

# JUDICIAL ROLE IN THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAW IN NIGERIA

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## ABSTRACT

When the courts make historic decisions, doctrines, and pronouncements, the importance of the court's role in interpreting the law is most clear. In this context, the courts are in charge of shaping jurisprudence and deciding the legal underpinnings. This article focuses on the larger context and framework in which the court's role in the interpretation and growth of Nigerian intellectual property laws can be analyzed. Where does Nigerian intellectual property law exist? It takes a conceptual approach, tracing intellectual property law and the courts' role. It also analyzes some recent case law that can be used to determine judicial power and the function of the court in the evolution of IP law. With a few notable exceptions, the overall interpretative function has been less than ideal, according to the article. It thus suggests a more pragmatic and constructive judicial approach to the interpretation of IP legislation, particularly given the growing importance and contribution of IP to national development, as well as the need for a socially responsive policy and legal framework for an effective intellectual property right regime.

**Keywords:** Role, Courts, Intellectual Property, Adjudication, Development

## INTRODUCTION

The function of the court in the interpretation and development of intellectual property law is certainly relevant and crucial in the current dynamics of intellectual property law and practice in this country. It comes at a good moment, because intellectual property has become one of the most serious issues in the expanding information economy. It's significant because courts interpret relevant IP laws and assess the full extent of their rights and obligations in terms of intellectual property protection and economic exploitation for the entire global knowledge industries that rely on IP.

Against this backdrop, this essay will examine the traditional role of the courts in the evolution of intellectual property law. Following the introduction, the article is divided into four (4) sections.

The first section examines intellectual property law and the role of the court. Intellectual property law, it argues, is the branch of law that deals with legal rights linked to creative work or economic reputation and goodwill. It goes on to say that the courts' traditional role in law interpretation is a time-honored duty that underpins the state's organic function and structure, and that role has been defined by various jurisprudential schools of thought, such as the natural, normative, and positive schools, and that regardless of the context of interpretation, the courts are expected to advance the state's development within the confines of interpreting the law.

The second section of the report looks at Nigeria's intellectual property laws. It contends that the current state of IP law exposes an alarming lack of correct balance, efficiency, and utility in the protection offered by the current intellectual property right (IPR) legal framework. It continues by stating that intellectual property law has its roots in English imperial law and has, without a doubt, failed to reflect current conditions as periodic changes would have done. Finally, it says that Nigeria's intellectual property policy has failed to adapt to market and technological trends, and thus is unable to contribute to growth.

The third segment examines current case law on the role of courts in the evolution of intellectual property law. It asserts that, with notable exceptions, courts have failed to effectively explain IP rules, as some of the cases examined will show, and that the overall interpretative function has been inadequate.

Part four concludes the article with some recommendations.

## **INTELLECTUAL PROPERTY LAW AND THE ROLE OF THE COURT DEFINED**

Intellectual property is a broad term that encompasses inventions, literary and artistic works, as well as commercial symbols, names, and photographs. <sup>i</sup> According to WIPO,

Intellectual property refers to the legal rights that result from creative work in the fields of industry, research, literature, and the arts... The purpose of intellectual property law is to safeguard artists and other creators of intellectual goods and services by providing them with time-limited rights to control how their work is used. Those rights apply to the intellectual work itself, not the physical things in which it may be incorporated. <sup>ii</sup>

IP covers a wide range of topics, including but not limited to: literary, artistic, and scientific works; performing artists' performances, phonograms, and broadcasts; inventions in all fields of human endeavor, scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition, and other rights arising from intellectual activity in the industrial, scientific, and technological sectors. <sup>iii</sup> These works have been given legal protection, giving its creators proprietary and transferable rights. This right provides the creator control over how others utilize and abuse their creation. The act establishes the legal basis for the moral and economic rights of creators, as well as the promotion and incentives for the benefits of creativity and invention. According to the article, "IP has now almost canonically been recognised as a term of art to represent related but different norms or regulations that control the allocation of rights over information or the corpus of human inventions." <sup>iv</sup>

Two categories of intellectual property exist. Industrial Property exists on one hand, whereas Copyright exists on the other. Industrial property includes invention patents, trademarks for a variety of commercial interests or representations, industrial designs, and geographic markers. Copyright protects literary works such as novels, poetry, plays, and computer programs, as well as cinematograph films, musical works, aesthetic works such as drawings, paintings, and sculptures, and architectural designs. Copyright-related rights, sometimes known as adjacent rights, include the rights of performers in their performances, producers in phonograms, and broadcasters in their broadcasts. <sup>v</sup> Cultural representations of folklore and finer forms of

traditional knowledge expressions are increasingly included in newer types of intellectual property protection. IPRs are principally governed in Nigeria through statutes controlling the three main sectors of intellectual property: copyright, patents, and trademarks, as well as their respective rights. They are the CA<sup>vi</sup> Trademark Act 1965,<sup>vii</sup> and Patent and Designs Act 1970.<sup>viii</sup>

The inventor or IPR owner has exclusive rights provided by law. IPRs are thus defined by their exclusivity. Exclusive rights are a "bundle of rights" that give incentives for the exploitation of certain IP subject matter while also needing the owner's agreement or consent in order for the exploitation or usage to be legal or valid. Exclusive rights are clearly established under IP statutes. Exclusive rights under copyright, for example, cover numerous sorts of reproduction, performance, distribution, or broadcast,<sup>ix</sup> as well as many types of marketing or selling of the brand or working of the patent technique or product in the case of industrial property.<sup>x</sup>

Fundamentally, the courts' traditional responsibility in interpreting laws is a time-honored duty that underpins the biological function and structure of the state. A key idea of separation of powers is that the courts are responsible for interpreting the laws passed by the legislature. That interpretative role has been comprehensively described by several jurisprudential schools of thought, such as the natural, normative, and positive schools. The normative school sees the court's role as essentially interconnecting the law as it should be, whereas the positive school sees the court's role as strictly interpreting the law as it is. According to Richard Posner,

If judges performed nothing more than implement unambiguous principles of law set by lawmakers, administrative agencies, constitution framers, and other extrajudicial sources (including business custom), they would be well on their way to being supplanted by digitized artificial intelligence algorithms.<sup>xi</sup>

In any situation, within the limitations of interpreting the law, the courts are expected to advance the evolution of the law in some way. This judicial responsibility is what gives jurisprudence and the legal system its identity. As a result, the court's role is intertwined with the interpretation and development of the law, and that role should encourage the evolution of the law by providing acceptable legal solutions to complex societal issues. There are at least three imperatives that come from the conventional judicial role in legal creation. To begin, as previously indicated, the courts have traditionally been entrusted with adjudication duties and powers, which serve as the foundation for judicial powers and jurisdiction conferred by law

and the Constitution. Second, precedents are set by judicial decisions made in the course of exercising jurisdiction. Judge-made law, which is instructive, is the cornerstone of the legal system. Finally, the well-known canons of statutory interpretation position the courts in the best position to discern and give effect to the underlying policy and legislative intent, as well as the law's overall purpose. <sup>xii</sup>

When the courts deliver landmark decisions, theories, and pronouncements, the importance of the court's role in interpreting the law becomes clear. Courts are in responsibility of establishing and shaping jurisprudence in this framework, and thereby defining the legal foundations. The courts are in charge of giving the texts of the law life and soul; otherwise, the law would be dead, sterile, and naked. As a result, the role of the courts in interpreting IP law is important to its development. They are critical in setting the limits of intellectual property as a key legal mechanism for the allocation and distribution of rights over ideas in all legal systems. While that viewpoint may be more difficult to take given Nigeria's current status of IP law, it does embody numerous fundamental elements and attributes that can be used to describe Nigeria's IPR regime. <sup>xiii</sup>

## **WHERE IS INTELLECTUAL PROPERTY LAW IN NIGERIA?**

An analysis of the current state of IP law indicates an alarming lack of adequate balance, efficiency, and utility in the current IPR legal system's protection. Economic, technological, and legal/policy factors all have a role in the current condition of IP. To begin with, existing IP law has shown to be grossly inadequate from a legal and policy perspective, partially due to the lack of an underlying national IP policy or strategy, which traditionally serves to clarify and support legislative intent as well as judicial interpretation of the law. It became evident that existing IP law was not based on a well-considered policy that accounted for the contemporary economic and technological environment. IP law has its roots in English Imperial law, and it is evident that frequent modifications have failed to effectively reflect modern circumstances.

