

**AN OVERVIEW OF INTELLECTUAL PROPERTY
RIGHTS: A MANAGEMENT PERSPECTIVE**

AUGUST, 2022

**PART I
INTRODUCTORY OVERVIEW OF INTELLECTUAL
PROPERTY RIGHTS**

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PART I

INTRODUCTORY OVERVIEW OF INTELLECTUAL PROPERTY RIGHTS

Intellectual property (IP) has become one of the most discussed topical issues in today's business world. It is that category of property that covers the intangible creations and products of the human intellect. That is, assets that are not physical in nature, rather, they are ideas, concepts and creations of the mind such as inventions, literary and artistic work, designs, symbols, names, and images amongst many others.

IP rights are the legal rights associated with creative effort or commercial reputation and goodwill.¹ These rights form an integral component of the overall health of every nation's economy. They are institutional mechanisms put in place to promote and encourage creativity and innovation as well as to protect and enable creators, owners and holders of an IP to enjoy exclusive ownership and control of the IP, the benefit accruable from the same and the access to commence necessary legal action and/or seek remedies in the event of infringements.

As with tangible assets, IP has to be identified, protected, and well managed. Except for its intangible nature as to form, IP shares similar features with other tangible assets, such that it has economic value (can be assigned, acquired, mortgaged, licensed, registered, leased, audited and used as collateral). It can be destroyed, stolen, lost, neglected, or insured and can be a subject of litigation.

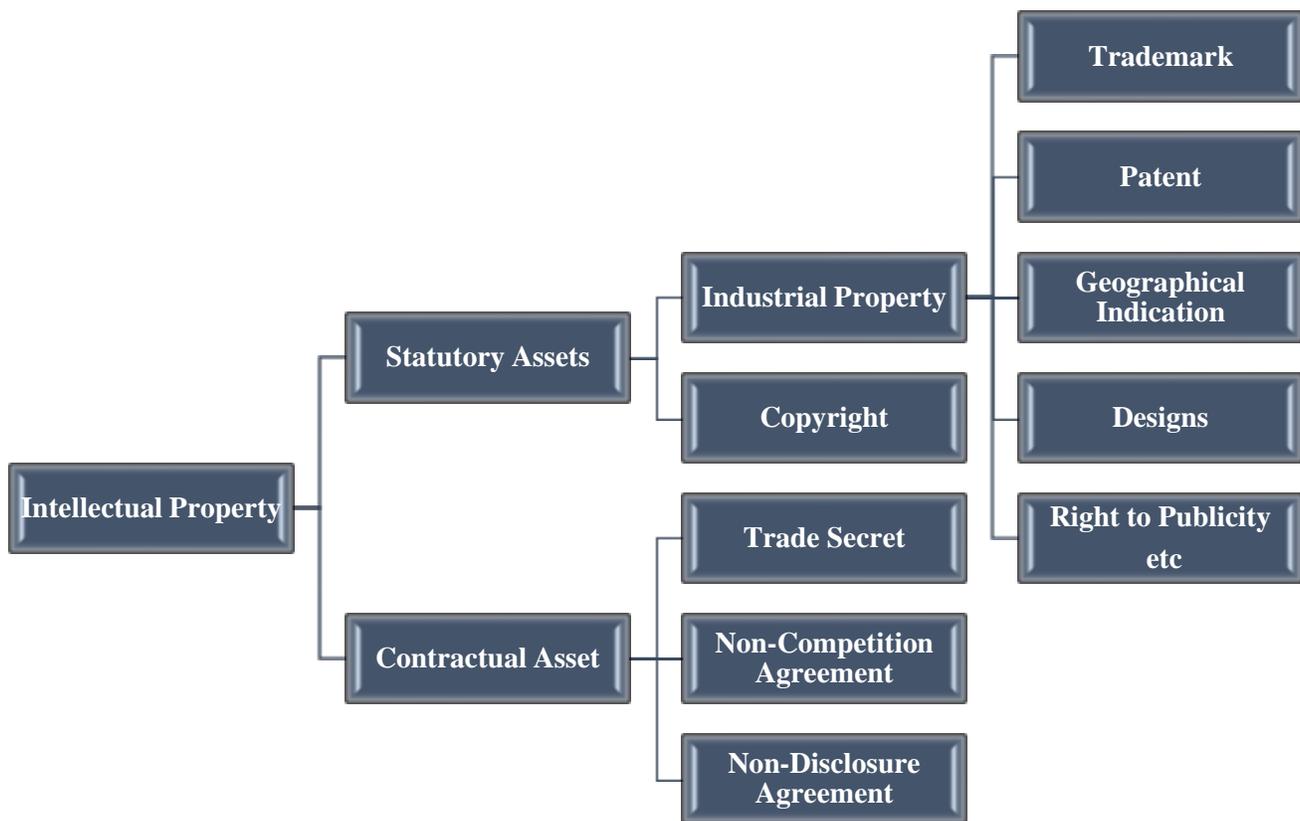
The rapid growth of the digital economy coupled with increases in computing power and storage creates global markets for content, innovations, and rights holders. However, the same also births new threats as well as helped evolve the existing threats (such as piracy, counterfeiting, unauthorized use, unfair competition, and illegal trade practices among many others) that without adequate control, will damage the creative industries.

