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THE EVOLUTION OF TRADEMARK LAW IN NIGERIA: HISTORY, REFORM AND LIMITS

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Abstract

Trademark law has historically evolved in response to shifts in commercial organisation, from ownership marks and guild-based liability to modern source identification and goodwill protection. Yet, the digitally connected marketplace platform-based trade, non-traditional branding, virtual assets, and global online identifiers has fundamentally challenged the industrial-era assumptions embedded in Nigeria's trademark framework. The research problem addressed is that, despite recent statutory reforms expanding the meaning and scope of trademarks, Nigerian law remains only partially aligned with contemporary brand communication and digitally mediated source identifiers. Using a doctrinal and comparative methodology, the article examined the historical foundations of trademark law, the Business Facilitation (Miscellaneous Provisions) Act 2022, relevant Nigerian and comparative judicial authorities, and the pending Trademarks (Repeal and Re-enactment) Bill 2025 as an emerging reform benchmark. The article found that while the framework has commendably widened the registrable subject matter, it remains underinclusive for sound marks, motion marks, domain-based identifiers, hashtags, and other digitally embedded commercial signs. It further found that this expansion, without robust limiting doctrines, creates risks of over-propertisation, speculative filings, monopolisation of commercially useful symbols, anti-competitive foreclosure, and closure of the expressive commons. The article concluded that Nigerian trademark law requires calibrated reform - strict distinctiveness thresholds, functionality constraints, genuine use safeguards, and explicit fair use protections to preserve the balance among trademark protection, market competition, and expressive freedom in the connected age.

Keywords: Trademark law, Business Facilitation Act 2022, over-propertisation, non-traditional marks, distinctiveness.

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1.1 Introduction

Trademark Law occupies a unique place within intellectual property jurisprudence. Unlike patent or copyright law, which reward innovation and creativity, trademark law is fundamentally concerned with market clarity. Its primary function is to prevent consumer confusion.[1] The term "trademark" itself has become something of a misnomer. It may now appear conceptually narrower than the realities it governs. Today, the discipline extends far beyond the simple notion of a mark used in trade. It now protects a wide range of source identifiers and applies equally to services, non-profit organisations, and certification bodies. In essence, modern trademark law not only protects marks as source identifiers and, in doing so, safeguards the goodwill and identity associated with them, subject, of course, to statutory limitations. The term "trademark," taken in its literal sense, may therefore appear inadequate, for it no longer fully captures the breadth of interests that contemporary trademark law seeks to protect.

Even far beyond the literal limitations obvious in the term, developments in the world particularly those propelled by technological advances[2] demand close scrutiny, at least from the standpoint of Nigeria's intellectual property framework. This raises critical questions: Is Nigerian trademark law adequately equipped to address the emerging array of marks now used in the digital marketplace? Does the meaning of "trademark" as defined in the statutes sufficiently capture the source identifiers employed in the current age? More fundamentally, are these new forms of identifiers covered under the existing scope of trademark law in Nigeria, or has the law fallen behind the very marketplace it was designed to regulate? These questions constitute the pith of this article.

This article examines whether Nigeria's statutory definition of a trade mark can coherently accommodate contemporary signifiers especially digital and non-traditional identifiers without producing overbroad private control that undermines fair competition and legitimate public use. The focus is doctrinal: it asks how the amended definition in section 67[3] (as modified by the Business Facilitation Act[4]) changes what qualifies as a trade mark and what limits the legal system should apply to avoid register congestion, monopoly effects, and the chilling of expression.

1.2 The Meaning of Trademarks: Historical Foundations and Recent Amendments

As is common with legal concepts that often resist precise definition, the most illuminating approach is to trace their historical origins. This method uncovers not only their original meaning but also the evolutionary path shaped by specific historical events—that has led to their modern form. For trademarks, their origins are hidden in the mists of prehistory, buried within the

[1]William M Landes and Richard A Posner, 'The Economics of Trademark Law' (1988) 78(3) Trademark Reporter 267–306.
[2]Dan L Burk, 'Trademark Doctrines for Global Electronic Commerce' South Carolina Law Review [1998] 49 695.
[3]Trade Marks Act, Cap T13, Laws of the Federation of Nigeria 2004, as amended by the Business Facilitation (Miscellaneous Provisions) Act 2022.
[4]Business Facilitation (Miscellaneous Provisions) Act 2022, Act No 5 of 2023.

archaeological remains of civilisations that flourished and declined long before written laws formalised commercial practices.

