INTELLECTUAL PROPERTY LAW SOCIETY, LAGOS STATE UNIVERSITY (IPLS-LASU) HANDBOOK

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PREFACE

In Nigeria, today, intellectual property law is one of the most important areas of law as it cuts across several other areas. Just as rights in the personal property of individuals are obviously protected under Nigerian laws, creations of the mind are also protected properties (here, intellectual property) of individuals. As this impeccable area of law continues to develop, Law Students, including those in the Prestigious Lagos State University, are increasingly interested and enthusiastic in intellectual property law, hence the imperativeness of this handbook.

This handbook will serve as a go-to material for members of IPLS-LASU while also being the first resource material for intending and prospective members of the society. Considering the fundamentality of the topics discussed, it is hoped that the handbook will serve the purpose of providing foundational knowledge of intellectual property law to IP enthusiasts in the Faculty of Law, LASU, and beyond.

This handbook is a collection of the intellectual efforts of members of the society who devoted themselves to rigorous research and have provided in-depth analysis of Intellectual Propriety Law viz: Copyright, Trademark, Patent, Unfair competition and Trade secrets. The writers of this handbook, who have donated their intellect for the use of members of the Intellectual Property Law Society, include:

1. Abdulsamad Lawal (Copyright)
2. Boluwatife Oshikoya (Copyright)
3. Folayemi Sanusi (Trademark)
4. Daniel Kodjovi (Patent)
5. Tobiloba Ankiru (Unfair competition); and
6. Ebunoluwa Braimoh (Trade Secrets)

While their intellectual capacity is apparent, as shall be seen in the substantive content of this handbook, the resources and time that they have freely put into this body of work is invaluable, and no words can adequately express how profoundly appreciative we are to these incredible authors.

This IP handbook has been put together by these authors for your consumption, and we are confident that a thorough study of this handbook will provide the much-needed foundational knowledge of Intellectual Property Law in Nigeria.

Olakunle E. Bamisile;
Director of Research 1, IPLS-LASU.

ABOUT THE INTELLECTUAL PROPERTY LAW SOCIETY, LAGOS STATE UNIVERSITY (IPLS-LASU)

The Intellectual Property Law Society, LASU, was founded by a group of likeminded students from the prestigious Faculty of Law, Lagos State University, who are enthusiastic and passionate about the intellectual property domain. Particularly, they saw the lack of a viable Intellectual Property Law Society in the faculty of law as a huge vacuum. Eventually, giant strides were taken which led to the official establishment of the society on the 24th of August 2020.

The core objectives of the society are to expand awareness on intellectual property law especially amongst law students, spur interest of newbies in the area, contribute to the jurisprudence and general body of knowledge on the subject, and to synergize with players in the industry to create learning and career opportunities for members of the society. The creation of the society was provoked by the urgency in the need to heighten the awareness on Intellectual Property law, most importantly amongst students of Lagos State University.

The activities and structure of the society is poised to educate students on the importance and indispensability of intellectual property rights in the society. The society intends to stand as a junction between interested students and positioning them to optimize opportunities available in this field. The society plans to achieve this by organizing seminars, workshops, sorting for career-boosting professional courses, and strategically synergizing with veterans in the sector.

In terms of relationship with practitioners in the legal community, the society is proud to have as its patron, distinguished personalities and revered legal practitioners such as Professor Adebambo Adewopo (S.A.N) and Barr. John Onyido (S.P.A Ajibade & co). The Society also enjoys the immense support of members of staff of the faculty of law, Lagos State University, with adorned and highly celebrated personalities like Professor K .A. Olatoye and Dr. Temitope Oloko (Senior Lecturer, Faculty of Law) as our staff-advisers respectively. The Society also has an official partnership with the World Intellectual Property Organization, Nigeria (WIPO NIGERIA).

MODULE 1: COPYRIGHT LAW IN NIGERIA

INTRODUCTION

Once a relatively esoteric subject taught in only a few law schools, today, copyright law is fast becoming a popular component in the mainstream curriculum. Both the academic and practicing branch of the legal world are now slowly realizing that copyright (*and intellectual property in general*), in its true essence, constitutes a crux of a nation's economic and infrastructural dynamics. Copyright touches almost every aspect of our daily lives, whether you realize it or not. When you watch television, listen to the radio, stream movies, box sets or music online, copyright interests are at play. Copyright exists in newspapers, magazines, graphic novels, websites, blogs, comics and books. The photos you take on your phone, to share with friends or to post online, are almost certainly copyright works. If you tweet, those tweets might also be protected. Copyright applies to most of the works created by teachers and students, such as teaching resources, essays, correspondence, video recordings or publications. And very often, these works are based on a reuse of other existing materials that are protected by copyright themselves.

But copyright is not just a set of rules indicating what you can do with existing content, and who owns the work you create. It also offers interesting topics and points of discussion to complement and enhance the subjects you are teaching or learning, whether it is English, Media Studies, Medicine, Law, and others. As Justice Joseph Story once put it; *''Copyright law approaches nearer than any other class of cases to what may be called the metaphysics of the law…"*

This module provides authoritative and accessible guidance on what you can do under Nigerian copyright law while also furnishing you with sequential evaluative exercises to aid in your understanding of the subject matter in focus.

At the end of this module, you should understand:

- The nature of copyright
- Historical evolution of copyright in Nigeria
- Works eligible for copyright
- Types of right under copyright
- Requirements for copyright protection
- Registration of copyright
- Ownership of copyright
- Transfer of ownership
- Authorship
- Collecting societies (or collecting management organizations)
- Duration of copyrights
- Infringement of copyright
- Exceptions to copyright infringement
- Remedies to copyright infringement

UNDERSTANDING THE NATURE OF COPYRIGHT

The word, copyright, is a mixture of two words – 'copy' and 'right'. To be more precise, copyright means 'right to copy', wherein only the creator or his authorised person has a

right to reproduce a work. When someone creates a product that is viewed as original and that required significant mental activity to create, this product becomes an intellectual property that must be protected from unauthorized duplication. Examples of such unique creations include computer software, art, poetry, graphic designs, musical lyrics, novels etc.
Copyright is a set of exclusive rights granted by the law of a jurisdiction to the author or creator of an original work, including the right to copy, distribute and adapt the work. Ekpo M.F., Director General Nigerian Copyright Commission (as at May 1997) defined it as “a right in law conferred on authors and owners of creative works be they literary, scientific or artistic in nature, to control the doing of certain acts in relation to those works. This means that the work is protected against unauthorised use. The rationale for this protection is that the law regards the work as property, which, like other properties, entitles the owner to the exclusive right of usage”.

The Copyright Act does not give a clear definition of copyright. It however recognises it as a right to stop or debar others from doing something and to restrain others from printing or interfering with others’ work. It can be inferred from the various definitions that the fundamental purposes of copyright are to control the copying of the intellectual materials existing in the field of literature and the arts, and to protect the writer or artist against unauthorised copying of his materials.

Initially, copyright only applied to published books, but over time, it was extended to other uses, such as translations and derivative works. It now covers a wide range of works, including maps, dramatic works, paintings, photographs, sound recordings, motion pictures, and computer programs.

HISTORICAL EVOLUTION OF COPYRIGHT IN NIGERIA

The body of laws relating to copyright in Nigeria developed over time and is still developing. There are two views on how this body of law developed in Nigeria. The first view traces it to the influence of foreign political and economic forces. By this, reference is made to the extension of the English Copyright Act 1911 to Nigeria under colonial government. The other view has it that copyright is part of our traditional concept and has been in existence for as long as the culture of the people. The proponents of this view draw their support from the practice where dancers and singers pay tribute to their predecessors in the trade before they commence performance. It seems, however, that the first view enjoys more support as the authorities point more to the fact that Nigerian copyright law has its roots in England. Thus, a discourse of this type must of necessity start with the development of the law in England.

The first copyright law was a censorship law. It was not about protecting the rights of authors, or encouraging them to produce new works. Authors' rights were in little danger in Sixteenth Century England, and the arrival of the printing press was if anything energizing to writers. The English government then became concerned about too many works being produced by the writers. The new technology was making seditious reading material widely available for the first time and the government urgently needed to control the flood of print matter, censorship being as legitimate an administrative function then as building roads. For this purpose, the English Crown found a formidable ally in the guild of "Stationers" and the censorship law was in the form of a Charter granted to the stationers by the Crown.

In the early days, the stationers had through their practices developed certain usages and customs which were made to ensure exclusivity of rights over books they had acquired from authors, in order to prevent copying by persons who were not members of their guild. Thus, in 1534, the Stationers secured protection against the importation of foreign books and in 1556, Mary Tudor, with her acute concern about religious opposition, granted the Stationers' Company a charter. This gave a power, in addition to the usual supervisory authority over the craft, to search out and destroy books printed in contravention of statute or proclamation. The company was enabled to organise what was in effect a licensing system by requiring lawfully printed books to be entered in its register. The right to make an entry was confined to company members, this being germane to the very purpose of the charter.

This system continued until 1662 but lapsed in 1679. King James II revived it for seven years in 1685 until 1694 when Parliament finally refused to renew the charter. The Stationers, who had argued forcefully against their loss of protection, were left with such claim to "copy-right" as they could make out of their own customary practices surrounding registration. As they also lost their search and seizure powers, and equity had not yet begun to grant injunctions to protect any interest they might establish, their only hope was common law and this they put to no decisive test. Thus, the stationers needed definite substantive rights and effective procedures to enforce them. So they approached parliament and offered the then novel argument that authors had a natural and inherent right of ownership in what they wrote, and that furthermore, such ownership could be transferred to other parties by the contract, like any other form of property. This argument paid off and saw the birth of the first recognisable modern copyright law and in fact the first Intellectual Property Law- the Copyright Act of 1710 also known as the Statute of Anne.

Interestingly, the Act was concerned with interest in books and other writings. It granted sole right and liberty of printing books to authors and their assigns, but this right stems nonetheless from commercial exploitation rather than literary creation. Enforcing the right depended upon registering the book's title before publication with the Stationers' Company and this was enforceable by seizures and penalties. The right has a life span of 14 years subject to extension for another 14 years if the author was alive at the time of the first expiration. Soon after the passage of the Act, other creative arts started yearning for protection of their works, particularly the visual arts. Protection was first extended to engravings in 1735-1777; sculptures in 1798-1814; and paintings, photographs and drawings in 1862; performing rights in 1833-1842.

In the early twentieth century, parliament saw it fit to bring all these measures into a single code since they all deal with the same subject – copyright, hence the enactment of the Copyright Act, 1911. The 1911 Act was also influenced by international concerns regarding copyright – need for foreign works to be afforded protection outside their shores and the need to set some form of international standards. The result of this was the Berne Convention of 1886 under which either the personal connection of the author with a Member State, or first publication in a Member state, was to secure copyright in others, under the principle of national treatment. At the Berlin revision of the Convention in 1908, Britain was obliged to accept the majority consensus on two matters: protection was to arise out of the act of creation itself, without any condition of registration or other formality – which obliged Britain to abandon the traditional requirement of Stationers' Company registration before suing; and the period of protection for most types of work was put to at least the author's life and 50 years.

Being a colony of Britain, and in order to protect the interests in creative products from Britain, Britain extended the 1911 Act to Nigeria through Order-in-council No. 912 of 24 June, 1912 which was made under section 25 of the 1911 Act. It is significant to note that although a new Copyright Act was passed in England in 1956, Nigeria still continued to apply the 1911 Act until 1970 when the first indigenous Copyright Act was promulgated as Decree No. 61 of 1970, ten years after independence. According to Adewopo (a learned author); *The impact of the (1911 Act) was limited probably due to what many described as the paucity of facility to generate copyright materials. Moreover, it did appear that the modern concept of individual proprietary right forged by the new Act was at variance with the traditional notion of communal ownership and free access.*

The 1970 Decree came into force on 24 December of that year. It was however found to be very defective in many aspects. For instance, under the Decree, copyright for literary, musical and artistic works, cinematograph films and photographs lasted for only 25 years after the end of the year in which the author died. In the area of administration, there was no effective structure under the Decree and there was also no Copyright Licensing Panel. The Decree only made provisions for civil suit at the instance of the copyright owner with regards to enforcement and the criminal sanction was very minimal, as the maximum penalty was N0.05K (Five kobo) per item seized up to a maximum of N10 (Ten Naira), with a possible prison sentence of 2 months for a second offence. In essence, enforcement was largely left in the hands of rights owners. It was these lapses and more that led to the promulgation of the Copyright Decree No. 47 of 1988. That Decree, now an Act has been amended twice in 1992 and 1999.

Observers have described the present Copyright Act as the most progressive in our legislative effort and the reason is not unconnected with the fact that the Act was fashioned after the World Intellectual Property Organisation (WIPO) Tunis model which has incorporated standard provisions reflecting current trends in global copyright legislation. Specifically, under the new Act there is now a body known as the Nigerian Copyright Commission with a governing board serving as the institutional frame work for administration and regulation of copyright in Nigeria. There is also established a copyright licensing Panel under the Act and a stronger regime for criminal sanctions. While retaining the mechanism for civil enforcement by individual right owners, the Act makes provisions for the licensing of Copyright Collective Societies for the collective management and enforcement of copyright on behalf of right owners.