IP rights provide the foundation upon which innovation is shared, creativity encouraged and consumer trust reinforced. Nonetheless, the digital world poses a new challenge, such as how to manage the balance when the consumer is the creator, when the marginal cost of copying is zero, when existing laws are inefficient or their enforcement is extremely difficult, and when "free" access to information and content is considered by many to be a right."²

IP may be divided into two broad categories, namely: statutory assets (defined and backed by statutory provisions) and contractual assets (arising from contractual obligation). The statutory assets are further segmented into copyright and industrial property.

¹ David Bainbridge: Intellectual Property, Financial Times Pitman Publishing; 4th ed., London; 1999; p.11

² A. Denton, "Intellectual Property Rights in today's digital economy", ITU News 7 (2011) available at https://www.itu.int/net/itunews/issues/2011/07/pdf/201107_38.pdf



A broader classification of the most notable IP rights includes:

- a. Patent
- b. Trademark
- c. copyright
- d. Geographical Indications
- e. Designs
- f. Trade Secret
- g. Right to Publicity

1. **Patent:** an exclusive right to protect any product or process which is novel, involves an inventive step and has an industrial application. These rights though for a finite period allow the right holder to utilize and exploit the invention without any form of interference in form of replication, usage and commercialization by third parties. A patentable invention must be novel, non-obvious and capable of industrial application.
2. **Trademark:** a recognizable sign, design, or expression that identifies and distinguishes the products and services of a particular enterprise from those of others.³ It protects the name, letters, calligraph, words, numeral, colour, font, symbol, shape, packaging and/or any combination of the above. In recent times, the protective wings of trademark have been extended to flavours and fragrances, three-dimensional representation, and even jingles associated with a brand. The most fundamental feature of a trademark is the distinctiveness of the identity to be protected.

³ <https://www.wipo.int/trademarks/en/>

3. **Copyright:** describes the rights that creators have over their literary and artistic works. By the nature of the rights, its protection survives the lifetime of the creator. It protects expressed originality and creativity and not ideas, procedures, methods of operation, or mathematical concepts as such works covered by copyright range from books, musical compositions, paintings, sculpture, architecture, photographs, drawings, choreography and films, to computer programs, databases, advertisements, maps, and technical drawings. The dimensions of rights available to the creator under copyright include the economic right (financial rewards via commercializing the creation); moral right (recognition and respect for the integrity of the creation) and neighbouring rights (protection of the right of all other authors associated with the creation).
4. **Geographical Indications:** refer to names and signs used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin such as agricultural products, foodstuffs, wine and spirit drinks, handicrafts, and industrial products. There must be an intimate connection and a clear link between the product (its qualities, characteristic and/or reputation) and the original place of origin, since its identity and quality is dependent on the product's place of origin.

The right obtainable under Geographical indication protects the registered products, the producer as well as the consumer. The right does not enable the holder to prevent a third party from making a product using the same techniques as those set out in the standards for that indication, rather it prevents and disallows a third party, the right over the sign that constitutes the indication. While a trademark distinguishes goods and services of one trader from another, Geographical location is an indicator of the purity and originality of distinctive goods in terms of the place of their origin.