In his seminal piece, Sidney A. Diamond[5] observes that:

> We have no clear understanding of what impulse first moved primitive humans to place marks of identification on objects. Perhaps he wanted to indicate that it was something he owned although we do not even know just when the concept of ownership of personal property started. Perhaps he felt the pride of an artisan in an article of his own handiwork and scratched a mark on it to show the rest of the tribe who the maker was.

Within Diamond's discussion of the reason, it is clear by consensus of scholars that markings on objects have always served as a form of identification. Evidence suggests that the earliest forms of marks used to identify ownership or origin appeared during the Stone Age, around 5000 BCE[6]. Archaeological discoveries of pottery from this period, particularly jars from Tordos in Transylvania, show markings believed to be among the earliest makers' marks. These findings indicate that humans were already using visual symbols to signify ownership or identity.

In this early, pre-literate era, cattle branding[7] emerged as one of the first systematic methods of marking property. These brands were simple designs burned onto animals, and the term "brand" itself derives from an Anglo-Saxon word meaning "to burn".[8] Similar practices gradually appeared across several ancient civilisations, including Egypt (Abydos tombs and monumental structures), the ancient Near East, Greece, and Etruria, before becoming widespread throughout the Roman world, including Italy, Pompeii, and Herculaneum[9], where marks were used on pottery, building materials, and commercial goods to indicate origin and ownership.

The next phase in the history of trademarks was the mediaeval period, which witnessed the rise of the guilds, tightly controlled associations of artisans that transformed the function of marks. Starting around the fourteenth century, guilds required their members to use compulsory production marks not as commercial assets but as regulatory measures to assign responsibility for poor-quality merchandise. This regulatory function was codified in a wave of legislation across Europe.

For example, in 1266, England enacted the first bakers' compulsory marking law[10], decreeing that every loaf must bear its maker's mark so that if any bread were faulty in weight, "it may bee then knowne in whom the fault is." The Goldsmiths' Company statute of 1300 went further, requiring three distinct marks: the individual smith's mark, an assay mark certifying

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[5]Sidney A Diamond, 'The Historical Development of Trademarks' Trademark Reporter [1975] 65 265, 272.

[6]Gerald Ruston, 'On the Origin of Trademarks', Trademark Reporter [1955] 45 127, 128; Maurice Vanhaelen, 'The Early History of Trademarks' (1920) 2 Journal of the Patent Office Society 625, 626–630.

[7]Ruston (n 6) 128–130. Ruston is the authoritative source for the etymology of "brand" and the practice of cattle branding as a precursor to modern trademark law.

[8]Ruston (n 6) 130–132.

[9]Diamond (n 5) 272.

[10]Frank I Schechter, *The Historical Foundations of the Law Relating to Trade-Marks* (Columbia University Press 1925) 45–78.

quality, and the guild's crowned leopard's head.[11] Penalties for infringement could be severe an innkeeper who passed off low-grade wine as the noble Rudesheimer was hanged on the order of the Elector Palatine.[12] However, the guild-based system was not designed to protect commercial goodwill in the modern sense. Rather, it functioned primarily as a mechanism of regulatory control, intended to enforce production standards within tightly organised craft communities. Marks served to identify the individual artisan responsible for a product so that guild authorities could discipline members who produced inferior goods.

Then came the Renaissance, which saw an expansion of trade, and goods began circulating far beyond the locality in which they were produced. This regulatory model proved increasingly inadequate. Consumers in distant markets relied on marks not merely to trace responsibility within a guild but to recognise and request goods associated with a particular reputation for quality. Consequently, the economic value of marks began to shift from internal guild regulation toward external commercial identification. The Renaissance and early modern period, therefore, witnessed a growing awareness of the misappropriation and imitation of marks as a distinct commercial problem. Authorities across Europe began to treat the fraudulent use of marks as a form of trade deception, sometimes imposing severe penalties. For example, in 1512 the Council of Nuremberg ordered a foreign printer to remove Albrecht Dürer's famous “AD” monogram from copied works[13], illustrating an early attempt to prevent the misleading appropriation of another craftsman's identifying symbol.

