

THE SCOPE AND SOURCES OF INTELLECTUAL PROPERTY LAW IN NIGERIA

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I. Introduction

Intellectual property is an idea, a design, etc that somebody has created which the law protects by preventing other people from copying same.¹ It encompasses such legal concepts as copyright, trade marks, patents, designs right and also includes rights against disclosure of trade secrets and unfair competition. It is a category of intangible rights protecting commercially valuable products of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trade mark, a patentable invention, or a trade secret,² etc. Because of the diversity of the field of intellectual property, it is incapable of a single generic definition that will cover the field. It is a term used to describe property rights in most of the human intellect. The utility of the various species of intellectual property to the society has been aptly put thus:³

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

The rationale for intellectual property protection cannot be over emphasised. Such legal protection accorded the various species of intellectual property does not only encourage the owners of such rights to engage their creative intellect in more creativity for the utility of the society, but it also serves as an incentive to others that have creative minds to put their creative intellect into uses too. Without legal protection, it is doubtful if many reasonable persons would dissipate energy into creating intellectual property for public consumption. In other words, creativity would not be attractive or considered worth while

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¹ Hornby, A.S: Oxford Advanced Learner's Dictionary, 6th ed; London: Oxford University Press, 2000, p.623.

² Garner, B.A.: Black's Law Dictionary, 8th ed, St Paul, Minn: West Publishing Co, 2004. P.284.

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

by many if after all the efforts, such as physical, intellectual exertion, time, money and other resources put into creation of intellectual property, the property is thrown into public domain for the society to use as it pleases and with the author or inventor of the property getting nothing in return from the society. The society would be the worse for the absence of creative zeal in the circumstance because it would have been deprived of the utility of most of the artistic, literary, musical and other creative works of the authors we enjoy today.

Intellectual property, is generally a complex phenomenon. Its complexity is not unrelated to the fact that, as can be seen from the earlier-description of the concept, some rather disparate topics have been brought together, to constitute the concept. Consequently, many, including lawyers, who are new to the subject, find it difficult to understand. It therefore becomes imperative to ease the complexity of the various complex but salient aspects of the concept by various writers in such a way that will make the subject easy to comprehend by readers who are new to the subject in particular and others generally who require a clear analysis in this area of law. This paper is, therefore, set out to make its own little contribution in this regard by discussing the scope and sources of intellectual property law. This will be done on the basis of the various local statutes and international instruments or conventions regulating intellectual property in Nigeria. In discussing the chosen aspects of intellectual property, the paper will be divided into four parts – the introduction, the scope, the sources, and, the conclusion.

II. The Scope of Intellectual Property

The owner of intellectual property does not have the same wide range of right that an owner of other types of property has and can exercise over his property. This is because the right of an intellectual property owner is seriously circumscribed and therefore very limited in scope compared to the right inherent in the ownership of other species of property (i.e. physical property). Take for instance copyright. The most important and common economic rights conferred on an owner of copyright are those, which place him in control over the copyright or reproduction of the work as well as its public performance for commercial purpose. But these economic rights, unlike those in relation to non-intellectual property, are seriously eroded by the numerous permitted acts, that is, the exceptions and defences. There are a total of twenty-seven permitted acts, that is the exceptions and five defences.⁴ These permitted acts allow others to

⁴ See the Second and Third Schedules to the Copyright Act, sections 15(15)(f), 15(2), 16(3), 20(1), 22(1) and 30(1) of the Act for the exceptions and defences respectively

reproduce or copy most of the works for purposes of fair dealing, research, private use criticisms, review and news reporting, for educational and library purposes, etc, without the consent or authorization of the owner of the copyright in the work. With these taken out of the control of the copyright owner, his economic right over the copyright is very restrictive in scope.

Similarly, a patent confers upon the patentee an exclusive right to do the following acts⁵:

- a) where the patent has been granted in respect of a product, the act of making, importing, selling or using the product, or stocking it for the purpose of sale or use, and;
- b) where the patent has been granted in respect of process, the act of applying the process or doing, in respect of a product obtained directly by means of the process, any of the acts mentioned above.

