, (2001) *Intellectual Property Law*, Oxford University Press New York p.903.
[602] Cornish W.R and Llewellyn D. (2007) Intellectual Property: Patents, Copyright, Trademarks and Allied Rights, 6th ed. Sweet & Maxwell p.686
[603] ibid
[604] Bentley, L. and Sherman B, op.cit 905.
[605] The Minister of Commerce, in exercise of the powers vested in him by virtue of sections 42 and 45 of the Trademarks Act and Regulation 5 of the Trademarks regulations, incorporated service marks into the classification of goods for purposes of registration of service marks only in Nigeria in 2007.

Merchandise Mark Act. Section 4(a)(b)[606] provides that:

> A person shall be deemed to forge a trademark who either-
> (a) without the assent of the proprietor of the trademark, makes that trademark or a mark so nearly resembling that trademark as to be calculated to deceive, or
> (b) falsifies any genuine trademark, whether by alteration, additional effacement, or otherwise, and any trademark or mark so made or falsified is in this Act referred to as a forged trade mark:
> Provided that, in any prosecution for forging a trademark, the burden of proving the assent of the proprietor shall lie on the defendant

Similarly, what constitutes infringement of trade mark had judicial pronouncements in the case of **Smithkline Beechman Plc vs. Farmex Ltd**[607] where the court held that: "…the rights accruable under the Act will be deemed infringed by any person who not being the proprietor or registered user, uses a mark or marks so nearly resembling as to be likely to deceive or cause confusion in the course of trade in relation to any goods in relation to which it is registered". Also in **Alliance International Ltd vs. S.K. International Enterprises Ltd**[608], learned Justice Rhodes-Vivour agreed with section 5(2) of the Trademark Act thus: "…trademark is infringed by a person who, not being the proprietor of the trademark who uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade".

5.9.2 Cybersquatting or Domain Name Infringement on the Internet

All computers on the internet have a unique identifying number – an Internet Protocol address. Because Internet Protocol addresses are difficult to remember, a unique name that corresponds with an Internet Protocol addresses, for example, www,abu.edu.ng is used as domain name. However, it should be noted that domain name infringement does not exist under Nigerian law since protection of internet materials is yet to be enacted. However, trademark registration or passing off may be used in cases of marks only. Cybersquatting originated at a time when most businesses had no practical knowledge or understanding about the commercial opportunities on the internet. Some entrepreneurial individuals registered the names of well-known companies as domain names with the intent of selling the names back

[606] Merchandise Marks Act, Cap.M10, Laws of the Federation of Nigeria, 2004.
[607] (2010)1 NWLR part 1175 at 285.
[608] (2010)13 NWLR part 1211 at 270. See also **A.B. Chami & Co. Ltd. VS. W.J. Bush & Co. Ltd** (1996)FHCLR 115

to the companies when they finally realized the economic potential of the internet[609]. Panasonic, Fry's electronics and Avon were among the early victims of cybersquatters. It should be noted that cybersquatters are rapidly diminishing because businesses now know the importance of registering domain names. There are two legal mechanisms of wresting the name from the cybersquatter. For example, a victim of Cybersquatting in the U.S. can now sue under the provisions of the Anti-cybersquatting Consumer Protection Act (ACPA) or can fight the cybersquatter using an international arbitration system created by the Internet Corporation of Assigned Names and Numbers (ICANN)[610]. A common variation on Cybersquatting is typosquatting in which misspelling of a domain name are used to mistakenly attract or mislead consumers. This could be lucrative when tied to the use of an internet advertising scheme such as Google Adsense. For example in **Lands' End Inc. vs. Remy**[611]**,** a typosquatter purchased domain names such as Inadsend.com and landswnd.com and then after sending the customer to the legitimate Land's End website, charged Land's End claiming that these were referrals under the Land's End referral proramme for which the typosquatter belonged under another legitimate domain. Land's End filed suit, and the defendant's attempt to dismiss the suit was rejected.

5.10ADMINISTRATIVE POWERS FOR PROTECTION OF TRADEMARKS

Institutional framework for intellectual property rights generally had been discussed in chapter two such as the role of the Police, Custom, and the Judiciary including Trademark, Patent and Design Registry and so forth. However, some specific administrative machinery for the protection of trademark such as the role of Minister of Trade and Investment and the Registrar of Trademark are hereunder discussed:

[609] Richard, A.S op cit p.371,
[610] See the following cases to substantiate the issue of infringement in internet: **Harrods Plc vs. UK Network Services Ltd** (1997)EIPR 0-106, **Glaxo PVC vs. Glaxowellcome Ltd** (1996)FSR 388 and **Britol Telecoms Plc vs. One in a Million Ltd** (1999)RPCL, 154
[611] (2006) 447 F Supp.2d 941

5.10.1 The Minister of Trade and Investment

The minister of Trade and Investment control and regulates the administration of Trademarks[612]. Section 45(1) of the Trademarks[613] provides for the powers and functions of the Minister thus:

> The Minister may make regulations
> (a) for regulating the practice under this Act, including the service of document;
> (b) for classifying goods for the purposes of registration of trademarks;
> (c) for making or requiring duplicates of trademarks and other documents;
> (d) for securing and regulating the publishing and selling or distributing, in such manner as the Minister thinks fit, of copies of trademarks and other documents;
> (e) for prescribing the fees to be paid in respect of applications, registrations and other matters under this Act;
> (f) for prescribing anything required or authorized by this Act to be prescribed by regulations;
> (g) for extending the time limited by this Act for the performance of any act, whether generally or in particular cases and whether at the discretion of the Registrar or otherwise.
> (h) for imposing restrictions as regards the registration under this Act of the arms, flags, emblems, titles or other distinctive marks of any country or international organization;
> (i) generally, for regulating the business of the office of the Registrar and all things by this Act placed under the direction or control of the Registrar or the Minister.

These are the numerous responsibilities of the Minister in relation to trademarks only. There are other numerous functions of the minister in-charge of the ministry. The question is whether these functions are judiciously carried out by a political holder who may be removed or transferred within short space of time. This accounts for the ineffectiveness of the administration of trademarks in Nigeria. Apart from the shortness of time, the office of the Minister has alot of other responsibilities that the minister may not be able to concentrate on the administration of the trademarks which is essential to economic development. An interaction with the staff of the Department confirms the above statements[614].

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[612] Section 1(2) of the Trademarks Act, Cap T13, Laws of the Federation of Nigeria, 2004.
[613] Trademarks Act, ibid
[614] The Researcher had unstructured interview with some members of the staff of the Ministry.

5.10.2 The Registrar of Trademarks

The Registrar[615] who is in-charge of the trademark is directly under a Minister of Trade and Investment. The administration under him is control and regulated by the Minister, that is to say he does not have full power on his own to administer the Department. However, sections 46, 47, and 48 of the Trademarks Act provide for the powers and duties of Registrar.

> Section 46 provides for duty of Registrar, if required, to hear certain persons
> Where any discretionary or other power is given to the Registrar by this Act or the regulations, he shall not exercise that power adversely to an applicant for registration or the registered proprietor of a trademark without (if duly required so to do within the prescribed time) giving to the applicant or registered proprietor an opportunity of being heard.
>
> Section 47: Power of Registrar to award costs
> In all proceedings before the Registrar under this Act, the Registrar shall have power to award to any party such costs as he may consider reasonable, and to direct how and by what parties they are to be paid, and any such order may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> Section 48 provides for Annual reports of Registrar
> The Registrar shall, before first duly in every year, send to the Minister a report on the execution by or under the Registrar of this Act, and on receipt of any such report, the Minister shall lay a copy thereof before each House of the National Assembly.