At the same time, governments and guild authorities began to formalise systems of regulation and registration for marks. Hallmarking regimes for precious metals were strengthened, and registries such as the Nuremberg goldbeaters' register (1619) required artisans to record distinctive device marks. Ordinances like that of the Cutlers' Company of Hallamshire, incorporated in 1624[14], which restricted the right to adopt a mark to those capable of independently producing the goods they marked, reflected an emerging principle that a mark must be connected to a genuine producer and not merely appropriated for trade.

These developments represent a major turning point in trademark history. While medieval guilds regarded marks mainly as tools for internal quality control, the economic changes of the Renaissance gradually revealed their broader function as indicators of origin and commercial reputation in larger markets. This shift laid the conceptual groundwork for the later development of modern trademark law, where the mark came to be seen not just as a regulatory device, but also as a symbol embodying the producer's goodwill in the marketplace.

Another significant historical phase is the Industrial Revolution, which fundamentally altered the role of trademarks, shifting them from regulatory or guild identifiers to tools of commercial branding and market recognition. As manufacturing expanded and goods were distributed across national and international markets, producers increasingly used marks to

[11] Ibid.
[12] Ruston (n 6) 130.
[13] Diamond (n 5) 274–276.
[14] Cutlers' Company's Act 1623 (21 Jas 1, c 31); see also Joan Unwin, 'Sheffield Cutlers' Marks 1614–1878' (1999) 33(2) *Journal of the Historical Metallurgy Society* 93.

distinguish their products and build reputation among distant consumers. By the early nineteenth century, manufacturers were consciously using marks for advertising and source identification, as illustrated by the 1822 resolution of the Herculaneum Pottery Works in Liverpool, which required all goods to bear the "Herculaneum Pottery" mark to give publicity and identity to its products. During this period, legal recognition of trademarks also began to emerge: courts increasingly treated the misuse of marks as a form of commercial fraud, with English courts granting one of the earliest injunctions against trademark infringement in 1838, in *Millington v Fox.*[15]

Building on these developments, the late nineteenth and early twentieth centuries (c. 1870–1946) witnessed the consolidation of modern trademark doctrine. Early legal theory emphasised the "strict source theory",[16] which required a trademark to identify the actual manufacturer of goods. However, as markets expanded and goods were distributed through complex commercial networks, courts gradually recognised that trademarks primarily protected the goodwill associated with goods rather than the physical identity of the producer. Landmark cases such as *Aunt Jemima Mills Co v Rigney & Co*[17] and *United Drug Co v Theodore Rectanus Co*[18] reflected this shift by protecting trademarks against deceptive use even in markets involving non-competing goods or geographically distinct producers. By the 1920s, courts had embraced the "anonymous source theory",[19] acknowledging that consumers relied on trademarks to signal a consistent commercial source even if they did not know the identity of the manufacturer.

As in Europe and around the world, archaeological findings reveal that the peoples of what is now Nigeria had developed sophisticated systems of marking that served functions analogous to modern trademarks. For example, the Nok culture, with its distinctive terracotta sculptures found within a 500-kilometre radius of iron-working sites, represents one of the earliest examples of a recognisable artistic tradition that would have functioned as an indicator of origin. The Late Stone Age site at Iwo Eleru in southwestern Nigeria, dated to around 9000 BCE, reveals evidence of settled communities with ceramic traditions requiring differentiation of wares.[20]

In terms of written law, Nigerian trademark law was transplanted wholesale from England. The substantive law governing trademarks in Nigeria today the Trade Marks Act 1965[21] is based substantially on the old United Kingdom Trade Mark Act 1938. This legislative transplantation occurred during a period when Nigeria was under British colonial administration. The 1938 UK Act, while comprehensive, had been "heavily criticized for the clumsiness of some of its provisions occasioned by bad drafting."[22] When ruling on the infringement section of that Act, Lord Justice

[15] (1838) 3 My & Cr 338.
[16] Barton Beebe, 'The Semiotic Analysis of Trademark Law' UCLA Law Review [2004] 51 621.
[17] Aunt Jemima Mills Co v Rigney & Co, 247 F 407 (2d Cir 1917).
[18] United Drug Co v Theodore Rectanus Co, 248 US 90 (1918).
[19] Robert C Denicola, 'The Anonymous Source Theory of Trademarks' Trademark Reporter [2011] 101 1021, 1025–1045.
[20] Thurstan Shaw, *Nigeria: Its Archaeology and Early History* (Thames & Hudson 1978) 45–67.
[21] The Trade Marks Act 1965 was consolidated as Cap T13, Laws of the Federation of Nigeria 2004. All references to 'the Act' in this article are to the consolidated version as amended by the Business Facilitation (Miscellaneous Provisions) Act 2022.
[22] Adebambo Adewopo, *Intellectual Property Law in Nigeria* (Nigerian Institute of Advanced Legal Studies 2019) 201–205.

