

**INTELLECTUAL PROPERTY LAW AND TRIPS: THE  
CASE OF NIGERIA**

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**INTELLECTUALPROPERTY AND INFORMATION  
TECHNOLOGY LAW**

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## **Abstract:**

MINT countries are frontier economies projected to have a double-digit economic growth rate. Developmental challenges faced by these countries arise from patent protection, innovation, foreign direct investment and research and development. To ensure it meets projected growth, these countries would need to protect against trade disputes settlements regarding copyright piracy and patent protection. Compliance with the TRIPS Agreement would provide minimum standards of intellectual property rights. This study will seek to examine the extent of Nigerian laws and legislation comply to TRIPS Agreement.

Nigeria has fallen behind in complying with the TRIPS Agreement as it viewed intellectual property as a novelty. The Agreement has been accused by scholars of protecting the interests of the developed countries above those of the developing members. Despite this, the Federal Court in Nigeria has been given jurisdiction over intellectual property cases. However, rulings have been inadequate and inconsistent. The various Acts (Copyright Act, Patent and Design Act and the Trade Marks Act are outdated and require updating. This study found that enforcement is hampered by the lack of knowledge rife in the government agencies that are mandated to protect intellectual property.

Keywords: Nigeria, Intellectual Property, TRIPS Agreement, Compliance, Enforcement

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## **Abbreviations**

BRICS: Brazil Russia India China South Africa

CA: Copyright Act

CFRN: Constitution of the Federal Republic of Nigeria

CLAMP: Copyright Litigation and Mediation Programme

COSON: Copyright Society of Nigeria

FDI: Foreign Direct Investment

GATS: General Agreement on Trade in Services

GATT: General Agreement on Tariffs and Trade

IP: Intellectual Property

IPR: Intellectual Property Rights

IPRL: Intellectual Property Reference Library

LFN: Laws of the Federation of Nigeria

MINT: Mexico Indonesia Nigeria Thailand

N: Nigerian Naira

NAFDAC: National Agency for Food and Drug Administration and Control

NCC: Nigerian Copyright Commission

NCS: Nigerian Customs Service

NIPLD: Nigerian Intellectual Property Judicial Decisions

NOTAP: National Office Technology Acquisition and Promotion

NWLR: Nigerian Weekly Law Reports

PMAN: Performing Musicians Employee Association of Nigeria

STRAP: Strategic Action Against Piracy

SON: Standard Organisation of Nigeria

TRIPS: Trade-Related Aspects of Intellectual Property Rights

UNESCO: United Nations Educational, Scientific and Cultural Organization

USA: United States of America

USD: United States Dollar

WIPO: World Intellectual Property Organisation

WTO: World Trade Organisation

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FHC/KD/1/92.

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British Copyright Act 1911

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Copyright Act 1988 Chapter 28, Laws of the Federation of Nigeria 2004

Copyright Decree no.61 1970

Economic Recovery Act of 1948 (The Marshall Plan) (USA)

English Law of Patents, Designs and Trade Marks Act 1883

Federal High Court Act 1973 Chapter 134 Laws of the Federation of Nigeria 2004

Nigerian Copyright Act 1912

Paris Convention

Paris Convention for the Protection of Industrial Property

Patent and Design Act 1970 Chapter 2, Laws of the Federation of Nigeria 2004

Patents and Designs Decree No. 60 Chapter 344 of the Laws of the Federation of Nigeria 1990

Patent Law Treaty

Patents Proclamation Ordinance No. 12 of 1902

Patents Ordinance No. 17 of 1900

Patents Proclamation Ordinance No. 27 of 1900

Registration of United Kingdom Patents Ordinances of 1925

Trade Marks Act 1965 Chapter 13, Laws of the Federation of Nigeria 2004

Trade Marks Proclamation Ordinance of 1900



TRIPS Agreement

Stockholm Act of 1967

Trade Marks Act of 1938 (UK)

WIPO Copyright Treaty

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## **Author's Declaration**

No portion of the work referred to in this dissertation has been submitted in support of an application for another degree or qualification of this or any other university or other institution of learning.

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# 1. Introduction (2692)

## 1.1. Introduction to the Study

In today's globalised age, there is a need for nations to foster innovative ideas and technological advances to transition from the slow growth economies to economic structures that encourage faster growth. Traditional economies are based in industry whilst knowledge-based economies are becoming the engines of economic development. Countries transitioning to knowledge-based economies are faced with developmental challenges. These challenges are faced in patent protection, innovation, foreign investment, research and development<sup>1</sup>. Countries must address these challenges through their intellectual property laws and procedures. Through the strengthening of their intellectual property laws and procedures, the nations will boost economic growth.

Nigeria is part of the MINT<sup>2</sup> countries that were chosen for their demographic advantages and economic prospects by Goldman Sachs economist Jim O'Neil. Jim O'Neil was famous for coining the acronym BRICS (Brazil, Russia, India, China and South Africa). MINT economies are not as large nor as powerful as the BRICS. This new grouping of nations was projected to be the emerging markets to back in the future. These countries are viewed as frontier economies that present a potential new investment destination. Each nation has a specific advantage that is projected to propel its economic growth. Mexico was employing economic reforms designed to benefit from close trade ties with the United States of America.<sup>3</sup> Indonesia was a long-term investment option with its large population presenting a beneficial consumption

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<sup>1</sup> Rifat Atun, Ian Harvey and Joff Wild, 'Innovation, patents and economic growth' [2007] 11 International Journal of Innovation Management 279

<sup>2</sup> Matthew Boesler, 'The economist who invented the BRICS just invented a whole new group of countries: The MINTs'. *Business Insider* (13 November 2013) <https://www.businessinsider.com/jim-oneill-presents-the-mint-economies-2013-11?r=US&IR=T> [Accessed 22 November 2018].

<sup>3</sup> Annabelle Williams, 'Sinking BRICS: Are the MINT markets a better bet?' *Investment Week* (London, 2 February 2014) <<https://www.investmentweek.co.uk/investment-week/feature/2326303/sinking-brics-are-the-mint-markets-a-better-bet>> accessed 3 December 2018

opportunity. Turkey was reaping rewards for its strategic geographic location at the cusp of Europe and the Middle East.<sup>4</sup> Nigeria had overtaken South Africa as the African economic heavyweight with strong economic fundamentals that could be built upon.

Unlike many developed nations, all the MINT countries would see a rise in the working age population in the next twenty years relative to those that are set to retire. Most nations worldwide are seeing an opposite effect with a larger proportion of their population set to retire than set to reach working age population. This incoming young population in the MINT countries would grow the economy faster than the aging population. This faster growth will translate to a faster growth rate than that which is currently experienced in the BRICS nations.<sup>5</sup>

With double digit growth rates of between 11-15%, MINT countries are growing at a faster rate than BRICS nations at 4%.<sup>6</sup> Geographically, these countries are strategically placed on four different continents with no formal cooperation amongst them. The BRIC countries have seen a lag in their growth rates as their economies move to consumer led economies.<sup>7</sup> The MINT countries have become a rallying point for economic development in international economic relations.<sup>8</sup> These countries have diverse characteristics from history, culture and geopolitics. However, they share similar economic prospects and conditions.

The MINT nations' geographical location is advantageous for their trade prospects. Indonesia is located at the heart of South-East Asia, next to China, an economic powerhouse. Mexico is located close to the United States of America and Canada, current signatories of the World Trade Organisation. Turkey is placed firmly between

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<sup>4</sup> Ibid (n. 2)

<sup>5</sup> Jim O'Neil, 'Building better global economics BRICS' (*Goldman Sachs*, 30 November 2001) <https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf> [Accessed 22 November].

<sup>6</sup> , F Ngwu, O Osuji and F Stephen, *Corporate governance in developing and emerging markets* (1<sup>st</sup> Edition, Routledge 2017)

<sup>7</sup> Annabelle Williams, 'Sinking BRICS: Are the MINT markets a better bet?' (*Investment Week*, 2 February 2014) <https://www.investmentweek.co.uk/investment-week/feature/2326303/sinking-brics-are-the-mint-markets-a-better-bet> accessed 3 December 2018

<sup>8</sup> A Durotoye, 'The MINT countries as emerging economic power bloc: Prospects and challenges' [2014] 4 *Developing Country Studies* 99

Eastern and Western Europe ideal for European Union trade. Nigeria is a buoyant economy on the African continent placed close to trade routes by land and sea. This common attribute between the nations' geographical position, demographics and economic projections makes the generic grouping ideal.

MINT countries are worthy of note for the avid investor and shrewd businessman. Nigeria has overtaken South Africa as Africa's largest economy. The country is on the way to further developing its economy and fulfilling its potential. To ensure it meets its projected growth, it will need to learn from the BRICS nations. The impact of the World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) are of great importance to emerging countries. Patent protection, copyrights, trademarks and intellectual property rights (IPR) are of concern to developing countries in particular.

MINT countries are categorised as developing countries. The TRIPS Agreement has proven to be a major concern in the World Trade Organisation (WTO) amongst developing countries. The BRICS have previously faced trade dispute settlements regarding copyright piracy and patent protection.<sup>9</sup> These nations broadened their trade law capacity, increased their capacity to use WTO law including TRIPS and coordinated participation in legal disputes with their respective domestic law. India and China for example, used TRIPS to negotiate better prices for antiviral drugs and the maintenance of domestic generics industry despite growing intellectual property agenda from the United States and Europe.<sup>10</sup> MINT nations including Nigeria would need to examine what complexities they could possibly face in their bids to fostering ever increasing economic growth and development and the coveted tag of 'developed' nation.

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<sup>9</sup> S Rolland, 'The BRICS' contributions to the architecture and norms of international economic law' [2013] 107 Proceedings of the Annual Meeting (American Society of International Law 164

<sup>10</sup> Ibid ([.165)

## 1.2. Background

Intellectual property (IP) is the creations of the mind, ranging from inventions, images, designs, artistic works and literary works. There are two broad categories to IP, namely industrial property and copyright.<sup>11</sup> Industrial property comprises patents for inventions, trademarks, commercial names, unfair competition, industrial designs and geographical indications.<sup>12</sup> Copyright covers artistic aspect such as literary works, films, music, artistic works and architectural design.<sup>13</sup> The rights that are entailed in copyright cover the artists performing, producers of albums and broadcasters of television and radio programmes.

Industrial property is defined in the Paris Convention<sup>14</sup>. Some aspects of IP are not clearly defined. In industrial property, the object must convey information to consumers regarding services and products on the market. The protection entailed in intellectual property law (IPL) is directed against the unauthorised use of these signs that could potentially mislead the consumers and against misleading practices. Inventions in some countries refer to new solutions to technical problems. The problem may be dated or new, but the solution must be new.

Unfair competition is an element of industrial property. Unfair competition is defined in Article 10(b) of the Paris Convention for the Protection of Industrial Property (Stockholm Act of 1967) as “any act of competition contrary to honest practices in industrial and commercial matter”. Hence unfair competition deals with industrial and commercial practices whilst passing off is limited to misrepresentation aimed at deceiving the purchasing public that one individual’s goods or services are the property of another.<sup>15</sup>

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<sup>11</sup> M J Umaru, *Intellectual Property Law in Nigeria: Its evolution and challenges* (1<sup>st</sup> Edition, Ahmadu Bello University Press Limited, 2013)

<sup>12</sup> Ibid (n.4)

<sup>13</sup> Ibid (n. 9)

<sup>14</sup> Paris Convention Article 1(3)

<sup>15</sup> M J Umaru, *Intellectual Property Law in Nigeria: Its evolution and challenges* (1<sup>st</sup> Edition, Ahmadu Bello University Press Limited, 2013)

IPL is an area in law that prevents others from copying, taking an unfair advantage of the work or reputation of another.<sup>16</sup> This area of law provides the precedent for when this arises. Under intellectual law, an individual is given exclusive rights to various intangible assets such as words, phrases, artistic expression and inventions amongst others. The law rewards the creator by ensuring that others are prohibited from copying, distributing or performing their work without their specific permission.<sup>17</sup>

The purpose of the protection provided under IPL, is to provide incentives for individuals to produce creative works and make scientific discoveries that can benefit the world. There are those subgroups within IP that are protected from their moment of creation. However, this is not broad, and the majority require the creator to make or request a specific grant of rights from the specific government agency, so they may be protected by the law.<sup>18</sup> Most nations have laws that protect IP, for example Copyrights Act Chapter 68 of the Laws of the Federation of Nigeria 2004.

Considerable progress has been observed towards international harmonisation of patent, copyright and intellectual law. Since the introduction of TRIPS Agreement there has been varying concerns over the effect it has on developing nations. The member states of World Trade Organisation (WTO)<sup>19</sup> are under obligation to give effect to the articles and requirements set down by the Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>20</sup>. Upon joining the WTO, member states are bound and have agreed to all its agreements and the accompanying annexes. The TRIPS Agreement is amongst these.