The Registrar of Trademarks is principally charged with the responsibilities of registration of trademarks and maintenance of such records. The procedure of registration of trademarks is laid down in the Trademarks Act. For example, Section 17(1) provides that:

> any person proposing to apply for the registration of a trademark in Part A or Part B of the registered may, if be so desires, apply to the Registrar in the prescribed manner for advice as to whether the trademark appears to the Registrar *prima* facie to be inherently adapted to distinguish or capable of distinguishing as the case may be; and the Registrar shall have power to give the advice asked for in the application.

[615] The Registrar is appointed by Federal Civil Service Commission. See section 1(1) of the Trademarks Act.

Also, the Registrar has the power to remove, on application to him a trademark from the register due to non-use. For example, in the case of **Bethlehem Knitting Factory Limited vs. Registrar of Trademarks**[616] where the Registrar removed a trademark for non-use was upheld by the Court. The Registrar prepares and forward to Minister annual report for onward presentation to National Assembly by the Minister. He is vested with certain jurisdictional powers over trademarks matters. The Registrar has power to award t5o a party such costs as he may consider reasonable and to direct how and by what parties they are to be paid[617]. Indeed any such order may by leave of the court, or a judge thereof, be enforced in the same manner as a judgment or order of the court. Let it however be noted that a dissatisfied party has right of appeal to Federal High Court.

5.11 DEFENCES TO TRADEMARK INFRINGEMENT

The most essential function of a trademark is to indicate the source or origin of goods in order to prevent confusion and to establish goodwill so that consumers can distinguish and select goods. Trademarks specify certain infringements, and how to establish these infringements, which can be undertaken in relation to registered trademarks. It also establishes various defences to trademark infringement: use of another registered trademark, use of own name and address, use of certain indications. Others are use of intended purpose and the use of an earlier mark.

i) Use of another registered trademark: If another person has in fact registered another trademark in relation to the same goods and services as an already existing trademark then there will be no trademark infringement. The only option available here would be to argue that the initial registration of the new mark is in fact invalid. The grounds for this would be that it is identical or similar to an already existing mark and that it will create confusion in the minds of the general public.

ii) Use of own name and address: If a company uses their name and address as a trademark then this will not be seen as trademark infringement. There is a qualification, however, that the use of their name and address must be in accordance

[616] (1983)F.H.C.L. 181
[617] See section 47 of Trademarks Act op cit.

with honest practice. Accordingly the name must be one by which they are ordinarily known.

iii) Use of certain indications: If another uses certain indications such as the kind of goods or services, the quality and quantity of the goods or services, the value or geographical origin of the goods or services then this will not constitute an infringement of a registered trademark. Again this must be done in accordance with honest practice.

iv) Use of Intended Purpose: In a situation where it is necessary to use a mark to indicate the intended purpose of goods or services then there will be no infringement of a registered trademark. As is the case with the other above defences this must be in accordance with honest practice.

v) The Use of an Earlier Mark: There shall be no infringement of a registered trademark where there has been use of an earlier right in the course of trade in a certain area. When the Act talks of an earlier right it means the use of an unregistered trademark. In European Economic Area use of similar or identical mark will attract a claim for infringement. However, within this area if there has been use of an unregistered trademark prior to your registration and further exploitation of your mark then you will not be able to claim for infringement against that earlier mark.

5.12 CHALLENGES OF TRADEMARK RIGHTS PROTECTION IN NIGERIA

There are various factors responsible for the ineffective protection of trademark rights in Nigeria. Some of the challenges militating against the protection of trademark rights are statutory impediments, corruption, non implementation of Law Reform Commission recommendation and low level of awareness, insecurity, enforcement problems and economic weakness.

5.12.1 Legislative Deficiencies

One of the impediments to effective trademark protection in Nigeria is the inherent statutory problems of section 67 on definition of 'trademark' itself. The section is so worded that it succeeded in confusing the readers. For example, it is not clear the word "goods" as used in the section include "service" marks since goods

itself was not defined. Another defect with the Trademark Act is the present definition of a mark does not include the packaging, shapes or presentation of goods. These are therefore not registrable. Further section 14(1)(2) creates confusion in that the dichotomy of registration in Part and B of the register is uncalled for. Similarly section 4 of the Trademark provision on registration to be in respect of particular goods is not clear. The recommendation of the Nigerian Law Reform Commission 1991was not attended to for upgrade of the Act.

5.12.2 Non Provision for Certain Registrable Marks

Firstly, the present Trademark Act does not have Service marks in the any of the sections. This is as a result of the lack of the provision in the United Kingdom Trademark Act of 1938 that served as a template for the Nigerian Trademark Act. However, it is should be noted that in March, 2007 the then Minister of Commerce, by ministerial order made pursuant to the powers conferred by sections 42 and 45 (1)(b) of the Nigerian Trademark Act extended the classes under which a Trademark may be registered from 34 classes to 45 classes, in line with the provisions of the 9th edition of the Nice Classification of goods. Accordingly, and effective from that date, service marks became registrable in those classes. Eventhough, the action taken by the Minister to expand the classes under which trademarks can be registrable is commendable, it should be noted that the act of the minister merely expands the classification of goods, not the extension of registrable goods to service marks, as the wording of the Trademarks Act has remained unchanged, referring only to goods, and not services[618].

Further, the current trademark regime in Nigeria does not recognize a number of distinctive signs, colour or combination of colours, sounds, taste and smell marks, 3-dimensional signs as the shape of the goods or their packaging, for example, the dimensional signs of Honda, Mercedes Benz, Toyota, Peugeot and so forth. Others are reputable distinctive slogans which are registrable in other jurisdictions like United Kingdom and United States of America. It is not as if those identified and recognized signs assumed the status of registrable trademarks arbitrarily by the force

[618] Agbai, C. (2012) Trademarks Reforms Treaty Obligations and the Registry, *Nigerian Law Reform Journal*, Nigerian Law Reform Commission, Abuja p.84.

of legislative fiat. They attained the status actually by virtue and lure of commercial necessity, expediency of trade arising from remarkable increase and sophistication in the level of global commercial and industrial activities. The exclusion of these vital indices of trade from the list of registrable trademarks under our law and practice is a pointer to the volume of potential marks that could not find their way into our register to the frustration of proprietors, to the loss of revenue and to our handicap at effectuating our obligation at the level of various international cooperation initiatives on trademarks in particular and intellectual property in general[619].

Although Nigeria is a signatory to the Paris Convention for the Protection of Industrial Property and the TRIPS Agreement but being an international obligation has to been domesticated into local law before enforcement. At moment, it is only of persuasive effect in Nigeria. These conventions have been ratified in countries such as China, South Africa and the United States of America. Under these conventions, a 'Well-known trademark' is to be protected, whether or not the mark is registered or used within the country. This is not protected under Nigerian law rather greater prominence is placed on the use of trademark in Nigeria and the application and registration of the marks within the territory with reference to 'invented word or invented words'. The requirement that the mark be an invented word or words seems to greatly restrict the application of the provision since many of the most prominent trademarks worldwide were derived from words that were not invented by the proprietors. For example the word 'Sony' which is well known trademark traces its roots from the Hindi word which translates as 'beautiful[620]. This can be seen from the extent of protection provided under section 32 of the Act[621] relating to Defensive registration of well known marks, the only provision in the Nigerian laws which cater for these types of marks, *albeit* in a limited and outdated manner. This does not meet the current requirement for registration of trademarks as applicable in other jurisdictions.