Mackinnon famously complained that its provisions and several others were of "fuliginous obscurity" a deficiency wholly inherited by Nigeria.[23] The current legal framework, therefore, consists of several interlocking statutes: the Trade Marks Act, the Trade Marks Regulations, the Merchandise Marks Act, the Trade Malpractices (Miscellaneous Offences) Act, the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act, and now the Business Facilitation Act 2022.[24]

According to the Trade Marks Act, section 67(1) of the Act provides that:

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

Since this definition refers to a "mark", the same section defines what constitutes a mark: a 'mark' includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof.[25] The use of the word 'includes' simply indicates that the list is not exhaustive, as the word suggests it could be more.

An analysis of these definitions shows that the emphasis on "goods" suggests a focus on tangible, physical products, excluding services, digital content, software, virtual assets, and interactive platforms. The phrase "connection in the course of trade" presumes a direct and linear relationship between producer and consumer, and a trademark, by this definition, has to indicate that connection between a proprietor and his goods. Even the enumeration of what constitutes a "mark" though presented through an inclusive definition employing the term "includes" remains rooted in traditional, print-era examples such as labels, tickets, and signatures. It neglects modern identifiers like sounds, colours, motion graphics, virtual skins, emojis, usernames, and algorithmically personalised brand elements, which are now integral to consumer perception and brand value in online and immersive environments.

However, the definition of what constitutes a trademark has undergone significant changes. These changes were introduced by the Business Facilitation (Miscellaneous Provisions) Act 2022. This Act amended the Trademarks Act's definition sections, effectively updating Nigeria's trademark law for the 21st century. Two principal changes were introduced: one, a new term, 'goods' has been added to the definition section[26] and is defined as: "goods" includes services. Two, trademark has been redefined thus:

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[23] *Bismag Ltd v Amblins (Chemists) Ltd* [1940] Ch 667

[24] Trade Marks Act (Cap T13 LFN 2004); Trade Marks Regulations 1967; Merchandise Marks Act (Cap M10 LFN 2004); Trade Malpractices (Miscellaneous Offences) Act (Cap T12 LFN 2004); Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act (Cap C34 LFN 2004).

[25] Section 67(1), Trademarks Act, Cap T13, Laws of the Federation of Nigeria 2004.

[26] Part XXI of the Business Facilitation (Miscellaneous Provisions) Act 2022, amends the Trademarks Act.

> A mark used or proposed to be used in relation to goods or services for the purpose of indicating a connection between the goods or services and a person having the right, either as a proprietor or as a registered user, to use the mark, whether with or without any indication of the identity of that person, and may include shape of goods, their packaging and combination of colours.[27]

From this new definition, three developments have been achieved simultaneously: (1) the inclusion of services, (2) the recognition of shapes, packaging, and colours[28] as part of what a mark may consist of (explicitly embracing non-conventional marks), and (3) the removal of the requirement that the mark indicate a connection "in the course of trade".[29] The last point is subtle but important: even if an entity is not trading in the goods such as a charity distributing products for free under its name its mark can still be registrable.

Despite these reforms[30], this definition remains anchored to a twentieth-century conception of what a mark can be. Although the Act added "shape of goods, their packaging and combination of colours," this formulation still leaves an entire universe of non-traditional marks in a state of legal uncertainty. Sound marks, motion marks, holograms, smells, tastes, and textures are not mentioned. The definition's language "may include" seems to suggest that the list is not exhaustive, but this vagueness places the burden entirely on judges to decide, case by case, whether such marks fall within the scope of the law.

More fundamentally, the definition is still tied to the concept of "goods or services" in a way that may not accommodate the digital and virtual economy. What are "goods" in the metaverse? When Nike sells a pair of virtual sneakers for an avatar to wear in a digital world, is that a "good" within the meaning of the Act? The definition does not say. When a brand's value resides not in any physical product but in its digital presence its domain name, its social media handle, its hashtag does the law recognise these as marks used "in relation to goods or services"? A hashtag like #ShareACoke functions as a commercial identifier, but is it used "in relation to goods" in the same way a logo on a bottle is? The definition offers no guidance.