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<sup>16</sup> Adekola Anthony and Eze Chinedu, 'Intellectual property rights in Nigeria: A critical examination of the activities of the Nigerian Copyright Commission' [2015] 35 Journal of Law, Policy and Globalization 56

<sup>17</sup> M J Umaru, *Intellectual Property Law in Nigeria: Its evolution and challenges* (1<sup>st</sup> Edition, Ahmadu Bello University Press Limited, 2013)

<sup>18</sup> Adekola Anthony and Eze Chinedu, 'Intellectual property rights in Nigeria: A critical examination of the activities of the Nigerian Copyright Commission' [2015] 35 Journal of Law, Policy and Globalization 56

<sup>19</sup> World Trade Organisation is the only global international organisation dealing with the rules of trade between countries. Its agreements are negotiated and signed by most of the nations and ratified by their respective parliaments. The organisation's goal is to ensure trade between nations flows smoothly and freely.

<sup>20</sup> 'Overview: the TRIPS Agreement' (*World Trade Organisation*) <[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)> Accessed 21 November 2018



The TRIPS Agreement came into effect in 1995 and is considered the most comprehensive multinational agreement in intellectual property. The agreement became imperative as global trade saw the growing involvement of intellectual property. This involvement necessitated the production of global standard for IP. The enactment of the agreement was a minimum standard for IP regulations. The Agreement covers copyrights, trademarks, geographical indications, industrial designs, patents and undisclosed information such as test data. The Agreement is contained in annex 1C of the WTO charter.<sup>21</sup>

The agreement was enacted to stem piracy, infringement and counterfeiting of IP. Article 7 of the agreement states, 'the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'<sup>22</sup> This article and Article 8 are the foundation to ensuring a solid foundation for a new legal and policy perspective on intellectual property law. These are designed to promote economic and social development for all members that have signed onto the TRIPS Agreement.

IP is diverse in nature and continues to expand. It has grown from rights to lay the foundation for a knowledge-based system. This reflects its importance in national and international policies. IP is used in the commercial and legal arena. It is imperative for a MINT country such as Nigeria to define and implement IPL that will ensure it receives maximum benefits and the economy meets its projected growth rates.

TRIPS Agreement cuts through many different issues. It is vital to the functioning of its member states in relation to development and economic growth. Nigeria is amongst WTO member states and is obligated to comply with all agreements. Nigeria is yet to review its laws since its adoption of the TRIPS Agreement. To comprehend the overall impact of a treaty, it would need to come into effect. A multifaceted study of Nigeria will

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<sup>21</sup> 'Annex 1C Agreement on Trade-Related Aspects' (*World Trade Organisation*) [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf) Accessed 21 November 2018

<sup>22</sup> TRIPS Agreement, Article 7

need to be undertaken to examine the social, economic and developmental impact on the country.

Nigeria has three substantial laws on IP. These are the Copyright Act,<sup>23</sup> Trade Marks Act<sup>24</sup> and Patent and Design Act.<sup>25</sup> Nigeria is a signatory for many intellectual property treaties such as the Paris Convention,<sup>26</sup> Patent Law Treaty<sup>27</sup> and WIPO Copyright Treaty<sup>28</sup> amongst others. Nigeria has developed case law on IP. This is unique to the country. It does not account for the IP that is involved in cross border dealings. Foreign IPR holders do conduct business in the country. Hence, posing a dilemma for the country.

Copyright is integral to the TRIPS Agreement. Copyrights have witnessed considerable activity in the country. This activity is heavily weighted in the movie making sector of the entertainment industry. The Nigerian movie industry is commonly known as Nollywood and is leading the African movie making sector. Nollywood is the second largest movie making sector in the world. Nollywood follows closely behind Bollywood (India) in terms of film output, surpassing Hollywood (U.S.A) in the process.<sup>29</sup> Nollywood produces over two hundred home videos in a month. The industry attracts multi-million-dollar investments locally and internationally. However, it continues to struggle with many producers unaware of IPR and ways of implementation.

For technological advancement, there is a need for a fully functional patent system. However, in Nigeria, there is no fully substantive examination for inventions under the Patent and Designs Act 1970. This is due to the lack of technical capability,

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<sup>23</sup> Copyright Act 1988 Cap C28, Laws of the Federation of Nigeria, 2004 as amended

<sup>24</sup> Trade Marks Act 1965 Cap T13 Laws of Federation of Nigeria 2004

<sup>25</sup> Patent and Design Act 1970 Cap P2 Laws of Federation of Nigeria 2004

<sup>26</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [Henceforth Paris Convention]

<sup>27</sup> Patent Law Treaty adopted on June 1, 2000 at Geneva entered into Force on April 28, 2005. Nigeria ratified it on December 19, 2002 and it came into force 28 April, 2005.

<sup>28</sup> WIPO Copyright Treaty adopted on December 20, 1996 at Geneva entered into force on March 6, 2002. Nigeria became a signatory on March 24, 1997.

<sup>29</sup> C Igwe, 'How Nollywood became the second largest film industry' (*British Council*, 6 November 2015). <https://www.britishcouncil.org/voices-magazine/nollywood-second-largest-film-industry> accessed 22 November 2018.

infrastructure, shortage of manpower and technological know-how.<sup>30</sup> Nigeria faces developments and challenges associated with rapid globalisation in the world economy. The country is faced with the challenge of protecting its pharmaceutical, biotechnological inventions, software and business methods from possible infringement. The patent will provide a temporary monopoly to the use of the invention in the public and private sector. Patents have in the past, fostered investment in the innovation and assisted in the dissemination of the knowledge.

Trade marks are said too have been in existence in Nigeria prior to the nation's initial contact with European settlers and traders.<sup>31</sup> Marks were used in a variety of forms from identifying an individual's origin, their status in their society and markings placed on animals, products and crafts to mark ownership. The foundation of trademarks stems from goodwill and branding. An individual will build up their merchandise's and business' goodwill in the market. This goodwill will need to be protected against infringement and counterfeiters that seek to benefit from the merchandiser's efforts. The law would seek to protect interests against competitors seeking to reap rewards from another's goodwill.

### **1.3. Research Problem and Statement**

This study will seek to give a comprehensive study of the impact of the TRIPS Agreement on IPL in Nigeria. This study will investigate the TRIPS Agreement in relation to the Nigerian IPL on patents, copyrights and trademarks. Hence the three categories of Copyright and Related Rights, Trade marks and Patents will be covered whilst the other four of Geographical Indications, Industrial Designs, Protection of Undisclosed Information and Layout Designs of Integrated Circuits fall out of the scope of the study.

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<sup>30</sup> F Damola and A Ayodele 'Patentability of inventions under the Nigeria's Patents and Designs Act: An examination' [2017] 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 48

<sup>31</sup> M J Umaru, *Intellectual Property Law in Nigeria: Its evolution and challenges* (1<sup>st</sup> Edition, Ahmadu Bello University Press Limited, 2013)

The TRIPS Agreement affects a signatory nation's legislation and amendments to ensure its compliance. The impact of the Agreement is anchored on the need for nations to adapt legislation to the requirements of TRIPS. Nigeria is amongst the bottom ten nations in the International Property Rights Index.<sup>32</sup> The International Property Rights Index examines the protection of property rights through the comparison of three core components of property rights systems.<sup>33</sup>

The purpose of this research is to accurately determine the specific implications and potential consequences of the TRIPS Agreement on intellectual property in Nigeria. Intellectual property affects a vast array of sectors including healthcare, foreign direct investments, technology and access to information amongst others. There is a need to safeguard and sustain a response to the queries on the impact of the relevant articles of the TRIPS Agreement and intellectual property law in Nigeria. These issues are vital to the development and economy of Nigeria. International and national legal frameworks on intellectual property shall be evaluated and compared with other jurisdictions to guide recommendations to resolving the uncertainties faced by current Nigerian law. Where possible, the legal gaps and deficiencies in the substance and scope of Nigerian law and the protection of intellectual property rights will be explored.

The major question to be addressed in the research study is 'what is the impact of the TRIPS Agreement on Nigeria's legislation in relation to IP? This study will explore if Nigerian intellectual property law follows the TRIPS Agreement and if not compliant, what aspects fail to comply. The study will end by highlighting the shortcomings of Nigerian IP legislation.

#### **1.4. Outline of Dissertation**

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<sup>32</sup> 'International Property Rights Index 2018' (*International Property Rights Index*)  
<https://www.internationalpropertyrightsindex.org/country/nigeria> accessed 21 November 2018

<sup>33</sup> Ibid

Chapter 2 will provide a literature review of existing studies in the impact of TRIPS Agreement on developing countries. This chapter will also extensively explore the TRIPS Agreement. This chapter will examine the objectives and principles of TRIPS Agreement. Enforcement proceedings of the Agreement will also be explored.

Chapter three will deal with copyright. The origin of the Copyright Act in Nigeria is examined. This chapter will assess the compliance of the Copyright Act to the relevant TRIPS Agreement. The chapter will then explore the necessary modifications required for the Copyright Act of Nigeria to be more effective. Finally, the possible impact of TRIPS Agreement on the socio-economic status of Nigeria will be explored.

Chapter four will give an overview of the patent law in Nigeria. The nature and scope of patent protection, administration of protection and grant of protection shall be evaluated. The compliance of Nigerian patent law and TRIPS Agreement will be discussed.

Chapter five will give an overview of trade mark legislation. The origin and provision of trademarks. This chapter will explore the compliance of the Trade Marks Act to the TRIPS Agreement. The impact of the TRIPS Agreement in relation to economic development will be explored.

Chapter six will briefly explore the challenges faced by Nigeria in compliance with TRIPS Agreement. The chapter will examine enforcement measures of compliance. The legal system of Nigeria in relation to intellectual property law will be explored. Finally, the challenges faced in intellectual property law in Nigeria in relation to law, policy research and education will be set out.

Chapter seven will conclude and explore recommendations brought up by the research findings; aimed at improving the status of Nigerian development and economy.

## 2. Literature Review (4675)

As the shift to global knowledge-based economies continues, the ownership and control of intellectual property is a vital policy issue for developing and developed nations. The TRIPS Agreement is the internationally recognised legal framework for determining the intellectual rights of information. This chapter shall begin by extensively exploring the TRIPS Agreement. An exploration of the existing literature on the impact of TRIPS Agreement shall be made from the earliest studies to the most recent. The chapter shall conclude by exploring the enforcement proceedings of the Agreement.

### 2.1. TRIPS Agreement (2000)

World Trade Organisation (WTO) was established in 1995 as an international intergovernmental organisation dealing and directly regulating trade.<sup>34</sup> Trade plays a vital role in economic development and advancing peaceful relationships amongst nations. The establishment of WTO was heralded as the biggest reform since the end of World War II.<sup>35</sup> This organisation differed from past organisations such as General Agreement on Tariffs and Trade (GATT).

GATT was an international agreement that covered the trade in goods.<sup>36</sup> The organisation was established to eliminate and reduce the trade barriers such as tariffs

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<sup>34</sup> 'The history of the multilateral system' (World Trade Organisation, 2018)  
[https://www.wto.org/english/thewto\\_e/history\\_e/history\\_e.htm](https://www.wto.org/english/thewto_e/history_e/history_e.htm) accessed 1 December 2018.

<sup>35</sup> Ibid

<sup>36</sup> 'GATT and the Goods Council' (World Trade Organisation, 2018)  
[https://www.wto.org/english/tratop\\_e/gatt\\_e/gatt\\_e.htm](https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm) accessed 1 December 2018.

and quotas. The membership of GATT was made up of 23 countries and proved to be the most effective instrument of global trade expansion and liberalization.<sup>37</sup> Rightfully, trade expanded exponentially in the second half of the twentieth century. The organisation improved communication as it provided incentives for the various countries to learn a variety of languages in a bid to improve trade relations. English was the main language spoken as English-speaking countries were the second largest consumer market. By adopting a common language in trade, this reduced misunderstandings and gave countries an insight into the culture, product needs and marketing of a country.<sup>38</sup>

However, GATT ensured low tariffs between nations and this would inevitably negatively affect the domestic markets and industries. This would ultimately contribute to higher unemployment rates. To alleviate these effects, governments were forced to introduce subsidises for the vital industries in their countries. The subsidies were designed to make the industries more competitive on a global market. These subsidies were counter-productive to the early progress made by reduction of tariffs and trade barriers.<sup>39</sup> The United States was a prime example of a government that signed onto GATT and introduced subsidies to protect their population's livelihoods and markets.

The United States of America (USA) agricultural subsidies were designed to bring the prices of US products lower than the world market prices with import quotas ensuring that domestic prices were higher than world levels.<sup>40</sup> The US government argued that these subsidies were designed to safeguard the livelihood of their farmers.<sup>41</sup> The Economic Recovery Act of 1948 (more commonly known as the Marshall Plan)<sup>42</sup> provided legislation that reflected the apprehension felt by the US government. The US

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<sup>37</sup> 'General Agreement on Tariffs and Trade' (Encyclopaedia Britannica, 23 June 2009) <https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade> accessed 1 December 2018.