5. **Designs:** design protects the visual appearance and ornamental aspect of a product or item (the way a product looks, its form and features) and gives you exclusive rights for that appearance to the extent that, if necessary, there is a legal right to stop an unauthorised party from producing or using your design.⁴

Industrial designs are applied to a wide variety of products of industry and handicraft items: from packages and containers to furnishing and household goods, from lighting equipment to jewellery, and from electronic devices to textiles. Industrial designs may also be relevant to graphic symbols, graphical user interfaces (GUI), and logos. Design is where function meets form, it is one of the key factors that attract users to a product, or leads users to prefer using one product over another.⁵ The standard to register a design is its newness and that it must have individual character, that is, the appearance must be different from the one already existing.

6. **Trade Secret:** this right protects and preserves the inventor's "know-how" as a commercial secret and the standard to the right is: the secrecy of such information; the information confers an economic benefit on its holder because the information is not publicly known; and the relentless effort to protect the information and maintain secrecy.

⁴ <http://ipo.guernseyregistry.com/article/4970/What-are-Design-Rights-#:~:text=A%20registered%20design%20protects%20the,producing%20or%20using%20your%20design.>

⁵ <https://www.wipo.int/designs/en/>

Trade secrets are a type of intellectual property that includes formulas, practices, processes, designs, instruments, patterns, or compilations of information that have inherent economic value because they are not generally known or readily ascertainable by others, and which the owner takes reasonable measures to keep secret.⁶ Intellectual property law gives the owner of a trade secret the right to restrict others from disclosing it, hence to maintain secrecy the holders of such secret information employs and institute special procedures in handling the information, which includes non-disclosure agreements (NDAs), work-for-hire and non-compete clauses.

7. **Right to Publicity:** protects public recognition and image of publicly known persons, celebrities or renowned persons, it acknowledges the commercial value of a famous person, or a performer and protects his proprietary interests. The right of publicity is an intellectual property right that protects against the misappropriation of a person's name, likeness, or other indicia of personal identity (such as a nickname, pseudonym, voice, signature, likeness, or photograph) for commercial benefit.⁷ This right is an evolving and developing area of the law that has similarities to trademark law and may also impact brand owners.

The public image of a celebrity is of immense value and involves a tremendous amount of money. Thus, it becomes important for such a person to protect his right so that nobody else exploits it or acquires unauthorized gains from it.

THE NIGERIAN IP ECOSYSTEM

The Nigerian IP regime is governed by a number of national statutes and ratified IP treaties in accordance with the provisions of section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) (as amended). The regulatory national statutes include the: Copyright Act (Cap. C28, LFN 2004); Merchandise Marks Act (Cap. M10, LFN 2004); Trademarks Act (Cap. T13, LFN 2004); Trade Malpractices (Miscellaneous Offences) Act (Cap. T12, LFN 2004); and the Patents and Designs Act (Cap. P2, LFN 2004).

More than ever the digital economy has laid a precedent that a viable economy is stimulated and driven by a competent IP regime which allows an enabling environment for creativity, innovation and research. Hence, establishing a strong correlation between robust IP rights and economic development. Unfortunately, Nigeria is home to one of the weakest intellectual property protection regimes which hamper the growth prospects of our already weak economy,⁸ making the country a target destination for counterfeits, pirated products, and illegal distribution of services.

These activities violate the proprietary rights of IP owners to reap the benefits of their inventions and hence, hamper the growth and development of intellectualism, innovation and the entire creative industry. Infringement of IP rights also has negative implications on the overall economy as it obstructs genuine investments by both domestic and foreign investors, hinders job creation

⁶ Lin, Thomas C.W. (8 October 2013). "Executive Trade Secrets". Notre Dame Law Review. 87 (3): 911. SSRN 2047462.

⁷ <https://www.inta.org/topics/right-of-publicity/#:~:text=The%20right%20of%20publicity%20is,or%20photograph%E2%80%94for%20commercial%20benefit.>

⁸ <https://www.pwc.com/ng/en/publications/intellectual-property-infringement-and-the-nigerian-economy.html>

and causes a loss of tax revenues to the government. Socially, widespread IP violations corrupt the cultural values and batter the national image of a country.⁹

“According to WIPO figures, there were only 200 patents granted to Nigerians in 2018, compared to 451 for South Africa. But patents granted to non-residents, i.e., foreigners, in Nigeria, was 642, compared with 4,295 for South Africa, which suggests more foreign interest in South Africa than Nigeria. In terms of trademark registration, the last available data for Nigeria was for 2013 when there were 4,369 trademark registrations for Nigerians and 1,048 for foreigners. But for South Africa, in 2018, there were 16,745 for residents and 15,247 for non-residents.”¹⁰