Furthermore, the definition's inclusion of "proposed to be used" as a basis for protection, while somewhat forward-looking, introduces its own difficulties. A person can now claim rights in a mark they have never actually used[31], simply by demonstrating an intention to use it. This

[27]Paragraph 69(b), Business Facilitation (Miscellaneous Provisions) Act 2022.
[28]This amendment aligns with the Supreme Court's decision in *Intl Tobacco (Nig) Ltd & Ors v BAT (Nig) Ltd & Anor* (2023) LPELR-60272(SC), which recognised the role that colour plays in safeguarding a trademark's distinct identity.
[29]In *Ferodo Ltd v Ibeto Ind Ltd* (2004) 5 NWLR (Pt 866) 317, the Supreme Court held that passing off can protect unregistered trademarks in Nigeria, emphasising the "connection in the course of trade" concept as central to trademark identity — which underlines why removing that phrase from the definition was notable.
[30]Although, on 11 November 2025, the Senate completed the first reading of the Trademarks (Repeal and Enactment) Bill 2025, section 2(1) of the Bill, which defines both "sign" and "trademark", does not explicitly include sound, motion, holograms, smells, tastes, or textures. The list remains visual/tactile (shape, colour, packaging).
[31]Livespot360 (founded by Darey and Deola Art Alade) secured a trademark for "Defy December" in 2019 under Class 41 for entertainment services. The registration remained largely unnoticed until October 2025, when the "Defy December Fest" was launched. See Fatimah Quadri, 'Defy December: from street slang to marketable brand', The

invites speculative applications. The definition does little to prevent this, and the resulting clutter on the register makes it more difficult for genuine traders to find available marks.[32]

Consequently, the historical evolution of trademark law reveals that its meaning and rationale have never been static. At each major stage of economic development from early ownership marks, to guild-based liability systems, to modern brand protection the function of trademarks has adapted to the realities of the marketplace. If historical experience demonstrates that changes in trade structures and commercial practices reshape the philosophy of trademark protection, then the technological transformations of the present era inevitably raise a similar question. The rise of digital commerce, algorithmic advertising, virtual marketplaces, and new forms of source identification suggests that the traditional understanding of what constitutes a "mark" may require reconsideration.

1.3 Registrable Subject Matter and the Distinctiveness Threshold

The subject-matter scope[33] of trademark is easily inferred from its statutory definition. Although the new definition now includes service marks[34], it remains questionable whether the reform sufficiently reflects the contemporary function of trademarks. If the principal purpose of a trademark is source identification, then any sign capable of performing that function should, in principle, qualify for protection. This suggests that the statutory definition ought to be sufficiently flexible to accommodate non-traditional marks such as sounds, scents, motion marks, and other emerging identifiers used in modern commerce.[35]

Additionally, to understand why these new forms of identifiers pose a challenge, it is necessary first to clarify the fundamental requirement of "distinctiveness." A trademark's primary legal function is to serve as an indicator of source. For a mark to be protectable, it must be "distinctive," meaning it must be capable of distinguishing the goods or services of one undertaking from those of others.[36] This capacity for distinction is the core threshold that any potential mark—whether a word, logo, sound, or scent must meet to qualify for registration. The distinctiveness of non-traditional marks is never presumed; it must be proven, typically by demonstrating that the relevant public has come to recognise the non-traditional sign as a source

ICIR (21 November 2025) <https://www.icirnigeria.org/defy-december-from-street-slang-to-marketable-brand/> accessed 5 April 2026.

[32]Barton Beebe and Jeanne C Fromer, 'Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion' (2018) 131(4) Harvard Law Review 945, 950–980.

[33]Subject-matter scope, that is.

[34]Service marks are particularly important for this age. In 2024, ICT contributed nearly 20% of Nigeria's GDP—over twice the oil and gas share. See T Karl, 'An Inflection Point for Nigeria's Digital Economy: The Imperative of Sustainability' (ThisDay, 9 January 2025) <https://www.thisdaylive.com/2025/01/09/an-inflection-point-for-nigerias-digital-economy-the-imperative-of-sustainability/> accessed 18 January 2026.