<sup>38</sup> Ibid

<sup>39</sup> J Evans, 'Subsidies and countervailing duties in the GATT' [1977] 3 'Maryland Journal of International Law' 211- 245

<sup>40</sup> J Joseph, 'Trends in the Marshall Plan' [1949] 13 'Science and Society' 1-21

<sup>41</sup> R Schnepf and J Womach, 'Potential Challenges to U.S farm subsidies in the WTO' [2007] 'CRS Report for Congress' <[www.nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33697.pdf](http://www.nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33697.pdf)> accessed 2 December 2018

<sup>42</sup> The Marshall Plan was named after the sitting Secretary of State George Marshall who proposed the United States provide economic assistance to restore economic infrastructure to post-war Europe.

government felt that despite the potential trade disputes that would arise from subsidization and the potential threat to the progress felt with the enactment of GATT; the domestic markets required protection provided by the government.

As GATT dealt predominantly on the international trade of goods, WTO and its agreements would deal with the trade of goods as well as services and IP. WTO also created a new procedure to deal with disputes and their settlements amongst member nations<sup>43</sup>. There are four core components of WTO. These are namely the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Trade Policy Review Mechanism<sup>44</sup>. The General Agreement on Trade in Services (GATS) was enacted to supervise and liberalise trade whilst the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sought to protect intellectual property across borders.<sup>45</sup>

TRIPS is a WTO Agreement that sets out the minimum standards for the protection of intellectual property rights and the procedures for their enforcement.<sup>46</sup> The Agreement gave an allowance for the member states to provide more extensive protection for their intellectual property if they so wish to do so. Through the TRIPS Agreement, intellectual property was irrevocably paired with international trade.

Gervais notes TRIPS Agreement provides a wider coverage of intellectual property rights including extensive possibilities of protection that had previously not been covered in other international law. TRIPS Agreement would provide multilateral protection from disagreements, opposition and protection of intellectual rights.<sup>47</sup> The United States, Japan and European Union amongst other developed nations lobbied the enactment of the TRIPS Agreement. These groups of nations saw the Agreement as an

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<sup>43</sup> Kym Anderson, 'World Trade Organisation' (Encyclopaedia Britannica, 10 May 2002) <<https://www.britannica.com/topic/World-Trade-Organization>> accessed 1 December 2018

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> B Nain, 'Impact of TRIPS Agreement on Developing countries' [2006] <http://dx.doi.org/10.2139/ssrn.1021962> accessed 28 November 2018

<sup>47</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4<sup>th</sup> Edition, Sweet and Maxwell, 2012) p.3



expansion and strengthening of the protection on intellectual rights and this would lead to an increased flow of foreign direct investment (FDI), technology transfer and increased innovation<sup>48</sup>

The protection of intellectual property rights was aimed at reducing infringement and loss of revenue to developed nations. The intellectual property rights covered included copyright, trademarks and patents. Service marks, industrial designs, layout of designs, undisclosed information were amongst those included in the description of intellectual property rights.<sup>49</sup> The Agreement covers protection in terms of the subject matter to be protected and the rights to be conferred. The rights include permissible exceptions to rights and minimum duration of protection.<sup>50</sup>

The TRIPS Agreement includes the basic principles found in GATT, other relevant international intellectual property agreements, effective enforcement measures for intellectual property rights and multilateral dispute settlement and transitional arrangements.<sup>51</sup> However, the developing nations that have signed on to TRIPS have yet to see a substantial benefit to their membership nor the better days that were promised. Some theorists have gone as far as accusing the WTO of extracting signatures from these countries under economic coercion without any foresight of being of any true benefit to their national interests.<sup>52</sup>

The TRIPS Agreement faces resistance on a theoretical claim that intellectual property standards have no place in trade deals as it is heavily weighted for developed nations and against developing nations. The enhanced protection of intellectual rights was believed to be a barrier to access to technology and would deter the process of development. Several commentaries on the TRIPS Agreement note that several

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<sup>48</sup> Ibid

<sup>49</sup> 'Overview: the TRIPS Agreement' (World Trade Organisation, 2018) <[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed 30 November 2018

<sup>50</sup> Ibid

<sup>51</sup> 'Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods' (World Trade Organisation, 2018) <[https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#nAgreement](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#nAgreement)> accessed 30 November 2018

<sup>52</sup> Ermias Biadgleng, 'The development -balance of the TRIPS Agreement and enforcement of intellectual property rights' in Justin Malbon and Charles Lawson (.eds) *Interpreting and implementing the TRIPS Agreement: Is it Fair?* Edward Elgar Cheltenham [2008]

developing nations have spoken out against enhanced protection and their fears that it would limit access and stifle their efforts of economic development.<sup>53</sup> The Agreement has been viewed as an attempt by the developed nations to safeguard their competitive advantage over the developing world.

However, an international agreement that has been drafted is unlikely to fit the needs of all nations. This can be attributed to the time it was established. In the early 90's, the developed nations had the capability to assess the possible effects that the Agreement would have on its economy and weigh its economic effects. However, many of the developing nations were in transition into a market economy and had more pressing internal domestic issues to deal with. The notion of intellectual property was a novelty and awareness levels of its importance was low. The developing nations were not dependant upon technological know how but rather on imported technologies that were produced by others.

The primary provisions of the TRIPS Agreement can be found in the preamble, objectives and principles of Article 7 and Article 8. The preamble can be used by governments as a guide to interpret the implementation and dispute settlement of the Agreement. The preamble expresses the view of negotiating parties to balance the rights and obligations concerning the Agreement.<sup>54</sup> The preamble is used to interpret other parts of the agreement. It is set out to dispel distortions and impediments of international trade. To protect intellectual property rights, the preamble ensures the measures and procedures for enforcement. This would ensure the Agreement does not itself become a barrier to international trade<sup>55</sup>.

The preamble recognises the need for rules concerning the application of the basic principles of GATT that are relevant to intellectual property rights' agreements and conventions. It reflects the contentious nature of negotiations and differing perspectives of nations under WTO. Statements made in the preamble should be used as operative

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<sup>53</sup> Carlos Correa, 'Trade-Related Aspects of Intellectual Property Rights: A commentary on the TRIPS Agreement' (Oxford University Press, 2007)

<sup>54</sup> Trade-Related Aspects of Intellectual Property Rights (unamended version)' (WTO, 2018) <[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)> accessed 2 December 2018

<sup>55</sup> UNCTAD-ICTSD, 'Resource book on TRIPS and Development'

provisions in the creation of specific rights and obligations.<sup>56</sup> However, it is unclear to which situations the preamble can be relied upon. There is room for interpretation in the preamble. The preamble does in the first clause recognize the measures needed to enforce the intellectual property rights may become barriers to trade between nations.<sup>57</sup> For example, differing nation's border policies could be implemented in such a way that would allow intellectual property rights to deter and inhibit possible trade opportunities.

The preamble in the 9<sup>th</sup> clause recognises the position of WIPO. The clause seeks to set out how a mutually supportive relationship with WIPO and other international organisations that are relevant to international trade can be pursued.<sup>58</sup> However, WIPO is given prominence. WIPO still remains the primary international organisation that deals with intellectual property rights. However, this clause allows for greater cooperation in the pursuit of broader developmental interests with international organisations such as World Health Organisation (WHO), United Nations Conference on Trade and Development (UNCTAD).

The importance of the preamble was demonstrated in the Shrimp-Turtles case.<sup>59</sup> This dispute was between the *United States of America v. India, Malaysia, Pakistan and Thailand*. The US imposed a trade embargo on the import of shrimp and shrimp products from nations that did not certify that the shrimp was caught using turtle excluder devices in the trawling vessels and could not certify if the turtle excluder devices were not comparable in effectiveness to those used in the USA.<sup>60</sup> The WTO Appellate Body (AB) decided upon the case and referenced the objective of sustainable

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<sup>56</sup> Peter Yu, 'The objectives and principles of the TRIPS Agreement' [2009] 46 'Houston Law Review' 979-1046

<sup>57</sup> 'Overview: the TRIPS Agreement' (WTO, 2018) <[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed 1 December 2018

<sup>58</sup> 'Trade-Related Aspects of Intellectual Property Rights (unamended version)' (WTO, 2018) <[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)> accessed 2 December 2018

<sup>59</sup> United States – Import Prohibition on Certain Shrimp and Shrimp Products, AB-1998-4 WT/DS58/AB/R, 12 October 1998.

<sup>60</sup> Jayati Srivastava and Rajeev Ahuja, 'Shrimp-Turtle decision in WTO: Economic and systematic implication for developing countries' [2002] 37 'Economic and Political Weekly' 3445-3455.

development.<sup>61</sup> However, the use of the preamble in this case did not guarantee that a comparable case would receive the same interpretation. The decision panel noted:

'...the panel failed to recognise that most treaties have no single, undiluted object and purpose but rather a variety of different and possibly conflicting objects and purposes....'<sup>62</sup>

The objective of Article 7 of the TRIPS Agreement is to serve as an interpretation and application of the main provisions of the Agreement. The provision was made due to a proposal made by developing countries that were concerned with the effect strong intellectual property rights would have on their economy, development and social welfare.<sup>63</sup> They valued the need to maintain a balance between the interests of users and the right holders implicitly.

Scholars have noted however, that there was no intention by WTO and the developed countries in making this provision in Article 7. Gervais claims the use of the term 'should' in the wording of the article rather than the term 'shall' has made the provision in the article 'mere hortatory' i.e. the use of 'shall' is exhortative and moralistic.<sup>64</sup> The content of the article implies that the individual nations are expected to structure their own intellectual property laws for the protection and promotion of technology, innovation and transfer and dissemination of technology.

The principle of Article 8 is to clarify how member nations can amend or formulate their laws and legislations to pursue public policy objectives that would be consistent with the TRIPS Agreement.<sup>65</sup> The article gives members the discretion to adopt internal measures that they consider necessary to protect their public health and nutrition whilst promoting public interest to the sectors that are important for social, economic and

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<sup>61</sup> Overview: the TRIPS Agreement' (WTO, 2018) <

[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed 1 December 2018

<sup>62</sup> 'United States- Import prohibition of certain shrimp and shrimp products' (WTO, 2001) <

[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm)> accessed 1 December 2018

<sup>63</sup> Article 2 of part II of Negotiation Group on TRIPS, including Trade in Counterfeit Goods, communication from Argentina, Brazil, China, Columbia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, MTN.GNG/NG11/W/71, 14 May 1990.

<sup>64</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4th Edition, Sweet and Maxwell, 2012) p.229

<sup>65</sup> Anthony Taubman, 'A practical guide to working with TRIPS' (Oxford University Press, 2011) p.83

technological advances.<sup>66</sup> The two general provisions deal with public interest principle<sup>67</sup> and prevention of abuse.<sup>68</sup>

Despite the provision, these are restricted due to the wording and terms used in the Agreement. The phrase 'consistent with the provisions of this Agreement'<sup>69</sup> can be seen as problematic. This is because it would be difficult to portray the broader concept of public interest. This would limit the scope through the consistency test. The consistency test would check if there is overall consistency with the Agreement. This would cause a dispute between parties as the yardstick is vague against the measures that must be applied.

The criticism for TRIPS Agreement comes in the form of its inclusion in an international trade organisation. The obligations under WTO and the intellectual property claims do not always coincide. This gives rise to the question of the TRIPS Agreement presence in WTO instead of World Intellectual Property Organisation (WIPO). Prior to TRIPS Agreement, WIPO had exercised exclusive rights to control the administration of intellectual property. The United States, the European Union and Japan are accused of being the instigators of the inclusion of intellectual property in a trade organisation.<sup>70</sup> However, one may argue that intellectual property is essential to trade. Trade cannot exist without intellectual property or if it was to exist, it would be severely restricted in its scope. Intellectual property can not be seen in trade. However, its presence is as vital as nutrition is to the human body. Just as nutrition is the driving force of a body so is intellectual property the driving force of trade.