It's no longer relevant to argue that Nigeria's IP laws, particularly the TMA and PDA, are outmoded. In terms of the four elements that make up the basic framework or structure of IP law, namely, IP subject matter, nature and scope of rights, administration, and enforcement, a close examination of the three pieces of IP legislation concerning copyright, trademark, and

patent reveals an outdated legislative framework, especially in light of rapid commercial and technological changes in the production and distribution of IPR since those laws were enacted. In general, copyright, trademarks, patents, and designs are all safeguarded. Copyright, for example, protects six different types of original creative works as well as adjacent rights. New creative forms shaped by the digital and online environment <sup>xiv</sup>, such as databases and multimedia, remain largely undefined in the copyright domain. Trademark protection is much more limited because there are few techniques or technologies by which brand owners can protect the goods and services they manufacture and sell. Service marks, collective trademarks, product shapes and packaging, domain names, and other novel ways to offer goods and services are all examples of this. Despite patents' utility as a viable instrument for invention and beneficial technology, the scope of patentable innovations is limited. For example, utility models, PGR patents, and TK are not covered. In general, intellectual property should be expanded to match the cognitive power available for exploitation and revenue generation. While new categories of works have been developed for some time, the IP debate has pushed for the development of creative and inventive works as IP subject areas.

IPR is defined not only as an exclusive right, but also by the type of exclusive right that can be gained. Even if the owner's creativity is a protectable subject matter with associated rights, the nature and scope of those rights are not only important but also at the heart of any IP framework because they determine what exclusive rights the owner has. Exclusive performing, reproducing, broadcasting, and distribution rights, as well as their appendices, have steadily evolved as the cornerstone copyright rights conferred on authors and IPR holders. Because of major developments in information technology that strengthened the way works are communicated or circulated, a new 'right of making available' in the digital environment was established and moulded into the bundle of exclusive rights in the digital context. For example, qualified employment rights must extend to the new digital and online world, which was not the case before the Internet. As a result, other countries and the international intellectual property system have quickly accepted this right. The absence of digital rights is a major flaw in Nigeria's copyright policy, and hence a key topic of revision. Because such a right does not exist under Nigerian IP law, a vast digital market for IPR exploitation in entertainment, media, trademarking, and branding, as well as electronic commerce, remains essentially unexplored. As a result, protecting IPR in the digital age is a crucial IPR law reform effort that provides the technological context for reform.

Copyright and intellectual property systems rely heavily on rights management and enforcement. They have been regarded as one of IP law's achievements to some extent, particularly in relation to the Trademark and Patent Registry (TPR) and later the establishment of the Nigerian Copyright Commission (NCC), which was established for the first time in 1989 under the Copyright Act with responsibility for copyright administration and enforcement in Nigeria. The development of administration and regulatory agencies may not be sufficient to determine the quality or standard of an IP law or system, despite the fact that it may be part of the examination. Other characteristics or elements of the legal system are also crucial. A proper and effective regulatory framework, including IPR enforcement, is an important part of that evaluation. While some IP issues and rights are missing, particularly in the context of IPR in the digital and online world, certain features of the IPR legislation and enforcement system have been addressed. The framework for digital rights management (DRM) and the legislative prohibition of circumvention of technological protection measures (TPM), as well as the scope of powers of the NCC and the Trademark and Patent register, and the issue of fragmentation of IP institutions, all require substantial change. <sup>xv</sup>

The registry's duties have been severely harmed by the lack of examining powers over substantive patent examinations. In the case of copyright, the justification for giving the Commission broad enforcement powers has been questioned. It has highlighted the question of whether IPR enforcement is primarily the responsibility of IPR holders, or whether it is within NCC's enforcement powers to carry out enforcement at all points of infringement. As a key component of that examination, the Commission's regulatory and enforcement authorities should not and must not affect private enforcement of IPR. While some IP issues and associated rights remain absent, particularly in the context of IPR in the digital and online world, certain components of the IPR regulation and enforcement framework have been brought to light. Part of this inadequacy is related to the framework for digital rights management (DRM) and the legal prohibition of circumvention of technological protection measures (TPM), as well as the scope of powers of the NCC and the Trademark and Patent registry, and the issue of fragmentation of IP institutions, all of which require substantive reform in some form or another.

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of whether IPR enforcement is primarily the responsibility of IPR holders, or whether it is within NCC's enforcement powers to carry out enforcement at all points of infringement. As a general rule, the Commission's regulatory and enforcement authorities should not and should not affect private enforcement of IPR. Instead, the powers and their exercise must be viewed through the lens of public enforcement and against the backdrop of the fight against large-scale piracy. It's also crucial to remember that the NCC's enforcement powers should be interpreted together, not separately. In this way, the IP institution's private and public interest narrative may be effectively communicated and enforced. IPR enforcement necessitates the implementation of appropriate enforcement mechanisms, such as court conditions for IPR enforcement. The dispersion of IP-related entities has resulted in increased IP management expenditures. <sup>xvi</sup>

Finally, from an economic standpoint, present IP legislation supports the socio-economic and commercial environment it is supposed to control, particularly one that has been influenced by improvements in information technology. Since the main copyright law was enacted in the 1960s through the 1980s, the environment has evolved dramatically. The frontiers of branding, advertising, and marketing of goods and services continue to shift, and new technical advances are growing in every domain of knowledge, with concomitant tensions in IPR and knowledge governance systems on the allocation of rights over information. Indeed, IP has provided the legal and political framework for developing and adding value to knowledge assets, and much of that function has been sustained by its ability to respond to and adapt to new developments and change brought about by knowledge asset production and dissemination. IP has a crucial role in the national economy in specific economic terms such as fostering creativity and innovation, value-added, revenue generation, supporting foreign trade, and helping to enhance productivity, according to experts. As IP businesses continue to create millions of employment across sectors while adding trillions to GDP, the economic factor is crucial.

Significantly, Nigeria's intellectual property policy has failed to adjust to the changing dynamics of the market and technologies, and so, strangely enough, cannot contribute to development. It has become obsolete as a result of being outpaced by advancements in the business and technological settings in which it works. The fact that those regulations were enacted long before the rise of the information economy indicates that they are clearly outdated. As a result, they are ineffective in safeguarding the country's intellectual property and emerging knowledge economy. The Copyright Act, for example, has not sufficiently preserved famous



copyright-protected works in the new digital environment that is today the new market for entertainment and media, even after revisions in the 1990s. TMA does not provide trademark protection for domain names, service marks, or a variety of other creative technologies or services in a variety of industries. Overall, the situation gives the impression that the IP field is mainly unexplored.<sup>xvii</sup>