Progressively, copyright protection in Nigeria gained a new feat on March 12, 2023, when President Muhammadu Buhari signed the Copyright Bill into law, which repealed the Copyright Act of 2004. The new Act sought to improve on the provision of just rewards and recognition for intellectual efforts while providing adequate limitations and exceptions to guarantee access to creative works in a manner that complies with international best practices. Some of the noteworthy amendments in the new Act includes digital rights, legal protection of technological protection measures, new economic and moral rights, extension of the fair dealing exceptions, new legal remedies and protection of expressions of folklore.

WORKS ELIGIBLE FOR COPYRIGHT

Literary works

Section 108 (1) of the Copyright Act, 2022 defines literary works to include (a) novels, stories and poetic works; (b) plays, stage directions, audio-visual work scenarios and broadcasting scripts; (c) choreographic works; (d) computer programmes; (e) text-books, treatises, histories, biographies, essays and articles; (f) encyclopaedias, dictionaries, directories and anthologies; (g) letters, reports, and memoranda; (h) lectures, addresses and sermons; (i) law reports, excluding decision of courts; (j) written tables and compilations, including table or compilation of data stored or embodied in a computer or any medium.

Section 9(1) (a) of the Copyright Act, 2022 grants the owner of a literary work in Nigeria the exclusive right to control the doing of any of the following acts; (i) reproduce the work in public; (ii) publish the work; (iii) perform the work in public; (iv) produce, reproduce, perform or publish any translation of the work; (vi) distribute to the public, for commercial purposes, copies of the work, through sale or other transfer of ownership provided the work has not been subject to distribution authorized by the owner (vii) broadcast the work; (viii) communicate the work to the public; (ix) make the work available to the public by wire or wireless means in such a way that members of the public are able to access the work from a place and at a time independently chosen by them; (x) make any adaptation of the work; and (xi) do in relation to a translation or an adaptation of the work.

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Musical Works

A musical work is defined as any musical composition irrespective of musical quality and includes work composed for musical accompaniment. The Copyright Act does not necessarily; require writing or other graphic presentation, so the above definition would have to be fixed in a definite medium of expression.

A song will have two copyrights: one in the music and one in the words of the song, the latter being a literary work. Making a new performing edition of an incomplete old work of music out of copyright may itself be worthy of copyright protection even if few or no new notes are added. In ***Hyperion Records Ltd v. Dr. Lionel Sawkins (2005)***, Dr. Sawkins wrote new performing edition of some of Lalande’s baroque musical compositions. He added a figured bass (numbered guidance to musicians, giving them some flexibility in playing the piece of music). He also corrected notes that he considered wrong or unsatisfactory. It was held by Mummery LJ that he has created a new work. The Copyright Act, 2022 also grants the owner of a musical work the same exclusive right as that of the owner of a literary work.

Artistic Works

The artistic work category is a diverse one and includes several different types of works. The Act defines an artistic work to include any of the following work (s) similar thereto: (a) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; (b) maps, plans and diagrams; (c) works of sculpture; (d) photographs not comprised in an audiovisual work; (e) works of architecture in the form of building models; and (f) works of artistic craftsmanship, including pictorial woven tissues and articles of applied handicraft.

Relatively, simple things such as football club badges are works of artistic copyright. See ***Football Association Premier League Ltd v. Panimi UK ltd (2004) 1 WLR 1147***. This principle also applies to crests applied to porcelain articles and patterns applied to tableware.

It appears that for works falling into the last category of artistic works, that is, works of artistic craftsmanship, some qualitative characteristics are required. Works of artistic craftsmanship give rise to the greatest difficulty amongst artistic works.

In ***George Hensher Ltd v. Restawhile Upholstery (Lancs.) Ltd (1976) AC 64***, a prototype made for a suite of furniture described a 'boat-shaped'. The House of Lords held that the prototype was not a work of artistic craftsmanship and that for something to fall into this category it must, in addition to being the result of craftsmanship, have some artistic quality.

Audiovisual Works

Audiovisual works is defined in the Act to include the aggregate of a series of related visual images with or without sound, which is capable of being shown as a moving picture by means of a mechanical, electronic or other device and irrespective of the nature of the material on which the visual images and sounds are carried and includes the sound track, but does not include a broadcast.

Per **Section 11 of the Copyright Act, 2022**, the owner of an audiovisual work has the exclusive right, to do or authorise the doing of any of the following acts: (a) reproduce the audiovisual work; (b) cause the audiovisual work that consists of visual images to be seen in public and of sounds to be heard in public; (c) communicate the audiovisual work to the public; (d) broadcast the audiovisual work; (e) make any copy of the sound track of an audiovisual work; (f) make the work available to the public by wire or wireless means in such a way that members of the public are able to access the work from a place and at a time independently chosen by them; (g) distribute to the public, for commercial purposes, copies of the work, through sale or other transfer of ownership provided the work has not been subject to distribution authorised by the owner; (h) make an adaptation of the audiovisual work; (i) make a translation of the audiovisual work or any part; and (j) do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work so specified under Section 11 of the Act.

Sound Recording

Sound recording means the fixation of a sequence of sound capable of being perceived orally and of being reproduced but does not include a sound track accompanying or incorporated in an audiovisual work.

According to **Section 12 of the Copyright Act, 2022**, the owner of a sound recording shall have 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 recognisably 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.

Broadcasts

The Act defines broadcast to means sound or television broadcast by wireless telegraphy or wire or both, or by satellite or cable programmes and includes re-broadcast;

Section 13 of the Copyright Act, 2022 establishes that Copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts: (a) rebroadcasting of the broadcast; (b) communication to the public of the broadcast; (c) making the broadcast available to the public by wire or wireless means in such a way that members of the public are able to access the work from a place and at a time independently chosen by them; (d) fixation of the broadcast; (e) reproduction of a fixation of the broadcast; (f) adaptation of a fixation of the broadcast; (g) distribution of a fixation of the broadcast or copies for commercial purposes by way of rental, lease, hire, loan or similar arrangement

According to **section 13 (2) of the Act**, the copyright in a television broadcast includes the right to control the taking of still photographs from the broadcast. According to **Section 13 (3) of the Act**, cable operators who merely retransmit the broadcasts of broadcasting organisations are not entitled to the rights provided for in subsection (1) in respect of the broadcasts retransmitted.

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TYPES OF RIGHT UNDER COPYRIGHT

Copyright law provides creators with two broad groups of rights: Economic rights and Moral rights.

Economic Rights

Copyright law protects creators of original works by granting creators the sole right to produce or reproduce any substantial part of the work in any form, to perform the work in public or, if the work is unpublished, to publish the work or any substantial part of it. This means that copyright owners have the exclusive right to control the translation of a work into another language, the adaptation of a work into another form, the communication of a work, the recording of a work, and the public performance of a work.

Moral Rights

Even if the creator sells copyright in the work to someone else (i.e. control over the publication and reproduction of the work and the right to receive remuneration), he or she retains moral rights in the work. The work cannot be distorted, mutilated, or otherwise modified in a way that is prejudicial to the creator's reputation or honour. Unlike economic rights, moral rights are personal to the creator, and thus cannot be sold or given away. However, moral rights can be waived by written agreement, e.g., not to exercise the rights. Specific moral rights include:

- the right to prohibit the use of a work in association with a product, cause, or institution in a way that would be prejudicial to the creator's reputation or honour;
- the right to protect the integrity of the work in order to prevent modifications that would be prejudicial to the creator's reputation or honour;
- the right to be associated with a work as its creator;
- the right of the creator to use a pseudonym in association with the work; and
- the right of the creator to remain anonymous.

REQUIREMENTS FOR COPYRIGHT PROTECTION

In order for a work of authorship to meet the requirements for copyright protection, the work must satisfy two basic criteria: originality, and fixation. The specifics on what each criterion is and how it can be met is as follows:

Originality

To be original, a work of authorship must merely be independently created. In other words, it cannot be copied from another. There is no requirement that the work be novel (as in patent law), unique, imaginative or inventive. A work need only demonstrate a very small amount of creativity in order to meet the originality requirement. Very few creations fail to satisfy the minimum creativity requirement.

Fixation

To meet the fixation requirement, a work of authorship must be fixed in a tangible medium of expression. Protection attaches automatically to an eligible work the moment the work is fixed. A work is considered to be fixed so long as it is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

Exercise 1

- ***What is copyright?***
- ***What are the works eligible for copyright in Nigeria?***
- ***Distinguish between the two types of right under copyright***
- ***Succinctly explain the requirements for copyright protection***

REGISTRATION OF COPYRIGHT

Registration of copyright is not required by the CA. In other words, eligible works are automatically copyrighted without any form of official registration. However, the Nigerian Copyright Commission has a database for owners of copyrights to register them with the commission. This would suffice as a good tool for proving ownership.
You can register a copyright with the Nigerian Copyright Commission by submitting a complete registration form, along with two (2) copies of the work, and evidence of payment of the prescribe fee. Registration can be done either online (www.eregistration.copyright.gov.ng) or physically at the NCC office.

OWNERSHIP OF COPYRIGHT

Ownership of copyright is expected to be simple in that if you create a work you should own it. However, in copyright, ownership is more complex than the ordinary concept of ownership. Ownership is a status that confers on a person the greatest range of rights over a property, having title to property and having property in an object. Ownership can be obtained by purchase, through a gift, through a devise (gift) in a will by operation of law.

Copyright ownership refers to the bundle of right exercisable by the owner of a work and it is an economic right. The Copyright Act gives a detailed definition of what constitutes ownership. The right of ownership is available only if one qualifies according to the provision of this Act. The Act also permits joint ownership of a work if they possess a joint interest in the whole or any part of a copyright or they own interest in the various copyrights in a composite production that is, a production consisting of two or more works.

The general rule is that the creator of the work is the first owner of all copyright interests in the work except where the work is commissioned by a person who is not the author's employer under a contract of service of apprenticeship or in the case of a work not having been so commissioned, the work is made in the course of the author's employment stipulated in writing under contract. Also, where a literary, artistic or musical work is made by the author in the course of his employment under a contract of service in a newspaper, magazine or similar periodical company the ownership of the work made by the author resides in the company or proprietor unless there is an agreement to the contrary. These works are treated differently from works created by individual authors on their own motivation.

Hence, the Act makes it clear that general ownership of copyright in a work resides in the author, however, a person may qualify as a legal owner of copyright for the purpose of vesting requisite locus, if he is the author of the work himself, the assignee and the licensee. It is only this legally authorized or accredited owner that can seek redress in copyright in the court of law.

In ***Musical Copyright Society (Nig) Ltd/Gte v. Adeokun Ors***, the appellant commenced action for infringement as the owner/assignee and exclusive licensee of the copyright in the musical work “Ojumore”. The respondent filed a motion on notice to strike out the action in its entirety on the grounds that the appellant lacked the requisite locus standi to institute the action. It was held that the obvious person to bring the proceedings for infringement of one of the statutory types of intellectual property is the owner at law or one of them. A person with equitable title under a trust or specifically enforceable contract is permitted to initiate the motion for interlocutory relief, but he may not proceed further without joining the legal owner. The appellant as owner, assignee and exclusive licensee of copyright in the allegedly infringed work had legal right and locus standi statutorily recognized. Thus, the ownership of copyright determines who can maintain an action for infringement.

Nonetheless, there are instances where copyright ownership would not vest initially in the author, where it is a commissioned work, or made in the course of employment under a contract. It is also noteworthy that physical possession of an object containing or representing a work of copyright or copy of such a work does not by itself give any right under copyright law, the person only has a right to the material object. Also, the author has rights referred to as the “resale right” which is an inalienable right to a share in the proceeds of any sale of that work or manuscript by public auction or through a dealer whatever the method used by the latter to carry out the operation.

Works Commissioned by Persons not the Author’s Employer under a Contract of Service or Apprenticeship

The general rule is that copyright is vested in the author who is the first owner of copyright. Accordingly, even works under commission are owned by the author. This position of the law, however, may be varied by contract where the work is commissioned. A work is commissioned where the commissioner, prior to the creation of the work, agrees in writing that the ownership of the work will reside in the commissioner and not the author.

Contractual agreements on ownership of copyright have to be well drafted to eliminate doubt, as can be seen in the case of ***Cyprotex Discovery Ltd v University of Sheffield***. The court found that the issue of copyright ownership was not addressed in the agreement, rather the clause that was supposed to address ownership only set out a complete code to be applied to all works created in the course of the project and was held it should be construed at that level of generality.

Where a person creates a work as an apprentice or under a contract of service but not as an employee, he owns the work created unless there is a contract in writing to the contrary. Thus, firstly, the important legal consequence from this category is that the employer does not have the right to the work and the employee has the ownership right. Secondly, works made can enjoy the protection of the life of the author plus 70 years. Thirdly, the status of the employer does not affect the claim of copyright.