Through TRIPS Agreement, the developing nations were bound to consent to stronger and stringent intellectual property rights' standards. Their consent was aimed to come together with trade-offs in the agricultural and textile sectors that are the backbone of

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<sup>66</sup> Ibid

<sup>67</sup> Article 8 (1) TRIPS Agreement

<sup>68</sup> Article 8 (2) TRIPS Agreement

<sup>69</sup> Trade-Related Aspects of Intellectual Property Rights (unamended version)' (WTO, 2018) <[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)> accessed 2 December 2018

<sup>70</sup> Andrew Guzman, 'International Antitrust and the WTO: The lesson from intellectual property' [2002] 43 'Virginia Journal of International Law' 933-957

most of their export trade.<sup>71</sup> TRIPS Agreement's inclusion in WTO was the development of world trade law that was governed by the WTO Ministerial Conference in conjunction with WIPO.<sup>72</sup>

## **2.2. Existing Literature (2000)**

The TRIPS Agreement's implications on developing nations has faced intense scrutiny in recent years. Policy makers and commentators have become divided without much discourse between the two sides<sup>73</sup>. Developed countries are increasingly concerned with the protection and enforcement laws that are set out in multilateral treaties. Concerns centre on their validity and insufficiency in protecting intellectual property interests. Whilst developing countries are facing frustrations with the protections implemented that stifle access to medicines, information and knowledge.<sup>74</sup> Regional trade agreements that function outside the multilateral process threaten the policy space available to developing nations. Developing nations are attempting to stifle the widespread unauthorised use of intellectual property to be found in cyberspace and the piracy filled markets of the developed world.<sup>75</sup>

Research into the TRIPS Agreement has centred on developed countries as they were the first signatories of the WTO TRIPS Agreement. The effect that these policies have on the developing world has produced a range of research studies.<sup>76</sup> These studies found that the effects will differ from nation to nation. Studies that focus on Nigeria and TRIPS Agreement are scarce. However, the works into the impact of TRIPS Agreement examine the globalisation of intellectual property rights. Despite the problems that arise

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<sup>71</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4th Edition, Sweet and Maxwell, 2012)

<sup>72</sup> Kym Anderson, 'World Trade Organisation' (Encyclopaedia Britannica, 10 May 2002) <<https://www.britannica.com/topic/World-Trade-Organization>> accessed 1 December 2018

<sup>73</sup> P Yu, 'The global intellectual property order and its undetermined future' [2009] 1 The WIPO Journal 1

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> B Nain, 'Impact of TRIPS Agreement on Developing countries' [2006] <http://dx.doi.org/10.2139/ssrn.1021962> accessed 28 November 2018

with globalisation, there are new opportunities that can be explored by developing nations. Amongst the problems that arise is the issue of access to patented innovations through transfer of technology or FDI.

Abbott<sup>77</sup> is an early study into TRIPS Agreement and its impact on the global economic development. This study was conducted a few years after the signing of the TRIPS Agreement by WTO member states. In these early years, TRIPS was viewed as a global system of high levels of protection of intellectual property rights that would be enforceable through trade sanctions regardless of local legislation. This study highlighted the importance and correlation of intellectual property rights and economic development. Developed countries had observed the importance of intellectual property rights as this varied across the service sectors and industrial sectors. For example, in the case of the oil industry, capital and natural resources are primary assets whilst intellectual property rights are secondary. Whilst in the entertainment industry, intellectual property rights are primary with capital and assets secondary.

The goal of international intellectual property law systems was to promote innovation, whilst protecting against the exacerbation of the divisions observed in economic development levels and technological advancements. Abbott notes the delay in the implementation of intellectual property rights policies aimed at reducing disparities in the knowledge-based wealth would prove problematic<sup>78</sup> Through the development of technology and its advancements, nations may observe an equitability in technology distribution globally. However, nations will still face difficulties in the initial capital needed to put technology to use. Abbott accurately predicted the arising of disputes between developed nations and developing nations as the distribution of the fruits of the information revolution would not be equally distributed.<sup>79</sup> Hence the need in promoting a balance between private capital, technological advancement and social welfare.

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<sup>77</sup> F Abbott, 'The WTO TRIPS Agreement and global economic development – The new global technology regime' [1996] 72 Chicago-Kent Law Review 385

<sup>78</sup> Ibid (p. 405)

<sup>79</sup> Ibid (p.405)

Yu<sup>80</sup> reviews the debate of intellectual property law in a paper on global intellectual property order in relation to the TRIPS Agreement. Yu notes that right holders are seeking to stop the prevailing unauthorised use of intellectual property asset on the internet and the piracy market of the world. The rise of globalisation has opened nations to the effects of digital technologies, new business models and open access arrangements made to bolster trade; that would disrupt the current intellectual property law and legislations. Yu's concerns centre on the impact of TRIPS Agreement on Africa that have yet to be fully explored. Yu notes the lack of research despite the potential risks that are faced by the developing world.

This paper highlights that most of the research is conducted by parties that have a stake in the decisions made by policy makers. This would raise concerns on the impartiality of the analysis and the viability of the research. Data is provided by interested third parties such as industrial lobbyists rather impartial researchers that will give substantive evidence.<sup>81</sup> The concern of international intellectual law would be to strike the balance between what the developed nations would support and what the developing nations could afford.<sup>82</sup> In the case of Nigeria, the problem is similar to that faced by most developing nations. The country relies on research data that is gathered by impartial parties that have an imbalanced stake in the outcomes of the macro-policies advocated by policymakers.

Walker<sup>83</sup> notes when assessing the impact of the TRIPS Agreement should encompass public interest elements within the Agreement. This assessment should examine the provisions made to permit governments to balance private rights and public interest to allow for broad application and interpretations.<sup>84</sup> TRIPS was implemented to support technological innovation. However, TRIPS alone is not sufficient to promote investment in the innovation of a developing nation nor promote the informal innovation that is

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<sup>80</sup> P Yu, 'The global intellectual property order and its undetermined future' [2009] 1 The WIPO Journal 1

<sup>81</sup> Ibid (p. 1)

<sup>82</sup> Ibid (p.15)

<sup>83</sup> S Walker, 'The TRIPS Agreement, sustainable development and the public interest: A discussion paper' [2001] 41 Environmental Policy and Law Paper 1

<sup>84</sup> Ibid



inherent in developing nations.<sup>85</sup> TRIPS has been noted to fall foul of being a broad legislation in granting patents in areas such as biotechnology and pharmaceuticals. This impacts on the innovation potential of a country by stifling future innovations.

This study highlighted the lack of clarity in the promotion of the dissemination of technology. Strong supporters of TRIPS Agreement argue that its implementation would enable and promote technology transfer to the developing countries. However, evidence shows that the licensing of intellectual property rights is centred around a small number of developed countries and held at a monopoly by a select group of multinational corporations.<sup>86</sup>

Most of the previous studies have found that intellectual property rights can be viewed from the lenses of the developed and less developed nations perspective. These view the less developed and developing nations as losers in regard to strengthening their intellectual property rights regime. International intellectual property rights systems make developed nations powerful innovators at the expense of their developing countries expense. The innovative power will ensure the developed nation's companies have the ability to erratically increase prices to maximise their profit.<sup>87</sup>

Hossain and Lasker<sup>88</sup> note that international legislation such as the TRIPS Agreement as a one size fits all system may stunt development in developing countries. These have been accused of exploiting countries through the use of exorbitant prices being levied for licensing and the subsequent social losses in economic welfare. This gives rise to the ethical issues that strong, international intellectual property rights lead to the transfer of wealth from the poor to the rich in society. This will effectively widen the economic divide and further deepen inequalities present in society.

Prior to the enactment of the copyright law in 1988 in Nigeria, there was no structured, effective copyright practice in Nigeria. The country had a Federal Ministry of Trade that

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<sup>85</sup> Ibid (p.x)

<sup>86</sup> Ibid (p.x)

<sup>87</sup> A Hossain and S Lasker, 'Intellectual property rights and developing countries' [2010] 1 'Bangladesh Journal of Bioethics' 43-46

<sup>88</sup> Ibid (p. 44)

was responsible of administering the copyright law. This ministry did not have a competent authority on administering the authority.<sup>89</sup> The establishment of Nigerian Copyright Commission (NCC) through the Copyright Act made the administration of copyright laws more effective. However, the jurisdiction of the country's law has faced inadequacies and inconsistencies over the years.

### **2.3. Jurisdiction of Intellectual Property Law in Nigeria (500)**

The TRIPS Agreement did not place an obligation on member states to enact judicial systems for the purpose of enforcing intellectual property rights. Member states could continue using the intellectual property rights that were already in existence in the countries. As a member state, Nigeria did not enact judicial systems to comply with TRIPS Agreement solely. The Federal High Court, exclusively, through the Nigerian Constitution hear intellectual property cases.

Section 251 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as Amended 2011) (CFRN) outlines the jurisdiction of the Federal Courts. “notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters – “.

“any Federal enactment relating to copyright, patent, designs, trade-marks and passing-off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards;”<sup>90</sup>

This section of the Constitution is similar to Section 7 (1) (f) <sup>91</sup>of the Federal High Court Act 1993 of Nigeria. This section means that any civil matter that borders on intellectual

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<sup>89</sup> Adekola Anthony and Eze Chinedu, 'Intellectual property rights in Nigeria: A critical examination of the activities of the Nigerian Copyright Commission' [2015] 35 'Journal of Law, Policy and Globalization' 56-61

<sup>90</sup> Section 251 (1) (f)

<sup>91</sup> Cap F12 Laws of the Federation of Nigeria (LFN), 2004

property shall be commenced in the Federal High Court. No other court in the country is permitted to address such matters.

Despite the proviso set out in the Constitution, there has been a record of inconsistencies viewed as the Nigerian Supreme Court ruled in these cases. In 1988, a registered proprietor with a registered trademark on his footwear brand found that there were other proprietors had infringed upon their trademark by labelling their footwear with the brand. This was the case of *Paktun Industries Ltd v. Niger Shoes Manufacturing Co. Ltd.*<sup>92</sup> The Supreme Court ruled that the “Federal High Court had jurisdiction in an action for passing off arising out of a registered trademark”. The Nigerian Supreme Court had not ruled on the distinction of which court was responsible of dealing with the case of passing off an unregistered trademark. The Constitution, however, is clear of the jurisdiction of such cases.

However, almost two decades later a dichotomy of existing law between registered and unregistered trademark was ruled upon in *Ayman Enterprises Ltd. v. Akuma Industries Ltd.*<sup>93</sup> The Nigerian Supreme Court ruled that an action of passing off of an unregistered trade mark goes to the State High Court. Whilst a registered trademark would be ruled by the Federal High Court. An argument could be made that due to the inconsistencies and ignorance displayed in the ruling in relation to the Constitution, this ruling could be pronounced null and void.

In *Omnia Nigeria Ltd. v. Dyketrade Ltd*<sup>94</sup>, the plaintiff sought an injunction against the defendant from infringing on his trademark. The court was tasked with determining of the claim for infringement of trademark. An appeal was presented to the Supreme Court after the Federal High Court had made a decision that did not satisfy the appellant in the case. The plaintiff had accused the defendant of using and distributing goods that were inscribed with his trademark. *Omnia Nigeria Ltd. v. Dyketrade Ltd*<sup>95</sup> was the case in which the Supreme Court ratified the correct position of rulings in regard to the letter of

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<sup>92</sup> [1988] 5 NWLR (Nigerian Weekly Law Reports) (Pt. 93)138 S.C.

<sup>93</sup> [2003] 13 NWLR (Pt. 836) 22 S.C.

<sup>94</sup> 2007] 15 NWLR (Pt.1058) 276 S.C.

<sup>95</sup> [2007] 15 NWLR (Pt.1058) 276 S.C.

the Constitution. The Supreme Court stated that Federal High Court has jurisdiction in the action for passing off arising out of a trademark; whether registered or unregistered.

The enactment of the Constitution of the Federal Republic of Nigeria 1999 brought about a radical curtailment of the exclusive and unlimited jurisdiction that had been previously enjoyed by the High Courts of the land. This jurisdiction extended to the adjudication of the causes and matters between parties and individuals. The Constitution was silent on the exclusivity of the jurisdiction of the Federal High Court as the phrases 'exclusive' or 'exclusion of any other court'. The lack of these phrases within the exact wording of the Constitution of the Federal Republic of Nigeria 1999 and the Federal High Act of Nigeria would mean concurrent jurisdiction is hence deemed permitted.

The infringement of the intellectual property is enforced in a similar fashion worldwide. Enforcement is dealt with in the courts. The threat of infringement or the start of an infringement or infringement that is in the earlier stages is enough to begin the enforcement process. Intellectual property law distinguishes between deliberate theft and infringement done unknowingly and innocently.<sup>96</sup> The infringement of intellectual property rights takes the form of civil and criminal infringement. This distinction allows for the litigation process to be either civil or criminal. These distinct processes with different methods and outcomes, work towards the same goal of ensuring the integrity of the intellectual property is preserved. However, Nigerian courts experience delays in the judiciary and other barriers that discourage litigation and enforcement in both civil and criminal matters.

The civil actions would seek remedies through injunctions, damages against the infringers by the right owner.<sup>97</sup> Civil action involves the attribution of adequate damages and expenses. The positive judgement in a civil action would require the losing party to destroy or remove from the channels of commerce the goods that have been infringed,

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<sup>96</sup> D Jankovic, 'Different legal aspects of the intellectual property rights' [2018] EU and Comparative Law Issues and Challenges 143 <https://hrcak.srce.hr/ojs/index.php/eclic/article/download/6526/3435/> accessed 4 December 2018

<sup>97</sup> B Yeh, 'Intellectual property rights violations: Federal civil remedies and criminal penalties related to copyrights, trademarks, patents and trade secrets' [2016] 7-5700 Congressional Research Service 1

the machinery that has been used in the production and processes. Facilities that have been used in trade and production must be shut down. These remedial actions are available through civil action. However, the process is expensive and may be easily circumvented by the defence or losing party through a lengthy appeal process and blatant disregard of the law.