However, the Patents and Designs Act⁶ provides that a person (other than the patentee) may apply to the court for grant of a compulsory licence at any time after the expiration of four years after the filing of a patent application or three years after the grant of a patent, whichever period last expires, on any one or more of the following grounds:

- a) that the patented invention, being capable of being worked in Nigeria, has not been so worked;
- b) that the existing degree of working of the patented invention in Nigeria does not meet on reasonable terms the demand for product;
- c) that the working of the patented invention in Nigeria is being hindered or prevented by the importation of the patented article, and
- d) that, by reason of the refusal of the patentee to grant licence on reasonable terms, the establishment or development of industrial activities in Nigeria is unfairly and substantially prejudiced.

The Act provides⁷ further that where an invention protected by a patent in Nigeria cannot be worked without infringing rights derived from a patent granted on an earlier application or benefiting from an earlier foreign priority, a compulsory licence may be granted to the patentee of the latter patent to the extent necessary for the working of his invention if the invention:

⁵ Section 6(1) of the Patents and Designs Act, Cap.P2, Laws of the Federation of Nigeria (LFN), 2004.

⁶ See section 11, Ibid and First Schedule thereto, Part 1, Paragraph 1(a) – (b)

⁷ First Schedule thereto, Part 1, Paragraph 2.

- a) serves industrial purposes different from those served by the invention which is the subject of the earlier patent, or
- b) constitutes substantial technical progress in relation to that last mentioned invention.

The foregoing statutory exceptions to the exclusive right to the use of a patent cannot be faulted if viewed against the back drop of the fact that they are aimed at encouraging the development of new industries. This is so because "...it would be pointless to allow an inventor to patent his invention and then do nothing about it and indeed prevent anyone else from making the new invention available to the public"⁸. This notwithstanding, they constitute an erosion of the rights and an impediment to the full enjoyment and enforcement of the patentee's rights over his property – the patent.

Ownership of physical or tangible property confers on the owner right to control most type of use and enjoyment of the subject matter of the property. But intellectual property confers limited number of exclusive rights. This is so because its owner is restricted to only those rights, which are specified by law.⁹

The scope of intellectual property (as opposed to tangible property) is further diminished as a property by the provision of the Copyright Act¹⁰ for compulsory licences for translating and reproduction of certain works. The Patents and Designs Act¹¹ empowers a Minister to authorise the use of a patentee's patent for service of government agencies. It provides that "...where a Minister is satisfied that it is in the public interest to do so, he may authorise any person to purchase, make, exercise or vend any patented article or invention for the service of a government agency" The Act makes no mention of compensation to the patentee for the use of his patent for the service of the state. However, it may be argued that even though the provisions of the relevant intellectual property enactments make no mention of compensation, this cannot be construed to have foreclosed the right of the intellectual property owner to demand for payment for the use of his property for state service. To argue

⁸ Babafemi, F.O.: Intellectual Property: The Law and Practice of Copyright Trade Marks, Patents and Designs in Nigeria, 1st ed, Ibadan: Justinian Books Ltd, 2006, P.382.

⁹ Sections 6, 7 and 8 of Copyright Act, sections 6 and 13 of the Patents and Designs Act and sections 5 and 6 of Trade Marks Act.

¹⁰ See the Fourth Schedule to the Act.

¹¹ See the First Schedule to the Act, Part 2, Paragraph 15 thereof.

otherwise will be contrary to the provision of section 44(1) of the 1999 Constitution of the Federal Republic of Nigeria¹², which provides thus:

No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that,

Among other things:-

(a) Requires the prompt payment of compensation therefore; and

(b) Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

This constitutional position finds support in Article 31(h) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) to which Nigeria is a member. It provides that where the law of a member State allows for other use of the subject matter of a patent without the authorisation of the right holder, including use by the government, or third parties authorised by the government, the right holder shall be paid adequate remuneration, taking into account the economic value of the authorisation.