[35]Through judicial interpretation, the Federal High Court in 2019, in *Duracell Batteries BVBA v Mczen* Suit No FHC/L/CS/1805/2016, recognised proprietary rights in product shapes and colour combinations years before the law provided explicitly for it. See further F Tifase, 'Protection of Shapes and Colours of Goods' (Lexology, 2021) accessed 18 January 2026.

[36]Section 9, Trademarks Act, Cap T13, Laws of the Federation of Nigeria 2004.

identifier through extensive use, a concept known as acquired distinctiveness or secondary meaning.

For example, in *In re General Electric Broadcasting Co*[37], General Electric Broadcasting Company, Inc. ("GE") owned and operated radio station WJIB in Boston and sought to register a sound mark for radio broadcasting services. The Trademark Trial and Appeal Board (TTAB) held that "sounds may, under certain conditions . . . function as source indicators in those situations where they assume a definitive shape or arrangement and are used in such a manner so as to create in the hearer's mind an association of the sound with a service." This decision laid the foundation for modern sound-mark jurisprudence in the U.S., later leading to registrations for the MGM lion's roar[38], the NBC chimes, the Intel jingle, and other notable marks. It further demonstrates that the legal concept of a trademark is not confined to visual signs; rather, any perceptible sign capable of distinguishing goods or services may perform the trademark function.

Similarly, the Trademark Registry in Delhi, India, granted its first sound mark registration to Yahoo when it registered its popular three-note "Ya-hooOOO!" yodel as a sound mark. The Registry concluded that Yahoo!'s yodel had "acquired distinctive character in India" and was "well-known worldwide," thus qualifying as a source identifier (i.e. a trademark) rather than merely decorative audio.[39]

An even more concerning issue within trademark jurisprudence and digital connectivity is the status of domain names. Without a doubt, domain names frequently operate as commercial identifiers equivalent to trademarks because consumers associate them directly with particular businesses. Domain names are globally unique web addresses (e.g. google.com) that serve as online identifiers. Unlike territorial trademarks, their international governance creates conflicts that traditional trademark law struggles to resolve.

In *Argos Ltd v Argos Systems Inc*[40], the High Court found no trademark infringement where a US company's website automatically generated ads to UK users, as there was no deliberate targeting of the UK market. The case underscores the tension between territorial trademark rights and the global nature of domain names. This creates a jurisdictional dilemma: despite harmonisation mechanisms like the UDRP, trademark owners face fragmented enforcement across legal systems. Systems such as the Uniform Domain-Name Dispute-Resolution Policy (UDRP)[41] and treaties such as the Madrid Protocol[42] provide some harmonisation, but they are procedural frameworks rather than substantive laws.

[37]199 USPQ 560 (TTAB, 12 April 1978).
[38]The roar that opens Metro-Goldwyn-Mayer films is a registered sound mark, Serial No 73553567, Registration No 1,395,550, registered 20 January 1970. See USPTO, 'Metro-Goldwyn-Mayer Lion Corp Trademark Application No 73553567: Registration No 1,395,550' (USPTO Report, 2025) <https://uspto.report/TM/73553567> accessed 18 January 2026.
[39]In re Yahoo! Inc, Trade Marks Journal (India) Vol 1225, Issue 34, 1270407 (18 August 2008).
[40][2018] EWCA Civ 2211.
[41]The UDRP is an administrative policy adopted by ICANN in 1999 to resolve disputes over domain names—particularly where those domains infringe registered trademarks. It offers a streamlined arbitration process rather than traditional litigation.
[42]The Madrid Protocol is a treaty enabling companies to register trademarks across multiple countries through a single application. It complements the earlier Madrid Agreement and has been the primary system since 2016.

Similarly, in Nigeria, the case of *Double Paws Enterprise v Facebook*[43] offers insights. The Federal High Court held that Facebook could not override a Nigerian trademark owner's registered rights through its internal policies. The court awarded damages, affirming that valid Nigerian trademark rights prevail over foreign platforms' terms of service. The decision was upheld on appeal.[44] The decision illustrates the growing tension between territorial trademark systems and globally operating digital platforms. It also demonstrates that traditional trademark frameworks must increasingly confront disputes arising from online identifiers and platform governance. If Nigerian trademark law cannot accommodate sounds, scents, domain names, and virtual assets, it may fail to protect the very source identifiers on which modern commerce depends.