[619] Oguamanam, C. op cit at p. 66
[620] Agbai, C. op cit. at p.86
[621] Trademark Act, op cit.

5.12.3 Inadequate Sanctions for Infringement

The criminal prosecutions of trademark offences are based on the Trademarks Act[622], Merchandise Marks Act[623] and in cases of Counterfeit and Fake Drugs Act[624]. Trademark offences are also prosecuted or conducted under Penal Code[625]. Section 60 of the Trademark Act provides that:

> If any person makes or causes to be made a false entry, in the register, or a writing falsely purporting to be a copy of an entry in the register, or produces or renders of causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of an offence and be liable on conviction on indictment to imprisonment for a term not exceeding seven years.

Under section 61 of the Trademark Act:

> any person who makes a representation that an unregistered trademark is registered, or that a registered trademark is registered in respect of goods for which it is not registered, or that registration confers exclusive right when in fact, it does not shall be liable on summary conviction to a fine not exceeding 200 Naira.

The Merchandise Marks Act[626] is in *pari materia* to the United Kingdom Merchandise Marks 1887. Section 3(1) of the Merchandise Marks Act creates the offence of product counterfeiting. Section 4 dealing with "forged trademark", provides that:

> a person forging trademark is one who (a) without the assent of the proprietor of the trademark, makes that trade mark or a mark so closely resembling that trademark as to be calculated to deceive or, (b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise, any trademark or mark so made or falsified in this Act referred to as a forged trademark.

It further provides that: "in any prosecution for forging a trademark, the burden of proving the assent of the proprietor shall lie on the defendant". Anyone convicted for an offence made under the Act before the High Court is liable to imprisonment for two years, or to a fine or both. If conviction is delivered at a

[622] Section 60 Trademark Act, op. cit.
[623] Section 3 Merchandise Act, op cit.
[624] Section 3 Counterfeiting and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act, Cap C34, Laws of the Federation of Nigeria, 2004.
[625] Section 54 Penal Code
[626] Merchandise Act, op cit.

Magistrate's court, the person is liable on summary conviction to imprisonment for six months or to a fine of N100. Apart from the order for delivery up which may be made by the courts at the conclusion of a civil action for infringement, the Merchandise Marks Act provides for forfeiture of the goods in respect of which prosecution was instituted, provided the accused person was found guilty. Though the Act does not specifically provide for it, the practice is that after a forfeiture order is made by the court, the goods concerned are normally destroyed. Copyright Act[627] specifically provides for forfeiture, delivery up to the owner of copyright or delivery up for total destruction at the discretion of the court, whether the alleged offender is convicted or not.

Section 372 to 380 of the Penal Code create various offences similar to the Merchandise Marks Act, including counterfeiting a property mark (section 375) making a false mark (section 378) and tampering with property marks (section 380). Terms of imprisonment range from one to three years or a fine or both. The punishments prescribed by Penal Code are so mild that it cannot deter infringers. Note that forgery of trademarks is capable of earning the infringers millions of Naira whereas the law provides smaller amount and or a very short term of imprisonment. With these and others watering ambiguity, penal provisions have not offered sufficient protection of trademarks owners.

5.12.4 Jurisdictional Challenges in Relation to Domain Names

Protection of internet activities does not exist under Nigeria law. This found expression in United States of America law. Our current trademark law is territorially based, that means the protection of proprietor of trademark does not go beyond Nigeria. However, due to increase in the business transaction and transnational commercial activities, territorial law may not cope with the modern trend of globalization. Modern communication technology often is said to be the prime mover accelerating the pace of globalization of the markets and professions. Oladipo[628] once remarked:

> The internet combines the capability of the mails, the fax, the phone, video, graphics, credit card, archive systems and more in a single, low

[627] Section 16, Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[628] Oladipo, B., (2003) Information Technology and The Law, The Nigerian Perspective Book 2, *Legal Digest Publishing* p.116.

> cost, world-wide interactive computer network. This network brings together the clients, professionals, dealers, brokers, market quote vendor, banks, government and more in an electronic environment that knows no sovereign, is beyond the reach of any single regulator, respects no geographical boundaries and applies no special law. An information highway without road signs, signals and traffic corps.

The trend toward internet usage is such that a whole industry is growing up whose primary purpose is to provide efficient connections to this electronic network. Domain names are on the increase used by electronic technology such as banks, educational institutions, financial institutions, private and public enterprises in the conduct of their businesses. The expansion of the World Wide Web has led also to an expansion in trademark infringement claims and lawsuits involving the internet. The internet has in fact become the latest point of activity for trademark infringement. In domain name disputes, the party seeking to obtain the domain name typically relies on their trademark rights. In most cases, the domain name was identical to the company's well-established trademark. However, that fact alone is insufficient to prove a charge of trademark infringement[629].

The registration of a trademark grants protection from unauthorized use of the enterprise or product name by third parties and protects the trademark owner through damages claims and cease and desist claims. The evaluation of an enterprise or a trade or service mark depends to a crucial extent on its internet websites. The corporate site is an indispensable prerequisite for a modern enterprise or trademark image[630]. This applies independently of the possibly and the importance of e-commerce-activities since also enterprises without actual or potential possibility for online sales are judged on the basis of their website. This is serious challenge because domain names know no boundary or sovereign in terms of infringement on the internet. There will be jurisdictional challenges in respect of prosecution and enforcement of trademark rights touching on domain names.

5.12.5 Corruption as Result of Greed

Corruption connotes impropriety and all forms of reprehensible, indecorous or infamous conduct especially when it is evinced in the performance of official, quasi-

[629]Tysver, D.A. (2013) Trademark Infringement and Domain Names. dtysver@bitlaw.com (1996-2013). Accessed on 9th May.
[630] Rudo, Joachim, *International Protection of Trademarks and Domains.* http://internationaldominlaw.org/inhalt.htm. Accessed on 6th November, 2012.

official or fiduciary responsibility[631]. Corruption generally refers to an inducement by means of an improper consideration to violate some duty[632]. According to Black's Law Dictionary[633] however, corruption is defined as "depravity, perversion or taint, an impairment of integrity, virtue, or moral principles, especially the impairment of public official's duties by bribery. The word corruption indicates impurity or debasement and when found in the context of criminal law, it means depravity or gross impropriety"[634]. The Black's Law Dictionary explained it as "the act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others, a fiduciary's or official's use of a situation or office to procure some benefit, either personally or for someone else, contrary to the right of others"[635]

In **Biobaku vs. Police**[636]**,** Bairamian J held that the word 'corruptly' does not simply mean improperly. He went on to define corruption thus:

> the mischief aimed at by section 98 of the Criminal Code is the receiving or offering of some benefit, reward or inducement to sway or deflect, a person employed in the public service from the honest and impartial discharge of his duties. In other words, as a bribe for corruption or its price

Corruption is promoted by infringers who target the police prosecutors, other law enforcement agencies and court officials, such as the Registrars, Exhibits Keepers, clerks and so on with the aim of evading the system by perverting the administration of justice with illicit monetary inducements[637]. This is done to influence the legal and regulatory processes by inducing the judges to 'fail' to stop illegal activities, that is, failure to exercise their discretionary powers particularly Anton Pillar Orders[638]. Due to these inducements even when enforcement agents arrest offenders, they cannot be prosecuted.