However, there are also disadvantages to the owner of the work (that is, the person who commissioned the work and has furnished consideration). Thus, where a photographer commissioned to take the photograph of a family, in theory can exhibit the family photograph without the consent of the family. He can even make copies of it and sell to the public as a work of art. Yes, in theory, that is what the Act provides in Section 10, that the author is the owner provided there is no contract to the contrary, no contract to the contrary means that the contract can set the terms of agreement as to the type of arrangement the parties have.

Owning the actual photographs is not the same as owning copyright and reproduction rights in the photographs. Where reference to ownership of copyright is not made, the court may imply an assignment or licence for the benefit of the commissioning party but will not always do so and, in any event, will only imply the minimum necessary to give commercial efficacy to the contract or give effect to the obvious intentions of the parties.

Works, though not Commissioned by the Author's Employer, made in the Course of the Author's employment

Works made by employees in the course of employment, not commissioned by the employer is owned by the employee unless otherwise stipulated in writing under the contract. The position of the law differs from the English position where a literary, dramatic, musical or artistic work made by an employee in the course of his employment, confers on his employer the first ownership of copyright subsisting in the work subject to agreement to the contrary. This provision is a radical departure from the classical Anglo-American principle that copyright in such cases belongs to the employer, particularly where it is proven that the work in question was created by the employee in the course of his duty, using the time and materials that belonged to his employer. It is perhaps unnecessary under the present provision as it was necessary under the old law to consider the issue of commissioning and course of employment since in any case, the copyright vests in the author.

The Act does not state whether the work is within the scope of the employee's duties or not. This is where the problem lies as this provision may cause difficulties in an instance where a manager writes a report for a board of director in the company where he works, he is paid to do a job which includes writing reports, this means that if there is no contract or the contract does not envisage all likely scenarios an employee may own copyright in a work that contains a company's trade secrets. In consequence, there may be times where the principle of initial ownership creates injustice. But the provision is meant to protect authors which it does quite well. In the recent English case of ***Laurence John Wrenn and Integrated Multi-Media Solutions Ltd v Stephen Landamore***, Wrenn who ran a company selling interface software and Landamore, a freelancer who wrote software for the company. Both parties claimed ownership of the software source code and Landamore also claimed he was owed royalties. Wrenn claimed that there should be an implied transfer of copyright by virtue of his hiring

Landamore. Landamore said that only an implied exclusive license had been granted and he was entitled to royalty payments.

It was held that where an agreement on copyright had not been made, courts should err towards the lightest remedy and assume that commissioning implies a licence to use the commissioned material, but not automatic ownership of all the rights. The judge found on the facts that it was necessary to imply a term in favour of Wrenn. It was further held that an exclusive license was sufficient, and he was not prepared to assign full ownership of the software.

In the United States of America, work made in the course of employment called work made for hire, the initial ownership vest in the employer who is considered the author of the work. The United States is not alone most copyright statute in Africa still retain the classical Anglo-American position, giving first ownership of copyright in the employees work to the employer, subject to contract.

Literary, Artistic or Musical Work Made by Author in the Course of Employment in the Media

Where a literary, artistic or musical work is made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship as is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical; or to the reproduction of the work for the purpose of its being so published; but in all other respects, the author shall be the first owner of the copyright in the work. This provision does not apply to freelance journalists. The Author must be under a contract of employment and he must have made the work in the course of his employment.

The several tests have been used to determine ownership of a copyright work. The most venerable method of looking at the relationship between the parties is the "control test". Does the employer have sufficient control not only over what work is done but also over the way in which it is done? "A servant is a person subject to the command of his master as to the manner in which he shall do his work".

Over the years, the organisational test and the economic reality test were also developed. Factors which may be taken into account include opportunities of profit or loss, the degree to which the worker is required to invest in the job (e.g. by provision of tools or equipment), the skill required for the work, and the permanency of the relationship.

The approach now favoured by the courts in England (and tribunals) borrows from all of the above approaches. Perhaps the best summary of the approach can be taken from ***Hall (Inspector of Taxes) v. Lorimer***. In this classification works that relate to employee/employer relationship, which is that the employee must be employed under a contract of employment. For the sake of argument, it may be said that an employee who is employed to create and uses the employer's facilities and material in the creation of a work still gets to keep the ownership of the work. This provision, however, may be overcome by a contractual agreement stipulated in writing by the parties. Oral agreements between the parties may not serve the purpose of constituting a contract to transfer ownership.

Generally, it is understood that mutuality of the obligation and control are two major factors to be considered in an employee/employer relationship. This requirement is, however, not conclusive as can be seen **in *Community for Creative Non-Violence v Reid***. The Community for Creative Non-Violence (CCNV) and one of its trustees entered into an oral agreement with respondent Reid (a sculptor) to produce a statue dramatising the plight of the homeless for display at a Christmas pageant. CCNV paid several visits to check the progress and also gave suggestions and directions, which Reid accepted. Reid finished the sculpture and the final instalment was paid. Copyright in the sculpture was never discussed by the parties, who then filed competing copyright registrations. The District Court decided in favour of CCNV holding that the statue was a 'work made for hire' vesting copyright ownership of works for hire in the person for whom the work is prepared. The Court of Appeals reversed the decision, holding that the sculpture was not a 'work made for hire'.

The Supreme Court, in determining whether a hired party is an employee, held that the general common law of agency should be considered to determine whether a work is made for hire and the hiring party's right to control the manner and means by which the product is accomplished. The court examined other factors as well, such as the skill required, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party. The Court further stated that no single one of these factors is determinative and held that the hired party was an independent contractor.

An author of a literary, artistic or musical work under a contract of service or apprenticeship who makes a work in the course of his employment by a proprietor of a newspaper, magazine or any publishing company will not be considered to be the owner of the work but the said proprietor, in the absence of any agreement to the contrary, shall be the first owner of copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical or to the reproduction of the work for the purpose of its being so published. This is an exception to the general rule and is limited to the publication or reproduction of the work that relates to any newspaper, magazine or similar periodical. And, thereafter, gives back to the author the right of ownership in the copyright work in all other respects.

Other works

In the case of audiovisual works or sound recording, the author who is usually the producer, is required, prior to the making of the work, to conclude contracts in writing with all those whose works are to be used in the making of the work in order to resolve where ownership will reside. Government owns the first copyright in works created on behalf of the Federal Republic of Nigeria or state authority as the case may be. Government ownership of copyright covers all works done by an employee of government, whether this provision can be varied by contract is not mentioned in the Act. The law also provides that works created by international bodies are owned by the international body.

TRANSFER OF OWNERSHIP

One of the primary values of owning copyright rights is the ability to transfer some or all of those rights to third parties. These transfers can be of all of the copyright rights in a work (which is generally referred to as an outright assignment), or can be for a limited portion of the rights provided by the Copyright Act under section 30 which usually takes the form of copyright licenses.

Ownership may be transmitted or transferred through an assignment, license, testamentary disposition or operation of law. Beyond the Copyright Act, copyrights are governed by common law of property and contract. Copyright is a personal property right and it is subject to various state laws and regulations that govern the ownership, inheritance, or transfer of personal property. It is probably best to view copyright as a bundle of rights. The rights included in that bundle are the rights granted by the Copyright Act can be transferred wholly or in any subdivision of those rights.

Assignment

An assignment of copyright rights is like the sale of personal property. The original owner sells its rights to a third party, and can no longer exercise control over how the third party uses those rights. The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright, either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof.

An assignment of copyright can be thought of as a disposal of copyright by way of sale or hire, or by will. The present owner (assignor) can assign the copyright to another. Under **section 30 (3) of the Act**, assignments of copyrights must be in writing to be effective. However, the assignment and other transmission of copyright need not be total or absolute it may be limited so as to apply to only some of the acts which the owner of the copyright has the exclusive right to control or to a party only for a specific period of the copyright, or to a specified country or other geographical area.

An assignment, licence or testamentary disposition may be effectively granted or made in respect of a future work or an existing work in which copyright does not yet subsist; and the prospective copyright in any such work shall be transmissible by operation of law as movable property. However, in the case of the assignment of copyright in any future works, the assignment shall take effect only when the work comes into existence and the prospective copyright in any such work shall be transmissible by operation of law as movable property. Where an assignment or license is granted by a co-owner, it is deemed granted by both parties.

Licenses

A license is an agreement where the copyright owner maintains its ownership of the rights involved, but allows a third party to exercise some or all of those rights without fear of a copyright infringement suit. Under the Copyright Act, license means a lawfully granted license permitting the doing of an act controlled by the Act.

A license will be preferred over an assignment of rights where the copyright holder wishes to maintain some ownership over the rights, or wishes to exercise continuing control over how the third party uses the copyright holder’s rights.

A transfer of one of these rights may be made on an exclusive or nonexclusive basis. An exclusive license means a license signed by or on behalf of a copyright owner, authorising the licensee to the exclusion of all other persons (including the person granting the license), to exercise any right which would otherwise be exercisable exclusively by the copyright owner.

The transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed as was held in ***Adenuga v Ilesanmi*** that for a license to be effective, it must be in writing. Transfer of a right on a nonexclusive basis does not require a written agreement. For example, the author of a novel, who is the original copyright owner of the novel, could transfer to a publisher the exclusive right to copy and distribute a novel (under the right of reproduction and distribution), and also grant a screen play writer the nonexclusive right to create a movie script based on that novel (under the right to create derivative works). The author's agreement with the publisher would have to be in writing to be valid. However, the agreement with the screen play writer could be oral and still be enforceable.

An implied copyright license is a license created by law in the absence of an actual agreement between the parties. Implied licenses arise when the conduct of the parties indicates that some license is to be extended between the copyright owner and the licensee, the parties themselves did not bother to create a license. This differs from an express license in that the parties never actually agree on where the specific terms of the license. The purpose of an implied license is to allow the licensee (the party who licenses the work from the copyright owner) some right to use the copyrighted work, but only to the extent that the copyright owner would have all owed had the parties negotiated an agreement. Generally, the custom and practice of the community are used to determine the scope of the implied license.

By Operation of Law

Copyright can be transmitted by operation of law, as movable property. This type of transfer of ownership contemplates bankruptcy sale, re-organisation and transfer of decedent's copyrights under intestacy laws. Thus, where a person dies without leaving a will for the distribution of his property, the law grants the beneficiaries of the estate a letter of administration to deal with the property left by the deceased thus where there is an intellectual property protected by copyright, the rights of ownership of that work will be transmitted to the beneficiaries of the estate.

Termination of Transfers

Where there is an outright transfer, although a copyright owner is free to transfer copyright rights as seen fit, the Copyright Act does not contain termination rights for a copyright owner to terminate any copyright transfer. Thus, the creator of the work or the creator's heirs may not get a second chance to exploit the work in situations where the value of the work may have been significantly enhanced since the original transfer, if the assignment or license is not limited in time. Thus, the author of a valuable book does not have the right to reclaim the copyright in the book by terminating the transfer if it is an outright transfer/sale.

This position of the law is contrary to what happens in the United states where a termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier. Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant. An author has the inalienable right to terminate any exclusive or nonexclusive grant of a transfer or license of any or all of the rights under a copyright. Termination clause is an important aspect of copyright that should be included in the transfer agreement

AUTHORSHIP

The author of a work is the person who creates it. The author of music is the composer of the work. It is essential to note that the author does not have to be the person who carries out the physical act of creating the work such as putting pencil on paper. In ***Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd (1995),*** it was held that an amanuensis taking down dictation is not the author of the resulting work.

Copyright protects only the expression of an idea, so there may be occasions when the originator of the information that forms the basis of the work in question will not be considered the author of the work. In ***Springfield v. Thame***, the claimant, a journalist supplied newspapers with information in the form of an article. The editor of the Daily Mail, from that information, composed a paragraph which appeared in the newspaper. It was held that the claimant was not the author of the paragraph as printed in the newspaper. A corporate entity can be the author of a work, as long as the body is incorporated under the law.

Authorship in Nigeria generally means the person who created the work or its material embodiment. The role of the author is significant in copyright as the author is the one who brings the subject matter of protection to life. That is why, as Davison, Monotti & Wiseman note in relation to Australian copyright law and which is applicable to the Nigerian situation, the author is the viewing platform from which the rules and concepts relating to copyright are commenced. For instance, the term of protection is based on the life of the author, qualification of the author is based on the affiliation of the author, moral right is attached to the author, and the author is regarded as the initial owner of copyright. The Act defines the author based on the type of work and does not contain a separate meaning of who the author is.

The author is central to the protection of copyright and the Act defines the author in relation to the type of copyrighted work in issue, for instance "author" in the case of literary, artistic or musical works, means the creator of the work; "author" in the case of a photographic work, means the person who took the photograph; "author" in the case of audiovisual work means the person by whom the arrangements for the making of the audiovisual work were made, unless the parties to the making of the audiovisual work, provide otherwise by contract between themselves; while an "author" in the case of sound recording, means the person by whom the arrangements for the making of the sound recording were made, except that in the case of a sound recording of a musical work, "author" means the artist in whose name the recording was made, unless in either case the parties to the making of the sound recording, provide otherwise by contract; and "author" in the case of a broadcast transmitted from within any country, means the person by whom the arrangements for the making or the transmission from within that country were undertaken.