Criminal action faces inadequacies in the imposition of the deterrent penalties such as forfeiture, imprisonment and fines. In the country, criminal procedures are viewed as inadequate. The system of penalties has proven out of date. There are various cases that have involved the sale of illegal copies of CDs and DVDs that contained foreign and local music or films. The Nigerian Copyright Commission (NCC) has dedicated its efforts to ensuring that the rights of copyright right holders are upheld and those in infringement face criminal action where appropriate.

*Nigerian Copyright Commission v. Oba Okechukwu*<sup>98</sup> was a case in which the accused was in possession of infringing copies of local and foreign musical works. This was a breach of Section 20 (2) (a) of the Copyright Act. A fine was imposed and destruction of goods was the judgement. However, the fine was miniscule calling into question the need for an upward review. The is inadequacies in the system of penalties as evidenced by the divergent rulings given for a similar case to the *Okechukwu* case. *Nigerian Copyright Commission v. Eze Igwe*<sup>99</sup> was in breach of Section 20(2)(c) of the Nigerian Copyright Act, CAP C28 Laws of the Federation of Nigeria for possessing 250 copies of copyright infringed works in the form of DVDs, CDs and VCDs. The accused was charged with six months imprisonment and a N5,000 Fine. This fine is minimal, and an upward review is required to act as an adequate deterrent.

Judges within the courts are faced with inordinate task of ensuring the public is aware of the importance of intellectual property rights and its role in bridging inequalities in society and bringing economic development to the country. In Nigeria, individuals are yet to comprehend the importance of intellectual property. The merit to protection of intellectual property and benefits are not easily evident to the public. The inherent

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<sup>98</sup> 55 NIPJD (FHC.2012) ABJ/CR/56/2012

<sup>99</sup> 55 NIPJD (FHC. 2013) ABJ/CR/93/2012

mindset is if one is going hungry and without bread; why deem the gourmet recipes inaccessible? To ensure that the public understand the importance of intellectual property, the appropriate structures and education must be in place. This will increase awareness of the importance of intellectual property to economic and social development.

### **3. Copyright Law (1946)**

To fully appreciate the legal obligations faced by Nigeria under the TRIPS Agreement, the Nigerian Copyright Act 2004 will need to be examined. The analysis will examine the copyright and related rights provision of the TRIPS Agreement. To determine the impact of the TRIPS Agreement upon the substantive copyright law of Nigeria, the general framework and operations of the act will be assessed. The impact of the international minimum standard of intellectual property rights protection on the national intellectual property laws is observed once the level of development of the country is accounted for in analysis. Hence this chapter will also explore the intersections between Nigerian Law and the TRIPS Agreement.

#### **3.1. Copyright Law in Nigeria (750)**

Nigeria was one of the colonies of England in Africa. Hence the development of their copyright laws can be dated back to the British Copyright Act of 1911.<sup>100</sup> The Order allowed for the protection of the rights of British publishers and authors in the Northern<sup>101</sup> and Southern<sup>102</sup> Protectorates of Nigeria. The Nigerian Copyright Act of 1912 incorporated the British Copyright Act of 1911. The Nigerian Act of 1912 allowed the British Copyright Act of 1911 to apply without hindrance or variation.

Upon independence, Nigerian authorities enacted the Copyright Decree of 1970<sup>103</sup> that repealed the Copyright Act 1912. Sections 16 and 18(1) particularly excluded the rules of common law and repealed the British Copyright Act 1911 as it was applicable to Nigeria. This was a political move designed to move away from the influence of the former colonialists rather than an actual move away from the protection of works provided under copyright law. The main departure from the 1912 Act and the Decree of 1970 was the term for which the copyright is protected. In the Decree, the term was extended to the life of the author and 70 years after their death.<sup>104</sup> Within the Act of 1912, the term was life of the author and 50 years after death.<sup>105</sup> It was soon replaced by the Copyright Decree 1988 which was re-designated to the Copyright Act 1988.<sup>106</sup> The Act has been amended twice in 1992<sup>107</sup> and 1999<sup>108</sup>. It is currently codified as part of the 2004 Laws of the Federation of Nigeria in Chapter 28.<sup>109</sup>

The Decree began to face pressure as the country saw the emergence of young talent. Copyright has received much attention in the country as it has seen a rapid growth in the film and music industry and the progress of literary works. The country is currently experiencing global prominence in these areas due to the artistic young, fresh talent of

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<sup>100</sup> The British Copyright Act of 1911 was made applicable to British colonies by Order in Council no. 912 of 1912

<sup>101</sup> Section 1 (b) no. 912 dated 24 June 1912

<sup>102</sup> Section 1 (d) no. 912 dated 24 June 1912

<sup>103</sup> Copyright Decree No. 61 of 1970.

<sup>104</sup> First Schedule Copyright Decree 1970

<sup>105</sup> Section 3 Copyright Act of 1912

<sup>106</sup> Cap. 28, Laws of the Federation of Nigeria, 1990.

<sup>107</sup> Copyright (Amendment) Decree (No.98) of 1992

<sup>108</sup> Copyright (Amendment) Decree (No.42) of 1999

<sup>109</sup> Copyright Act 1988 Cap 28 Laws of the Federation of Nigeria 2004

Davido (the singer songwriter), Chinua Achebe (author, poet, critic, professor) and Hakeem Kae-Kazim (actor known for his performance in 2004 Hotel Rwanda) to name a few. Despite this rapid growth, the TRIPS Agreement is the most recent change to copyright legislation in the country.

The Copyright Act 1988 outlines the works that are eligible for copyright protection under the broad categories of literary works, musical works, artistic works, cinematograph works, sound recording and broadcasts.<sup>110</sup> The Act fall short of defining copyright. However, the Federal High Court in *Sarg Aims Aluminium Products Limited v. Stanley Akagha & Anor*<sup>111</sup> defined copyright as the right of literary property as recognised and sanctioned by positive law. Hence from this judgement, copyright in the country could be defined as the intangible right that is granted by statutes to the originator of certain artistic or literary works that he/she has produced for a specified period of time with the sole and exclusive privilege of multiplying copies of the work and selling them. This definition is not exhaustive, nor comprehensive as it focuses on literary and artistic works only.

There are basic requirements for eligibility to copyright. These are sufficient effort must have been expended on making the work to give it an original character and the work must have been fixed in definite medium of expression.<sup>112</sup> This relates to literary, artistic and musical works. In the case of broadcasts, however, the nature of the works cannot apply to copyright. Broadcasts may deal with breaking news and may also contain content that is protected in another form. In *Jobela Nigeria Enterprises Ltd v. Kupolati*<sup>113</sup> is a court case in which the court found that the plaintiff had not displayed that there was no effort in the creation of the work that would lend it original character. Hence the plaintiff was neither the author nor joint author of the copyright despite having put up the initial capital and funding the project.

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<sup>110</sup> Section 1 CA Act 1988 Cap 28 LFN 2004

<sup>111</sup> (1994) 3 I.P.R.L. 219, FHC/KD/1/92. Or [1994] F.H.C.S.188

<sup>112</sup> Section 1 (2) (a) CA 1988 Cap 28 LFN 2004

<sup>113</sup> [2005] All FWLR p 1729. FHC/L/CS/1106/03



The administration of copyrights in Nigeria is overseen by the Nigerian Copyright Commission.<sup>114</sup> All copyright matters as set out by the Copyright Act 1988 are the responsibility of this Commission. Various strategies have been employed by the Commission in trying to carry out its functions. The Strategic Action Against Piracy (STRAP) provided an alternative dispute resolution route tagged the Copyright Litigation and Mediation Programme (CLAMP). This route would enable out of court settlements in the event of misunderstandings between parties.<sup>115</sup> The public through the enlightenment and education initiatives would be given the knowledge of the intellectual property rights and the know how of how to defend them. The functionality of these strategies would allow for the respect of intellectual property and encourage creativity amongst the general public.

### **3.2. TRIPS Agreement Compliance (750)**

Nigeria's compliance with respect to the provisions given in the TRIPS Agreement encompass its compliance with the Berne Convention, Rome Convention and Paris Convention. There are various Articles within the TRIPS Agreement that provide for these conventions. Article 2.2 of the TRIPS Agreement provides as follows:

'Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.'

This article reiterates that member states owe the same obligation to one another as was provided under the various other conventions. By ensuring this, the TRIPS Agreement brought the other Conventions to be enforceable and compel member states that are non-Union members to have these provisions applicable to them. Article 9.1 of

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<sup>114</sup> Section 34 (1) CA 1988 Cap 28 LFN 2004

<sup>115</sup> 'STRAP and CLAMP – Nigerian Copyright Commission in Action' (WIPO Magazine, September 2008) < [https://www.wipo.int/wipo\\_magazine/en/2008/05/article\\_0009.html](https://www.wipo.int/wipo_magazine/en/2008/05/article_0009.html) > accessed 3 December 2018

the TRIPS Agreement provides for Articles 1 to 21 of the Berne Convention 1971 to comply to all member states.

Nigeria is a member of the Union to whom the Berne Convention applies. Regardless, under Article 9, it is compulsory for those members of the WTO that are not members of the Union would have to uphold the provisions of the Berne Convention.<sup>116</sup> Section 1 of the Copyright Act 1988 covers Article 2 of the Berne Convention. This relates to the type of work that is protected; from literary, artistic works,<sup>117</sup> requirement of fixation,<sup>118</sup> works of applied art and industrial design<sup>119</sup> and obligation to protect beneficiaries of works<sup>120</sup> among others. These areas are all covered under the Copyright Act of 1988.

Copyright is given to all works that are made under the control or direction of the state authority or government or international organisation that is subject to copyright.<sup>121</sup> Hence, if a work is first published within a country that Nigeria has treaty obligations to or is a party of an international agreement that they are both a party of; then the party will have copyright protection within Nigeria.

*Microsoft Corporation v Franike Associates Ltd*<sup>122</sup> is a perfect example of such a case. Microsoft Corporation as owner of the copyright of Microsoft software, programs and products sought to exercise their copyright on their products. As these works were published works, the international corporation sought to enforce their foreign copyright within Nigerian courts. This case was highly publicised and brought to question whether international copyrights were protected in the local courts of Member States of the TRIPS Agreement.

Microsoft Corporation (the plaintiff) brought an application to the courts for a restraining order against Franike Associates Ltd (respondent) for infringing its copyright on its

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<sup>116</sup> Article 9.1 TRIPS Agreement

<sup>117</sup> Section 1 CA 1988 Cap 28 LFN 2004

<sup>118</sup> Section 1 (2) CA 1988 Cap 28 LFN 2004

<sup>119</sup> Section 1 (3) CA 1988 Cap 28 LFN 2004

<sup>120</sup> Section 5 and 41 CA 1988 Cap 1988 LFN 2004

<sup>121</sup> Section 4 CA 1988 Cap 28 LFN 2004

<sup>122</sup> FHC/L/CS/610/05 and CA/L/573/2008 and 54 NIPJD [CA.2011] 573/2008

software and products.<sup>123</sup> Microsoft Corporation is incorporated in the United States of America. The US is a signatory on the Berne Convention and the TRIPS Agreement. This meant that the copyright of Microsoft Corporation should generally be recognized and protected in Nigeria under Section (5)(a) and (b)(i) of the Copyright Act 1988 and Article 3.1 of the TRIPS Agreement that states

‘each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property...’

However, the application of this Article was not clear cut in Nigeria. For foreign copyright owners to seek enforcement in Nigeria, Section 41 of the Copyright Act 1988 must be met first. This section provides:

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

- a. Individuals who are citizens of or domiciled in that country;
- b. Bodies corporate established by or under the law of that country;
- c. Works, other than sound recordings and broadcasts, first published in that country; and
- d. Broadcast and sound recordings made in that country.’<sup>124</sup>

This provision in the Copyright Act meant Microsoft had to prove that a Nigerian individual or corporation had received reciprocal protection of their copyright works in the United States of America. The respondent first raised an objection to the jurisdiction of the Federal High Court to hear the suit. The respondent also raised whether the reciprocal protection of copyright proof between the US and Nigeria. There was no order in the Federal Gazette or a certificate from the Nigerian Copyright Commission (NCC). Due to these grounds, the court of appeals dismissed the case. The judge dismissed the entire suit for want of jurisdiction.<sup>125</sup>

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<sup>123</sup> Ibid

<sup>124</sup> Section 41 CA 1988 Cap 28 LFN 2004

<sup>125</sup> FHC/L/CS/610/05 and CA/L/573/2008 and 54 NIPJD [CA.2011] 573/2008

From the Microsoft case, one can surmise that the compliance of Nigeria to the TRIPS Agreement in terms of copyright law is not fully compliant. This will be assessed further in terms of trademarks and patents.