1.4 Reforming Nigerian Trademark Law: Key Considerations

Trademark law has always lived with an internal tension. On one side, it protects the signs by which traders distinguish their goods and services in the market. On the other hand, it must resist becoming a mechanism for the excessive privatisation of language, symbols, shapes, colours, and other communicative resources needed by competitors and the public. That tension is now sharper in Nigeria. The current Trade Marks Act remains rooted in a traditional, visually oriented conception of trademark, yet the Business Facilitation (Miscellaneous Provisions) Act 2022 has already widened the statutory definition to include services and the shape of goods, their packaging, and combinations of colours. The pending Trademarks (Repeal and Re-enactment) Bill 2025, if enacted, goes further by expressly embracing colour, shape, packaging, business identifiers, dilution, and well-known marks, while still leaving several digitally mediated and sensory identifiers such as sound, motion, holograms, and domain-based signs without explicit textual recognition. The jurisprudential question is therefore no longer simply whether Nigerian law should modernise; it is whether, in the process of modernising, the law can still maintain competition and the expressive commons of trade.

The first danger is over-propertisation.[45] Historically, trademark protection was justified by its source-identification function: it cleared market confusion without privatising the underlying signs. A word, a logo, or a symbol remained available for all to use except in a specific context likely to deceive. But as the statutory definition expands to include shapes, colours, sounds, packaging, and even domain names, the law risks treating every perceptible sign as a potential asset. This is not merely an expansion of subject matter; it is a philosophical shift. The registration of a common street slang like "Detty December" as a trademark illustrates this conceptual shift: a phrase that emerged organically from popular culture is now privately owned, not because it uniquely identifies a commercial source, but simply because someone filed first. When the law

[43](Unreported) Suit No FHC/L/CS/1164/2017, Federal High Court, Nigeria.
[44]R Egbe, 'Court fines Facebook N10m for interfering with Nigerian firm's trademark' The Nation (22 March 2020) <https://thenationonlineng.net/court-fines-facebook-n10m-for-interfering-with-nigerian-firms-trademark/> accessed 20 January 2026.
[45]William P Kratzke, 'The Biblical Fool and the Brander: The Law and Economics of Propertisation in American Trademark Law' Cardozo Arts & Entertainment Law Journal [2016] 34 699, 700–725.

permits such registrations without demanding rigorous proof of distinctiveness, it transforms the communicative resources of trade language, symbols, colours, sounds into fragmented enclosures. Over-propertisation does not just clutter the register; it alters the basic premise of trademark law from preventing deception to conferring property rights over ordinary signs.

From over-propertisation flows a second concern: monopoly. Unlike patents, trademarks are potentially perpetual — they may be renewed indefinitely so long as they remain in use. This feature, benign when applied to a distinctive invented word or a unique logo, becomes problematic when applied to basic identifiers that no single trader should own forever. A colour mark (a specific shade of purple for confectionery), a product shape (the curve of a bottle), or a simple sound (a three-note jingle) can, once registered, confer a perpetual monopoly over that identifier within a product category.[46] Competitors are forced to adopt less intuitive branding, raising consumer search costs and distorting market choice. The Duracell case, where Nigerian courts recognised proprietary rights in battery shapes and colour combinations even before the BFA, shows that such monopolies are already being enforced. The question is not whether non-traditional marks can ever be distinctive some can, after extensive use but whether the law has erected sufficient barriers to prevent the permanent monopolisation of the basic building blocks of commercial communication. Without a rigorous distinctiveness ladder that demands proof of acquired secondary meaning for colours, shapes, and sounds, registration becomes a tool for perpetual market entrenchment.

Monopoly, in turn, shades into anti-competitive behaviour. When a dominant trader accumulates a portfolio of marks over colours, shapes, packaging, and common phrases, it can use those rights not to prevent consumer confusion but to block legitimate market entry.[47] The BFA's permission to register marks "proposed to be used" without any requirement of genuine commercial intention invites speculative filings and defensive thickets. A new entrant wishing to use a green-and-yellow colour scheme for agricultural products, or a round shape for a beverage bottle, may find those identifiers already claimed by an incumbent who has never actually used them in trade. Worse, well-resourced firms can threaten infringement litigation over descriptive or comparative uses that would not confuse any reasonable consumer. The doctrine of functionality which denies trademark protection to features that are essential to competition exists only in embryonic form in Nigerian jurisprudence. The Federal Competition and Consumer Protection Act 2018 prohibits abuse of dominance, but its intersection with trademark misuse remains largely unexplored. Without explicit limits, trademark expansion becomes a lawful means of achieving unlawful ends: suppressing competition through the privatisation of symbols that competitors need to communicate effectively. The depletion of useful symbols colours, shapes, packaging elements is not a theoretical concern; it is the predictable outcome of a system that allows registration without genuine use and without a robust functionality defence.