## **TOPICAL CASE LAWS ON THE ROLE OF THE COURT IN THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAW**

While it is hard to name or mention all reported or unreported IP cases, it is vital to highlight a few key cases that are relevant to the discussion. A comprehensive examination of Nigerian case law will reveal some of the key features and settings of IP law that have emerged throughout time. Because all IPR cases cannot be evaluated for this purpose, some notable reported cases will be highlighted, particularly in the fields of copyright and trademark law, to demonstrate the fundamental assumption, namely, that there has been a lack of satisfactory definition of the boundaries of IP law, as well as a lack of depth in judicial pronouncements, even when the opportunity has arisen. In a case like *Obe v Grapewine Communications* (2007),<sup>xviii</sup> for example, a good case for a strong judicial declaration on the defense of fair dealing under Nigerian copyright law was lost because no further judgement or pronouncement on the matter has been issued. The lawsuit concerned the release of images shot by Peter Obe, a well-known Nigerian photographer. He sued the defendant for copyright infringement after the defendant published his picture documentary on the Nigerian Civil War. The defendant invoked the fair dealing defense, claiming that the images were used to illustrate an incident of "historical significance" and "great public interest," and that because they were acknowledged sufficiently, they qualified as fair dealing and were thus immune from copyright protection. It was difficult to see how the photographic documentary could be considered one of the four actions stated in the clause and thus qualify for the defense of fair dealing. Furthermore, beyond stating that there was insufficient acknowledgement, the court failed to articulate the principle of fair dealing in connection to the claimed use in its analysis of the facts. It's worth noting that similar principles have been articulated in court in other jurisdictions, including the United Kingdom, as well as a similar doctrine of fair use under US copyright law.<sup>xix</sup> Of fact, because the Nigerian copyright law is based on English copyright law, the accurate interpretation of fair dealing should be more in line with English judicial rulings than the

American version.<sup>xx</sup> On the crucial issue of moral right, *Ashaolu v Aromire*<sup>xxi</sup> displayed the same disappointing tendency. These instances highlight a flaw in judicial articulation of the law, leading to conclusions regarding the courts' inability to fulfill their role in the development of IP law. It is important to note at this point that the overall effect of the characteristics of IP law in this country as indicated reveals the limitations and flaws of the role of the courts, because the courts' primary purpose is to interpret the law rather than to make law. To that extent, the courts have been forced to deal with IP law that is essentially outmoded and ineffective.

The accumulation of those features resulting from a lack of IP cases or an inadequacy of IP law has a direct impact on the function of courts in the overall evolution of the law. However, if there are examples of judicial failure, such as in the copyright and trademark cases *Microsoft Corp. v Franike*<sup>xxii</sup> and *Omnia v Dykrade*<sup>xxiii</sup> the courts have essentially failed the most basic standard in the jurisprudential definition of IP law, notwithstanding the issues' simplicity and clarity. More complicated instances, such as *Ferodo v Ibeto*,<sup>xxiv</sup> a trademark case, just provide a spurious rationale for a less-than-innovative judicial articulation of the law. Those examples demonstrate another essential feature of Nigerian IP legislation on which judicial attitudes are based, namely, the lack of IP understanding among judges with jurisdiction to decide IP disputes, as stated in the conclusion. To support this point, two copyright and trademark cases from the Court of Appeal and the Supreme Court will be discussed in order to assess the current judicial attitude that has drawn assumptions and principles on the court's less-than-satisfactory role in the interpretation and development of IP law. However, before discussing copyright and trademarks, which are the two main topics of discussion, it is necessary to quickly address the patent situation.

### **Patents**

There is little that can be said about judicial rulings on patents, mostly because existing patent legislation has not greatly aided in shifting the frontiers of scientific and technical growth, making it difficult to say with certainty if Nigeria has a patent system. Patent cases haven't fully proven the law's effectiveness, such as patentability, which is one of the pillars of any modern patent system. Furthermore, because patents are not subjected to substantive scrutiny as part of the patentability determination process, patents are rarely challenged in court. Only one old case deserves special mention as a bold footnote in the trajectory of patent law in Nigeria, whereas the latter and more recent cases simply reiterated, without any in-depth

interpretative venture, some of the most basic provisions of the existing PDA, which do not invite any serious evaluation in the context of the current discourse. It is important to note that patent law was largely uncharted, with almost no case law except for an isolated decision by Ikpeazu J. in 1965, which only echoed the largely dependent patent era and reflected a restrictive and unimaginative interpretation of the relevant Registration of UK Patents Ordinance of 1925 and the UK Patents Act of 1949.<sup>xxv</sup> It should be remembered that, under the said Ordinance, patents were granted in the United Kingdom under the UK Patents Act of 1949 and were merely registrable or, better yet, registered in Nigeria, subjecting grantees to all the provisions affecting patents in the United Kingdom '[A]s fully as if the same had been granted, with an extension to Nigeria'<sup>xxvi</sup> under the dependent patent system. The Ordinance effectively brought the Nigerian patent system under the umbrella of the UK Patents Act, which was only abolished in 1970, ten years after independence, with the decision playing a significant role in the repeal process. That decision reaffirmed the lack of court support for patent interpretation.

The point of contention was the effect or import of Section 6 of the 1925 Ordinance, which granted privileges and rights under Nigerian law as if the patent had been issued in the United Kingdom, with an extension to Nigeria of the government's right to issue compulsory licenses for the supply of patented drugs under the Ordinance. The defendants in that case were permitted to provide certain pharmaceuticals under the plaintiffs' patent by the then-military government through the Federal Ministry of Health. While the defendant did not contest the plaintiff's patent title, he denied the patent infringement claim and defended himself by citing Section 46 of the UK Patent Act 1949, which allows any government department to use or exercise any patented invention for the Crown's benefit, and under which the patented drugs in question were purportedly supplied. Despite the combined effect of Section 6 of the Ordinance and Section 46 of the UK Patent Act, the court issued an injunction against the defendant, holding that the UK Patent Act 1949 did not apply in "its totality or as such to this country" to validate the defendant's authorization to supply the drugs in question. By upholding the plaintiff's claim, the court reinforced the limitations on patents imposed by the Ordinance, stating that registration in Nigeria did not allow the Nigerian government to exercise the Crown prerogative under the 1949 Act by issuing a compulsory license authorizing the supply of the patented drug. In essence, unlike the Crown, the Nigerian government was unable to issue compulsory licenses under the Patent Ordinance, a circumstance that was manifestly ridiculous and offered legal support to the anomalous patent regime. The court reached this judgment

despite the fact that the patent registration in Nigeria had the same effect as if it had been granted in the United Kingdom, with "all the rights and advantages" and subject to "all the provisions affecting patents in the United Kingdom."<sup>xxvii</sup> Regardless of the dependent patent regime under which it functioned, that situation appears to expose the underlying effect of the applicable requirements to a great extent.

It was unsurprising that the Nigerian government, as is characteristic of military governments, was displeased by the political implications of that ruling, beyond from patent law. It quickly responded by enacting the Patents Rights (Limitation) Act 1968, which expressly vested the powers to grant compulsory licenses, similar to those vested in the Crown under Section 46 of the UK Patent Act,<sup>xxviii</sup> a precursor to the PDA, which repealed and replaced the 1925 Ordinance while keeping the same provision. The judgement lacks a thorough understanding of the nature and usage of compulsory licensing in a given patent system in a young technical and pharmaceutical environment, particularly when that system derives its force and tenor from English patent law with compulsory license provisions. While the judgement has no bearing on the current patent regime, it should be noted that it provided a judicial false start in the development of Nigerian patent law. Without a doubt, neither plaintiffs nor courts, nor future policymakers, can depend on the case when considering the use of compulsory licensing (or government usage, as the case may be), which has emerged as one of the most essential patent instruments for dealing with serious public health problems. As previously stated, succeeding patent decisions were a repetition of basic patent requirements, which are minor in comparison to the question of compulsory license decided in the case at hand.<sup>xxix</sup> In retrospect, the case does not satisfy the functional role of judicial interpretation in the development of IP law in Nigeria, and it should thus be relegated to the relics of Nigerian patent and political history.