An individual claiming to be the author for copyright purposes must show the existence of facts of originality, of intellectual production, of thought and conception. In ***Oladipo Yemitan v. The Daily Times (Nig) Ltd & Another***, it was held that copyright belongs to the author who is the one that expended labour, knowledge and skill on the work. The author does not have to be the person who carries out the physical act of creating the work, such as putting pencil to paper. Thus, in ***Cala Homes South Ltd. v. Alfred McAlpine Homes East Ltd***, a case centred on drawings made by a draughtsman, with the input of another person who told them what features to be incorporated in the design for new houses, the two parties were held to be co-authors. Accordingly, an author does not have to exercise penmanship but something akin to penmanship is required.

Authorship in copyright today is a legal artifact allowing market creative works to function and at the same time is also a reversion to early versions of romantic authorship that allows autonomous individuality on the part of the author. Since the concept of authorship provides a fundamental contradiction between collective market economies of commercialization and the individual prerogatives of an author to exercise complete control over how the work is used.

Thus, ascertaining the author seems easy but this may not always be the case, for instance where the author of a work is unknown as in the case of anonymous and pseudonymous, the Copyright Act does not specify who the author should be. The issue is clearer under the Berne Convention where it provides that in the case of anonymous and pseudonymous works, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity, he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work. In case of cinematographic work the person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.

Furthermore, there is a lacuna in the Copyright Act regarding unpublished works, the act does not make mention of unpublished work, in this regard the Berne Convention provides that in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. Thus, where there is no provision by the country what will happen, would it be left to the Nigerian Copyright Commission or other competent authority to determine what is to be done regarding the unpublished work.

The Copyright Act grants the Nigerian Copyright Commission power to be responsible for all matters affecting copyright in Nigeria and be responsible for such other matters as relate to copyright in Nigeria as the Minister may, from time to time, direct. In this way, if the Minister deems it fit to provide protection for unpublished works then it may receive protection.

Consequently, unpublished works are left to the discretion of the Minister. Accordingly, the minister may give to the Commission directives of general or special character with respect to any of the functions of the Commission under this Act and it shall be the duty of the Commission to comply with the directive.

Joint Authorship

Joint authorship is another area of authorship that should be clearly distinguished from where a person makes significant contribution to a work but does not qualify as a joint author. When several people work together to create a single work, a joint work may be created. The Copyright Act defines a joint work as a work produced by the collaboration of two or more authors in which the contribution of each author is inseparable from the contribution of the other author or authors. Thus, they intend that their contributions be merged into inseparable or interdependent parts of a single whole.

Under this definition, both authors must intend that their contributions be combined, and this intention must exist at the time the contribution is created. It is not necessary, however, that the contributions be equal in effort or value. Nor is it necessary that the joint authors work in the same physical area or at the same time. As defined in the copyright Act, the only requirement is that both authors have the intention that the works are to be “inseparable from the contribution of the other author”. Chapters in a book written by different authors is not a work of joint authorship rather it is a “collective work”.

Therefore, the process of creating a work is important to determine who the authors are. In Fylde Microsystems Ltd. v Key Radio Systems Ltd. the defendant claimed that he was the co-author of a computer software used in mobile and portable radios of the sort used by security guards. The defendant’s contribution was substantial in testing the software and reporting employee errors and making suggestions as to the cause of some of the faults. The defendant’s employees have also been involved in developing the specifications for the software. But the software was entirely written by the claimant’s employees. It was held that the defendant was not a joint owner of the copyright subsisting in the software as the contributions made by the defendant’s employee does not amount to an act of authorship though the testing of the software involved skill and judgment it was not an authorship skill.

In essence, ideas, suggestions, and information to assist the author create a work will not, without more qualify a person to be a joint author of the finished work. Refusing to give joint authorship to a person who contributes ideas is entirely consistent with the principle that copyright protects expression not ideas.

The authors whose intention is to create a joint work describes only one way in which a joint work is created. A joint work can also result in several ways. Firstly, a joint work is created when a copyright owner transfers the copyright to more than one person. Secondly, a joint work arises when the copyright passes by will or intestacy to two or more persons. Thirdly, a joint work occurs when a work is subject to state community property law.

COLLECTING SOCIETIES (OR COLLECTING MANAGEMENT ORGANIZATIONS)

Copyright is the right of an individual and in most cases that right should be exercised as the creator decides or authorises. It is fact though, that the owner of copyright in a song or sound recording may not be able to know where and when his work is being exploited. It is difficult to indeed know whenever such song is being played around the country, at shopping malls, restaurants and stadiums, nightclubs, on radio and television stations and the rest. This simply shows that exercise of rights in respect of works which are intended for wide scale public use and performance such as plays and musical works, on individual basis is nearly not possible. When one considers the volume of songs played on radio stations on annual basis, or what is played at the venues mentioned above, it is neither practicable nor feasible for owners of the venues to have personal contact with the copyright owners for each of the songs or sound recordings to be able to reach an agreement to secure requisite licenses for their usage, cost implications inclusive.

The fact that a copyright holder may have to face countless users of his work makes it impossible for individual collection of royalties, and this propels, in the face of contemporary economic realities, assignment of such rights to administrative system of approved collecting societies also known as Collective Management Organisation (CMO), to bridge the gap, with the sole aim of distributing earned royalties to affected members/owners of the copyright.

The CMOs have the power to license (on behalf of copyright owners) rights in copyright works to users. The revenues generated from these licenses are, in turn, distributed to the members of the CMOs, who are the copyright owners. The copyright owners usually assign or licence their rights in the works to the CMOs, who will administer such rights, on their behalf, to users. In the light of the fact that CMOs have control over huge repertoire of copyright works, they weigh enormous power in the music industry, and are usually in a good position to negotiate acceptable license terms and fees (on behalf of their members) with record labels and publishing industries. Ordinarily, creators of music should personally manage and administer the use or exploitation of the rights in the music.

In Nigeria, the realization of the aforementioned led to the approval of Performing Mechanical Rights Society [PMRS] in 1995 to operate as a CMO in respect of musical works. With its demise, COSON in May 2010 came on-board, but later got suspended in 2018 till date, over internal management issues and for her refusal to comply with the NCC’s lawful directives. Moreover, in 2017, MCSN with similar jurisdiction like COSON was finally approved by NCC as a collecting society vide a letter by the Attorney-General of the Federation. The dust on whether approval and licensing of CMO for any particular class be limited to just one, as the enabling statute and subsidiary regulations appears to provides (or be more than one in order to discourage monopoly in a free market economy) is yet to settle.

Switzerland has five approved CMO and one clearing centre for multimedia and internet (SMCC). The USA has three main CMO (namely ASCAP, BMI and SESAC). The United Kingdom has over twenty CMO spread over different genres of intellectual property, as well as Brazil, with many CMO including those representing newspaper writers and authors, literary artists and many more. Therefore, unlike the US, it is not proper for enabling statute to attempt limiting individual right holder's choice of CMO to identify with, being that generally, it is accepted that management of right to collect royalties from users of work in most of musical fields can best be achieved through the administration of CMO.

Collective administration bodies provide the best available mechanism for licensing and administering copyrights and needs to be encouraged wherever individual licensing is not practicable. They represent the best means of protecting the rights owners' interests, enabling copyright owners to license and monitor the use of their works to collect and distribute royalties, and to bring actions for infringement. They facilitate access to copyright protected works for the consumer and minimize the number of persons with who users must negotiate licensing contracts. The convenience offered by such bodies both to the owner and user of copyright cannot be matched by any other means and, in their absence, in a totally free market, individual users and copyright owners would be at a serious disadvantage in negotiating and subsequently enforcing contractual arrangements for the exploitation of rights. CMO's make the copyright system more efficient and effective, promote the dissemination of works and tend to enlarge the choice of works made available to the public. They benefit rights owners, users alike, and in principle, the public.

Exercise 2

- ***Distinguish between authorship and ownership***
- ***Can ownership be transferred?***
- ***Can copyright be owned by three persons over the same work?***
- ***What are the functions of a collecting society?***

DURATION OF COPYRIGHTS

Copyright in Nigeria protects "intellectual" as opposed to "physical" property. One difference between intellectual and physical property is that ownership of physical property, such as a boat or a toaster, is perpetual. One continues to own physical property until it is given away, sold, consumed or destroyed. Ownership of intellectual property, like copyright, is different. Copyright ends at a legally defined point in time. These points in time are set out in rules in the Copyright Act. There is one general rule and many special rules that apply to certain kinds of works. (See the second Schedule)

General Rule

The general rule is that copyright lasts for the life of the author, and for 70 years. After that, the work becomes part of the public domain and anyone can use it. For example, Shakespeare's plays are part of the public domain; everyone has an equal right to produce or publish them. This rule applies to all categories of works except those to which special rules apply. Some of the more important special rules are listed below.

Photographs: The term of protection is the remainder of the calendar year in which the work was made and for 50 years following the end of the calendar year.

Certain cinematographic works: The duration of protection for cinematographic works which do not have an original arrangement, acting form or combination of incidents (e.g. most home videos) is the remainder of the calendar year of first publication and for 50 years following the end of that calendar year.

Sound recordings: This category includes audio cassettes, CDs, recordings and similar devices. Copyright lasts for 50 years after the end of the calendar year of the first fixation of the sound recording.

Performer's performance: Copyright lasts for 50 years after the end of the calendar year in which the performance is first fixed or, if it is not fixed, 50 years after it is performed.

Broadcast signals: Copyright lasts for 50 years after the end of the calendar year in which the signal was broadcast.

Works of Government copyright: These are works created for or published by the government i.e., government publications. Copyright in these works lasts for the remainder of the calendar year in which the work was first published, and for 70 years after that. Anyone may, without charge and without asking permission, reproduce federal laws, decisions and reasons for decisions of federal courts and administrative tribunals. The only condition is that due diligence is exercised in ensuring the accuracy of the material reproduced and the reproduction is not represented as an official version.

Joint authorship: In the case of a work which has more than one author, the term will be measured using the life of the author who dies last and 70 years following the end of that calendar year.

Unknown author: In the case of a work where the identity of the author is unknown (anonymous or pseudonymous) but the work is protected for 70 years after the end of the calendar year of the published.

INFRINGEMENT OF COPYRIGHT

The Copyright Act, 2022 marks out the rights of copyright owners by reference to certain acts which only the owner can do or authorize. He is given exclusive rights of these acts. These are the acts restricted by copyright. Other activities, which are mainly of a commercial nature, such as dealing with infringing copies of a work if they are done without the licence of the copyright owner, are described as secondary infringements. Anyone who does one of the acts restricted by the copyright, including the secondary infringements, without the permission or licence of the copyright owner infringes copyright, unless a defence or any of the exceptions known collectively as the permitted acts apply.

This is because any activity in relation to a copyright work which is neither a restricted act nor a secondary infringement of copyright can be performed by anyone without the permission of the copyright owner. For example, lending a book to a friend does not infringe copyright neither does making an artistic work from a literary work. Therefore, unless there is an issue of infringement, the relevance of the permitted acts does not enter into the case. If there is no infringement, there is no need to rely on the permitted acts to excuse the particular activity concerned. Copyright may be infringed vicariously, where a person without the permission of the copyright owner authorizes another to do a restricted act. An aggrieved copyright owner can seek for civil remedies for copyright infringement, the Act also provides for criminal offences.

Section 36 of the Copyright Act provides thus:

> *“Copyright is infringed by any person who without the authorisation of the owner of the copyright —*
> *(a) does or causes any person to do an act, which constitutes a violation of the exclusive rights conferred under this Act;*
> *(b) imports or causes to be imported into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy under this Act;*
> *(c) sells, offers for sale or hire any work in respect of which copyright is infringed under paragraph (a);*

(d) makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the sole purpose of making infringing copies of the work;
(e) permits a place of public entertainment or of business to be used for a public performance of the work, where the performance constitutes an infringement of copyright in the work, unless the person permitting the place to be used was not aware and had no reasonable ground to suspect that the performance constitutes an infringement of the copyright;
(f) permits within its premises, the reproduction of a copyright work; or
(g) performs or causes to be performed for the purposes of trade or business or the promotion of a trade or business, any work in which copyright subsists.
(2) The doing of any of the acts referred to in this section shall be in respect of the whole or a substantial part of the work either in its original form or in any form recognisably derived from the original."

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EXCEPTIONS TO COPYRIGHT INFRINGEMENT

Copyright law essentially confers on authors and creators of creative works, exclusive rights to control the exploitation of such works for a limited period. At the same time, the law recognises the need to ensure that such control does not hamper other activities which may be in public interest or which does not prejudice the normal exploitation of the right of the author. Accordingly, copyright law usually contains provisions that curtail the author's monopoly to exploit the copyright in a particular work in certain circumstances.