Frantic efforts made at strengthening IP rights and protection in Nigeria as well as encouraging investments in innovation and research have been riddled by piracy, counterfeiting, unauthorized/unlicensed use and unfair competition. To salvage the instant situation and birth an enabling and attractive IP ecosystem, the following challenges must be adequately addressed:

- a. Lack of IP awareness:** In Nigeria, the abuse of IP rights has become inevitable, largely due to the lack of adequate IP awareness among the generality of the populace (creators and users). Ignorance on the part of the creators has created an excuse for some of the IP infringements (particularly, copyright and trademark).

An average copyright infringer is either totally oblivious or inadequately aware of IP rights and the possible liabilities of his/her actions, rather, feels entitled to the usage of the infringed work or perceived himself to be doing the owner a favour (work/product promotion and publicity). Owners of the infringed IP rights, on the other hand, are unaware of the proprietary rights and benefits associated with their inventions, hence, are unconcerned about the existing and potential infringement and the unauthorized usage of their IPs, largely due to a lack of awareness of the existence of such IP rights, the detrimental implications of the infringement, the means to protect their inventions or how to enforce their right and prosecute infringers.

Ignorance on the part of IP policymakers and enforcement officers has further worsened the Nigerian IP regime. There is a need for a systemic awareness programme that involves all stakeholders at various stages on the evolving trends of IP policies and enforcement.

The culminating effect of the above is the undeveloped IP laws and judicial precedent; a continuing reign of IP ignorance and infringement as well as hindered Foreign Direct Investment (FDI), innovation, research and development and technology transfer which negatively impact entrepreneurs and consumers.

⁹ F. Olubanwo and O. Oguntuase “Strengthening Intellectual Property Rights and Protection in Nigeria” Banwo & Ighodalo (2019), available at: <https://www.mondaq.com/nigeria/trademark/788714/strengthening-intellectual-property-rights-and-protection-in-nigeria>

¹⁰ <https://businessday.ng/columnist/article/nigeria-needs-a-robust-intellectual-property-regime-for-economic-growth/>

- b. **Weak IP Legal Framework:** The strongest tool with which to restore Nigeria's IP protection and enforcement regimes are robust legislation and policy initiatives that prioritise IP protection. However, the Nigerian IP legal framework has failed to evolve and adequately align its provisions and structure to suit the dynamic IP development and innovation obtainable in the modern economy. Particularly in areas of registration, protection, enhancement and enforcement, thereby hampering investment in creativity, innovation and research. The existing framework is plagued with outdated and onerous statutory provisions, archaic and inefficient administrative systems and practices and requirements hostile to modern innovations.

For instance, the Trade Marks Act was enacted in 1967, the Copyright Act in 1988, and the Patents and Designs Act was enacted in 1971. The applicable laws have lost touch with and fail to contemplate the recent developments and trends in the global IP ecosystem, and therefore do not provide means, for protecting new developments and innovations in industrial property.

“Article 41 of TRIPS places an obligation on members to make available in their laws, enforcement procedures that permit effective action against any act of infringement of intellectual property rights including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. This is an area our Nigerian law is lagging behind. The penal sanctions contained in our Copyright Act are unreasonable and cannot thrive in modern times. They are insufficient to constitute a deterrent factor to prospective infringers. The Act was enacted in 1988 without any serious amendment till date. It is as obsolete as the dinosaur and requires immediate revision to meet modern-day realities. The judges cannot in enforcing the law go beyond the penal provisions of the law.”¹¹

There is a need for the purposeful and strategic development of an IP policy that recognizes the importance of a robust and virile IP rights legal framework. A framework that adequately evolves with the IP trends in protecting the interests of inventors by legally recognizing their proprietary rights over their inventions, penalizes Infringements of IP Rights, creates adequate remedies for infringed inventors, establishes competent institutions and strategies for the proactive and reactive enforcement measures available to inventors.