The scope of the power conferred on the Minister to authorise any person to use any patented article or invention for the service of the government has been given a judicial definition in the case of *Welcome Foundation Ltd Vs Lodeka Pharmacy Ltd & Anor*¹³. In this case, the plaintiffs were the owners of a patent registered in England in 1958 with the then Government of Northern Nigeria. The defendant supplied drugs, dressing and other medical equipment including ALCOPAR" to that government. The plaintiffs instituted an action against the defendants for the infringement of their rights. The then Patents Rights (Limitation) Decree 1968 conferred identical power, to the one under discussion, on the Federal Commissioner of Health. With a view to exercising that power, the Commissioner gave the defendant a written exemption. The defendants pleaded that they were exempted from liability under the Decree.

¹² Now Cap.C23, Laws of the Federation of Nigeria (LFN), 2004.

¹³ (11971) All NLR. 536.

It was held that the Decree did not give the Minister power to exempt any person from liability for the infringement of patent rights but that it merely empowered him to authorise the purchase, use or sale of such patented articles for the services of government agency. The court further held that what the defendants relied upon was not an authority required under the Decree but was at best a letter of exemption.

In determining the suit in favour of the defendants, the court stated that although the Commissioner did not adhere strictly to the letters of the law, it would nonetheless not hold as null and void his act in issuing the letter of exemption instead of an authority. To do otherwise would, the court reasoned, work great hardship on the defendants.

Because intellectual property law is relatively an emerging field in Nigeria, many aspects of it (including the aspects covered by this paper) are yet to receive sufficient judicial pronouncements or interpretations to constitute case law on them.

Intellectual property subsists for a fixed period of time¹⁴ whereas ownership of most other types of property lasts in perpetuity, subject, however, to dealings with it and subject to inheritance. The moment the duration of intellectual property lapses, it goes into the public domain and the owner loses control over it.

With all the foregoing limitations on the rights conferred by intellectual property, it is obvious that in comparison with other kinds of property, the scope of intellectual property is far less.

III. The Sources

The sources of intellectual property law in Nigeria can broadly be divided into two. These are municipal laws and international instruments. We will briefly look at these sources one after the other.

(a) *The Municipal Laws*

One of the sources is the 1999 Constitution of the Federal Republic of Nigeria. The constitution is the supreme law of the land and it is therefore superior to all other laws in Nigeria. For this reason, its provision on any subject matter overrides the provision of any other law on the same subject. Under the constitution, copyright, patents, industrial designs,

¹⁴ See the Fourth Schedule to the Copyright Act and the First Schedule to the Patents and Designs Act respectively.

trade or business names, trade marks and merchandise marks are items on the exclusive legislative list¹⁵. This means that only the National Assembly has the sole authority to make laws on all these subjects.

Intellectual property legal framework in Nigeria has a strong umbilical connection with English legal history. This is so because of Nigeria's political, historical and legal connections with the United Kingdom as a result of colonialism. Most of these laws on intellectual property are therefore traceable to the English models, which have evolved over the years.

Five main local statutes primarily regulate intellectual property in Nigeria currently. These are Copyright Act,¹⁶ Patents and Designs Act¹⁷, Trade Marks Acts,¹⁸ Merchandise Marks Act¹⁹ and Companies and Allied Matters Act (CAMA).²⁰ While Copyright Act regulates literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts,²¹ invention and industrial designs are governed by the Patents and Designs Act. On the other hand, trade marks are protected by Trade Marks and Merchandise Marks Acts while Merchandise Marks Act criminalises certain acts relating to fraudulent marks on merchandise. Merchandise means trade goods - goods that are bought or sold, goods that are for sale in a shop/store.²² Act may therefore be regarded as a supplementary statute to Trade Marks Act since the two concern trade and merchandise. Business names are taken care of by Part B of CAMA.