### **3.3. Impact Assessment (200)**

Copyright protection can be sought for products that are intangible, in the public domain and hence accessible to all. Thorpe notes that this raises very little concern for copyrights in terms of TRIPS Agreement obligations.<sup>126</sup> Nigerian legislation needs little changes to offer adequate protection. The country's film, music and entertainment industries have functional copyright protection organisations such as Copyright Society of Nigeria (COSON), Musical Copyright Society of Nigeria and Performing Musicians Employee Association of Nigeria (PMAN). PMAN spearheaded the repealing of the Copyright Act of 1970 as it did not adopt Berne Convention copyright protection. This proactive action was only possible because the organisation was aware of the effects of lack of Berne Convention compliant legislation would affect its members. Knowledge was key.

The lack of access to knowledge on the part of potential copyright holders affects revenue and potential economic benefits. Knowledge and education are vital for development. Both socially and economically.<sup>127</sup> The access to knowledge would allow for advancement in the fight against poverty and inequality inherent in Nigerian society. Through the Copyright laws and legislation and modifications in governmental policies; this could bring about collective human development and welfare in Nigerian society. Artists and creators of content would be assured of protection of their creations. Assured through the law that the potential revenue of their creations would reach them and not be pocketed by infringers and counterfeiters.

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<sup>126</sup> Phil Thorpe, 'Commission on Intellectual property rights: Study on the Implementation of the TRIPS Agreement by developing countries' (Commission on Intellectual Property, London, 2002) available from: [http://www.iprcommission.org/papers/text/study\\_papers/sp7\\_thorpe\\_study.txt](http://www.iprcommission.org/papers/text/study_papers/sp7_thorpe_study.txt) accessed 3 December 2018

<sup>127</sup> Chris Armstrong, Jeremy de Beer, Dick Kawooya, Achal Prabhala and Tobias Schonwetter, 'Access to Knowledge in Africa: The role of copyright' (UCT Press, 2010)

## **4. Patent Law (2238)**

Patents are the most controversial aspect of intellectual property regarding what constitutes a patentable subject matter and uses without authorisation of the right holder. The controversy is more evident within the public health sector. Patents are connected to the cultural, economic and health condition of the country. The development of the country is influenced by the inventions in the country as they are

designed to make the lives of the people better and easier.<sup>128</sup> This chapter will examine the Patent Law in Nigeria and its compliance to the TRIPS Agreement. Finally, the potential modifications to the law will be given and the impact the law has had on the country.

#### **4.1. Patent Law in Nigeria (750)**

The historical development of patent law in Nigeria, much like all laws in the country, can trace their origin to English law from the time when the country was part of the British Empire. The first patent legislation in the country were the Patents Ordinance No. 17 of 1900<sup>129</sup>, Patents Proclamation Ordinance No. 12 of 1902<sup>130</sup> and Patents Proclamation Ordinance No. 27 of 1900.<sup>131</sup> These were applicable to the colony of Lagos, Northern Nigeria and Southern Nigeria respectively. These ordinances provided an independent patent administration system to be established for the different parts of the country. The patent systems faced multiple repeals and amalgamation till the independence of the country from the United Kingdom. The Registration of United Kingdom Patents Ordinances of 1925 was the last patent related law to be applied to pre-independent Nigeria. The 1925 Ordinance stated that patents could only be granted in the United Kingdom and would only be valid in Nigeria if the application was registered within 3 years of the grant of the patent in the United Kingdom.<sup>132</sup> The United Kingdom Patents Ordinances were fully repealed in 1970 when the Patents and Designs Decree No. 60 was enacted. This is now known as the Patents and Design Act and published as Chapter 344 of the Laws of the Federation of Nigeria 1990.

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<sup>128</sup> Andrew Reamer, 'The impacts of technological invention on economic growth – A review of the literature' [2014] 'The George Washington Institute of Public Policy' 1-55 available at: [https://gwipp.gwu.edu/.../Reamer\\_The\\_Impacts\\_of\\_Invention\\_on\\_Economic\\_Growth\\_02-28-14.pdf](https://gwipp.gwu.edu/.../Reamer_The_Impacts_of_Invention_on_Economic_Growth_02-28-14.pdf) accessed 9 December 2018

<sup>129</sup> Ordinances of the Colony of Lagos, 892 (1901)

<sup>130</sup> Laws of the Protectorate of Northern Nigeria 415 (1910)

<sup>131</sup> Laws of the Protectorate of Southern Nigeria Ch. 48, 653 (1908)

<sup>132</sup> Registration of United Kingdom Patents Ordinance No. 6 of 1925, Cap 182 Laws of the Federation of Nigeria and Lagos 1958.

The Patent and Design Act 1970 was not based on any defined or underlying policy consideration.<sup>133</sup> There was no national policy in regard to industrial or technological development. Under the Patent and Design Act 1970, patent rights are protected, and conferment of a patent is affected under Section 2 Patent and Design Act 1970.

‘Subject to this section, the right to a patent in respect of an invention is vested in the statutory inventor, that is to say, the person who, whether or not he is the true inventor, is the first to file, or validly to claim a foreign priority for, a patent application in respect of the invention.’<sup>134</sup>

The statutory inventor is the person who, (whether he/she be the true inventor or not) is the first to file or validly claim a foreign priority for a patent application in respect to an invention.<sup>135</sup> This description bars companies that may be sponsoring the research or innovation to be named as inventors on the patent. Neither does the law of the country allow for this to be modified through the use of contracts.<sup>136</sup> The patent can last for up to 20 years if the annual renewal fees are kept up to date for the duration of the life of the patent. The Act does give provision of some rights to employers.

The patent rights of an employee and employer are unbalanced under the Patents and Designs Act 1970. If an employer is not required to invent as per their employee contract but makes use of data at the expense of the employer, then the invention will be regarded to be the employer’s. The employer is granted fair remuneration if the invention is of exceptional importance<sup>137</sup> However, the Act does not account for what is meant by the wording ‘exceptional importance’. This allows for inventors to be cheated out of revenue or rights by the employer as the employer is given fair room to manoeuvre and manipulate the interpretation. Hence, it would be fair to say that the spirit of the Act was in the mind of benefiting the inventor hence, the patent rights must vest in the employee even if employer resources have been used in the efforts of creation. The employer should then receive adequate compensation for their resources.

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<sup>133</sup> Adebambo Adewapo, ‘Public health, access to medicines and the role of patent system in Nigeria’ [2011] 171 Nigerian Institute of Advanced Legal Studies (NIALs) Journal of Intellectual Property Maiden Edition 164

<sup>134</sup> Section 2 PDA 1970 P2 LFN 2004

<sup>135</sup> Section 2(1) PDA 1970 P2 LFN 2004

<sup>136</sup> Section 2(2) PDA 1970 P2 LFN 2004

<sup>137</sup> Section 2(4)(a)(ii) PDA 1970 LFN 2004

Scholars of law have noted that these issues arise due to the Act being nearly half a century old and becoming increasingly dated and out of touch with modern times.

As the Act is founded on the basis of English law and the former Acts have since been repealed and replaced by the Patents Act 1977 to meet the conundrum presented by modern times of the employee/employer statutory rights on patented inventions created during their course of their employment.<sup>138</sup> Under the Patents Act 1977, employees are owners of the invention if it is made at work except if the invention has arisen from normal duties or duties that have been specifically assigned to him and such an invention been reasonably expected.<sup>139</sup> Employees are also the owner of the invention if the invention has been made in the course of the duties of the employee and at the time of making the invention because of the nature of their duties and the particular responsibilities arising from the nature of his duties he had 'a special obligation' to further the interests of the employee's undertaking.<sup>140</sup>

The Federal High Court has jurisdiction to hear and dispose of all legal proceedings under the Patent and Design Act.<sup>141</sup> A patentee can institute an action for patent infringement if any of the rights granted by the Patent and Design Act are infringed.<sup>142</sup> In Nigeria, the patent is granted on a formality basis and this poses a risk for patent infringement as patents that have been granted in another country may be granted anew in Nigeria without the patent office being aware that there is an existing or expired patent. An argument can be made that a nullity provision would take care of this however, there has been a high rate of patent infringements in the country.

There is a high level of malaria deaths in the country that are attributed to the influx of fake drugs that are cheap but ineffective in the treatment of the disease.<sup>143</sup> Malaria

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<sup>138</sup> The Patents Act 1977 Section 39

<sup>139</sup> Section 39 (1) (a) UK Patents Act 1977

<sup>140</sup> Section 39 (1) (b) UK Patents Act 1977

<sup>141</sup> Section 26 (1) PDA 1970 P2 LFN 2004

<sup>142</sup> Section 25 (2) Patent and Design Cap P13 Laws of the Federation of Nigeria 2004

<sup>143</sup> Salwa Dawaki, Hesham A-Mekhlafi, Init Ithoi, Jamaiah Ibrahim, Wahib Atroosh, Awatif Abdulsalam, Hany Sady, Fatin Elyana, Ado Adamu, Saadatu Yelwa, Abdulhamid Ahmed, Mona AlOareeqi, Lahvanya Subramaniam, Nabil Nasr and Yee-Ling Lau, 'Is Nigeria winning the battle against malaria? Prevalence, risk factors and KAP assessment among Hausa communities in Kano State' [2016] 15 Malaria Journal 351



sufferers are subjected so many different doses of fake malaria treatment drugs, the effects are unpredictable. There is speculation that some recorded malaria deaths actually having been caused by the fake medication.<sup>144</sup> Counterfeiters are going as far as making the fake drugs look as much like the original as possible. These would lead to patent and trademark infringement. There are various cases of such situations that have been brought before the Federal Courts.

*Beijing Cotec New Technology Corp & Anor v. Greenlife Pharmaceuticals Ltd. & 5 Ors.*<sup>145</sup> was a case of patent infringement in the pharmaceutical industry. The plaintiff alleged to have the sole right to import and sell anti-malaria drugs that contain dihydroartemisinin in Nigeria. The case was unique as some of the defendants named on the case were officers from the National Agency for Food and Drug Administration and Control (NAFDAC). NAFDAC is a federal agency that is responsible of regulating and controlling manufacture, distribution and importation of drugs amongst its repertoire of responsibilities. NAFDAC was included in the case as they had approved the sale of the drug Alaxin that contained dihydroartemisinin without upholding their mandate of pursuing and preventing counterfeit products to enter the market. The Federal Court resided over the case and granted the plaintiff and their agents the jurisdiction to seize Alaxin and determine patent infringement.

As Section 25 of the Patent and Design Act granted that a patent is infringed if a person without the express permission of the patentee or license of the patent does or causes the doing of making, importing, selling or using of the product or stocking it for the purpose of sale or use.<sup>146</sup> However, the Act does not account for an infringer being unaware of the presence of a patent protection. Section 6 (4) (b) of the Patent and Design Act excludes acts of patent infringement that are done in good faith.<sup>147</sup>

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<sup>144</sup> Ibid

<sup>145</sup> 46 NIPJD [FHC. 2003] 718/2003. Suit No. FHC/L/CS/718/03

<sup>146</sup> Section 25 (1) PDA 1970 P2 LFN 2004

<sup>147</sup> Section 6 (4)(b) PDA 1970 P2 LFN 2004

## **4.2. Compliance with TRIPS Agreement (500)**

The Paris Convention was adopted in the TRIPS Agreement to cover provisions for patent protection. The TRIPS Agreement require member nations to make patents available for any inventions in all fields of technology without discrimination subject to tests of novelty, inventiveness and industrial applicability.<sup>148</sup> Articles 4 and 5 of the Paris Convention relate to patents.<sup>149</sup> Nigeria is expected under its tenets as a member state of TRIPS Agreement to treat foreign national in the same way it would treat its own national regarding intellectual property protected under the Paris Convention.<sup>150</sup>

Much like most African countries, Nigeria has a rich dependence on traditional medicines, knowledge and culture. The majority of the country's population relies on the traditional remedies rather than 'western medicine'. The herbal medicine practitioners are unregulated, and any individual could set up a traditional herbal clinic without action taken against them. The population still believe in the effectiveness of these medicines despite the high child mortality rates of children that are born at home aided by village midwives and medicine men nor the high death rate of childhood diseases such as polio that could easily be treated with western medicine. The Patent and Design Act excluded patentable inventions that relate to human health. This is an area of concern and amendments made to ensure that the population are protected, and medicines are patented to ensure their effectiveness in treatment of disease.