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[631] Oyebode, A. (1999) An Overview of Corruption in Nigeria. A paper at the Roundtable on the Impact of Corruption on the Political Reform and Economic Recovery of Nigeria organized as part of the 20th Anniversary celebration of the Nigerian Institute of Advanced Legal Studies, March 30-31, , p.2.
[632] Richard, L.B. (2007)Longman Dictionary of Law 7th edition
[633] Bryan, A.G. (2007) Black's Law Dictionary, 7th Edition, p.348
[634] Rottin M.P. and Ronald, N.B. (1982) Criminal Law 855, 3rd ed.
[635]Bryan, A.G. Op.cit.251
[636] (1951)2 N.I.R. 30.
[637] Nwabachili, C.O (2010),. Business Law Review, Nigerian Journal of Business and Corporate Law, A Quarterly Journal Vol. I, No.I p.51.
[638] ibid

The overall negative effect of corruption in the erosion of the capacity of the nation to produce competent law enforcement agencies since the quality of services of law enforcement agencies are marred by graft and bribe taking. This has brought the perception of ineffectiveness of the protection of the proprietor of trademarks. Proprietor of trademarks is thus shortchanged and cannot expand because the benefit of the mark goes to infringers, denying the rightful owners.

5.12.6 Low Level of Awareness

Eventhough, there is improvement in Nigeria level of literacy, however, a larger percentage of the populace still remain illiterate, with the possibility of deception or confusion. The infringers capitalize on the ignorance of masses and launch their nefarious activities by affixing counterfeit trademarks to products or services especially in respect of scarce products like drugs. With this group of people in place, the possibility of deception or confusion is much greater than with the enlighten community. An educated person may be able to differentiate between genuine and counterfeit trademarks in some cases. It does not mean that he cannot also fall victim, but the chances are less and far in between. In contrast, the illiterate consumer only has a mental picture or impression of what he wants and he goes for it once he sees something like it. It may as in most cases, turn out to be counterfeit label on the product, for example, pharmaceuticals products, automobiles parts and electrical and electronic devices.

In our markets today, some manufacturers, all in a bid to make fast or quick money, imitate already existing marks that have gained reputation and goodwill over the years. Worse still is where these infringed products are sub-standard and of inferior quality which is not identifiable by illiterate consumers. With the low educational background, it becomes difficult to for consumers to identify such counterfeit thus could not reports same to appropriate authority for the arrest of offenders.

5.12.7 Insecurity of Lives and Property

Insecurity and unfriendly political and social environment hamper the effort of regulatory authorities to carry out their duties diligently. For example, during emergencies or insurgencies infringers or imitators of trademarks may flourish unhampered because the law enforcement agencies immediate concern is geared

towards matters of physical protection and not protection of product marks. Also, under such situations, consumers hardly think of the consequences of products with counterfeit marks. They consume what comes their way since life itself is at stake in a political or social crisis. That is why during emergencies, people first consume any type of drug in the name of 'treating illness'. Fear of armed attack by infringers may also force the law enforcement agencies at times, to retreat thus allowing infringers to have their day[639]. Intimidation may result in many of the personnel to retreat for fear of being killed.

Insurgencies also account for the increase in the infringement in the sense that people at such situation could hardly differentiate between original and counterfeit products in a hurry. Whatever comes their way is the choice they make because the unfriendly environment has set a fear of movement. This is worse when communication infrastructures too get under attack[640]. The telecommunication lines of Global System Communication in Nigeria (GSM) were attacked and destroyed which cut off people from the benefits of knowing what happens at different parts of the country at given point in time. This also means that transportation, particularly by road is not safe for travelling due to sudden attacks. All these situations promote counterfeits and subsequently discourage the proprietor of trademark since benefit rather goes to the counterfeiters.

Porous National Borders - Counterfeit products pass through borders especially seaports and airports which in most cases are believed to be of genuine goods. However, it is dishearten that those products such as pharmaceuticals, electrical, drinks and body care bear fake trademark instead of genuine ones. The President of the Manufacturers Association of Nigeria once raised an alarm that Nigerian manufacturers were losing billions of naira through trademarks and trade names malpractices. He disclosed that most of the fake products bearing the trademarks and trade names of the genuine manufactures were being smuggled into Nigeria from foreign countries.

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[639] Akunyili, D.N. (2005) Counterfeit Drugs and Pharmacovigilance. The 10th Pharmacovigilance – The Study of Adverse Drug Reaction Training Course held at Uppsala Monitoring Centre, Sweden, p.32. She reported on the attempted assassination on her life. Gunmen fired at the vehicle she was travelling in and the back windscreen was shattered by bullets which pierced through her head scarf and burnt some upper part of her scalp. She further reported that counterfeiters had planned attacks and indeed armed men invaded her residence too but fortunately she was not indoors

[640] See also Nwabachili, C.O. op cit. 84

5.12.8 Ineffective Enforcement Mechanisms

This also is one of the factors to ineffectiveness of trademarks protection in Nigeria. Trademarks enforcement in Nigeria remains weak and subject to inconsistencies. The relevant Nigerian institutions such as police and other enforcement agencies suffer from low morale, poor training and limited resources[641]. Therefore they cannot adequately curb the menace of the infringers of trademarks. A key deficiency is inadequate appreciation of the benefits of intellectual property rights among regulatory distribution networks and consumers. The over-stretched and under-trained Nigeria police have little understanding of trademark rights. Companies and individual manufacturers do not often trust trademark 'protection' because of the ineffective enforcement mechanisms of law.

The Nigerian judiciary is bedeviled with manpower and infrastructural constraints such as insufficient number of judicial officers, poor record management facilities, absence of research assistants for presiding officers of court and the non availability or insufficient court halls to mention but a few[642]. A matter which lingers in the court for a 2 year period might have been heard for a less than a total number of 20 days only within the 2 year period in question. The pace of judicial proceeding is generally slow. The protection of trademarks as well as other forms of intellectual property is the exclusive preserve of the Federal High Court. The Federal High Court is crowded with many of federal matters relating to revenue and also the court does not have sufficient experts in the matters of intellectual property. On the other hand, there are no effective alternative dispute resolution mechanisms for trademark infringement either. Even though, there are few centres brought into existence now, these are just not enough to cover the issues arising from intellectual property rights particularly issues of trademark. Trademark can be registered only for goods or classes of goods in respect of which the owner of the mark has acquired or intends to acquire a reputation for dealing in within Nigeria. Where therefore goods are dealt in only outside Nigeria a trademark in respect of such goods cannot be registered in Nigeria unless the owner of the mark has the intention to deal in those goods within Nigeria. It is noted however, that in practice the Trademarks

[641] ibid
[642] Sodipo, op cit.

Registry does not require applicants to produce evidence of such intention. It is therefore quite easy for person who has no right to a mark to have it registered as their own, especially as the law does not specify who is entitled to apply to register a mark.

Inadequate Inter-Agency Relations - The absence of coordination among the various agencies of government such as National Agency for Food and Drug Administration and Control (NAFDAC), Customs, National Drug Law Enforcement Agency (NDLEA), Standard Organization of Nigeria (SON), Nigerian Ports Authority (NPA), Consumer Protection Council (CPC), Shipping Lines, Police and so forth create a fertile ground for counterfeiters to escape detection, arrest and sanctions. Some of the criminally minded importers take advantage of this state of disorder to propagate their illegal business.