### **Copyright**

There were few copyright cases in the courts until the 1970s, the era that saw the growth of copyright-based sectors, primarily the entertainment and publishing industries, and those lawsuits were mostly in the field of music, with a few on literary and creative works.<sup>xxx</sup> Those instances cannot be considered significant or pertinent for a meaningful assessment of judicial attitude in any form or character consistent with systematic jurisprudence. Unlike now, the environment could not be considered completely copyright-aware. Although the current Copyright Act was a result of the creative community's growing awareness of and response to the importance of copyright, it actually signaled a significant improvement in the quality and

standard of the law within the four basic frameworks of IP statute already mentioned; namely, the nature and scope of the subject matter, exclusive rights, administration, and enforcement of rights, which can be found in any modern copyright law. It wasn't until the 1990s that published cases began to reveal some degree of legal know-how originating from intense disputes, which have continued to put the Copyright Act and, more importantly, the courts, to the test.

As previously stated, it is disheartening to note that the Supreme Court has only decided one copyright case, which is not one of the two cases to be discussed in this analysis, simply because the issue decided is neither definitive nor recondite in the overall value of the discussion of the court's role in IP law. The MCSN and Microsoft decisions determined by the Court of Appeal under the current copyright law provide the basis for a more critical evaluation for the purposes of evaluating judicial appreciation and attitude in IP adjudication throughout a four-decade period on numerous problems. The two MCSN cases dealt with collective administration, an important topic in copyright law and the interpretation of the regulation dealing to Collecting Societies or Collective Management Organizations (CMOs) under the current Copyright Act.

Since the 1992 amendment, which introduced the legal and regulatory framework for collective administration for the first time in Nigeria's copyright law, there have been more than a dozen decisions from both the Federal High Court and the Court of Appeal on the issues surrounding the copyright law on collective administration. Since the 1990s, the Musical Copyright Society of Nigeria (MCSN) has filed a number of lawsuits against the Nigerian Copyright Commission (the Commission) and other parties in order to enforce its rights to operate as a collective management organization and to enforce those rights in cases of alleged infringement of those rights, which is the basic essence of those actions as supported by the facts. As a result, Section 39 has been the subject of judicial interpretation in those cases, particularly with regard to issues such as CMO's status as owner, assignee, and exclusive licensee, the Commission's powers in granting CMO approval, and the section's constitutional standing with respect to fundamental rights to freedom of association and property, among others.

At least two decisions by the Court of Appeal can be considered defining of the function of the courts in this regard, notably in the context of Section 39 concerns. The two cases in question, *MCSN v Adeokin*<sup>xxxvi</sup> and *Compact Disc Technologies Ltd. v MCSN*,<sup>xxxvii</sup> give authority for collecting societies' legal status as owner, assignee, and exclusive licensee of copyright under the current Copyright Act. For example, while *Adeokin* decided that a collecting society has

an unrestricted and unconditional right to institute and maintain action for infringement of copyright when interpreting Section 39 in relation to Section 17, Compact Disc Technologies, distinguishing Adeokin and interpreting the same provision as amended by the Copyright (Amendment) Act 1999 and contained in the text of the 2004 Laws of the Federation, decided that the 1999 Constitution placed a restriction on the right to institute and maintain action for infringement of copyright. As a result, Section 17 now restricts the right of action of those who negotiate and grant licenses, collect and distribute royalties on behalf of more than 50 copyright owners unless they have been approved as a collecting organization. The Adeokin decision, in which the court established locus for MCSN despite the fact that it had not been approved as a collecting society, is particularly instructive. In their separate and combined judicial authority on the legal status of collective management organizations in Nigeria, the two decisions from the Court of Appeal, in particular, constituted a watershed in the development of copyright law. They were not, as they were utterly incompatible in their individual interpretations of the Copyright Act, despite taking opposing stances on distinct provisions of the legislation. Closely connected is the third case, *MCSN v. NCC*,<sup>xxviii</sup> ruled by the Federal High Court on the legitimacy of the same Section 39 relating the Commission's authorizing powers in relation to the plaintiff's fundamental rights under the Constitution, notably Sections 40 and 44. The question is whether Sections 17 and 39 of the Copyright Act, which require approval to act as a collecting society, infringe on the applicant's constitutional right to freedom of association. In declining to address the question, the court held that a legal requirement that a party meet certain criteria before exercising his rights, such as obtaining a license before conducting business, is not equivalent to coercive acquisition of property. As a result, the action failed, and the Commission's authority was upheld. The exercise of those powers, on the other hand, was a different story. Those decisions set a crucial foundation for the evolution of copyright law in the defining of collective administration borders, which is still being studied in certain key elements in present dispensation and industrial operations.

The Court of Appeal decision in *Microsoft*<sup>xxvii</sup> is another copyright decision of considerable importance with far reaching legal and commercial implications on the protection of foreign copyright works in Nigeria in the straightforward facts of the case, the Microsoft Corporation had instituted the action at the Federal High Court against the defendant/respondent for infringement of its 'Windows' operating programmes and products. The court dismissed the case because it lacked jurisdiction to hear the claim due to a lack of proof of reciprocal copyright protection between Nigeria and the US. The Court of Appeal was tasked with

deciding this question. As a result, the case concerned the reciprocal extension of copyright to a work of foreign origin in Nigeria, with a focus on Microsoft Corporation software. It raises the important question of whether Microsoft's product, as a work of foreign origin, is protected by copyright in Nigeria under Section 33 of the Copyright Act, without which the courts will lack the necessary jurisdiction. The case provides the court with another opportunity to address the errors made in the two earlier cases on the subject.<sup>xxxv</sup> The court again refused to extend reciprocal protection to the appellant under Nigerian law due to his ineligibility as a foreigner. To make matters worse, the court went out of its way to require a certificate from the Commission bestowing copyright on the appellant,<sup>xxxvi</sup> as well as documentation of a Copyright Act Order confirming the reciprocal extension of protection.<sup>xxxvii</sup> It's a ridiculous argument with no legal foundation. That decision is one of the most regrettable court outcomes in Nigerian copyright law interpretation.

To begin with, in Nigerian copyright law, there is no rule or principle that requires copyright in a work to be registrable or subject to any formality as a condition of eligibility and protection. Second, reciprocal protection for foreign works was particularly provided for by an Order issued under the Copyright Act, namely the Copyright (Reciprocal Extension) Order of 1972, which designated the United States as one of the nations to which the Nigerian Copyright Act extends protection. In a similar vein, the requirement or eligibility of copyright by reference to international agreement obligates Nigeria to protect a foreign work that was "first published in a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party," among other international or regional agreements mentioned.<sup>xxxviii</sup> As a result, the Order is the statutory manifestation of Nigeria's commitment to safeguard works originating in the nations specified. Third, as a subsidiary statute under the Copyright Act, the stated Order is proof in and of itself in any Nigerian court of law, requiring no more proof. The Commission is obliged to provide a document demonstrating that a country is also a party to the same treaty as Nigeria in order to demonstrate Nigeria's commitment to that country. As a result, the issue of copyright proof by Commission certificate constitutes a grave legal error. Furthermore, it is well known that all courts of law must take judicial notice of all statutes, enactments, and other subsidiary legislation.<sup>xxxix</sup> Finally, Nigeria has an international copyright obligation to safeguard foreign copyright works, which must be proven with the Commission's aid as part of its advising and supervisory role on 'Nigeria's status in reference to international treaties.'<sup>xl</sup> It is so difficult to comprehend how the Court of Appeal ended itself in such a legislative quagmire by refusing jurisdiction based on a lack of proof of reciprocal extension

of protection, which is clearly attainable under existing copyright law, a colossal blunder in statutory interpretation. That approach has the effect of undermining the goal of copyright law, which is to safeguard the rapidly increasing software industry from piracy and counterfeiting. Unfortunately, only the Supreme Court has the power to correct that error when the time comes.