As previously mentioned, Nigeria has experienced an influx of patent infringed drugs into the country with some counterfeit products of sub-standard that lead to deaths or further illness. Pharmaceutical patents are a controversial issue under TRIPS Agreement.<sup>151</sup> Patented medicine is a multi-billion-dollar industry. Due to its economic lucrateness, industrialised countries highly protect the industry. There are

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<sup>148</sup> Article 27 (1) TRIPS Agreement

<sup>149</sup> Temitope Oloko, 'An examination of Article 27 of the TRIPS Agreement in relation to the provisions on patentable subject matter under the PDA in Nigeria' [2016] 42 Journal Commonwealth Law Bulletin 236

<sup>150</sup> Ibid

<sup>151</sup> Chandra Saha and Sanjib Bhattacharya, 'Intellectual property rights: An overview and implications in pharmaceutical industry' [2011] 2 Journal of Advance Pharmaceutical Technology and Research 88

controversies attached to the protection given to this medicine, whilst those that need the medicine are dying in droves in developing countries. Companies that hold the patent rights argue that due to the investment that was poured into research and development, the patents allow for them to recoup these investments.<sup>152</sup>

As was the case in *Beijing Cotec New Technology Corp & Anor v. Greenlife Pharmaceuticals Ltd. & 5 Ors*<sup>153</sup> the pharmaceutical sought to prevent competition from generic products. The plaintiff sought to protect its patent. Some has gone as far as to infer that the products that were being sold by Greenlife Pharmaceuticals were of sub-par standard and this put the malaria patients that were buying the products at risk. This was not proven, however. The courts only granted the plaintiff jurisdiction to confirm if a patent infringement had occurred. Which it had. Nigeria complies with TRIPS Agreement regarding the protection of the patent rights.

Section 1 (4) (a) and (b) of the Patent and Design Act 1970 sets that patents cannot be obtained for plant and animal varieties,<sup>154</sup> inventions the publication or exploitation of which would be contrary to public order<sup>155</sup> and those principles and discoveries of a scientific nature that are not inventions.<sup>156</sup> These sections do not as per the lettering of Article 27 (2) of the TRIPS Agreement include 'including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.'<sup>157</sup> The Patent and Design Act does not explicitly exclude the protection of inventions on human health nor that the inventions that cause serious prejudice to the environment must be avoided. The Act has had no amendments from the time of enactment in 1970.

The idea of the protection of human life, health and environmental concerns were not of concern in the 1970's. One controversial area is that of human genome. Gene technology and engineering is an area of science that is still in its infancy now and

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<sup>152</sup> *ibid*

<sup>153</sup> 46 NIPJD [FHC. 2003] 718/2003. Suit No. FHC/L/CS/718/03

<sup>154</sup> Section 1 (4) (a) PDA 1970 P2 LFN 2004

<sup>155</sup> Section 1 (4) (b) PDA 1970 P2 LFN 2004

<sup>156</sup> Section 1 (5) PDA 1970 P2 LFN 2004

<sup>157</sup> Article 27 (2) TRIPS Agreement

would never have been thought possible except in science fiction in the 1970's. Neither had scientists grasped the full extent the harm the human carbon footprint is having on the planet in terms of climate change and global warming. On this front the Patent and Design Act 1970 is non-compliant.

### **4.3. Modifications Required (200)**

The Patent and Design Act 1970 requires some modification to fully comply with TRIPS Agreement. These modifications should come in the form of structure and simpler language that would allow the Act to meet the standards required for these modern times. The definition patentable inventions will, firstly require to be more comprehensive. These definitions can be found in Section 1 of the Act which describes what can be patentable.<sup>158</sup> The TRIPS Agreement's Article 27 (2) on patentable matter has three requirements that will require to be made in the Patent and Design Act to ensure that there is no loophole for varying interpretation.

Another essential modification required should account for the environment and the human carbon footprint that does not currently appear in the Patent and Design Act 1970. This is a minimum standard that appears in the TRIPS Agreement. Despite no country being obliged to follow the exact wording of the TRIP Agreement in the enactment of their Act, Nigeria needs ensuring its Act is accounting for issues that currently affect it country and its development and human welfare.

## **5. Trade Mark Legislation (1572)**

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<sup>158</sup> Section 1 PDA 1970 P2 LFN 2004

Trade marks are a valuable commercial asset that has been present for many years. They attach the reputation of the business to the goods and services that it sells.<sup>159</sup> Trademarks may be used as a source indicator, quality controller and a source of protection for the consumer. This chapter shall examine trademark law and legislation in Nigeria and their compliance to TRIPS Agreement. The chapter shall conclude by examining the modifications required for compliance.

### **5.1. Trade Mark Law in Nigeria (500)**

The English Law of Patents, Designs and Trade Marks Act 1883 was the first trademark law in the country. It came into effect in 1900 as the Trade Marks Proclamation Ordinance of 1900.<sup>160</sup> Various ordinances from the United Kingdom that applied to all British colonies were enacted, modified and repealed till 1958. The Trade Marks Act of 1965 was the first legislation enacted by the newly formed predominantly African government. This Act was heavily influenced by the UK Trade Marks Act of 1938.<sup>161</sup> The UK Trade Marks Act of 1938 was criticised by scholars as being poorly drafted and lacking in many respects. Unfortunately, these criticisms were inherited by the Trade Marks Act 1965. This is the Act that is currently incorporated in the Laws of the Federation of Nigeria 2004 as Chapter T13.<sup>162</sup> It remains unamended and facing legislative inertia.

The Act provides for the protection of trademarks in respect of goods, service marks, certification marks, defensive marks and associated trademarks. A trademark is important in providing a distinction and identification for a business. The Nigerian public are major importers of foreign technology and finished goods. Hence, have become grossly familiar with international brand names and trademarks. This, however, has

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<sup>159</sup> Andrew Christie and Stephen Gare, 'Blackstone's Statutes on Intellectual Property' (14<sup>th</sup> Edition, Oxford University Press, 2018)

<sup>160</sup> Chudi Nwabachili, 'Intellectual property law and practice in Nigeria' (1<sup>st</sup> Edition, Malthouse Press Limited, 2016) p.98

<sup>161</sup> Ibid

<sup>162</sup> Trade Marks Act 1965 Cap T 13 Laws of Federation of Nigeria 2004

given rise to many unscrupulous businessmen imitating these brands and trademarks in a bid to further their business interests. Nigerian law protects the interests of foreign investors as they are permitted to protect their intellectual property interest in a trademark, patent or copyright prior to establishing the business in the country.<sup>163</sup>

Under Nigerian law the protection of unconventional marks such as packaging and trade is under consideration. This is due to cases that have been brought before the courts that sought to receive judgements on possible infringements despite having no provision in law. The case of *International Tobacco (NIG) Ltd v. British American Tobacco Nigeria & Anor*<sup>164</sup> is one that explored trademark infringement to include the way in which a product was packaged. British American Tobacco Nigeria Ltd. had discovered that in February 2012, International Tobacco Ltd. had manufactured, distributed and sold a gold bond brand filter cigarette in gold colour. This, they claimed was an infringement on their exclusive and distinctive get up, device and design of gold colour Benson & Hedges brand of filter cigarettes.

The colour of the brand had been distinct for 33 years and so any subsequent use of those colours was an infringement on proprietary rights of British American Tobacco. The ruling of the case went in favour of British American Tobacco. This broke jurisprudential ground in trade mark law as the traditional notion of word, mark or logo was expanded to encompass packaging as a distinction in trademarking. The ruling put under consideration that trade mark infringement could go beyond words that are registered and include packaging, colours and design.

## **5.2. Compliance with TRIPS Agreement (700)**

TRIPS Agreement draws from the Paris Convention in relation to trade marks. The Paris Convention is for the protection of industrial property including patents, utility

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<sup>163</sup> Muhammed Aminu, 'Trademarks in Nigeria: An overview' [2016] 4 International Journal of Innovative Legal and Political Studies 11

<sup>164</sup> 56 NIPJD [CA.2013] 43/2012 and Suit No. CA/IL/43/2012

models and trademarks amongst others.<sup>165</sup> The Paris Convention was incorporated as part of the minimum standard to which member nations have to comply. Articles 6 through to 9 of the Paris Convention make specific provisions for trademarks.

Section 12 (1) of the 1999 Constitution of Nigeria states:

‘no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treat has been enacted into law by the National Assembly.’

Hence, international legal frameworks can only have effect if they are domesticated. The Trade mark Act is over 45 years old and would have been passed by the National Assembly prior to TRIPS Agreement establishment and Nigeria becoming a party to it. However, cases have been brought before the courts of Nigeria that argued that international treaties had superiority over domestic legislation. *Chief J E Oshevire v. British Caledonian Airways Ltd*<sup>166</sup> argued the superiority of the Warsaw Convention over the Nigerian Law. The ruling for this case gave precedence to international treaties and ruled that domestic legislation in conflict with international treaties were void.

The rulings of the courts have been inconsistent in this aspect as some have interpreted Section 12 (1) of the Constitution to be paramount. Hence declaring that domestic legislation took precedence over international treaties and declaring that international treaties that conflict with domestic legislation are void in domestic courts. *Capital Bancorp Ltd. v. Shelter Savings and Loans Ltd*<sup>167</sup> held that the Constitution of Nigeria and its provisions were supreme. Due to the inconsistencies presented in the decisions of the courts; the application of international provision on domestic courts will go as far as to ensure that justice is served.

Article 16.1 of the TRIPS Agreement conferred rights of a trademark to the owner to prevent third parties from using identical or similar signs for their product. In line with scholars’ criticism of the archaic definitions of trade mark on the Trade Mark Act 1965, means that Nigeria was lacking in encompassing the full definition of trade mark that

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<sup>165</sup> Article 1 (2) Paris Convention 1979

<sup>166</sup> (1990) 7 NWLR (Pt.163) 507 at 519-520

<sup>167</sup> (2007) LPELR-SC.27/2000

was in line with the global view of today's world. For example, the Trade Mark Act 1965 does not account for service marks. Service marks are vital to service providers. This lack of support and coverage of service marks is a point of non-compliance.

Article 15.2 of the TRIPS Agreement allows for members to deny trademark registration on grounds other than those that are provided for in the rest of the Agreement and the Paris Convention 1967. For example, the Paris Convention nor TRIPS Agreement do not expressly exclude the registration of marks that are scandalous, obscene, deceptive or immoral. However, Nigeria is amongst the nations that do not protect marks that fall within these descriptors. Section 11 of the Trade Marks Act states:

'It shall not be lawful to register as a trade mark or part of a trade mark –

- a. Any matter the use of which would, try by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice or be contrary to law or morality; or
- b. Any scandalous design.<sup>168</sup>

Marks that fall under these descriptors are prohibited under Nigerian Law. Hence, Nigerian law complies with Article 15.2.

Article 16 (2) and 16 (3) provides for the protection of well-known marks. This provision allows for those that may seek to register a similar mark despite the original being a well-known mark. The mark must be in use internationally and recognised as well known. The mark must be recognisable by the specific industry's consumers for protection to be provided. Nigeria does not have specific provisions. However, well known marks can be protected as defensive marks. Section 32 of the Trade Marks Act 1965 implies that a proprietor may apply for the registration of a well-known trademark. This application would provide a defensive perimeter around the registered trade mark. This section allows Nigerian Law to be complying with the Paris Convention and TRIPS Agreement. However, this defensive registration, blocks up the trade mark database

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<sup>168</sup> Section 11 TMA 1965 T13 LFN 2004



and may cause problems for the automated system of registration due to trademark clutter.

### **5.3. Modifications Required (300)**

Nigeria is noted as the largest economy in Africa. The country elicits a large portion of the influx of foreign direct investment (FDI) on the continent. As trading is a major part of the country's economy, it is crucial to have a Trade Mark law and legislation that is robust, relevant and compliant to international standards. The Trade Marks Act 1965 has faced no pressure for revision. However, there is a need to protect intellectual property rights due to the economic and social implications. It is vital for Nigerian intellectual property laws to protect themselves but also other Member states.

Well known trade marks have been accused over the years of crushing small and medium sized business in a bid to create a monopoly. In Nigeria, some products are called by the popular brand name in that industry. For example, washing powder is called surf due to the popularity of the detergent. These large brand names benefit a competitive advantage of being capable to advertise and distribute to all areas in the country. Whereas a local business can only supply to the around them.

Despite the potential damage caused by well -known trademarks, Nigeria complies with TRIPS Agreement. In this case the cost is two-fold. Large brand names such as Johnson and Johnson or McDonalds will be prompted to enter the Nigerian market. This will provide employment, diversity and address a need in society. However, a large well-known brand will garner a competitive advantage and attract consumers. This would lead the local businesses exposed and force them to close down.

The Nigerian legal framework needs to eliminate inconsistencies in their ruling. This would further build trust with international brands and trade marks that would be encouraged to enter the Nigerian market.