The extent to which the curtailment goes has in some cases been a subject of varying views and controversy. Part II of the Copyright Act creates exceptions to copyright control in respect of certain uses of copyright works.
These provisions can be grouped into six sub-heads as follows:
a. Fair dealing;
b. private use
c. parody, satire, pastiche, or caricature
d. non-commercial research and private study
e. criticism, review or the reporting of current events, subject to the condition that, if the use is public, it shall, where practicable, be accompanied by an acknowledgment of the title of the work and its author except where the work is incidentally included in a broadcast

Of all the above, the exception most often invoked is the **fair dealing** provisions.
The second schedule states thus:

The right conferred in respect of a work by Section 5 of this Act does not include the right to control;

a. The doing of any of the acts mentioned in the said Section 5, by way of fair dealing for purposes of research, private use, criticism or review, or the reporting of current event, subject to the condition that if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast.

The impression given in the foregoing provision is that so far as an act falls within the ambit of the specified purposes like research, private use, criticism or reporting of current event, it will not be an infringement of copyright if it is deemed to be fair dealing "Consequently, the act must not only be tailored to a specific purpose but must also qualify as fair dealing. This provision arguably has been said to contain the most popular statutory defence to infringement of copyright. At the same time, it presents a veritable challenge from the point of view of interpretation and application.

For the purpose of the Copyright Act, fair dealing only avails a user of work if such use pertains to one or more of the approved purposes like research, private use, criticism, review or the reporting of current event. Research has been defined as a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles The Copyright Act does not however distinguish between private research and commercially driven research. So, it would appear that a person might use a work not only for private research but also for commercial purposes. It is doubtful if such interpretation reflects the intention of the legislature. Whatever advantage this seeming oversight may provide is nullified by the restriction placed on the use of the work. The activity in question must be for the purpose of eliciting facts or principle, and must be seen to be fair in the circumstances.

In respect of private use, what is contemplated here is that a student for instance, may reproduce an extract from the work solely for his own personal use and not with the intention of circulating the extract or copies of it among fellow students. Accordingly, private use would occur where the use is confined to the user himself or where it does not go beyond the domestic setting.

A fair dealing for the reporting of news allows the use of copyright material, most usually by the media, to report on "news". The copying must be for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical, provided the copier makes a sufficient acknowledgment. The defence of fair dealing for the purpose of reporting current event was not available to a defendant as the event in question was held to be purely historical. On the contrary, an Australian Court in the case of *De Garis* defined "news" by its ordinary dictionary meaning, and went on to state that "news" was not limited to current events,

Beyond being for the specified purpose, the Act has introduced a further condition to the effect that where a use is in public, it shall be accompanied by an acknowledgement of the title of the work and its authorship, the only exception to this rule being the incidental inclusion of a work in a broadcast.

The Act also requires that such use may comprise only so much of the work as is fair. The application of this requirement presents some challenges. For instance, how and who will determine the extent of use which could be adjudged fair-the person using the work, the author, or an impartial third party? Unfortunately, the Nigerian Copyright Act has not defined the term fair dealing; neither is there any guideline stipulated in the law to determine fair dealing. In the United States for instance, courts have identified four cardinal factors to be considered in arriving at a decision whether a use qualifies as fair dealing. These are:
i. the purpose and character of the use;
ii. the nature of the copyrighted work,
iii. the amount and substantiality of the portion taken; and
iv. the effect of the use upon the potential market for the original work

It must however, be noted that these factors are mere guidelines which are not sacrosanct. The courts are free to adapt them to peculiar situations on a case-by-case basis. In other words, a judge has great deal of freedom when making a fair use determination and the outcome in any case can be hard to predict. The difficulty of applying the of fair dealing is well captured by **Lord Denning** in the case of ***Hubbard v Vospert*** where he noted that it is impossible to define in precise terms what would constitute fair dealing. The facts of each case would therefore be approached separately with caution.

The requirement of fair dealing in the context of quantum of usage would be taken to refer to use of the work that does not involve making a copy of a substantial part of the work in question. Generally speaking, the less the quantity of work used, the more likely for such usage to be excused. In some cases, the amount of material copied may be so small ("de minimis") that the court permits it even without conducting a fair use analysis. For instance, where copyrighted photographs appeared in a movie, the court excused such usage as "de minimis" having come to the conclusion that the photos "appear fleetingly and are obscured, severally out of focus, and virtually unidentifiable". Where however, what is taken is regarded as "the heart of the work", copying will not be deemed to be fair. In other words, the user is more likely to incur liability if he takes the most memorable aspect of a work.

A parody may stand as an exception here, as a parodist is permitted to borrow even from the heart of the work in order to conjure up the original work. The US Supreme Court in upholding this position noted that the heart is also what most readily conjures up the original for parody, and it is the heart at which the parody takes aim". The rationale for this position could be anchored on the premise that the light hearted use of a work, as in a parody is not always presented to the audience as a totally new original, but as deriving from another work which is often identified or well known to those audience of the parody. The court may deny a plea of parody, pastiche or caricature where the defendant engages in complete or verbatim copying, or where the defendant has borrowed more than necessary to conjure up the object of the parody.
In applying the four factors, it is necessary that they be viewed not necessarily as mutually exclusive. The factors are not separate, but are interrelated and together are used to assess where the limits to the author's control should be drawn. The US Supreme Court dealing with fair use, in the case of ***Campbell v Acuff-Rose*** gave a decisive opinion as to how the factors should be interpreted. Each factor, said the Court, is to be understood as a subset of the overall goal of copyright law: to bring intellectual enrichment to the public by providing authors with limited control over their writings and to provide them with the necessary inducement to create. Unfortunately, the sheer absence of case law on this issue in Nigeria has not helped the development of jurisprudence on the issue of fair dealing. The bare provisions of the second schedule may not provide any substantial assistance to either the user or owner of copyright material to know what may be a fair dealing under this provision.

REMEDIES TO COPYRIGHT INFRINGEMENT

It is to be noted that the remedies available to a copyright owner whose copyright is infringed in civil proceedings are Damages, Injunction, Anton pilfer order, Accounts and conversion.

1. **Damages**: Damages are divided into general and special damages, exemplary or punitive damages and nominal damages. General and Special Damages: General damages are losses which flow naturally from the defendant's conduct and its quantum need not be pleaded or proved as it is generally presumed by law. Special damages arc damages which law does not presume but must be specifically pleaded. Exemplary or Punitive Damages: This class of damages is not intended to compensate the plaintiff but to punish the defendant and to deter him from similar behaviour in the future. Nominal Damages: these are awarded in those cases where the plaintiff establishes a violation of his rights by the defendant but he is unable to

show that he suffered any actual damages as a result of the defendant's wrongdoing. See **Section 37 (2) of the Copyright Act**.

2. Injunction: An injunction is granted by the Court to prevent a person from doing or continuing to do a wrong. It is also granted to compel a person to do an act. See **Section 37 (2) of the Copyright Act**.
3. Anton piller order: An Anton piller order is an order which can be given for inspection, photographing and delivery up of infringing materials in the possession or control of an infringer.
4. Account of Profits: This is an order to produce and account for the profits in respect of the infringing materials.
5. Conversion: A copyright owner whose work is infringed can bring an action for conversion. In respect of the criminal proceedings, there are stringent provisions in the law for any criminal act committed against the copyright owner. See **Sections 40 and 44 of the Copyright Act.**

Exercise 3

- ***Can copyright be infringed upon?***
- ***What are the remedies to copyright infringement?***
- ***Mention three exceptions to copyright infringement as established by the Copyright Act***

MODULE 2: AN ANALYSIS OF PATENTS IN NIGERIA

INTRODUCTION

The 21st century has recorded remarkable developments typical of an ever-changing world. In a swift sequence, the world consistently evolves with the dissemination of ideas, proffering of solutions to problems with unique technological tools and resources, and diversification of innovations generally; hence the need for the protection of this creativity to further encourage more innovations for the betterment of the society. Patent is one of this plethora of rights available in this instance.

A patent is the grant by a country to an inventor of a monopolistic right to preclude another person from exploiting his invention without his consent for a fixed period. The monopoly is granted in return for the investor making his invention publicly known.[1] According to the World Intellectual Property Organisation (WIPO), a patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application.[2]

Consequently, patents are not just mere abstracts. They transcend all facets of life because they help improve the standard of living, divert impending dangers and create a supportive system for efficiency and effectiveness. Basically, patents help us in our day-to-day activities. The WIPO Statistics Database reported that Patents in force worldwide grew by 5.9% to reach around 15.9 million in 2020.[3] Examples of some patent law and treaties that provides for a regulatory framework in the world includes the Paris Convention, Patent Corporation Treaty (PCT), Patent Law Treaty (PLT), Budapest Treaty, and Strasbourg Agreement Concerning the International Patent Classification.

At the end of this module, you should understand:

- Benefits of registering a patent
- The legal framework of patent in Nigeria
- Criteria for an invention to be eligible for patent
- Examination and grant of patents
- Patent infringement

BENEFITS OF REGISTERING A PATENT

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[1] Akinjide & Co, "*Nigeria: Intellectual Property Protection In Nigeria – 3. Patents*", momdaq. <https://www.mondaq.com/nigeria/corporatecommercial-law/1959/intellectual-property-protection-in-nigeria--3-patents#:~:text=The%20Nigeria%20law%20of%20patents,step%20(%22not%20obvious%22)%3B> accessed August 1, 2022.

[2] <https://www.wipo.int/patents/en/> accessed August 5, 2022.

[3] <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2021.pdf> accessed August 5, 2022.

- A patent gives the patent holder the right to stop others from using the registered invention or to choose to permit the use by other persons of such invention under agreed terms.
- A patent also gives the patent holder the right to bring a legal action against anyone who infringes on the registered invention and to make a claim for damages.
- The Court may also, in appropriate circumstances, grant injunctive orders restraining the offending party from further infringing on the rights of the patent holder.
- A patent gives the patent holder the right to grant others a license to use such invention, or sell it, as with any asset. This can provide an important source of revenue for one's business.[4]

THE LEGAL FRAMEWORK OF PATENT IN NIGERIA

In order to ensure the recognition of patent in Nigeria, the legislators formulated a law that seeks to regulate the protection of patents. The substantive law governing patent in Nigeria is the Patents and Designs Act of 1970. **Section 1(1) of the Act** provides for the requirements of innovations to be patentable in Nigeria and it extends to **Section 1(2) of the Act**[5] as well.

'The art' as defined by **Section 1(3) of the Act**[6], 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. The Act under **Section 1(4)**[7] provides for restrictions on areas where patents for an invention cannot be validly obtained. Such areas include: (a) Plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products); or (b) Inventions, the publication or exploitation of which would be contrary to public order or morality (it should be understood for the purposes of this paragraph that the exploitation of an invention is not contrary to public order or morality merely because its exploitation is prohibited by law).
Section 3 of the Act[8] sets out the formal requirements and procedure for a patent application by an inventor at the Trademarks and Patents and Design Registry.
Section 4 of the Act[9] further states that the Registrar will examine the patent application as to its conformity with the provisions of the Act and, if the application

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[4] T & A Legal, "*Nigeria: Registration of Patents in Nigeria*", (May 22, 2018), mondaq. <https://www.mondaq.com/nigeria/patent/703362/registration-of-patent-in-nigeria> accessed August 3, 2022.
[5] Patents and Design Act of 1970, CAP P2, Laws of the Federation of Nigeria, 2004.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Ibid.

meets the requirements, the patent shall be granted as applied for without further examination.

Section 5 of the Act[10] provides that a patent shall be granted by issue to the patentee of a document containing: the number of the patent in the order of grant; the name and address of the patentee and, if that address is outside Nigeria, an address for service in Nigeria; the dates of the patent application and the grant; if foreign priority is claimed; an indication of the fact; and the number and date of the application on which the claim is based and the name of the country where it was made; the description of the invention (with any relevant plans and drawings) and the claims; and where appropriate, the name and address of the true inventor*.*

Section 3(4) of the Patents and Designs Act[11] provides that with respect to a patent application, an applicant who seeks to avail himself of a foreign patent priority in respect to an earlier application made in a country outside Nigeria is required to append his signature to his application in a written declaration and provide the following details: the date and the number of the earlier application; country in which such application was made and the name of the person who made the application. **Section 7 of the Act**[12] establishes the duration of patent which is 20 years from the date of its registration. **Section 25 of the Act**[13] contains provisions that states when an infringement of patent would be said to have occurred.

CRITERIA FOR AN INVENTION TO BE ELIGIBLE FOR PATENT

The law provides that for an invention to be eligible for patent, such invention must be:

- new[14]
- an inventive step (not obvious) and is capable of industrial application (useful)[15]
- not specifically excluded in the Act (e.g. inventions, the publication of which may encourage immoral and offensive behaviour)[16]

Additionally, after an invention has met the requirements, the inventor or organisation registering on behalf of the inventor should file an application for registration which must contain:

- The applicant's full name and address, and if the address is outside Nigeria, there should be an address for service within Nigeria;
- A description of the relevant invention with any appropriate plans and drawings;
- A claim or claims (for any number of products, processes or applications), however, an application shall relate to one invention only;

[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Section 1 of the Patents and Design Act of 1970, CAP P2, Laws of the Federation of Nigeria, 2004.
[15] Section 1 (2) (b) of the Patents and Design Act of 1970, CAP P2, Laws of the Federation of Nigeria, 2004.
[16] Section 1 (4) of the Patents and Design Act of 1970, CAP P2, Laws of the Federation of Nigeria, 2004.