5.12.9 Economic Weakness

Essentially, intellectual property rights seek to ensure that no-one unlawfully annexes the fruits of another person's labour. However, the extent of poverty in Nigeria militates against effective protection of trademark. Many people are unemployed thus their earning is uncertain, therefore cut corners by infringing a reputable registered trademark of a manufacturer in order to earn a living. Consumers often patronize these infringed goods because they are cheaper in the market. Also strong desire for affluence without commensurate hard-work contributes to ineffectiveness of the protection of trademark in Nigeria. People indulge in nefarious activities by misleading others with counterfeit trademark especially products with high value. It is against this background that trademark law frowns at unfair competition. Further, easy access to fake products due advancement of technology is responsible for ineffectiveness in trademark protection. Again low price of imitated products accounts for poor protection of trademark.

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 SUMMARY

The research has analyzed literature comprising books, periodicals, court cases, enabling laws and institutions relating to intellectual property rights, their origin, purpose and enforceability. Domestic laws have, herein been scrutinized to evaluate their efficacy and potential pitfalls. It further examined the international scenario and its impact on the Nigerian citizens.

The purpose of intellectual property rights is to promote creativity, innovation and to expedite technology transfer by rewarding the inventor for his travails else no one would invest time and huge sums for research and development. Generation of protection encourages technology transfers by ensuring equitable sharing of commercial benefits. Scientists are assured that their works can be disseminated without fear of counterfeiting. Intellectual property law spells out obligations of all stakeholders in intellectual property generation and commercial utilization and enhances the quality of human life.

Essentially, intellectual property rights seek to ensure that no-one unlawfully annexes the fruits of his labour to another person's labour. Awareness of this area of the law will obviously contribute to reduce considerably not only the ever-rising trend of piracy, particularly in the book, music and film industries but also reduce the piracy of trademarks and trade names malpractices.

The functions of the Nigerian institutional framework, such as, the Nigerian Copyright Commission, National Office for Technology Acquisition and Promotion, the Nigeria Police Force, the Nigerian Customs and Excise and the Federal High Court are critical in the enforcement of the intellectual property legal frameworks. International bodies such as the World Intellectual Property Organization (WIPO), for example, Trade Related Aspect of Intellectual Property Rights (TRIPs) under World Trade Organization (WTO) provide guidance in respect of enforcement mechanisms for intellectual property. The coordination and cooperation of our national agencies account for how successful our legal framework is. Copyright inspectors and the police are expected to work harmoniously together in respect of copyright protection.

Copyright is a legal recognition granting the authors the exclusive right to produce, publish, distribute, perform, broadcast or display their creative works[643]. The goal of copyright law is to encourage authors to invest effort in creating new works of art and literature. Law sanctions for the breach of any of the provisions relating to the right. The eligible works for copyright are literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts". Aside from the neighbouring rights, therefore, there can be no copyright in any work that does not come expressly or impliedly within the six categories of works enumerated. Qualifications for copyright protection include originality of work, fixation or reduction of works into permanent form, author's territorial relationship to Nigeria. There are various rights of copyright owners.

The music and entertainment industries in the most advanced countries of the world notably, the United States of America, France, United Kingdom and Germany, to mention a few, are responsible for nothing less than 25 percent of the Gross National Income of the economies of these countries. In Nigeria, too, the Minister of Finance recently disclosed that the movie industry alone has generated an income of about 30 billion naira over the years and that this sector will in future hold the key to the economic growth of Nigeria[644].

The Berne Convention stated that copyright covers "every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression" Covered under this broad term is every original work of authorship, irrespective of its literary or artistic merit. The owner of copyright in a protected work may use the work as he wishes, and may prevent others from using it without his authorization. These rights are referred to as "exclusive rights". Copyright protects both economic right and moral rights. In addition to those mentioned above, the TRIPS Agreement included another genre of work to be covered under copyright. This is multimedia production. Although there is no legal definition, there is a consensus that the combination of sound, text, and images in digital format, which is made accessible by a computer program, is considered an original expression of authorship and is therefore covered under the umbrella of copyright.

[643] Section 6(1)(a)(c), Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.
[644] Okojon-Iwala, N. Report on the State of Economic Growth of Nigeria through Nigerian Television Authority News at 9.00pm June, 2014.

The direct product of research is knowledge. This can be in the form of a new technology, new product or process and improvement in existing product, process of technology[645]. This is useful only if its products can lead to economic development, industrialization, job creation and poverty reduction. Application of intellectual property rights in patents improve the overall research environment and provide an impetus for greater creativity and knowledge generation. Intellectual property rights protect technologies by way of licensing, transfer to end users through private, cooperative, non-governmental and public channels[646].

Patent law is a branch of the larger legal field known as intellectual property law, which also includes trademark and copyright law. Patent provides reward not only for the creation of an invention, but also for the development of an invention to the point at which it is technologically feasible and marketable. A patent[647] is granted under the law to protect an invention that is new or essentially better in some ways than what was made before, or for a better way of making it. This protection is of tremendous importance to technicians and technologists such as electricians, mechanics and engineers. The objective of patent therefore is to make the patent system work more effectively in order to give the necessary impetus and protection to our nationals to embark on industrial and technological research and development, to stimulate innovation and the adaptation of existing technology to our peculiar needs. An invention must constitute an improvement upon a patented invention and must also be new, must result from inventive activity and must be capable of industrial application[648]. In other words, it does not matter that a similar process has already been invented. As long as this new process constitutes an improvement on the old process and satisfies all the requirements of novelty, it is deemed patentable.

The demand for general legal protection against unfair imitation of marks and names is a product of the industrial revolution that followed factory production and the growth of canals and railways. There was increase in the production of products

[645] Alegbejo, M.D (2010) Intellectual Property Rights in the National Agricultural Research System in Nigeria: A paper presented at the Workshop on "Creating Awareness on Intellectual Property: Issues, Rights and Obligations organized by the National Cereals Research Institute Badeggi, Niger State, Nigeria December, , p.2.
[646] ibid
[647] There are three types of patents: Utility patents, design patents, and plant patents. Commonly, when people refer to a patent, they are referring to a utility patent, which allow the creator of useful, novel, non-obvious inventions to stop others from making, using, or selling that invention for a statutory period of 20 years.
[648] S.1(1)(b) Patents and Design Act, Cap. P.2, Laws of the Federation of Nigeria, 2004.

which the manufacturers were identified with. Thus, distinguishing products from others by trademarks became very important. Most advertisements teach the consumers to buy by product mark or manufacturing house name and keep reiterating the message in the hope of persuading buyers not to deviate to rivals.

Nigeria, like several other developing nations, is facing new developments and challenges in the processing of strengthening its intellectual property systems, as a result of rapid globalization that has engulfed the world economy. Specifically, some of the areas of concern is the establishment of appropriate legal and institutional framework, creating awareness on the importance of IPR, protection of pharmaceuticals, biotechnological inventions, business methods and software, electronic filling of patent application and the future of the intellectual property system in general. As Nigeria advances industrially, there is indeed a great need for the protection of trademarks rights. Apart from fake products which are imported, many other counterfeit products which are produced locally within the country also carry marks which imitate often times the trademarks and names of the genuine Nigerian and non-Nigerian manufacturers. A trademark is a right in favour of a person in respect of any unique expression relating to his goods and services. The rights of proprietor includes, right of exclusive possession, right to exclude others, right to transmission, right to sue and be sued, right of licensing and right of assignment. It is unlawful to use any expression without the consent or knowledge of the trademark proprietor.

6.2 FINDINGS

The research has entirely examined the legal and institutional framework on ground, in Nigeria and found a number of discrepancies, that hamper the effective protection of intellectual property rights as detailed below.