Finally, the cumulative effect of over-propertisation, monopoly, and anti-competitive enclosure is the closure of expressive space the broadest and most consequential normative

[46]Mark A Lemley and Mark P McKenna, '(Dys)Functionality' Houston Law Review [2011] 48 823, 830–860.
[47]Herbert Hovenkamp, 'Antitrust and the Monopolisation of Trademarks' Notre Dame Law Review [2022] 97 1579, 1600–1625.

concern. Trademark rights no longer stay within the bounds of commercial transactions; they leak into everyday cultural life. A hashtag like #ShareACoke, a slogan like "Just Do It," a meme that incorporates a brand's logo, a musician's parody of a famous jingle, a journalist's descriptive use of a trademarked phrase all risk infringement claims. The registration of "Detty December" as a trademark means that a small business owner describing her end-of-year sales as "Detty December deals," or a comedian using the phrase in a sketch, could receive a cease-and-desist letter. This is not a hypothetical; it is the logical consequence of a system that allows common phrases, colours, and sounds to be owned. The expressive space the semiotic commons from which all speakers, artists, and traders draw is steadily enclosed.

1.5 Conclusion

This article examined the shifts in the meaning and scope of trademark law in Nigeria through a doctrinal review of its historical development, statutory evolution, and recent legislative reforms. It traced the journey of trademarks from early ownership and liability marks to modern instruments of source identification and goodwill protection, and further interrogated whether the recent expansion introduced by the Business Facilitation (Miscellaneous Provisions) Act 2022 sufficiently aligns Nigerian law with the realities of contemporary commerce. Particular attention was paid to the growing significance of non-traditional and digitally mediated identifiers, as well as the normative dangers that may arise where legal expansion outpaces doctrinal safeguards.
Based on the foregoing, the following findings were made:

Firstly, the article finds that the 2023 statutory amendments represent a significant doctrinal advancement by expanding Nigerian trademark law beyond its former goods-centred and visually restrictive conception to include services, shapes, packaging, and colour combinations, yet the resulting framework remains under-inclusive in relation to several contemporary source identifiers particularly sounds, motion marks, domain-based identifiers, hashtags, and other digitally embedded commercial signs thereby leaving substantial uncertainty in the protection of modern brand communication.

Secondly, the article finds that the expansion of registrable subject matter without equally robust limiting doctrines creates measurable risks of register congestion, speculative filings, monopolisation of commercially useful symbols, and anti-competitive market foreclosure and that the long-term legitimacy of Nigerian trademark law now depends on whether future reforms can reconcile proprietary protection with competition policy and the preservation of the shared expressive resources of trade and public culture.

In light of these findings, the following recommendations are made:

Firstly, the law should expressly recognise a broader range of non-traditional marks including sound, motion, holographic, and digitally mediated identifiers provided they satisfy strict proof of distinctiveness and source significance, and the proposed reform framework should codify clear limiting doctrines, particularly functionality, genuine intention to use, and proof of actual commercial deployment within a defined period, in order to curb speculative and anti-competitive filings.[48]

Secondly, statutory fair-use protections should be expressly introduced for descriptive, nominative, comparative, and parodic uses so as to protect legitimate market communication and public expression, and Nigerian courts should continue to develop a principled interpretive jurisprudence that treats trademark rights not as absolute proprietary claims, but as limited market instruments justified by consumer clarity, fair competition, and the protection of goodwill.

Ultimately, the challenge before Nigerian trademark law is no longer whether it should evolve, but how it should evolve. A modern trademark regime must be sufficiently adaptive to recognise the realities of digital and non-traditional branding, yet sufficiently disciplined to prevent the enclosure of commercially and culturally valuable signs that ought to remain available to the market and the public. The enduring strength of Nigerian trademark law will therefore lie not in the breadth of rights it creates, but in the precision of the limits it imposes.

[48]By the provision of section 4(2)(e)(ii) of the Bill, speculative filings are still possible. However, section 22 provides a five-year use requirement as a safety valve. Although this is weaker than requiring actual use before registration (as in some jurisdictions), it is a genuine-use safeguard.