- The application is to be accompanied by the prescribed fees as determined by the Registry from time to time;
- Where appropriate, a declaration by the true inventor of the product supplying his name and address and requesting that he be mentioned as such in the Patent;
- Where the application is submitted by an agent, a power of attorney authorising the donee of the power of attorney to that effect.

In the process of registration, the following should be noted:

- One invention per registration
- An address for service in Nigeria if the applicant's address is outside Nigeria
- An application must date only to one invention but may cover claims for any number of products or processes

It is instructive to note that a transfer or assignment of a patent must also be registered.[17]

EXAMINATION AND GRANT OF PATENTS

The Registrar is charged with the duty of examining patent applications, in order to determine suitability or otherwise for a grant. It should be noted however that the power of a Registrar in this regard is limited to a formal examination of the application to ensure conformity with the procedural requirement of the Act. Once these have been complied with, the patent shall be granted as applied for without further examination of the substance of the application.

Where the formal requirements for registration have been met, the Registrar may grant the patent by the issue of a certificate containing the number of the patent, the name and address of the patentee, the date of application and other information as may be required. Soon after the grant, the registrar causes the notification of the grant to be published.[18]

Lastly, a Patent approved by the Registrar shall expire at the end of the 20th year from the particular date of the filing of the patent application, and such a grant can lapse if the prescribed annual renewal fee is not paid.[19]

PATENT INFRINGEMENT

[17] Arewa Textiles PLC & Ors v. Finetex Ltd (2002) LPELR-5361(CA)

[18] Resolution Law Firm, "*Patent Registration in Nigeria| How to register patents*". <https://www.resolutionlawng.com/how-to-register-patent-in-nigeria/> accessed August 3, 2022.

[19] Resolution Law Firm, "*Patents Law and requirements for Patents in Nigeria*". https://www.hg.org/legal-articles/patent-law-and-requirements-for-patent-registration-in-nigeria-56941> accessed August 5, 2022.

A patent has been established to be an intellectual property right; therefore, the violation of a patent owner's right constitutes patent infringement. Per **Section 25 of the Act**,[20] a patent infringement occurs when a person, other than the patentee, in the case of a patented product, makes imports, sells or uses the product, or, in the case of a patented process, applies the process or imports, sells makes or uses the product of the process without the licence of the patentee. As obtainable in other civil cases, the onus of proof in an action for infringement of patent lies on the plaintiff.[21] An action with respect to patent infringement is to be instituted at the Federal High Court.[22]

CONCLUSION

The Importance of Patent in the world today cannot be overemphasized. Among various functions, it fosters technological innovation by providing an incentive for research and development. The rationale behind the formulation of patent laws in Nigeria is to encourage more innovations among bright minds. The primary statute that regulates patents in Nigeria is the Patents and Design Act of 1960-1970.

Exercise

- ***What is patent?***
- ***Can a patent be transferred?***
- ***What statute regulates patents in Nigeria?***

[20] Ibid.
[21] Uzokwe v. Densy Ind. (Nig) Ltd & anor (2002) LPELR-3456(SC)
[22] Section 251 (1) of the Constitution of the Federal Republic of Nigeria; Corporation v. Frankie Associates Ltd (2011) LPELR-8987(CA)

MODULE 3: TRADEMARK LAW

INTRODUCTION

Trademark remains a very pivotal aspect of intellectual property. Hence, it is important that every intellectual property enthusiast has a basic understanding of trademarks. This module by the Intellectual Property Law Students Society, LASU, aims to contribute to the general understanding of students on the Nigerian Trademark Law through conceptual analysis, examination of the procedural requirement and national legal framework governing trademarks in Nigeria.

At the end of this module, you should understand-

- The meaning of a trademark
- National Legal Framework
- Procedure for the Registration of Trademark
- Classes of Trademark
- Duration of Trademark
- Trademark infringement
- Passing off

OVERVIEW

A trademark, in its simplest form, refers to a mark used in trade. Essentially, a trademark as the name implies is the distinguishing feature of a brand from another brand. The protection of marks of businesses became imperative for consumer protection and prevention of unlawful competition.

A trademark therefore could be a word, letter(s), signature, name of the business or product, domain name, logo, label, numerals, slogans, symbols, sound of a product, shape of a product etc. to indicate the source of goods and services.

In the simplest of terms, the World Intellectual Property Organization (WIPO) describes a trademark as a sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors.

In order to qualify for registration, a trademark must not infringe on an existing trademark. Above all, it must have two main characteristics according to WIPO:

1. It must be distinctive
2. It should not be deceptive

The distinctiveness of a trademark requires that the trademark should be unique and not descriptive, in the sense that the mark must not exactly refer to a generic product which every other competitor produces so that no one has monopoly over it. The trademark must not be closely linked or associated with the product or service, it represents when judged with it.

It is highly essential that a trademark shouldn't be deceptive and must not be false in relation to the goods and services.

Apart from being distinctive, a word to be registered as a trademark must have no direct reference to the character or quality of the goods. It must not be a geographical name or a surname. It cannot also be contrary to law, morality, or be scandalous.

Exercise 1

- ***What do you understand about a trademark? Do not use the exact words used in this module and do not interrupt your flow of thought.***
- ***The characteristics of a trademark has been rightly explained in the above lesson; now, do a mental survey of brand in your locality and give two examples each***

LEGAL FRAMEWORK

The laws applicable to trademark in Nigeria are as follows:

1. Trademarks Act Cap T13, Laws of the Federation of Nigeria 2004
2. The Trademarks Regulation 1967.

The principal legislation for the protection of trademarks in Nigeria is the Nigerian Trademarks Act. According to **Section 67 of the Act**, 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 person having the right, either as a 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 trademark.

The Trademark Act is apportioned into 69 sections, 15 parts and 3 schedules. Part I of the Act contains Section 1&2 which deals with the Registrar and the Register, Part II of the Act deals with the Effects of Registration and Non-Registration and contains sections 3-8. Part III covers Registrability and validity of Registration in sections 9-16.

Part IV deals with the procedure for and Duration of Registrations, S.17-25. Part V covers Assignment and Transmissions, S.26-30. Part VI covers Use and Non-Use, S.31-37. Part VII deals with Rectification and Correction of register, S.38-42. Part VIII covers Certification Trademarks, S.43. Part IX deals with International Arrangement; S.44. Part X covers the power of the Ministry to make Regulations under section 45. Part XI contains the Powers and Duties of the Registrar in S.46-48. Part XII deals with Legal Proceedings and Appeals, S.49-56. Part XIII covers Evidence and methods of giving evidence under S.57-59. Part XIV deals with Offences and Restraint of Use of Arms of Nigeria, S.60-62. Part XV contains sections 63-69 which covers Miscellaneous and Supplemental Provisions.

REGISTRATION OF TRADEMARKS

A trademark can be protected on the basis of either use or registration. Registration under the relevant trademark law, gives the trademark owner the exclusive right to prevent others from marketing identical or similar products under the same or a confusingly similar mark.
The Trademarks Registry under the Commercial Law Department of the Federal Ministry of Trade and Investment is the relevant trademark authority.

Note that the registration of a business name under the Corporate Affairs Commission (CAC) does not translate to a trademark. A company only registers its name as a legal entity and could own more than one trademark to describe different products.

REGISTRABLE & NON-REGISTRABLE MARKS

Registrable Marks

To be Registrable in Nigeria, a trademark must contain any of the following:

- The name of a company, individual or firm represented in a special or particular manner.
- The signature of the applicant for registration or some predecessor in business.
- An invented word or invented words
- A word 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.
- Any other distinctive mark.

Non-Registrable Marks

Any trademark which is identical or deceptively similar to an existing registered trademark or trademark for which application for registration has been made cannot be registered.

Also, a trademark that would likely cause deception or confusion or is offensive is disallowed by law. Words such as Patent, Copyright, Red Cross and other similar words that are capable of misleading members of the public are not allowed for registration

Additionally, geographical names in their ordinary signification, common trade words and common abbreviation cannot be registered as a trademark.

Common names like names of chemical substances are non-registrable.

PROCEDURE INVOLVED IN TRADEMARK REGISTRATION

- **Filing the Application**: An application is made in the prescribed manner to the Registrar of Trademarks. The following are required to file a trademark in Nigeria:

1. Applicant's details: name, corporate name, address etc
2. 'Authorization of Agent Form: For applications presented through a legal practitioner, there must be a duly completed T.M. Form authorizing the lawyer to act as agent on behalf of the trademark owner, with respect to the registration.
3. A clear representation of the trademark to be registered.
4. An indication of the class of goods and/or services in which the trademark is to be registered.

- **Acknowledgement of Application**: The Registrar, on receipt of the application, issues a letter of acknowledgement which contains all relevant filing details on the trademark like Temporary Number, date of application, the trademark etc.

- **Examination of the Application**: The Registrar examines the trademark for distinctiveness, similarity with existing registered trademarks and general compliance with the requirements of the law. Where the Registrar is satisfied, he issues a Notification of Acceptance for the mark to be advertised in the Trade Marks Journal for opposition purposes. Otherwise, the mark is refused and a Letter of Refusal is issued stating the reason(s) for the refusal.

Duration for registration: It takes about 6-12 weeks from filing an application to obtain an acceptance form and 12-18 months to complete the registration process.

Refusal of Application: A trademark may be refused registration on the following grounds:
a. the applicant of the trademark is not the true proprietor thereof;
b. the application was made in bad faith;
c. the trademark is identical or confusingly similar to an existing/prior registration; and/or
d. the trademark contains some restricted words and/or symbols such as representations of the Geneva cross and other crosses in red or of the Swiss Federal cross in white

Where an application is refused, the applicant must apply for a hearing in the matter within two (2) months, otherwise the application will be deemed abandoned. The hearing is an ex-parte forum for the applicant to lead evidence to persuade the Registrar to accept its application. Such evidence may include prior use, bad faith on the part of the proprietor of the cited mark, honest concurrent user etc.

STAGES OF THE PROCEDURE FOR TRADEMARK REGISTRATION

Summarily, the procedures for trademark registration in Nigeria can be subsumed into three (3) stages:

1. **Search/Availability Check Stage:** This basically involves status check. An applicant is required to conduct a clearance search of the Trademark Registry to ascertain if there is any existing registered trademark. If there is an already registered trademark which is identical with the applicant's mark, the Registry will refuse the applicant. However, where the search reveals that no identical mark has been previously registered, then an Acknowledgement Letter will be issued to the applicant.
2. **Acceptance of Application Stage**: Applicant is expected to submit application for trademark registration. Thereafter, an official Acknowledgment and Acceptance Letter would be issued by the Registry to the applicant. The Acknowledgement Letter Form will reflect the Trade Mark Number (for example, F/TM/2022/05300), the Nigerian Coat of Arm, the Applicant's names, the date of application, the date the application was received, good or service, the Class(es) under which the mark is registered, the amount paid, the Agent's name and address, signature and stamp of the Registrar of Trademarks. The Acceptance Letter is the initial confirmation that a trademark has been approved for registration. The Acceptance Letter Form will inform the Applicant that the application has been accepted and will, in due course, be advertised in the Trade

Marks Journal. Every Acceptance Letter Form must refer to the File Number, the Acknowledgement Letter Form, reflect the Applicant's name, Agent's name and address, the good or service and the Class of trademark as well as bear the signature and stamp of the Registrar of Trademarks.

3. **Publication and Certification Stage**: This is the final stage in the process of trademark registration. Every trademark application must be advertised in the Nigerian Trademark Journal. The publication serves as a notice to the public members and invites any objection from anyone with a pre-existing trademark that may or seems to be identical with the trademark sought to be registered. If no objection is received within two (2) months or the objection is overruled, the Registrar will issue the Applicant with a 'certificate of registration'. The certificate is issued for each class of trademark registered by the Applicant. The certificate will reflect the date of initial filing as date of application (i.e. date of filing acknowledgment). The Registrar shall constitute a Tribunal to determine the merits of the objection to the application for trademark registration.

GROUNDS FOR REVOCATION OF A TRADEMARK

1. Non-use: that is, where the trademark was registered without any bona fide intention by the applicant to use same and there has in fact been no bona fide use of the trademark up to one month before the date of the application; or that up to one month before the date of the application, the trademark has not been used for a continuous period of at least five years.
2. Contravention of, or failure to observe, a condition entered on the register in relation to a trademark.
3. Non-renewal.