1. Deficiencies in Legal Provisions

The research work found that there are some legal provisions that undermine the protection of intellectual property right in Nigeria:

a) Copyright:

Section 20(2)(a)-(d) of the Copyright Act exempts an infringer from criminal liability if he can show that he did not know and had no reason to believe that the materials he is offering for sale, hire, rent, distribution or has in his possession are

infringing copies. The requirement of "knowledge or having reason to believe" creates a subjective test in determining the guilt of the accused. Most infringers will rely on lack of knowledge to evade punishment.

Section 1(2) (e) of the Copyright (Collective Management Organizations) (CMO) Regulation, 2007, which provides that to register must have minimum of 100 persons demonstrates the difficulty in fulfilling the requirement. Also section 44 of the Copyright Act, which places restriction on importation of printed copies without same for exportation gives room for infringement. This could actually account for the reason why infringing disc are exported from Nigeria to other countries.

b) Trademarks

Trademark Act in Nigeria has inherent statutory problems in section 67 based on definition of 'trademark' itself. The section is so worded that it lost the meaning. Another defect with the Trademark Act is the present definition of a mark does not include the packaging, shapes or presentation of goods. These are therefore not registrable. Section 67 of the Trademarks Act provides ambiguous definition of "trademark" which is quite confusing. Further section 14(1)(2) creates confusion in that the dichotomy of registration in Part A and B of the register is uncalled for. Similarly section 4 of the Trademark provision on registration to be in respect of particular goods is not clear.

Again trademark does not provide for the registration of service marks. Efforts are however being made to review the Patents and Trademarks laws to introduce substantive examination, include service marks and generally make the law TRIPs compliant. Further, imposition of inadequate sanction on infringers encourage infringement, for example, sections 61 and 62 of the Trademark Act provides "any person who makes a representation that an unregistered trademark is registered, or that a registered trademark is registered in respect of goods for which it is not registered, or that registration confers exclusive right when in fact, it does not shall be liable on summary conviction to a fine not exceeding 200 Naira". Also section 3(3)(a)(b) of Merchandise Mark Act provision is grossly inadequate punishment for infringement, for example, if the matter is determined by the High Court the infringer is liable to 2 years imprisonment or a fine and if before Magistrate court the infringer is imprisoned for 6 months or a fine of N100.00.

The penalty for infringement especially piracy and counterfeiting is not sufficient to deter would-be offenders. The only remedy for an owner is civil action in court there is no provision in the law for criminal prosecution except in the area of copyright where the owner can institute a criminal action through the Nigerien Copyright Commission. Also sections 372 to 380 of the Penal Code create various offences similar to the Merchandise Marks Act, including counterfeiting a property mark (section 375) making a false mark (section 378) and tampering with property marks (section 380). Terms of imprisonment range from one to three years or a fine or both. The punishments prescribed by Penal Code are so mild that it cannot deter infringers.

Section 13 of the Merchandise Marks Act states that: "no prosecution of an offence against an act shall be commenced after the expiration of three years after the commission of the offence or one year after the first discovery of the commission of the said offence, whichever time expires first". The time limitation placed on the complainant is indeed a major problem. This is because there are a variety of factors that may have to be considered prior to filing a complaint. Therefore, the limitation seems rather impractical and unjustifiable particularly foreign investors may be unable to bring an action within the stipulated time frame. It is considered that since the proprietor's rights remain valid as long as the trademark is renewed, he should not lose his rights to the time limitation of possible criminal prosecution.

c) Patent and Industrial Design

As regards Patents and Design law, some of the provisions need to be amended in order to make it comply with international standard. Presently, there is no provision for substantive examination of inventions under the Patent law due to lack of technical capability and infrastructures for such exercise. The Registrar of Patents will conduct an examination only as to form. In section 4 of the Patent Act, the Registrar of Patents will not in considering any application for a patent, enquire whether the subject of the application is patentable, whether the description and claims satisfy the requirements of the law or whether there has been a prior application, for or a prior grant of, a patent in respect of the same or a similar invention as that under consideration. In the circumstances, section 4(4) provides that "patents are granted at the risk of the patentee and without guarantee of their

validity". Also in section 1(4) it provides that "patents cannot be validly obtained in respect of plant or animal varieties, or essentially biological processes for the production of plants and animals, (other than microbiological processes and their products". That is to say the Act does not cover plants and animal varieties. However, it should be noted there is a bill on Intellectual Property Right Bill 2009 which would take care of aspect.

Another problem with Patent Law is in respect of inventions developed by an employee in the course of employment. The Patent law provides that "in the case of inventions made in the course of employment or in the execution of a contract for the performance of a specific work, the right to a patent in the invention is vested in the employer or the person who commissions the work". The challenge here is that employee who use their talent to come up with inventions, though in the course of their employment, express the desire to have a share of the proceeds that might accrue therefrom as an incentive. The modern trend is to encourage these inventors by making them share from the royalties arising from their invention.

The ambiguity in the wordings of Section 14(1) of Patent and Industrial Design which gives ownership of industrial design to any person... "who whether or not is the true creator, is first to file, or validly to claim a foreign priority for an application for the design" is a barrier to protection of industrial design. The wordings of this section seems to be too open ended and a counterfeiter who is smart or fast can capitalize on this provision by being the first to file.

The power of the Minister of Trade and Investment in paragraph 15 of the First Schedule to the Patent and Design Act to make, use, exercise or vend whether authorized or not by patentee is likely to violate the right of a patentee.

2. Ineffective Enforcement Mechanisms

The research has found that there are deficiencies in enforcement mechanism of institutional framework, too, for example, lack of unity of command of different agencies, such as the police, copyright inspectors, customs and excise. It further found that there are several duplication of powers and functions of agencies which create confusion for them. It was also noted that trademark, patent and industrial design do not have institutional framework like Nigerian Copyright Commission for copyright matters. The ineffectiveness of enforcement systems are commonly

attributed to a lack of human resources, funding and practical experience in intellectual property enforcement by relevant officials. The fact is that insufficient knowledge on the side of right holders and the general public, concerning their rights and remedies and systemic problems resulting from insufficient national coordination including lack of transparency are the major contributors to failure of enforcement process. Another great concern is the application of digital technology in the late 20th century. It has a serious down side for content producers in the copyright based industries. The greatest challenge in this area includes the difficulty in the control of information sharing and the getting admissible evidence to convict infringers.

3. Bribery and Corruption

Bribery and corruption undermine the enforcement capacity of the Nigerian Custom Service and the police, which affects the collaborative efforts of agencies for enforcement of copyright in Nigeria. The result is lack of intra and inters-agency communication and networking failure which gives room for the pirates to successfully operate. Revenue losses are also incurred in those countries in which counterfeit and pirated products are produced for export to Nigeria. As this trade tends clandestine, the producers of infringing products will hide the size of production output also from the tax authorities. False documentation will accompany the false products, understating their sale price, for the purpose of reducing tax imposts in both the producing and importing countries.

4. Lack of Adequate Funding of the Enforcement Agencies

The work found that the funding of enforcement agencies and their collaborators (especially government parastatals) has not been adequate. Lack of release of funds is responsible for dearth of technical tools for anti-piracy operations and inadequate personnel in the agencies. This results in lack of facilities such as vehicles and instruments of investigation and detection which hinder the effective operation sometimes. This hampers enforcement activities, as strengthening proactive enforcement interventions, conducting surveillance on suspected piracy locations and prosecutorial activities put in place by the Nigerian Copyright Commission for the enforcement of copyright laws.