### **Trademark**

As previously said, trademarks are likely the most disputed IP subject matter, owing to commercial trends and their prominence as a trade icon. The developments have posed important and practical trademark law difficulties, putting the legislation's scope as well as judges' attitudes in interpreting the TMA's relevant provisions to the test. Some of the concerns that have been enunciated by the current body of case law include registrability and uniqueness, jurisdiction as it relates to trademark infringement vs passing off, and probability of confusion as the basis of infringement, among others.<sup>xli</sup> As a result, two Supreme Court opinions are discussed here. The two instances in particular deal with crucial problems related to trademark enforcement, which we view to be the fulcrum of trademark law in Nigeria.

The first is the *Ferodo v Ibeto* case, which dealt with trademark registrability based on distinctiveness.<sup>xlii</sup> The importance of previous judgements on the subject is also implied while looking at this case.<sup>xliii</sup> The second case is *Omnia v Dykrade*<sup>xliv</sup> which deals with the thorny issue of trademark infringement vs. passing off and the Federal High Court's jurisdiction, which has a long case law history culminating in the Supreme Court decision in *Ayman v Akume*<sup>xlv</sup> and the sister case of *Dykrade v Omnia*<sup>xlvi</sup> both of which have now been overruled, along with a whole line of case law in that direction, by the *Omnia v Dyketrade* decision in 2007. As a result, we believe that both *Ferodo*<sup>xlvii</sup> and *Dyketrade* ruled by the Supreme Court, serve as a barometer for evaluating the role of the courts in the evolution of IPR protection from the perspective of trademark law on at least two bases. To begin with, the prominence of the trademark problems at issue in those rulings emphasizes the significance of those decisions. The judicial attitude toward trademark enforcement would go a long way in deciding the freedom that trademark owners and users alike can have in protecting trademark rights in today's extremely competitive market. *Ferodo*, for example, is currently considered as the 'locus classicus' on trademark.<sup>xlviii</sup> Second, they are noteworthy, given the overall binding effect and finality of Supreme Court rulings under the theory of stare decisis as the highest court of the land, as opposed to the general paucity or rarity of decided cases, particularly at the Supreme Court level (except where it overrules itself).



Starting with *Ferodo*,<sup>xlix</sup> the judicial attitude toward trademark law growth paints an intriguing picture. The lawsuit essentially revolves around the crucial issues surrounding the meaning and registrability of trademark law's base. That statement is reflected in the Supreme Court's decision on a wide range of trademark issues, including the definition of a trademark and the assessment of distinctiveness as a foundation for registrability under the TMA. Without going into too much detail about the case's background, the lawsuit is essentially about trademark registration and registrability. The Supreme Court had to decide whether the use of the respondent's brake lining having the mark 'UNION' constituted trademark infringement and passing off of the appellant's brake lining bearing the name 'FERODO' coupled with its get-up. Prior to the case, the Appellants had been manufacturing and marketing FERODO brake lining and brake pads in the Nigerian market for over ten years. The said product was a registered trademark that consisted of a large red rectangle, a black and white chequered strip stretching from one side to the other at the lower end of the rectangle, and a small black rectangle in the upper half of the red rectangle in which the word FERODO was inscribed in white capital letters.<sup>i</sup> Of course, the packaging was not unique to the Appellant, and the Appellant did not have exclusive rights to the colors on the packaging, which it claimed were customary in the trade of the products in question. It was also argued that the Appellant's registered trademark only contained the term 'FERODO,' and that the remainder of the backdrop was purely embellishments, not part of the trademark.<sup>ii</sup> The Federal High Court found that the Respondent had not infringed on the Appellant's trademark because the words 'UNION' or 'UNION SUPA' could not be construed as an infringement of the Appellant's trademark, despite the Respondent's claim that the colors and designs on the packaging were merely embellishments and garnishes. Though the decision was focused on the subject of trademark registration, the court's attitude in deciding what constitutes trademark registration in terms of what qualities form part of the registered mark under TMA demonstrates the importance of the case. While it is undeniable that 'FERODO' was registered as a name trademark, the determination of the features of the registration of the trademark FERODO, particularly with regard to the constitutive features and coloration of the mark, could be described as the court's Achilles' heel in its interpretation of Section 9 of the TMA. The Supreme Court's reasoning was effectively captured in Justice Dahiru Musdapher's lead judgment:

An examination of the appellants' registered trademark convinces me that what was actually registered was FERODO... The creative and ornamental characters

that color the package faces cannot be considered part of the trademark... what was registered, in my judgment, was FERODO... The respondent, in my opinion, has done nothing to infringe upon the appellant's trademarks. In terms of personality, the two trademarks are worlds apart. <sup>lii</sup>

'What was registered as a trademark is merely the word 'FERODO'... a distinguishing character... by which the proprietor manufacturer meant to transmit a message that the products are hers and no one else's,' the court held. When a term is used to describe a product but the other aspects are not distinctive, they are only cosmetic and not part of the trademark', <sup>liii</sup> The Supreme Court has determined the extent of trademark registration, which is now an important component in any finding of trademark infringement in Nigeria. <sup>liv</sup> The decision's significance stems from the lack of a combined and purposeful construction of Sections 67, 11, and 9 of the TMA to identify what comprises a trademark and what qualifies it for registration. However, to define a mark, which includes 'a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or their respective combination,' as defined in Section 67, which features may constitute the basis of distinctiveness under Section 9, a more expansive construction is likely required. . While those features outside of the name FERODO, which cannot be separated from the FERODO trademark as a brand or device, were not considered to be registered or forming part of the registration of FERODO, it was not clear or settled by the decision that those features would be registrable if they were part of the register of FERODO and were distinctive of the product.

The courts search for what is registrable due to its distinctiveness and what has been registered as evidenced in the register, which are two separate but linked exercises of legal implication. The court, in this writer's opinion, did not adequately draw the distinction and relationship between what is registrable and what was actually registered. What would have satisfied the registration requirement may not have been registered, resulting in just passing-off at common law rather than an infringement case. <sup>lv</sup> This begs the question of whether the decision would have been different if these 'ornamental or garnish' characteristics had been registered as part of the FERODO brand. However, under the TMA, that would have been a challenging question mark to register. <sup>lvi</sup>

The Court of Appeal ruled in *International Tobacco (Nig.) Ltd. & Ors v British American Tobacco (Nig.) Ltd. & Anor* <sup>lvii</sup> that the plaintiffs'/respondents' registered mark included the gold color. Unlike in the Ferodo case, the respondents were found to have registered the gold

coloring pack of their smokes in addition to the name mark, which was bolstered by the registration of the phrase "Turn to Gold." As a result, the appellants were found to be guilty of trademark infringement. A more purposeful or, better yet, radical construction of trademark under the TMA could extend the entire scope of a mark in the context of a 'device or brand' beyond mere name or word to its other features represented by the entire written person, its device or brand properly so called, though the TMA may not allow for its 3 dimensional or graphic representation. While that position may differ from the prevalent view in the application of Nigerian trademark law that shapes and packaging of goods are not registrable, the position of a mark indicating a 'device' or 'brand' in conjunction with the familiar non-graphical representation in a 'name,' signature, word, letter, or numerical or any combination of them that are ordinarily regarded as registrable should be given more thought. A fortiori, it is self-evident that the court must evaluate the entire statute, not just a component or a piece of it, when construing the words.<sup>lviii</sup> As a result, advancing the meaning and import of the words 'device' or 'brand' in the overall conception of trademark in relation to the application of the principle of trademark abstraction, wherein a trademark can be used or considered in part, would have been a significant legal task. The courts are cautioned against declaring an absence of infringement simply because the shapes and packaging are not registrable per se, without first examining the entirety of the representation of the trademark allegedly infringed in order to determine the scope of its name or word as represented or denoted and registered as a 'device' or 'brand' properly so called.