## 6. Challenges and Enforcement (1089)

The back bone of legislation is enforcement. Without it, the country will be overrun by chaos and lawlessness. However, it is a complex area of law as other sectors of the government will be used who may not be fully trained in the intricacies of intellectual property. Nigeria, much like many African nations, has seen an influx of counterfeit products from countries such as China and Taiwan.<sup>169</sup> These products are becoming a menace as some have exposed the nation to public health risks such as cancer and destruction of local markets such as the telecommunications market. The Chinese have been accused of deliberately flooding the Lagos markets with fake products. The Standard Organisation of Nigeria (SON) advocates for increased collaboration with other agencies in the government to monitor the country's borders for the sub-standard products.<sup>170</sup>

Enforcement of intellectual property rights is an urgent issue to deal with counterfeit products from other parts of the world and from the country itself. The Nigerian film and music industry are facing huge losses in revenue due to counterfeiting and piracy. The enforcement section within TRIPS Agreement facilitates a reliable implementation of the provisions of the agreement. TRIPS Agreement Article 61 provides for criminal procedures for intellectual property rights. Criminal measures within TRIPS Agreement are specifically applicable in the case of copyright piracy and trade mark counterfeiting on an industry or commercial scale. The measures may also be extended to cover infringement of intellectual property rights. This is if they are committed wilfully and on a commercial or industry scale<sup>171</sup>. Article 61 states that penalties can be applied for crimes at a 'corresponding gravity' including seizure, forfeiture, destruction and

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<sup>169</sup> Ken Nwogbo, 'Nigerians risk cancer, others as counterfeit phones flood market' *The Guardian Nigeria*, (7 September 2018) < <https://guardian.ng/business-services/nigerians-risk-cancer-others-as-counterfeit-phones-flood-market/>> accessed 3 December 2018

<sup>170</sup> Chima Nwokoji, 'Is China deliberately flooding Lagos markets with fake products?' *Nigerian Tribune* (24 March 2017) <https://www.tribuneonlineng.com/75816/> accessed 3 December 2018

<sup>171</sup> Article 61 TRIPS Agreement

imprisonment. The standards are minimal, and countries have different approaches to the application of penalties regarding infringement of intellectual property rights.

The Federal Court in Nigeria has jurisdiction in civil and criminal causes and matters that relate to intellectual property rights.<sup>172</sup> There are various regulatory frameworks for intellectual property rights for enforcement procedures. These include the Copyright Act<sup>173</sup> in sections 14 through to 22<sup>174</sup>, sections 25 through to 27<sup>175</sup> and section 29<sup>176</sup> that deal with the enforcement of copyright. The Patent and Design Act<sup>177</sup> in sections 25 and 26 make provisions for infringement. The Trade Marks Act<sup>178</sup> does not have the specific provisions that are evident in the Copyright Act. The Trade Marks Act gives a superficial reference to infringement in sections 3, 5, 6, 43 (5), 43 (6) and 44 of the Act.

Civil action is taken by the plaintiff who has suffered loss or been injured as a direct result of the actions of the infringer.<sup>179</sup> Criminal action is one that is instituted by the state or government.<sup>180</sup>

However, the challenge faced by intellectual property rights is the disregard given by the government and intergovernmental agencies. Intellectual property rights are not constitutionally protected.<sup>181</sup> The USA is an example of a country that protects intellectual property rights as a constitutional right.<sup>182</sup> Despite the presence of laws there are no government policies. Policies would define the responsibilities of the

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<sup>172</sup> Section 251 (1) (f) Constitution of the Federal Republic of Nigeria 1999 and Section 251 (3) Constitution of the Federal Republic of Nigeria 1999

<sup>173</sup> Cap C28 Laws of the Federation of Nigeria 2004

<sup>174</sup> These sections relate to the infringement of copyright

<sup>175</sup> These sections relate to infringement of neighbouring rights

<sup>176</sup> These sections relate to infringement of folklore protection

<sup>177</sup> Cap P11 Laws of the Federation of Nigeria 2004

<sup>178</sup> Cap T13 Laws of the Federation of Nigeria 2004

<sup>179</sup> John Cross, Leslie Abramson and Ellen Deason, 'Civil procedure: Cases, problems and exercises' (4<sup>th</sup> Edition, West Academic Publishing, 2016)

<sup>180</sup> John Scheb and John Scheb II, 'Criminal law and procedure' (7<sup>th</sup> Edition, Wadsworth Cengage Learning, 2011)

<sup>181</sup> Article 43 and Article 44 Constitution of the Federal Republic of Nigeria

<sup>182</sup> Article I Section 8 Clause 8 Constitution of the United States of America

intellectual property administrators.<sup>183</sup> The lack of policies gives rise to administrators defining their own plan. Once that particular director vacates the office, their strategies or plans are abandoned, and new ones pursued in accordance to the new director. This lack of definition allows the agencies to be exposed to both good or bad plans.

Policies create continuity and stability by fostering a common goal for all government agencies. The policy would establish provisions that promote the advancement of arts, creativity, technological progress, research and development on matters of copyrights, patents and other areas of intellectual property rights. The revision of laws will be enough to address the inappropriate and inadequate regulations. As part of the country's long-term policy review, the intellectual property laws should be made part of the legal and institutional frameworks. The review should align policies with the current trends in the country such as digital protection of copyright which is currently non-existent in the Copyright Act.

Finally, to ensure the protection of intellectual property would be the introduction of a specific law against counterfeiting and piracy. The local creative talent is in jeopardy due to the threat posed by individuals who hold no value in intellectual property rights.<sup>184</sup> Waziri notes that the Nigerian entertainment industry has lost over N81 billion (approx. 223 million USD).<sup>185</sup> Unfortunately, artists view their works as further income in the pockets of the counterfeiters. To alleviate this fear the Nigerian Copyright Commission would need to work together with the Nigerian Customs Service and other agencies to reduce the import of counterfeit goods and the spread of pirated goods onto the local market.

Nollywood has been left to grow from the basements of producers, marketers and all the individuals involved in the film production. Despite being the second largest film production industry in the world, UNESCO has excluded the country from its rating of

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<sup>183</sup> Carsten Fink, 'Enforcing intellectual property rights: An economic perspective' (*International Centre for Trade and Sustainable Development*, 2008) < <https://www.ictsd.org/sites/.../carsten-fink-enforcing-intellectual-property-rights.pdf> > accessed 10 December 2018

<sup>184</sup> K Waziri, 'Intellectual property piracy and counterfeiting in Nigeria: The impending economic and social conundrum' [2011] 4 *Journal of Politics and Law* 196

<sup>185</sup> *Ibid.* (p.196)

world production of feature films for theatrical release as they are viewed as unprofessionally made with commercial infomercials as the main objective.<sup>186</sup> This commentary can be attributed to the creative environment that Nigerian film professionals work in. In their environment, commercial enterprise is paramount, innovative development takes the backseat with the upholding of intellectual property rights not even making it on the scale. Professionals are in the industry to make quick cash. This can only be achieved by selling space on their movies to businesses for advertisements and producing subpar productions that can quickly make it onto the market and generate revenue.

It is paramount to note that consumers buy pirated and counterfeit goods due to the poverty and income inequality that is rampant in the country. 87 million Nigerians in extreme poverty living on less than 1USD (approx. N364) a day<sup>187</sup>. Hence these individuals are unable to afford the true value of goods. This will attract them to counterfeit products as they seek to have nice things but cannot afford the legitimate product. These consumers want to enjoy the same music, movies and benefit from medicine and technological advances and innovation.

Enforcement is not just about giving the holder more rights. The enforcement procedures in Nigeria have issues in inadequacy in relation to their penalties. Despite penalties meant to function as deterrents. Their benefit to the system is yet to be seen. Government should advance better, long term policies that will ensure better cooperation and awareness amongst responsible agencies. Once the authorities are working from the same page then deterrent of infringement may be more effective.

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<sup>186</sup> UNESCO, 'Emerging markets and the digitalization of the film industry' [2013] 14 UIS Information Paper 1 < [www.uis.unesco.org/.../emerging-markets-and-the-digitalization-of-the-film-industry-en\\_0.pdf](http://www.uis.unesco.org/.../emerging-markets-and-the-digitalization-of-the-film-industry-en_0.pdf) > accessed 8 December 2018

<sup>187</sup> Bukola Adebayo, 'Nigeria overtakes India in extreme poverty ranking' (*CNN World*, 26 June 2018) <https://edition.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html> accessed 20 December 2018

## **7. Conclusion and Recommendations (977)**

In an age of globalisation, countries need to nurture innovative and technological advances to stimulate growth and development. The strength of the intellectual property laws and procedures are assured of boosting economic growth and sustainability. Nigeria is part of the MINT nations whose demographic advantages and economic prospects have prompted renowned economist J. O'Neil to identify them as emerging markets to keep an eye on. These nations are currently experiencing double digit growth and, on the road, to fulfilling their economic potential.

Prior to the MINT countries, BRICS nations were touted as the emerging market nations to watch out for. However, BRICS experienced trade dispute settlements regarding copyright piracy and patent protection. To deal with these disputes, the BRICS broadened their trade law capacity, increased their capacity to use WTO law including TRIPS and coordinated participation in legal disputes with their respective domestic law. India and China for example, used TRIPS to negotiate better prices for antiviral drugs and the maintenance of domestic generics industry despite growing intellectual property agenda from the United States and Europe. If MINT nations including Nigeria are to learn from the BRICS, an examination of their laws and legislation's compliance, enforcement and integration of the TRIPS Agreement would be beneficial.

Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a World Trade Organisation (WTO) international agreement. TRIPS Agreement was enacted to stem piracy, counterfeiting and infringement of intellectual property. It sets out the minimum standards for the protection of intellectual property rights and procedures of enforcement. However, an international agreement is unlikely to fit the needs of all the members. Developed countries had the capacity to assess the effects of the Agreement and negotiate accordingly. Whilst the developing countries saw intellectual property as a novelty. Nigeria falls into the latter category. A criticism of the TRIPS is the restriction placed due to the wording and terms used within the Agreement.

The Agreement's implications on developing nations has faced intense scrutiny with concerns centred around its validity and insufficiency in protecting their intellectual property rights. Accusations are strife of the Agreement protecting interests of the developed countries whilst stifling access to medicines, knowledge and information. Current research is centred on developed countries and have found that influence and implications differ across countries. All the studies found that the stifling of the developed countries is evident, and this will widen the economic divide amongst the developing and developed countries. In Nigeria, the Federal High Court have jurisdiction over intellectual property cases according to the Constitution of the country. However, over the years, this jurisdiction has been questioned with inconsistent rulings being passed down and cases being heard in the Supreme Court and rulings made being upheld.

The Copyright Act 1988 lays out the laws and legislations regarding copyright rights and infringement in Nigeria. Nigeria has seen exponential expansion in the arts and culture sector. Nollywood is considered the second largest film industry in world behind Bollywood of India. To ensure young talent is stifled and discouraged from further developing the sector, copyright laws would need to protect intellectual property rights. However, the Copyright Act decrees that copyrights of international bodies can only be upheld if there is proof that Nigeria has enjoyed the same treatment in the applicant's host nation. This has proven problematic for some organisations as their copyrights have been infringed in Nigeria. This loophole within the Act has encouraged the trade of

counterfeit products in the country and may stifle the rise of young talent as they are denied full access to their potential revenues.

The Patent and Design Act 1970 protects the patent rights of a creator/ inventor in Nigeria. Patent rights are unbalanced in the employee/ employer relationship. Controversies arise over who has rights over an invention that has been created or discovered whilst using employer resources. The Act has been in enforcement for close to half a century and its tenets are dated in application to situations in the modern times. The pharmaceutical sector in Nigeria is facing the most backlash from this. Medicines that are sub-standard and dangerous to the health of the public are making it to the market. Organisation enacted to govern this have been in recent years brought before the courts as part and parcel of the accused in facilitating counterfeit medicines.

The Act is not in compliance with TRIPS Agreement as it allows the unregulated distribution of international patent products in the country. The Act does not account for sustainability and the country's carbon footprint. This goes against the TRIPS Agreement tenets that seek to protect human life, health and environment. The Act would require modernising and accounting for international patents, the environment and the greenhouse effect.

The Trade Mark Act 1965 allows for protection of trademarks that provide a distinction and identification of a business. The identification of unconventional marks has been explored in Nigeria as cases are brought before the court of counterfeit products that infringe on unconventional marks. TRIPS Agreement accounts for these unconventional marks and protects the trademark rights holders against these counterfeiters. The Constitution of Nigeria gives precedence of international treaties. However, this is inconsistent with rulings in the courts as some cases have upheld this tenet whilst others have not.

The enforcement of intellectual property rights in the country is an urgent issue due to counterfeit, infringed products. The country imposes fines, destruction of products and prison sentences for the sale and distribution of products. Civil and criminal cases are brought before the courts over patent, copyright and trademark infringement. The biggest challenge that intellectual rights have in the country is the disregard given by



government agencies including the police and the lack of knowledge and coordination on an interagency level. Once agencies gain the knowledge and begin to work together, infringement, counterfeiting deterrent and prosecution can be more effective in the country.

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