Besides the aforementioned statutory sources, another source of intellectual property law is the common law. Unfair competition, disclosure of trade secrets and passing off are species of intellect property. But unlike the other species, they are recognized in Nigeria not by statutory provisions but the common law through the torts of passing off and disclosure of trade secret. This takes care of mostly acts which are not covered by the provisions of the statutory sources of intellectual property mentioned earlier but which are all the same considered to be injurious to the interests of an owner of an intellectual property. An example of this is an infringement of unregistered trade marks. But this is

¹⁵ See 2nd Schedule to the 1999 Constitution, items 13 (for copyright) and 43 (for the rest - i.e. industrial property).

¹⁶ Cap. C28, LFN., 2004

¹⁷ Cap. P2, Ibid

¹⁸ Cap. T13, Ibid

¹⁹ Cap. M10, Ibid

²⁰ Cap. C10, Ibid

²¹ See section 1(1) (a)-(f) of the Copyright Act.

²² Hornby, op cit, n.1, P.737.

not to say that it is only unregistered trade mark that can be protected under the common law of passing off, for even a registered mark is protectable under the common law.²³ In other words, infringement is exclusive to registered trade marks while passing off is, though applicable mostly (but not exclusively) to unregistered trade marks. For instance, the present trend is the practice of courts whereby a claim for passing off is formulated in the alternative to one for infringement. The advantage of this practice is that where the action for infringement fails for any reason, the action may still succeed on the ground of passing off²⁴. In the light of the foregoing, it is our view that common law of passing off serves as a subsidiary source of intellectual property law, albeit limited in scope.

Other sources of intellectual property law are the various subsidiary legislations made by the relevant Ministers in the exercise of the power conferred on them by the principal or enabling statutes. This is with a view to simplifying and facilitating the translation of the various provisions of the principal statutes into practical terms as well as to regulate the practice of the different branches of intellectual property. The Ministers are so empowered to fulfill of the fulfillment of a treaty, convention or other international agreement or agreements to which Nigeria is a party.

These subsidiary sources in relation to copyright are Copyright (Reciprocal Extension) Order.²⁵ This extends protection to copyright works emanating from countries which are signatories, like Nigeria, to the Universal Copyright Convention of 1952; Copyright (Collecting Societies) Regulations,²⁶ to regulate and provide procedure for the formation as well as the functions of the Societies; Copyright (Video Rental) Regulations,²⁷ regulating video rental activities so as to protect the copyright of the authors in video from being infringed by those involved in rental services; and Copyright (Security Devices) Regulations,²⁸ prescribing the use of hologram stamps in relation to sound recordings

²³ Patkun Industries Ltd Vs Niger Shoes Manufacturing Company Ltd (1988) NWLR. (Part 93) 138 at 156.

²⁴ John Walkerden & Co. Ltd Vs Jacob Akinyemi Oshodi, cited in Nnodum, J.T.U. Infringement of Trade Marks in Nigeria, Orlu: Friends' Law Publishers, 1992, p.60.

²⁵ This Order was made in 1972 but with retrospective effect from 1970 pursuant to section 14 of the Copyright Act, 1970, (now section 41 of the Copyright Act 2004) by the Minister in charge of culture – section 51(1) of the Act.

²⁶ Made by the Minister in 1993 pursuant to section 32B (now 39) of the Copyright Act, 1988 (as amended).

²⁷ Made in 1999 pursuant to section 37(4) (now 45(4)), Ibid.

²⁸ Made in 1999 pursuant to section 18A (now 21), Ibid.

and cinematograph films intended or offered for sale, rental, hiring, etc for commercial purpose in Nigeria.

In respect of patents and designs, we have Patents and Designs (Convention Countries) Order²⁹ which accords priority to a patent application or a design application in Nigeria, if an earlier corresponding application for the protection of an invention or the registration of a design has been made in that convention country. Such an application will be treated as having been made on the date when that earlier application was made.

Again we have Patents Rules and Designs Rules³⁰ regulating the manner in which the Registrar shall maintain and make entries in the Register, providing administrative and procedural provisions necessary or expedient in order to facilitate the operation of the Patents and Designs Act.