Exercise 2:

- ***Do a review of the Trademark Act and point the relevant sections that stood out for you while making reference to their specific provisions.***
- ***List out the Registrable and Non Registrable Marks***
- ***At what stage will an acknowledgment letter be issued to an applicant?***
- ***What are the grounds for revocation of a trademark?***

TRADEMARK CLASSES

Trademarks are grouped into “classes” according to the groups or services they serve to identify. Nigeria is a party to the Nice Agreement Concerning the International Classification of Goods and Services for the purpose of the Registration of Marks. Trademarks are classified under 45 classes. It is possible to register a trademark in more than one class. In fact, it is advisable to register your trademark in a class, and in related classes. However, use or intention to use a trademark is important in registration. **Section 31(2) of the Trademark Act** lists out the grounds for the removal of a registered trademark as lack of *bona fide* to use it in relation to the goods for a month before the date of application and after five years or longer after the application, after which the trademark was registered, there was still no *bona fide* use.
Classification of Goods: Classes 1 – 34

Class 1*:* All chemical products used in industry, science and photography, including agriculture, horticulture and forestry; unrefined synthetic or artificial resins, unrefined plastics; manures; fire extinguishing compositions; tempering and soldering preparations; chemical components for saving foodstuffs; tanning substances; adhesives used in industry; unrefined plastics in the form of liquids, chips or granules.

Class 2*:* Paints, varnishes, lacquers; preservatives against rust and against deterioration of wood; colorants; mordants; raw natural resins; metals in foil and powder form for painters, decorators, printers and artists.

Class 3: Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.

Class 4: Industrial oils and greases; lubricants; dust absorbing, wetting and binding compositions; fuels and illuminants; candles and wicks for lighting; combustible fuels, electricity and scented candles.

Class 5: Pharmaceutical and veterinary preparations; sterile drugs for clinical purposes; dietetic food and substances adapted for medical or veterinary use, meal for babies; dietary supplements for humans and animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.

Class 6: Common material and their combinations; metal building materials; transportable buildings of metal; materials of metal for railway tracks; non-electric cables and wires of common metal; ironmongery, small items of metal hardware; pipes and tubes of metal; safes; goods of common metal not included in other classes; ores;

unwrought and partly wrought common metals; metallic windows and doors; metallic frame conservatories.

Class 7: Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); agricultural implements other than hand-operated; incubators for eggs; automatic vending machines.

Class 8: Hand tools and hand operated implements; cutlery; side arms; razors; electric razors and hair cutters.

Class 9: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signaling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus.

Class 10: Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopedic articles; suture materials; sex aids; massage apparatus; supportive bandages; furniture adapted for medical use.

Class 11: Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes; air conditioning apparatus; electric kettles; gas and electric cookers; vehicle lights and vehicle air conditioning units.

Class 12: Vehicles; apparatus for locomotion by land, air or water; wheelchairs; motors and machines for land vehicles; vehicle body parts and transmissions.

Class 13: Firearms; ammunition and projectiles, explosives; fireworks.

Class 14: Precious metals and their alloys; jewelry, costume jewelry, precious stones; horological and chronometric instruments, clocks and watches.

Class 15: Musical instruments; stands and cases adapted for musical instruments.

Class 16: Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photos; stationery; adhesives for stationery or home purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and educational material (except apparatus); plastic materials for packaging (not included in other classes); printers’ type; printing blocks.

Class 17: Rubber, gutta-percha, gum, asbestos, mica and goods made from these materials; plastics in extruded form for use in manufacture; semi-finished plastic materials for use in further manufacture; stopping and insulating materials; flexible non-metallic pipes.

Class 18: Leather and imitations of leather; animal skins, hides; trunks and travelling bags; handbags, rucksacks, purses; umbrellas, parasols and walking sticks; whips, harness and saddlery; clothing for animals.

Class 19: Non-metallic structure stuff; nonmetallic rigid pipes for building; asphalt, pitch and bitumen; non-metallic transportable buildings; non-metallic monuments; non-metallic framed greenhouses, doors and windows.

Class 20: Furniture, mirrors, picture frames; articles made of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum or plastic which are not included in other classes; garden furniture; pillows and cushions.

Class 21: Household or kitchen tools and vessels; combs and sponges; brushes; brush-making materials; articles for cleaning purposes; steel wool; articles made of ceramics, glass, porcelain or earthenware which are not included in other classes; electric and non-electric toothbrushes.

Class 22: Ropes, string, nets, tents, ceilings, covers, tarpaulins, sails, sacks for transporting bulk materials; padding and stuffing materials which are not made of rubber or plastics; raw fibrous textile materials.

Class 23: Yarns and wear, for cloth use.

Class 24: Fabrics and fabric goods; bed and table cover; travelers’ rugs, textiles for making articles of clothing; duvets; covers for pillows, cushions or duvets.

Class 25: Clothing, footwear, headgear.

Class 26: Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers.

Class 27: Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile); wallpaper.

Class 28: Games and playthings; playing cards; gymnastic and sporting articles; decorations for Christmas trees; children's toy bicycles.

Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; prepared meals; soups and potato crisps.

Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, sweetmeat and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes.

Class 31: Agricultural, horticultural and forestry products; live animals; fresh fruits and vegetables, seeds, natural plants and flowers; foodstuffs for animals; malt; food and beverages for animals.

Class 32: Beers; mineral and aerated waters; nonalcoholic drinks; fruit drinks and fruit juices; syrups for making beverages; shandy, de-alcoholised beverages, non-alcoholic beers and wines.

Class 33: Alcoholic wines; spirits and liqueurs; alcopops; alcoholic cocktails.

Class 34: Tobacco; smokers’ articles; matches; lighters for smokers schemes; advertising services provided via the Internet; production of television and radio advertisements; accountancy; auctioneering; trade fairs; opinion polling; data processing; provision of business information; retail services connected with the transaction of goods.

Classification of Services: Classes 35 – 45

Class 35: Advertising; business regulation; business administration; office functions; electronic data storage; organisation, operation and supervision of loyalty and incentive.

Class 36: Insurance; monetary services; real estate agency services; building society services; banking; stockbroking; financial services provided via the Internet; issuing of tokens of value in relation to bonus and faithfulness schemes; provision of monetary information.

Class 37: Building construction; repair; installation services; installation, maintenance and repair of computer hardware; painting and decorating; cleaning services.

Class 38: Telecommunications services; chat room services; portal services; e-mail services; providing user access to the Internet; radio and television broadcasting.

Class 39: Transport; packaging and storage of goods; travel arrangement; distribution of electricity; travel information; provision of machine parking complexes.

Class 40: Treatment of materials; development, duplicating and printing of photographs; generation of electricity.

Class 41: Education; providing of training; entertainment; sporting and cultural activities.

Class 42: Scientific and technological services and research and design relating thereto; industrial analysis and research services; layout and development of computer hardware and software; computer programming; installation, maintenance and repair of computer software; computer consultancy services; design, drawing and commissioned writing for the compilation of websites; creating, maintaining and hosting the websites of others; design services.

Class 43: Services for providing food and drink; temporary accommodation; restaurant, bar and catering services; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; retirement home services; nursery services.

Class 44: Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services; dentistry services; medical analysis for the diagnosis and treatment of persons; drug store; garden design services.

Class 45: Legal services; conveyancing services; security services for the protection of property and individuals; social work services; consultancy services relating to health and safety; consultancy services relating to personal appearance; provision of personal tarot readings; dating services; funeral services and undertaking services; fire-fighting services; detective agency services.

E*xercise 3:*

Drawing up from your personal experiences, give ten examples of Nigerian brands belonging to goods classification and services classification in their specific class.

DURATION

A registered Nigerian trademark has an initial validity term of seven (7) years. Thereafter, the Nigerian trademark can be renewed for fourteen (14) years subsequently, according to **Section 23 of the Trademark Act**. An application for renewal should be made not less than three (3) months from the due date.

To maintain the registration of a trademark, the proprietor is required to pay the prescribed renewal fee of N12,000 before the expiry of the initial term granted and any subsequent term. It is possible to renew a trademark up to three months before it is due for renewal and up to three months after the renewal deadline.

A trademark can be removed from the Register of Trademarks for failure to pay the renewal fee within the prescribed period.

TRADEMARK INFRINGEMENT

In accordance with the provisions of the Trademarks Act, only the owner of a registered trademark is conferred with the exclusive right to use that trademark and any unauthorized commercial use of the registered trademark or a trademark similar to it will be deemed an infringement.

To enforce his rights, the proprietor of a registered trademark may institute an action at the Federal High Court in line with section 67(1) of the Trademark Act. The federal high court is the court with competent jurisdiction to settle trademark disputes. The decision of the federal high court can be appealed to the Court of Appeal and ultimately the Supreme Court. The owner of a trademark may also take advantage of the opposition procedure provided under the Act in respect of pending trademark applications that have been published.

Please note that it is only the owner of a trademark registered in Nigeria that can bring an action for infringement of his trademark in Nigeria. The proprietor of a trademark

which is registered in other countries but not in Nigeria cannot bring an action for infringement.
Also note that the rights of the proprietor of a registered trademark will not affect the rights of any person who had been using that trademark in good faith from a date prior to the registration of the trademark.

Remedies: The court can award damages or give an order of injunction to prevent further infringement, Delivery Up, Account for Profits etc.

DEFENCES TO TRADEMARK INFRINGEMENT

Fair use, honest concurrent use, proprietor's abandonment of the trademark or non-use, as well as non-renewal.

PASSING OFF

Although the owner of an unregistered trademark cannot bring an action for infringement under the Act, he can institute an action in passing off against an unauthorised user of his trademark. This action is based on the common law action of passing off. For a claim of passing off to succeed, the user must prove that he has been using the mark and has acquired goodwill in that mark and that the 'infringement' has led to injury. Also, there is a likelihood that consumers may be deceived into believing that there is some connection between the goods and/or services of the owner of the unregistered trademark and the goods and/or services of the other party.

EXERCISE 4

- ***What is the duration of a trademark?***
- ***How is a trademark renewed?***
- ***What court has jurisdiction over trademark matters in Nigeria?***
- ***Can a trademark owner sue for infringement of his trademark in another country? - Give reasons for your position.***
- ***Is an action in passing off provided for in the Nigerian Trademark Act?***

KEY TAKEAWAYS

- Intellectual Property law plays an important role in our daily lives and Trademark is an aspect of intellectual property.

- Trademark differentiates a product or service from a brand from that of another.
- A trademark must be distinctive and not deceptive.
- A trademark can be protected on the basis of use and registration.
- Only the Registrar has the power to approve a trademark
- Failure to use a registered trademark can lead to a revocation of the trademark
- Trademarks in Nigeria, be they goods or services are grouped into classes based on the Nice Classification.
- A trademark registration lasts for 7 years.
- The court with jurisdiction over trademark disputes is the Federal High Court
- Only a Registered trademark can institute actions for trademark infringement
- An unregistered trademark can only institute a passing off action subject to certain conditions

MODULE 4: A LOOK AT THE PROVISIONS OF UNFAIR COMPETITION UNDER THE NIGERIAN IP SYSTEM

At the end of this module, you should understand**:**

- What unfair competition is
- Difference between Anti-Trust and Unfair competition
- Forms of unfair competition
- Unfair competition in the Nigerian legal system

WHAT IS UNFAIR COMPETITION?

Unfair competition is a term which refers to business practices wherein unscrupulous tactics are employed to restrict or alter a company's revenue. Acts of unfair competition often have prominent features of bad faith and fraud.[23] The Paris convention defines it as *"any act of competition contrary to honest practices in industrial or commercial matters".*[24] In essence, when a person carries out business with the intent to deceive, make dishonest gains, sabotage other businesses amongst others, he is said to engage in unfair competition practices. While "Unfair competition" is not limited to the field of Intellectual property, it is a major aspect of it. This concept has existed in intellectual property for quite a while, traceable to as far back as the 1900s, thus having cemented its place in the annals of intellectual property both in international law and the national laws of various countries.

ANTI-TRUST VS. UNFAIR COMPETITION

No discussion on unfair competition will be complete without the mention of anti-trust. The importance of this is due to the similarity between both concepts and as such a tendency to confuse them. While they do share similarities, they are fundamentally different concepts. This difference is rooted in the rationale behind their existence. Unfair competition prioritizes the protection of creative investments of individuals, companies and businesses- placing them on a level playing field, while competition law (Anti-Trust) is geared toward protecting the interest of consumers by regulating the conduct of companies which are unhealthy and promoting a competitive market wherein there are no restraints on trade and no arbitrary use of economic power.