5. Jurisdictional Ambiguities in Relation to Domain Names

The research has found that there are jurisdictional challenges in respect of prosecution and enforcement of trademark rights in respect of domain names. Our current trademark law is territorially based. That means the protection of proprietor of trademark does not go beyond Nigeria. However, due to increase in the business transaction and transnational commercial activities, territorial law may not cope with the modern trend of globalization. Modern communication technology often is said to be the prime mover accelerating the pace of globalization of the markets and professions.

The trend toward internet usage is such that a whole industry is growing up whose primary purpose is to provide efficient connections to this electronic network. Domain names are used by electronic technology such as banks, educational institutions, and financial institutions, private and public enterprises in the conduct of their businesses. The expansion of the World Wide Web has led also to an expansion in trademark infringement claims and lawsuits involving the internet. The internet has in fact become the latest point of activity for trademark infringement. In domain name disputes, the party seeking to obtain the domain name typically relies on their trademark rights. In most cases, the domain name was identical to the company's well-established trademark. However, that fact alone is insufficient to prove a charge of trademark infringement.

6. Insecurity of Lives and Property

It is also found that insecurity, unfriendly political and social environment hamper the effort of regulatory authorities to carry out their duties diligently. Infringers and imitators flourish unhampered because immediate concern of personnel of the law enforcement agencies is geared towards matters of their own physical protection and not protection of product. Customers consume what comes their way when life itself is at stake in a political or social crisis. Fear of armed attack by infringers may also force the law enforcement agencies, at times to retreat thus allowing infringers to have their day. Intimidation may result in many of the personnel to retreat for fear of being killed.

7. Porous National Borders

Border security has assumed great importance in the world today as the rate of criminal activities has also increased in scale such as counterfeit products and pirated materials. There are several irregular and regular routes in Nigeria borders. These allowed criminals to move across the borders unhindered and even continue with illicit business with impunity and this affects the socio-economic development and security of lives and property. Counterfeit products pass through borders such as seaports, airports and also indefinable corridors or regions that serve as a route to illegal activities which in most cases are believed to be of genuine goods. However, it is disheartening that those products such as pharmaceuticals, electrical, drinks and body-care are counterfeits instead. The smugglers pass unsuspected routes thus beating the enforcement agencies and bring into Nigeria counterfeits especially in areas of pharmaceuticals and electronic/electrical products which are detrimental to social and economic lives of the citizenry.

8. Lack of Facilities and Expert Personnel

The study found that the administration of intellectual property rights in Nigeria is incapacitated by inadequate skills. Persons involved in its administration are usually not experts. For instance, patent examiners are not experts in the field of science and technology, therefore the grant of a patent is as to form only not substantive examination. There is shortage of manpower to cover the length and breadth of Nigeria for effective operation. The infrastructure for operation of intellectual property rights is still largely undeveloped. Information Technology is also in the early level of development thus not encouraging proper research by intellectual property experts, students and scholars. Filing of applications is always slow whereas IPRs vest on the data of filing as against the date of grant. The process of grant of IPR could take years due to the limited infrastructure facilities at the Trademark and Patent Registries. These infrastructure deficiencies have not encouraged business development in Nigeria with bottlenecks in passage of goods and services between borders. Also facilities for operation and inadequate support for organizational activities such as delay in passing Bills, for example, Intellectual Property Right Bill since 2009 are found to be in favour of pirates and counterfeiters.

9. Lack of Public Awareness and Cooperation

The researcher found that the socio-cultural behaviour of the populace also accounts for ineffectiveness and difficulty of protection of intellectual property rights, for example, cultural beliefs and orientation. People do not attach economic interest to inventions. They see it as cultural antiquity rather than economic well being. Users and vendors of counterfeit goods, pirated audio and video tapes, illegal duplicated software and compact disks do not feel bad for their actions, because to them IPR is alien to our cultural belief. Although awareness on the intellectual property right protection is increasing in Nigeria, the pace is still very low compared with the rapid global changes taking place in respect of the subject matter. The financial resource to embark on awareness building program has therefore constituted a great challenge to government agencies for this exercise. The awareness is most needed in industries, especially in small and medium enterprises (SMEs), researchers, innovators, inventors, universities and polytechnics.

Also **t**here is lack of cooperation among the Nigerian citizenry as regards enforcement of intellectual property, for example, public engage in download from internet, buying and condoning pirated materials even when it is known to them. Public failure to support an initiative in reporting illegal clandestine activities in private neighbourhoods is also a factor to poor enforcement activities. The deliberate attitude of walk away when illegal reproduction or printing is known is against public morality which results in many of the pirates of go scot free.

10. Lack of Development of Intellectual property Law

Most of Nigerian laws relating to intellectual property have not been updated since their enactments, such as Trademark Act 1965, Patent and Design Act 1970, Merchandise Act 1915, and so on. It make them outdated and could not stand the modern reality. This implies that Nigeria laws are behind the modern application of new technological improvements such as internet. 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.

Presently in Nigeria, service mark is only now recognised and protected by an amendment to the regulation made by the Minister of Commerce in exercise of his power under the Trademarks Act 1965. The grant of patent on some Plant Varieties

and Seed are already in force in England, China, United States, Kenya and South Africa. However, it is still non-patentable in Nigeria.

6.3 RECOMMENDATIONS

It is evident from the above analysis that combating counterfeit and pirated goods is a collective responsibility, needing effective institutional collaboration and cooperation. This includes information sharing and acting in concert. On the basis of the findings, the following recommendations are made to improve the protection of intellectual property rights in Nigeria.

1. Deficiencies in Legal Provisions

a) Copyright

The study recommends that the legislative deficiencies of relevant laws be reviewed and streamlined, for example, Second Schedule of Copyright Act in respect of research, private use, criticisms, review and reporting of current events. Also, the powers of the Minister of Trade and Investment to purchase, make and vend under patent law be reviewed.

It is further recommended that the Nigerian Copyright Commission ought to engender stronger proactive enforcement of the Copyright Act for more stringent penalties for infringement to ensure effective check of piracy in the country. For example, section 39(5)(6) of the Copyright Act provision for contravention of the law by individual which attract N1,000.00 and Corporate body N10,000.00 are far below what he or it gets upon successful nefarious activities of piracy. N5,000.00 and N50,000.00 respectively are recommended and should be remitted to the rightholder. Sections 20(2)(a)(d) which provides for exemption from criminal liability for want of knowledge. It is recommended that the test should have been an objective one and the question should be that, would a reasonable man engaged in the business of offering for sale, hire, rent, distribution of copyrighted materials given the same circumstances know the difference between pirated copies and legitimate ones and the credibility of his sources of materials . If the answer is affirmative, then the accused should be found guilty. Section 44 of Copyright Act which restricts the importation of copyright work but no corresponding punishment for export should be reviewed, that is, the Customs should prohibit exportation. Second and Third Schedules seem to have denied the right holders the right to IP in

the name of access, it is thus recommended that it should be streamlined. Copyright Act, Section 1(2)(e) of Copyright (Collective Management Organization) Regulation 2007 be readdressed to enhance enforcement of copyright laws.

b) Trademarks

It is recommended that the ambiguity in section 67 of the Trademark be recasted to give clear meaning to the inherent statutory problems. Similarly S.14(1)(2) of the Trademark relating to 'Option for registration in either Part A or B to be harmonized appropriately. Service marks and Consumers' rights should be provided in the Act for the benefit of service providers. Appropriate punitive measures should be enacted to discourage infringements of intellectual property so as to boost our economy particularly as they relate to sections 372-380 of Penal Code (as amended) to reflect the reality of the modern time.