Despite the fact that the decision provides a unique opportunity for the court to examine the scope of Sections 9, 11 and 67 of the TMA as it relates to what constitutes a mark for the purposes and context of registrability, the decision exhibited a lack of depth and a ready reluctance to expand the ambit of trademark law that would have cured the TMA's obsolescence and unsuitability to current commercial and trading patterns and practices, where it would have been possible. The lack of judicial vision in that regard has begun to produce comparable trends in other cases that have arisen as a result of the ruling. For example, relying on *Ferodo*, the Court of Appeal in *Virgin Enterprises Ltd. v Richday Beverages*<sup>lix</sup> held that the appellant's registered trademark was only the word "Virgin," not the coloring outlet and geometric designs that accompanied the word, thereby perpetuating the trend of limiting trademarks to mere words or names without considering the wholistic meaning and scope of the term "mark" as encompassing the "device" or "brand" used without the use of the word. It is clear that the

courts are not tuned in to the legal core of trademark as provided, and as a result, have failed to give trademark its proper extent of meaning, even within the TMA's allowed range.

Given the aforementioned context, the Supreme Court's 2007 ruling in *Omnia v Dykrade* should be evaluated in light of its obvious inconsistency. The case provides a curious, and ironically, as we will see, significant judicial attitude in the interpretation of this country's trademark law against the backdrop of current trademark practice on the problem of trademark enforcement with an emphasis on the court's jurisdiction. The case stemmed from an interlocutory appeal between the same parties, which resulted in the *Dykerade v Omnia* Supreme Court ruling. Although issue estoppel was examined, the issue for this purpose is the manner in which trademark rights are enforced, which has become an essential component of trademark practice requiring clarity of existing case law. In that regard, the *Omnia* decision is a significant contribution to the development of the law, though there is still a serious and subtle interpretational question left unanswered by the court, lending credence to the Supreme Court's landmark decision in *Patkun v Niger Shoes*<sup>lx</sup> on the same issue of trademark enforcement. While the Federal High Court has always had jurisdiction over registered trademarks, the jurisdiction over unregistered trademarks has always been a challenge, especially because the two causes of action are always disclosed in the same action, raising jurisdictional issues on trademark enforcement regarding infringement of a registered trademark on the one hand and passing-off of an unregistered trademark on the other. This issue arose as a result of the Federal High Court's founding, original definition, and expanded jurisdiction, which has since been streamlined by constitutional provisions. Mariam Aloma Mukhtar JSC (as she was then) delivered the lead judgment in *Omnia*, affirming the present legal position:

As a result, the Federal High Court has jurisdiction to hear and decide the claim for passing off, and I agree with the learned counsel for the respondent that the court has jurisdiction whether the claim originates from a registered or unregistered trademark infringement.<sup>lxi</sup>

That decision, in my opinion, has sparked a hornet's nest whose effects will continue to influence practice and be argued among IP practitioners and academics, maybe until legislative change is eventually enacted. How can a 'unregistered trademark,' or better still, common law passing-off, fail within the meaning and effect of Section 7(1) (F) of the Federal High Court Act, as revised and construed in accordance with Section 251(1) (F) of the 1999 Constitution?

Starting with Section 251 of the Constitution, the wordings of the two clauses, in pari materia, are as follows.

In civil cases and proceedings, the Federal High Court shall have and exercise jurisdiction in the absence of any other court, notwithstanding anything in this Constitution to the contrary, and in addition to any further authority as may be conferred on it by an Act of the National Assembly:

(f) Copyright, patents, designs, trademarks, and passing-off, industrial designs and merchandise markings, and business names are all covered by federal legislation. Monopolies, combines, and trusts in the commercial and industrial sectors; product and commodity standards, as well as industrial standards. <sup>lxii</sup>

Section 7(1) (F) of the Federal High Court Act as amended states:

To the exclusion of any other court, the court shall have original jurisdiction over civil cases and matters associated with or relevant to it.

(f) Any common law Federal enactment dealing to copyright, patents, designs, trademarks, passing-off, industrial designs... <sup>lxiii</sup>

Clarifications must be made regarding these clauses, beginning with the Constitution, but mainly the two operative words (highlighted above) "trademark and passing off," which appear in both provisions, raising the question of how those words should be construed: To begin with, the Constitution mentions the Federal High Court having jurisdiction under a 'Act of the National Assembly,' which refers to both the Federal High Court Act and the TMA, and by which both laws are governed. <sup>lxiv</sup> Second, all civil causes and items stated in the two provisions forming the subject, in particular "trademark and passing-off," where the Federal High Court has jurisdiction must arise from a "federal enactment," not from elsewhere. To put it another way, any issue connected to "trademark and passing-off" mentioned in the two instruments must come from the applicable statutory legislation (Federal enactment), not from outside it, i.e., not from common law. It effectively indicates that the terms "trademark and passing-off" mentioned in the two instruments must come from the applicable statutory law (Federal enactment), and not from somewhere else. That brings up the TMA, which is a specific trademark statute whose section on passing-off is now pertinent to evaluate. The third section states:

No individual shall be able to bring a lawsuit to prevent or recover damages for the infringement of an unregistered trademark; nevertheless, nothing in this Act shall be construed to impact rights of action or remedies against anybody who misrepresents their goods as the goods of another.

The Supreme Court considered the meaning and effect of that provision in the locus classicus case of *Patkun Industries Limited v Niger Shoe Manufacturing Co. Ltd*<sup>lxv</sup>, which clearly represents the authority for the rule that the TMA provides for two causes of action with respect to trademarks registered under the Act: infringement and infringement relating to passing off of registered trademark, though it incorporates common law passing off. The clause exclusively protects passing off action against registered trademarks, not unregistered ones. In the context of the case, as simply explained in the solid jurisprudence contained in Karibi-Whyte JSC's lead judgment, that interpretation is illuminating (as he then was). For the sake of clarity, the explanation should be laid clearly. His Lordship alluded to a statutory formation of a common law right and the TMA.

Section 3 of the Trademark Act of 1965 accomplishes exactly this. The Act has granted an extra right of action in this section, in addition to the right of action conferred on the owner of a registered trademark. The right of action of passing off is therefore established in Section 3 of the Trademark Act of 1965. As a result, the right of action stems from the Trademark Act of 1963 rather than common law. It is incorrect to believe that just because a right of action has its origins in common law, it is ineffectual. Not at all. The common law tort of passing off applies to trademarks, but not to other subjects. The right of action for passing off based on infringement of a registered trademark is statutory in this country, and may be found solely in Section 3 of the Trademarks Act 1965.

As we've seen, the fundamental principle in that section isn't as plain or clear-cut as it appears, and that's exactly what the Supreme Court's eternal Paktun judgment has left to Nigerian trademark law. For the avoidance of doubt, the passing off anticipated under Section 3 is in respect to registered trademarks, not unregistered trademarks, despite its common law origins. In effect, Patkun enunciated three types of trademark actions, two of which are covered by the Act and only apply to registered trademarks, namely infringement action in respect of registered trademarks and passing-off relating to infringement of registered trademarks; the third, passing off action, which is based on common law and applies to unregistered

trademarks, is not covered by the Act. 'Trademarks and passing off in those provisions are in relation to registered trademark and not unregistered trademark for the purposes of conferring jurisdiction on the Federal High Court on infringement and passing off action relating to registered trademark, not unregistered trademark,' according to Sections 7 and 215 of the Constitution. If relied on in the Omnia case, the Patkun decision provided reasonable judicial reasoning for the formulation of Section 3 of the TMA in context. Unfortunately, Patkun was never mentioned or addressed in the Omnia case on a topic that is relevant to the same issue. Her Lordship, in my opinion, misinterpreted the meaning and import of "trademarks and passing off" in both the Federal High Court Act and the Constitution, and so missed the correct legal effect of the adoption of common law passing off into this country's trademark law. My conclusion is based on her Lordship's rationale below.