On the part of trade marks, there is Trade Marks Regulation³¹ regulating the practice under the Act, including the service of documents; classifying goods for the purpose of registration of trade marks; making or requiring duplicates of trade marks and other documents; prescribing the fees to be paid in respect of applications, registrations and other matters under the Act, etc.

(b) *International Instruments*

The scope of the application of any municipal law (including the foregoing laws or sources) is limited to its country of origin alone. It is therefore not surprising that the foregoing laws alone are not capable of protecting intellectual property rights outside the borders of this country-Nigeria. To protect such rights elsewhere, there is the need for a supportive international protective regime. This informed the emergence of various international instruments or conventions on intellectual property.

The origin of the different fields of intellectual property is not traceable to one place because they don't have a common origin. Their origin is therefore traceable to different places and at different times. Similarly, intellectual property rights went through different stages of evolution

²⁹ Made pursuant to section 27(1) of the Patents and Designs Act, by the Minister in charge of commerce – section 32(1) of the Act.

³⁰ Both made in 1971 pursuant to section 30, Ibid.

³¹ Made in 1967 under section 45 of the Trade Marks Act, by the Minister charged with responsibility for trade marks – section 67(1) of the Act.

before arriving at their present position. These stages may be broadly classified into three the territorial stage, the international stage and the global stage. Each of these stages will be very briefly discussed presently.

(i) *Territorial Stage*

The territorial stage was dominated by the principles of territoriality whereby intellectual property rights were enjoyed only within the territory or state that granted the rights. Enjoyment of such rights by their owners never extended beyond the territory of the sovereign or state in which the owners were domiciled. It meant that an intellectual property right or law granted or passed by country A was not applicable to country B. Intellectual property owners were confronted with a classic free-riding problem to which the principle of territoriality had no answer. The owners of these rights then realised that if their rights were confined to their territory alone, they would not be able to protect and exploit their intellectual property to the fullest. To protect their intellectual property outside their territory, the right holders would need to invoke the law of another country where counterfeiting may take place. This led to the next stage of intellectual property protection – international stage, during the nineteenth century.

(ii) *International Stage*

The international stage was where states began to take more and more interest in the exploitation of the possibility of international cooperation on the protection of intellectual property. This interest for international protection culminated, at first, in bilateral agreements³². Under these agreements, each state would give protection within its own frontiers to intellectual property of the other's nationals. Those states that were at the receiving end of the free-riding problem started to negotiate bilateral treaties with other states. On the other hand, those states that saw themselves as the beneficiaries of free-riding phenomenon remained isolationist. While the United Kingdom (U.K.) represents an example of the former response of the free-riding problem, America (U.S.A.) provides an example of the latter response³³. In 1838 and 1844 the U.K. enacted Acts for the protection of works that were first published outside of the U.K. on the basis of reciprocity. This led to the conclusion of a considerable number of bilateral agreements between U.K. and other

³² Ricketson, S.: *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Kluwer, Centre for Commercial Law Studies, Queen Mary College, 1987, PP:25-38.

³³ Drahos, P.: "The Universality of Intellectual Property and Human Rights: Origin and Development," *Intellectual Property and Human Rights*, Geneva, WIPO, 1998, P.16.

European states³⁴. But the USA held tenaciously to its policy of national protectionism until after the second World War when it fell in line with other countries that had internationalised their intellectual property regime.³⁵

The new international intellectual property regime saw sovereign states that agreed to certain foundational principles. The most important of this is the principle of national treatment, which did not only permit reciprocity but also allow national laws to differ in scope, which is one of the cardinal principles of all the conventions on intellectual property. There was no unified technical rule as states retained enormous sovereign discretion over the extent of technical rules they were prepared to put in place to govern the protection of intellectual property.

Nigeria is a subscriber to some of these international conventions which are intended to set internationally acceptable standards that the domestic legislations on the various species of intellectual property must attain. These international convention to which Nigeria is a signatory include the Universal Copyright Convention (UCC); the Berne Convention; the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention); Paris Convention for the Protection of Industrial Property (Paris Convention); the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) within the framework of the General Agreement on Tariffs and Trade (GATT)/World Trade Organisation (WTO) and the Convention Establishing the World Intellectual Property Organisation (WIPO Convention).