Appropriate punitive measures should be enacted to discourage infringements of intellectual property so as to boost our economy particularly as relates to sections 372-380 fines or punishment of Penal Code amended to reflect the reality of the modern time.

c) Patent and Industrial Design

It is recommended that the lack of provision for 'substantive examination' of inventions under the patent law be solved by employment of experts in technical capability and provision of infrastructures for such exercise by the agencies. Experts in various technical fields should be engaged for the examination before patent is granted. That will eliminate the section 4(4) of the risk of the patentee without guarantee of their validity. With the advancement in world economy, it would be out of place for Nigeria to be silent on plants and animal varieties.

It is also recommended that the 2008 Bill for an "Act to provide for the Establishment of the Intellectual Property Commission of Nigeria, Repeal of Trademarks Act, and Patents and Design Act LFN 2004 and Make Comprehensive Provisions for the Registration and Protection of Trademarks, Patents and Design, Plant Varieties, Animal Breeders and Farmers Right and for other Related Matter" be assented to by the President to correct most of the anomalies in the present Acts.

Again the Bill for Biosafety 2010 also be made reality for enhancement of Genetically Modified Organisms in Nigeria.

It is further recommended that government work out a fair package of incentives and the modalities to motivate such inventors and also encourage research and development generally in Nigeria. The authority of a Minister of Trade and Investment in paragraph 15 of the PDA should be redrafted to the effect that the minister should have the authority of the patentee or at least set aside a sum reasonable to compensate the right holder.

2. Ineffective Enforcement Mechanisms

The fight against counterfeiting and piracy should be a coordinated one, involving all the relevant stakeholders and dealing with all various intellectual property rights. Such ministries like Trade and Investment, Science and Technology, Justice and other agencies such as Nigerian Copyright Commission, Trademark and Patent and Design Offices, National Office for Technology Acquisition and Promotion Customs and Police should all work together. Members of such bodies or associations of stake-holders like COSON, NAFDAC and SON as well as leading manufacturing, retail and consumer organizations are recommended to join the fight.

In order to streamline intellectual property administration in the country and make it more effective, government is considering the establishment of an Intellectual Property Commission, an umbrella organization which will bring the copyright system, patents, and trademarks regime under a single authority. It is recommended that the relevant agencies of government should build stronger cooperation and coordination for effective monitoring and enforcement of the intellectual property. WIPO and other international agencies are enjoined to collaborate with developing countries like Nigeria in the enforcement of the legal regime on IPR, as this will assist in combating infringements, piracy, counterfeiting, passing-off and products faking that have bedeviled the economies in developing nations and has forced some intellectual property owners out of business.

3. Bribery and Corruption

It is recommended that attention should be paid to the causes of dishonesty and the endemic effect on the economy generally. Responsible agencies should be audited and probed periodically. There is need for accountability on the part of

agencies charged with the task of enforcing the intellectual property rights. Hard-work should be encouraged by strict protection of intellectual property and support for capacity building. There should be check on prices of products to forestall fake or counterfeits products being sold in the market. Hawking especially of drugs and body care products should be controlled because often times low prices are associated with counterfeits.

4. Lack of Adequate Funding of the Enforcement Agencies

The researcher recommends that meaningful public education at the grassroots level must form a critical component of intellectual property enforcement in Nigeria. Government at all levels should provide adequate funds for the agencies with the responsibility of administration, promotion, enforcement and prosecution of intellectual property rights to enable them carry out their mandates effectively. It should provide infrastructures and facilities to enhance monitoring of activities of infringers, counterfeits or pirates. The populace should be made to be conscious of the benefits of intellectual property protection through public enlightenment by the use of symposia, workshops, and seminars. Further, intellectual property information should be disseminated to members of the public through the electronic media and print.

5. Jurisdictional Ambiguities in Relation to Domain Names

It is recommended that the Nigeria government borrow a leaf from other jurisdiction like United States of America since US has law dealing with internet operation. It may carry out this by adopting the WIPO "Internet Treaties," which is an emerging development in law and technologies.

6. Insecurity of Lives and Property

The work recommends that peaceful environment should be the target of both government and the citizenry. While the government provides security for lives and properties, individuals may report those breaching peace to the appropriate authorities for necessary action. Conducive atmosphere promote businesses, invention and innovation which brings about economic advancement.

7. Porous National Borders

It is recommended that borders such as seaports, airports, and neighbouring borders are properly secured and equipped to combat smuggling of pirated and

counterfeited products into Nigeria through those avenues. This is because they are the gateways through which such products come or leaves the country. These borders should be manned by honest security personnel, so as to reduce the incidences of passage of counterfeits and pirated products into Nigeria.

The Customs and Excise law gives customs department the power to check inward and outward means of transport and examine inward and outward goods and articles. In allowing Customs to check outward goods, customs is entitled to examine, re-examine or take samples from the goods. The consignor of the export goods shall be present and the responsible for moving the goods and opening and resorting the package. This is to facilitate its border control of infringing goods, where infringing goods are sought to be Customs is permitted to confiscate the goods, impose a fine on the party concerned and, investigate and prosecute the criminal responsibility according to law where the export constitute a crime.

8. Lack of Facilities and Expert Personnel

It is recommended that right holders contribute to the training of customs, staff in the identification of counterfeit and pirated goods, and in intelligence reporting from their own sources to assist officers in identifying consignments of counterfeit or pirated goods. This would enhance contacts with right holders and their representatives organizations, the establishment of benchmarks with specialist anti-counterfeiting units in other Customs administrations, and participate in public awareness campaigns.

It is further recommended that provision and maintenance of infrastructure to allow easy access to information and development of IPRs through transfer technology be adopted. Public and private financing of university education on intellectual property and technology should be encouraged. And provision of information technology facilities to aid learning culture, research and application of technical know-how be a priority. There should be intensive and regular training for IP personnel and practitioners to keep abreast of current developments in contemporary IPRs. By improving the legal regime, enforcing existing laws and increasing public awareness, the government in concert with relevant private sectors can made significant contributions in realizing its goal of protecting intellectual property rights in Nigeria.

Other business organizations can also educate their members and the general public on the value and necessity of safeguarding intellectual property rights. Such organizations may target consumers, retailers, wholesaler and manufacturers. This may be done through educational campaign and reorientation on intellectual property rights. Finally, right holders and their managers also need to refine their promotional and marketing strategies, to better utilize the opportunities to market their works.

9. Lack of Public Awareness and Cooperation.

It is recommended that the fight against counterfeiting and piracy have to involve the public since the public has the purchasing power which causes these practices to flourish. National anti-counterfeiting and anti-piracy campaigns could be used to indicate the link between intellectual property, crime and job losses, the debilitating effects of organized crime, and the dangers to health and safety of infringing goods. As intellectual property rights are ultimately private rights, right holders have the largest immediately financial stake in ensuring the protection of those rights. For this reason rights holders should be willing to assist in enforcement efforts by providing information to assist in the identification of infringing products and in cooperating in awareness and training programmes. It is further recommended that provision of codified standards for the protection of cultural values and traditions. WIPO and other International Organizations should work out standards for the preservation and protection of Nigeria cultural standard values and traditions with which the territory is well endowed.

10. Lack of Development of Intellectual Property Law

The researcher recommends that the Bill for Intellectual Property Right be passed and assented to by the President to have current laws relating to prevention of pirate and counterfeits in Nigeria. It is hoped that the Bill would have taken care of internet provisions, provide for non-existent shape, diagram and others for effective protection of intellectual property rights in Nigeria. Law Reform Commission should be proactive in their assignment to encourage update of our laws. The legislatures are advised to fast track the processes of enactment.

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