The subject of common law and passing-off was particularly brought to the provision of Section 7 of the Federal High Court Act, which was replicated in the Ayman's case *supra* and reprinted herein, with this alteration. The Trademarks Act of 1965, Section 3 of which I have already reproduced, is the federal statute at question in this case. Despite the introduction and or modifications to Section 7 of the Federal High Court Act described above, the Federal enactments still contain the reproduced Section 3 of the Trademark Act, which has not been modified. The fact that the Trademark Act was referred to and depended upon rather than the old text of Section 7, i.e. the Federal Revenue Court, does not negate the fact that the enactment referred to and relied upon was the Trademark Act. The Federal High Court thus has jurisdiction to hear and determine the claim for passing-off...

While her Lordship's interpretation of the common law's introduction into statute law was correct, it was her interpretation of the effect of that introduction to mean that passing-off in its purest form, which is a common law action, would fall under the Act for unregistered trademark that her Lordship missed the point, which was correctly stated in Patkun. It was because of this erroneous reasoning that the Federal High Court was given jurisdiction over both registered and unregistered trademarks. To emphasize the argument, the term "common law" appears nowhere in the Federal High Court Act or the Constitution, but even if it did, the effect on the strength of Patkun would have been the same:

It is well established law that if a common law right has been translated into statutory provision, such right must be sought through the statutory provision and not through the common law.<sup>lxvi</sup>

As a result, the passing off action contemplated, preserved, or incorporated into the TM arises from infringement of a registered trademark, which is its subject matter, regardless of its common law origin, and such construction is clearly consistent with both provisions of the Federal High Court Act and the Constitution, as evidenced by the use of the phrase "[A]ny Federal enactment relating to... trademark and passing off." Given the jurisdictional problems and inconsistencies associated with trademarks, the court's decision did not appear to provide a welcome solution or relief, as the case may be, in dealing with the predicament of litigants with regard to multiple actions in different courts in relation to essentially the same subject matter. At best, it is a final decision with a high degree of fallibility, pending statutory revision as the law develops. Though it is desirable on a practical basis for improved judicial administration and forum convenience to confer jurisdiction on the Federal High Court over all types of trademark matters, it is much more orderly if it is accomplished through an unequivocal legislative amendment or on a much more unassailable doctrinal basis than a spurious conclusion resulting from an apparent misconstruction of the law. While it is simple to agree in practice, it is far more difficult to agree in law. It's ironic to disagree with a decision's desirable outcome, especially when it results in a solution to a problem. In any case, the decision does not support the accurate interpretation of the law and, regardless of how good the practice may be, it is a deceptive method of reaching a conclusion. The importance of that decision resides more in its outcome and function in allowing better court management for trademark claimants and their counsel than in the reasons behind it, as it is only hoped that IP reform will put the issue to rest.<sup>lxvii</sup>

## CONCLUSION

While the courts have been hampered by insufficient IP statutes that do not adequately represent the level of creative and innovative activity, they have also failed to exhibit a constructive judicial approach toward the advancement and conditions of the existing IP regime in many cases. The increase of IP expertise, as well as IP law and policy reform, have become crucial imperatives for the courts' future role in the interpretation and evolution of IP law. To



begin with, improving IP expertise at the bench has become critical to the quality of adjudication and the advancement of IP law. Because judges are appointed from the profession, IP knowledge and competence within the bar is also essential. It isn't solely a question of establishing a specialized IP court. The Federal High Court already has a court dedicated to intellectual property. Reorganizing the court along specialized sub-disciplines is required for better adjudication of IP cases in comparison to other specialized domains of law. Fortunately, IP is no longer a mysterious topic of law; yet, greater specialization in the field, particularly from the bar, will improve the quality of IP court rulings. Second, the cases have demonstrated the negative consequences of insufficient legislation in the administration and enforcement of IP matters. Even where the courts are ready to push the boundaries of the law, there isn't much innovation that can be used to adorn an outdated legislation like the existing IP rules, particularly the TMA and PDA, which have been on the books for over a century without any amendment. While the justification for IP law reform is well-worn ground, it is the actual reform that will lead to the implementation of new IP legislation in the three areas that requires immediate attention.

The overall interpretive role has been less than satisfactory, according to the study, with notable exceptions. It thus advocates for a more pragmatic and constructive judicial approach to the interpretation of IP legislation, particularly given the growing importance and contribution of IP to national development, as well as the need for a socially responsive policy and legal framework for an effective intellectual property right regime.

## ENDNOTES

<sup>i</sup> See World Intellectual Property Organization, "What is Intellectual Property?" (2003), No. 450IE, *WIPO Publication*, p. 2.

<sup>ii</sup> World Intellectual Property Organization, *Introduction to Intellectual Property, Theory and Practice*, (Geneva, Switzerland: Kluwer Law International, 1997), p. 3.

<sup>iii</sup> Article 2(viii), Convention Establishing the World Intellectual Property Organization, 1967.

<sup>iv</sup> A. Adewopo, "According to Intellectual Property: A Pro-Development Vision of the Law and Nigerian Intellectual Property Law and Policy Reform in the Knowledge Era" (2012), *Nigerian Institute of Advanced Legal Studies*, p. 10.

<sup>v</sup> In the context of the Nigerian Copyright Act, both sound recordings and broadcast are protected as copyright. (See Section 1(1) of the Copyright Act, Cap C28 Laws of the Federation of Nigeria 2004) (hereinafter "CA").

<sup>vi</sup> *Ibid.*

<sup>vii</sup> Cap T13, Laws of the Federation of Nigeria 2004 (hereinafter "TMA").

<sup>viii</sup> Cap P2, Laws of the Federation of Nigeria 2004 (hereinafter "PDA").

<sup>ix</sup> See Sections 6, 7 and 8, Copyright Act, *Ibid.*

<sup>x</sup> Section 5, Trademark Act, *Ibid.*; P. O. Idorngie & A. Adewopo, "Arbitrating Intellectual Property Disputes: Issues and Perspectives", (2016), Vol. 7 No. 1, *The Gravitas Review of Business & Property law*, pp. 3 – 4.