The WIPO is an international organisation charged with the responsibility of ensuring that the rights of creators and owners of intellectual property are protected not only within the confine of their home countries but world wide and that the authors and inventors are thus, recognised and rewarded for their ingenuity.

The need for international protection of intellectual property came to the fore when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because they were afraid of their ideas being stolen and exploited commercially in other countries. Free riding was a common place then.

³⁴ Sherman, B.: "Remembering and Forgetting: The Birth of Modern Copyright Law", Intellectual Property Journal, Vol. 10, 1995, P.10.

³⁵ Ringer, B.: "The Role of United States in International Copyright: Past, Present and Future", Georgetown Law Journal, Vol.56, 1968, PP.1050-1079.

One of the most important part of WIPO's activities in the discharge of its mandated (i.e. promoting intellectual property protection) is the development and application of international norms and standards. The Organisation currently administers 11 treaties that set out internationally agreed rights and common standards for their protection, that the states which sign them agree to apply within their own territories. It is constantly alert to the need to develop new norms and standards in line with advances in technology, as well as in response to specific concerns such as folklore, biodiversity, etc³⁶.

(iii) *Global Stage*

Although the TRIPS Agreement has the foundational principles of territoriality and national treatment, it also represents the beginning of property globalisation.

The Agreement establishing the World Trade Organisation (WTO) is the latest on the international intellectual property scene. The TRIPS Agreement was made binding on all members of the WTO and consequently any country wishing to become or remain a member of the multilateral trading regime must toe the line of the TRIPS Agreement. In other words through the trade linkage, the TRIPS Agreement binds all those states (including China from 2003) that are members of the multilateral trading system or wish to become a member.

Previously states had the discretion to choose which clause in treaties they did not want to be bound with and they therefore had the choice not to ratify certain protocols or conventions. But this unfettered discretion has been whittled down by TRIPS Agreement (which incorporates various other intellectual property conventions³⁷ by reference), which is binding on all members of the WTO. Consequently, states participating in the regional and multilateral trade regimes have to implement a common and enlarged set of intellectual property standards.

The global stage has been a period in which countries are faced with the task of national implementation of their obligations under the TRIPS Agreement and an institutional mechanism for this purpose is put in place. The WTO Agreement provides for a Council for TRIPS for the

³⁶ WIPO Publication No. 400 (E) 1999

³⁷ Such as Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), 1886; Universal Copyright Convention (UCC), 1952; and Rome Convention for the Protection of Performers, Phonograms and Broadcasting Organisations (Rome Convention) of 1961.

monitoring of members' compliance with the obligations under the agreement.

Under TRIPS, a breach by a state may attract the sanctions of withdrawing WTO advantages. These advantages include the suspension of concessions in the same sector or even cross-retaliatory measure such as the imposition of quotas or other exclusions on a country's export of goods and services.³⁸

IV. Conclusion

This paper discussed the scope and sources of intellectual property law in Nigeria kick starting with description of the concept known as intellectual property, its functions in the society and the rationale for the legal protection accorded the concept.

In discussing the scope of intellectual property, we pointed out that even though it shares some attributes of other property, the numerous permitted acts, which have eroded considerably the economic rights of the owner of intellectual property, placed him at a very serious disadvantage. This disadvantage is worsened by the fact that intellectual property right endures for a limited duration. We therefore concluded that it is limited in scope.

While discussing the sources of intellectual property law in Nigeria, we observed that its genealogy is traced to English model due to the fact that Nigeria was colonised by the British. We divided the sources broadly into two - local laws and the international instruments. The universalisation of intellectual property protection was briefly discussed also. We concluded that property globalisation was brought about by TRIPS Agreement which also took care of the defect of international stage, by providing a mechanism for the monitoring of members' compliance and imposing sanctions for non compliance.

³⁸ Cornish, W. and Llewelyn, D.: *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London: Sweet and Maxwell, 2003, PP. 28-29