Another major contributor to the Nigerian weak IP legal framework is the operation of Section 12 of the 1999 CFRN, which provides for the domestication of international instruments for the same to be enforceable in Nigeria. This provision has enabled the unwillingness of relevant authorities against domesticating prominent multilateral IP

¹¹ Itanyi, Nkem. (2016). Nigeria and TRIPS: Positioning Nigeria for the Promotion of a Sustainable National Development. Medwell Journals. The Social Sciences 11. 4013-4019. 10.3923/sscience.2016.4013.4019.

treaties that holds the potential of bridging the gaps and lacunas in the Nigerian IP laws, policies and structure.

- c. **Lack of Private-Public Sector Collaborations:** the failure in birthing a competent and enabling IP regime in Nigeria has largely been due to the epileptic and uncomplimentary efforts and the lack of meaningful collaboration between the public and the private sector. The war against piracy, counterfeiting, unauthorized use of as well as other forms of IP rights violation cannot be effectively combatted without an effective and complimentary synergy between the public sector (government) and the private sector. There is the inevitable need for purposeful collaborations between the government and the private sector to dialogue, identify, and develop viable solution frameworks to the problems of IP rights infringements in Nigeria. The government must put in place adequate institutions, frameworks, effective policies and mechanisms to enable the private sector to build upon and make whole the intended competent and enabling IP regime.
- d. **Judicial IP Expertise Gap:** the evolving nature of IP rights in this digital economy requires judicial officers that are particularly knowledgeable in IP laws and operations, that is, sector experts and not just ones with the generic knowledge of dispute resolution as it is currently obtainable. Holding to the doctrine of stare decisis - which compels lower courts to follow established precedent of superior courts when ruling on cases with similar facts – it, therefore, becomes expedient that quality and meritorious judicial precedent be laid by judicial officers who are vast and knowledgeable in the sector as a result of their special training in IP and allied fields.
- e. **Administrative Bottlenecks:** IP registration, protection, enhancement and enforcement in Nigeria could best be described as a nightmare by some inventors and creators due to the administrative bottleneck that has hindered the birth of an enabling IP regime. Registration of industrial property is hampered by an archaic and not very efficient administrative system in Nigeria, creating a disincentive to personal and corporate investment in creativity and invention, with an overall negative impact on human and economic development¹².

*Since inception in 1967, the Registry has been riddled with several problems including but not limited to (i) lack of adequate funding; (ii) inadequate space for its operations; (iii) lack of well-trained personnel; (iv) lack of an electronic database. All these have resulted in a disorganized filing system whereby IP files get mislaid or lost, an unduly protracted IP registration process (some trademark applications are known to have been registered well after the expiration of the seven (7) years initial validity period of their registration) and opposition process, lack of qualitative rulings issued by the Registry, and lack of funding to efficiently and effectively run the Registry.*¹³

¹² *ibid*

¹³ *Ibid*

Likewise, the protection and enhancement of IP Rights, as well as enforcement against IP infringers, has over time not yielded much results holding to the inefficiency in achieving its deterrence objective. The objective of the enforcement is to prevent and discourage future infringement, incapacitate and rehabilitate defaulters as well as retribution for the victim of such infringement. Until the national laws and regulatory institutions can achieve such a level of deterrence, the enabling and attractive IP regime so desired remains a national fantasy.

CONCLUSION

The last decade has experienced a significant shift in the Nigerian creative industry, particularly amongst the younger generation. Sadly, the same dispensation has also experienced a sharp increase in IP rights infringement denying creators and inventors the full extent of their proprietary rights to their creations and inventions as well as denying the nation from attaining its potential economic growth. This is largely due to the uncurbed age-long entitlement right perceived by infringers, the inactions of creators and the weak national IP institutions, laws and strategies.

The lack of IP awareness, administrative and institutional bottlenecks, weak IP legal framework and the lack of collaboration between the private and public sectors has also given room to more infringements and discouraged creators' enforcement of their rights when infringed.

It has therefore become pertinent, particularly in the dispensation of the digital economy that for economic growth, there is a dire need to create and stimulate investment (both foreign and local) in Nigeria. However, nations without efficient IP regimes and an enabling IP environment have over time proven to be unfruitful to investors, hence, the need to address the Nigerian IP challenges, establish an enabling IP ecosystem that rewards creativity and innovation, protect creators and inventors from the woes of infringers, set-up an efficient IP protection and enforcement institutions, launch IP awareness campaign educating both creators and users on the proprietary rights of IP and the liabilities associated with infringement as well as updated IP laws and policies adaptable to national development and in sync with modern trend and practices.

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