- <sup>xi</sup> Richard Posner, *How Judges Think* (U.K.: Harvard University Press, 2008), p. 5.
- <sup>xii</sup> Cross, *Statutory Interpretation* (London: Butterworth, 1976), pp. 27 – 33.
- <sup>xiii</sup> A. Adewopo, “Role of the Court in the Interpretation and Development of Intellectual Property Law: The Nigerian Experience”, (2015), Vol. 6 No. 1, *The Gravitas Review of Business & Property Law*, pp. 1 – 2.
- <sup>xiv</sup> Section 1, Copyright Act, Cap C28 Laws of the Federation of Nigeria 2004. The works include literary, artistic, musical, sound recording, cinematographic film and broadcast. Neighbouring rights includes live performance and expressions of folklore.
- <sup>xv</sup> A. Adewopo, supra note 13, p. 164.
- <sup>xvi</sup> A. Adewopo, supra note 13, pp. 164 – 165.
- <sup>xvii</sup> A. Adewopo, supra note 13, pp. 165 – 166.
- <sup>xviii</sup> Suit No FHC/L/CS/1247/97.
- <sup>xix</sup> *Folsom v Marsh* (1841). See Justice Story’s pronouncement on fair use cited in several cases, developed fair use doctrine and eventually codifies in Section 106 and 107 of the US Copyright Act. Under English Law, the concept of fair dealing from which Nigeria derived its own is considerably narrower than the US fair use.
- <sup>xx</sup> *Hubband v Vosper* (1972) 2 QB 84 (Lord Denning).
- <sup>xxi</sup> Suit no FHC/L/CS/949/97.
- <sup>xxii</sup> FHC/L/CS/610/05.
- <sup>xxiii</sup> SC176/2003.
- <sup>xxiv</sup> (2003 – 2007) 5 IPLR 136.
- <sup>xxv</sup> *Rhone Paulenc & Anor v. Lodeka Pharmacy* (1965) LLR 9. The case was decided under Section 6 of the Registration of United Kingdom Patents Ordinance, 1925 which states as follows:  
Nigeria as though the patent has been issued in the United Kingdom with an extension to Nigeria.
- <sup>xxvi</sup> Section 5(1), Registration of UK Patents Ordinance, 1925.
- <sup>xxvii</sup> *Ibid.*
- <sup>xxviii</sup> Section 1(1), Patent Rights (Limitation) Act No. 8, 1968 essentially granted the Commissioner, when he is satisfied it is in the public interest so to do the powers to authorize any person including government department to purchase, make, use, exercise or vend any such articles for the service of a government agency in the Federal Republic, anything to the contrary in any enactment or rule of law, notwithstanding.
- <sup>xxix</sup> Some of the few cases include *Densy Industries v Sunday Uzokwe* (1999) 2 NWLR (591) 392, which reiterated the basic patentability requirements of newness, inventive activity and industrial application under Section 1 of the PDA. See also *Welcome Foundation Ltd v Lodeka Pharmacy & Anor.* (1971) All NLR 536, which interestingly deals with the issue of compulsory license, (with the same defendant pharmacy involved) under the now repealed Patent Rights (Limitation) Act 1968. However, it is not surprising that *Rhone Poulenc & Anor. v Lodeka Pharmacy* (supra note 25) did not provide a precedent in the case because the decision was based on a repealed law.
- <sup>xxx</sup> The list is non exhaustive: To mention a few, see *ECWA v Akandu*. Unreported Suit no. FHC/PH/30/86 where it was held that the plaintiff being an exclusive licensee could not sue unless they joined the owner, a decision now overruled by the *MCSN v Adeokin* (2007) NWLR (pt. 1052); See also *Offrey v S.O. Ola*, Unreported Suit NO. 23/68 of 27<sup>th</sup> June 1991; *Yemitan v Daily Times* (1980) FHRLR 186 where Belgore J. described the issue of damages for copyright infringement as ‘important but difficult; see also *Adenuga v Ilesanmi* (1990 – 1997) 3 IPLR; *Masterpiece Investment Ltd v Worldwide Business Media* (1990 – 1997) 3 IPLR 362; *MCSN v Details* (1990 – 1997) 3 IPLR 260, among others.
- <sup>xxxi</sup> (2007) NWLR (PT 1052).
- <sup>xxxii</sup> CA/L/787/2008 delivered on 17<sup>th</sup> March 2010. For the discussion of the cases; see Olukunle Ola *Copyright Collective Administration in Nigeria, Lessons for Africa* (U.K: Springer Briefs in Law, 2013).
- <sup>xxxiii</sup> Suit No. FHC/L/CS/478/2008, 3<sup>rd</sup> April 2009 (Justice I. M. Sani).
- <sup>xxxiv</sup> Suit No FHC/L/CS/610/05.
- <sup>xxxv</sup> *Island Records Ltd v Pandun Technical Sales & Services* (1993) FHCLR 318 where the court regarded the American companies involved as ‘foreign companies, that were by virtue of the 1970 Act outside the protection of Nigerian law’ and *Societe Bic SA v Charzin Industries* Suit No. FHC/L/CS/1182/95 where the French company was also regarded as foreign for the purposes of eligibility to copyright protection in Nigeria.
- <sup>xxxvi</sup> Whereas the relevant certificate is as regards the question whether a country is a party to an obligation in a treaty to which Nigeria is also a party. Section 5(2), Copyright Act.
- <sup>xxxvii</sup> The court agreed with the respondent’s argument that by the provision of Section 113 of the Evidence Act 2011 all official communications of the government of the federal and of a state may be provide by the production of such gazette.
- <sup>xxxviii</sup> Section 5 Copyright Act.
- <sup>xxxix</sup> A position reinforced under Section 74 of the Evidence Act. See *Ado Ibrahim & Co. v Bendel Cement Co.* (2007) 50 WRN 178, 205-206, *Olagunju v Yahaya* (2004) 11 NWLR (883) 24, 58, among others.

<sup>xi</sup> Section 34(2) (b), Copyright Act, Ibid.

<sup>xli</sup> There are of course several other issues such as parallel import, protection of service mark, registration of assignment, proof of registration, registry practice involving the powers of the registrar, removal ratification renewal or other actions in the trademark register, quite apart from the interlocutory relief that a huge number of trademark cases has dealt with.

<sup>xlii</sup> (2003 – 2007) 5 IPLR, 136.

<sup>xliii</sup> See a long line of trademark cases including *Alban Pharmacy v Sterling Products* (1968) All NLR 300; *Beecham Group Ltd v Eesdee Food Products Nig. Ltd* (1985) 3 NNLR (II) 112, *Bell Sons & Co. v Aka* (1972) 1 SC 215; *P2 & Co. v AB Chami & Co.* (1971) 2 NCCR 376, among others.

<sup>xliv</sup> SC 176/2003.

<sup>xlv</sup> (2003) 13 NWLR (836) 22.

<sup>xlvi</sup> (2000) 12 NWLR (680) 1.

<sup>xlvii</sup> SC 95/1999 reported in (2004) 5 NWLR (866) 317 – 378.

<sup>xlviii</sup> *Virgin Enterprises v Richday Beverages* (CA/L/550/05).

<sup>xlix</sup> The case has been comprehensively reviewed by two scholars in two editions of NIPJ: See Helen Chuma-Okoro, 'Ferodo v Ibeto A Review' (2011) NJIP maiden Edition 219 and Ayoyemi Lawal-Arowolo, 'Ferodo Ltd v Ibeto: Another Critical Review' (2012) 1(2) NJIB 118.

<sup>l</sup> *Ferodo v Ibeto* (2003 – 2007) 5 IUPLR, pp. 347 – 348; G-A, (Mudapher JSC as he then was).

<sup>li</sup> Ibid.

<sup>lii</sup> Ibid.

<sup>liii</sup> Lead judgment of Mudapher JSC (as he then was) 136, 164.

<sup>liv</sup> IN so doing, not only must the trademark be registrable by reason of being distinctive, it must in fact be registered.

<sup>lv</sup> Unfortunately, passing off ground was abandoned in the case on which the proof of goodwill could have afforded an alternative cause of action for the appellant.

<sup>lvi</sup> The category is limited to the essential particulars listed in Section 9(1) Trademark Act, Ibid.

<sup>lvii</sup> (2009) 6 NWLR (1138) 577.

<sup>lviii</sup> *A-G Lagos State v A-G Federation* (2004) 18 NWLR (904) 1, 114.

<sup>lix</sup> CA/1/550/05.

<sup>lx</sup> (1998) 5 NWLR (93) 138.

<sup>lxi</sup> Ibid (n 55).

<sup>lxii</sup> (emphasis added).

<sup>lxiii</sup> (emphasis added).

<sup>lxiv</sup> Section 315, Constitution 1999, referred to by Justice Maryam Aloma Mukhtar.

<sup>lxv</sup> (1988) 5 NWLR, 138.

<sup>lxvi</sup> Per Nnamani JSC 22 – 23, paras a-g, read in context.

<sup>lxvii</sup> A. Adewopo, supra note 13, pp. 7 – 18.