FORMS OF UNFAIR COMPETITION

Unfair competition practices come in different forms; some are targeted at disparaging the reputation of competitor goods. Some are based of the infringement of patent and trademark rights. In whatever form they do come in, it causes losses to the creative investment of businesses, hence the importance of protection regime in the Intellectual

[23] "What is Unfair Competition" Liveabout https://www.liveabout.com/unfair-competition-2164416 accessed 27 November 2022
[24] Article 10bis(2) Paris Convention

property framework of countries. The generally recognized forms of unfair competition include:[25]

1. Causing confusion: some businesses intentionally create false representations of themselves in order to confuse the customers as to the true status of their business as opposed to that of a competitor.
2. Violation of trade secrets: this involves the disclosure of a competitor's trade secrets which are bound to affect the business of same. It needs to be noted that a big part of what makes some businesses competitive is as a result of innovative techniques which are unique to them and sets them apart from other players in the field. Once this has been revealed, it takes away a significant edge.
3. Freeriding: this is similar to the concept of passing off, where one person skims off the success of another by masquerading his product as that of the competitor so he can benefit from the reputation or goodwill that has been built up by the other party.
4. Comparative advertising: here, a comparison is built between two products with the intent of declaring one as inferior in order to highlight the advantages of the other. The approach adopted by countries are different, some forbid it while orders only require that representation of the competitor's product is accurate.
5. Misleading: this involves a situation wherein a person creates a false impression about a product or its place in the market, his product does not necessarily have to be inferior for false impression to be created. It is sufficient if the impression the person creates from his actions does not represent accurate state of the market.
6. Discrediting Competitors: this involves making false allegations against the product of the competitor with the intent to disparage his reputation which is likely to have detrimental effects on his business.

UNFAIR COMPETITION IN THE NIGERIAN LEGAL SYSTEM

[25] General Course on Intellectual Property (2019) WIPO: Unfair Competition

There is no specific regulation for Unfair Competition in Nigeria; the closest thing we have is the **FCCPA (Federal Competition and Consumer Protection Agency)** which is a legislation for the regulation of competition law (Anti-trust). A quick look at the objectives of the Act informs us that the provisions of the act are geared towards promoting and maintaining competitive markets in the Nigerian economy; promoting economic efficiency; protecting the interests and welfare of consumers; prohibiting restrictive or unfair business practices; and contributing to the sustainable development of the Nigerian economy.[26]

Some of the regulations on unfair competition in Nigeria are gotten from the ratification of international treaties. One of such is the ***Paris Convention for the Protection of Industrial Property***. This treaty was ratified in September 1963. It lists one of the major aspects of protection of industrial property as repression of unfair competition[27]. It lists three acts of unfair competition which are especially protected-

- All acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods, or the industrial or commercial activities of a competitor
- False allegation 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
- Indications or allegations, the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods[28].

Another international agreement that has been ratified in Nigeria is the ***TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement.*** This agreement was ratified on the 16th of January 2017. This treaty is regarded as the most comprehensive multilateral agreement on intellectual property. The agreement provides that geographical indications are to be protected by members/parties to the agreement by prevention of any use which constitutes unfair competition in the meaning assigned by

[26] Section 1 of the FCCPA, 2018
[27] Article 1(2) Paris Convention for the Protection of Industrial Property
[28] Article 10bis Paris Convention for the Protection of Industrial Property

the Paris Convention[29]. The protection also extends to undisclosed information which is related to the operation of a business[30]

The common law principle of passing off which is recognized under the Nigerian IP System is also quite relevant to unfair competition as it prevents a situation wherein a person rides on the unscrupulously leeches of the success of another person's business. The Trademark act has, through its mandate of preventing infringement of a company's trademark[31], also to a large extent contributes to the jurisprudence of unfair competition in Nigeria.

CONCLUSION

To conclude, the legal framework on unfair competition is fragmented in Nigeria, there is a need to create a unified legal framework to allow ease of determination of what consists of unfair competition or otherwise. The concept is too sensitive to be left to fragmented regulations, when unfair competition practices are allowed to fester it has adverse on creative innovation of producers, adverse effect on the economy and an adverse effect on the consumers.

Exercise

1. ***In your own words, what do you understand by unfair competition?***
2. ***What laws regulate unfair competition in Nigeria?***
3. ***Differentiate between unfair competition and anti-trust.***

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[29] Article 22(2)(b) of the TRIPPS Agreement
[30] Article 39 of the TRIPPS Agreement
[31] Section 3 of the Trademark Act

MODULE 5: THE NITTY-GRITTY OFTRADE SECRETS

INTRODUCTION:

Hello, intellectual property law enthusiast! Since this is a learning material intended to make you truly understand the concept of Trade Secrets, I will be switching the narrative technique for this paper to first-person.

Trade Secrets are no doubt one of the very interesting categories of Intellectual Property (IP) Law. If you have picked up interest in Trade Secrets, you must have been well vast in other Intellectual Property law categories such as Copyright, Trademark and Patent. 'Trade Secrets' is like the cliché student in High School movies that is not popular but is somehow very important to the success of the movie, the movie this time being Intellectual Property Law.

I started seeing the Netflix series "One of us is lying" and I have come to realize that secrets can be very costly. For businesses, secrets can be very financially costly. They are capable of affecting the reputation of the business, and its revenue and it can ultimately lead to the downfall of the business. So, you see, if there is no reputation to protect or revenue to gain, trademark and copyright are useless. For this paper, a trick question will be given at the beginning, so I'd advise you to take time out to write out the answer sincerely. At the end of the paper, you should come back to the question and attempt it again, I mean write down the answer. Then, reflect on both answers given, this way you can track your learning progress. Another tricky question will be left at the end, for study group discussions. Enjoy or not. Oh yes, all copyright on this work belongs to me. I bet you already knew that.

Tricky Question: *Mr Krabs wrote down the ingredients for the Krabby-Patty Formula on a piece of paper, he rolled the paper and put it in a bottle. He then puts the bottle in a safe where he keeps it hidden. Aside from Spongebob and Squidward (His staff), nobody else knows the Krabby-Patty Secret Formula. Plankton has been trying for a while to get his hands on it. Somehow, he hypnotised Mr Krabs and he had access to the formula. He read out the ingredients loudly at the KrustyKrab and realised that it was just ingredients for a normal burger and the only interesting ingredient was love*.

1. Since only the customers present heard the ingredients, is it still a Trade Secret?
2. It was just ingredients for a normal burger, will that still be protected by Trade Secret?
3. What can Mr Krabs do to Plankton for revealing the Secret Formula?
4. How will this revelation affect Mr Krabs' business?
5. Does the fact that Spongebob and Squidward are privy to the secret stop it from being a Trade Secret?
6. Do you think Mr Krabs was dramatic for putting the secret in a safe?

   Don't forget to write down your answers.

At the end of this brief and interesting module, you should understand:

- What trade secrets are
- What qualifies as trade secrets
- What Nigerian law says about trade secrets
- Why trade secrets are important
- How trade secrets can be protected
- Possible disadvantages of trade secrets

WHAT ARE TRADE SECRETS ANYWAY?

Simply put, Trade Secrets are the merger of two words, Trade and Secrets. Understanding the words individually, Trade means the act of buying and selling, while secrets mean something kept hidden from others. Trade Secrets mean unknown information concerning buying and selling kept hidden from others. In a most sophisticated definition, Trade secrets are formula, pattern, division or compilation of information which is used by businesses to gain an advantage over other competitors who are not aware of that information.[32]

Trade secrets have inherent economic value because they are not well-known or exposed to the general public. Trade Secrets can either be technical or commercial information and they can take different forms such as formulas, recipes, methods, proprietary processes, designs etc. Google, for example, has a trade secret over its search algorithm, some processes are revealed but many are kept hidden from the public. Some other popular brands you know also have trade secrets.

For example, Kentucky Fried Chicken (KFC). The original ingredients for the finger-lickin' good chicken were kept in Colonel Sander's head. He eventually wrote it down and kept it in a safe in Kentucky, just like Mr Krabs. Only a few employees know the ingredients and they signed a confidentiality agreement. It is good to note that the obvious difference between Trade Secrets and similar Intellectual Property Rights is that it is a secret and is not disclosed. Unlike patents where the process involves a full disclosure, Trade Secrets are just never shared. It is no surprise that Coca-Cola would rather have Trade Secrets, rather than a patent. There are rumours that cocaine might be part of the ingredients and the list on the bottles does not constitute a full disclosure of ingredients. There are also rumours that only two employees know half of the ingredients and they must never get on a plane together, for obvious reasons (what if it crashes).

In 2006, Coca-Cola's trade secret was almost disclosed. An employee and two accomplices stole the formula and tried to disclose it to Pepsi. Pepsi blew the whistle and the culprits were arrested. Corporate espionage is fun sometimes.

Another very interesting feature of Trade Secrets that distinguishes them from other laws is that it is not subject to territorial limitation. That is a superpower for an

[32] Robert P.M. 1997. Patent Law and Policy, cases and materials. Second edition

intellectual property right, meaning Trade Secret is like Iron man in the Justice League of other IP rights. In addition to this, there is no need for registration renewal like a trademark and it does not expire like most intellectual property rights.

WHAT QUALIFIES AS TRADE SECRETS?

It is quite obvious at this point that not all undisclosed information will qualify for Trade Secrets Protection. Section 39 of the TRIPS (World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property rights) has specified information that will qualify for Trade Secrets Protection. In simple terms such information will qualify if;

1. The secret is not readily accessible to persons who normally deal with that kind of information
2. The secret has commercial value
3. There have been reasonable steps taken by the person lawfully in control of the information to keep it secret.

WHAT DOES NIGERIAN LAW SAY ABOUT TRADE SECRETS?

Nothing.

There are no subject-specific laws concerning Trade Secrets. This is no surprise because Nigerian Intellectual Property Law is not as evolved as it ought to be. Unfortunately, the legislators will rather fight with the mace in the National assembly than make laws to improve the commercial environment. Does this mean that the secret recipe for the delicious *Ewa Agonyi* beans can never be protected by Trade Secrets? The happy news is no. There is hope for *Ewa Agonyi's* recipe. Nigeria has signed various treaties into law that embodies Trade Secrets protection such as the World Trade Organization's agreement on Trade-Related Aspects of Intellectual property rights (TRIPS). I do hope when we finally catch up with local laws, we can have a dramatic name for the law like the United States' Economic Espionage Act of 1996, James Bond is shaking.

WHY IS TRADE SECRET IMPORTANT?

As discussed earlier, Trade Secrets are invisible but they are still very important in the commercial environment. One of the most significant importance of Trade Secrets is the competitive advantage it bestows on companies. Companies can gain a competitive edge over other players in the industry because they can achieve differentiation that cannot be replicated. Asides from this, Trade Secrets can significantly cut down the costs of patent registration by simply keeping the process a secret. Although Trade Secrets are invisible, they have a lot of positive impact on a company's valuation and financial prowess.

HOW CAN TRADE SECRETS BE PROTECTED?

Simply put, Trade Secrets can only be protected by ensuring that they stay secrets. Once divulged, the benefits are simply discarded. The nature of Trade Secrets makes it complicated for legislation to protect it. The bulk of the protection is done by the business owners who wish for their Trade Secrets to remain just that, trade secrets. The common ways through which Trade Secrets protection is obtained is through Non-disclosure agreements and Non-compete agreements. Non-disclosure agreements are simply contracts entered into between companies and their workers (employees and independent contractors), precluding them from divulging information about the company to third parties.

In the case of ***Koumoulis v Leventis Motors limited***,[33] an employee who previously worked with a company divulged the former company’s business plan to its new

[33] (1973) LPELR-1710(SC)

employer. The new employer took advantage of it and the former company lost business opportunities. The employee was held liable for damages. It feels as though Coca-Cola has been very involved in Trade Secrets but in this case, they were not granted damages. In ***Akinsanya v Coca Cola***, the plaintiff disclosed official confidential information to her spouse. However, Coca-Cola was not granted damages because of the plaintiff's wrongful dismissal. So, does this mean Plankton cannot be guilty because he has no NDA with Mr Krabs?

Another means through which companies gain protection is through Non-compete agreements. Non-compete agreements are formal agreements between the employee and employer where the employee agrees to not engage in employment activities that are prejudicial to their job. This means they will not work with competitors for a certain duration of time even after leaving the primary company. A good example of this is the ***Koumalis v Leventis Motors limited*** case.

ARE THERE DISADVANTAGES?

The cons of Trade Secrets include monopoly. A single business can remain dominant for centuries because Trade Secrets are perpetual, a good example is Coca Cola. In addition to this, the fact that certain ingredients are not revealed because of Trade Secrets can be very harmful to the well-being of the populace. Trade Secrets do not also offer protection against other infringements such as reverse engineering like patent.

CONCLUSION

This paper has been able to take you through a rollercoaster of Trade Secrets, everything it entails, and how it affects businesses and individuals. I hope you have been able to gain enough insights into Trade Secrets but you can also do further reading to get more information. Don't forget to write down your new improved answers. Cheers.

Discussion group:

An inventor licensed the secret formula for a mouthwash to Lambert Pharmaceuticals. Lambert made royalty payments to the inventor's family for over 70 years. During these payments, the formula was revealed by Lambert's employee to her spouse who went ahead to start a company using the ingredients. Lambert tried to stop payments after paying over $22 million for a formula that was no longer secret because their employee had already revealed it. It sued, saying it was no longer responsible for licensing fees. The court ruled that the contract did not stipulate that payments could be stopped if the trade secret was legitimately discovered by others, especially since Lambert had acquired the formula when it was still secret and derived a competitive advantage from it. ***What are the issues in this case****?*