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## Intellectual Property Right Enforcement Strategies: Nigeria as Case Study

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### Abstract

This article reviews legal framework for enforcement of IPRs internationally and in Nigeria, it identifies enforcement strategies employed by enforcement agencies (such as the Nigerian Police, Copyright Inspectors and the Nigerian Customs Service) in enforcing IPRs, highlights the challenges to an effective enforcement regime of IPR in Nigeria and proffers recommendations for legal reform.



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### 1.0 Introduction

Enforcement strategies give credence to the legal protection of intellectual property rights. Such strategies include internal procedural measures, legal procedure and regulatory mechanism among others. Intellectual Property Rights (IPRs) are the exclusive rights given to a person, for a certain period of time, upon the creation of works.<sup>1</sup>

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<sup>1</sup>WTO 'What are intellectual property rights?' <[https://www.wto.org/english/tratop\\_e/trips\\_e/intell\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intell_e.htm)> accessed 16 February 2021.

Speaking broadly, IPRs can be grouped into two namely, copyrights and industrial property. Copyright are the rights that creators or innovators have over their literary, musical and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings, among others.<sup>2</sup> Industrial property on the other hand relates to those intangible properties such as trademarks industrial designs and patents.<sup>3</sup>

In general terms, IPRs infringement is any breach of intellectual property rights without the consent of the right owner. According to the Black's Law Dictionary, it is the act of interfering with one of exclusive rights of a copyright, patent or trademark owner.<sup>4</sup> IPRs are said to be infringed when a work protected by IP laws is used, copied or otherwise exploited without having the proper permission from a person who owns those rights.<sup>5</sup> Examples of an IP infringement are *counterfeiting* and *piracy*. Counterfeiting is the practice of imitating genuine goods, often to inferior quality, with the intent to take advantage of the superior value of the imitated product. Piracy on the other hand is an unauthorized copying, use, reproduction and/or distribution of materials protected by intellectual property rights.<sup>6</sup>

The increase in infringement of IPR in Nigeria in recent times has been traced to the lackadaisical attitude of owners of artistic, musical and literary works, who are more interested in creating the works without taking steps to ensure protection of their legal rights. Another way in which IPRs are being infringed in recent times is the unauthorized reproduction, streaming, distribution and broadcast of protected works online or through social media without the permission or consent of the owner. Unfortunately some owners either out of naivety or ignorance of their right do not consider the unauthorized distribution of their works as an infringement. To some, it is beneficial in the sense that they are being promoted or their products marketed without any effort or resources being invested.<sup>7</sup>

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<sup>2</sup> WIPO 'What is Copyright' <<https://www.wipo.int/copyright/en/>> accessed 16 February 2021.

<sup>3</sup> Karius Tim (2016), 'Intellectual Property and Intangible Assets: Alternative Valuation and Financial Approaches for the Knowledge Economy in Luxembourg' <https://www.econstor.eu/bitstream/10419/126183/1/846567334.pdf> accessed 8 April, 2021.

<sup>4</sup> Bryan A. Garner, *Black's Law Dictionary*, (8th Edn, Thomson West Publishing, 2004) 796.

<sup>5</sup> European Union IP Helpdesk 'What is an IP infringement: Infringement and Enforcement?' <<https://www.iprhelpdesk.eu/node/3188>> accessed 16 February, 2021.

<sup>6</sup> See Definition of Piracy on Google Dictionary, available online at [https://www.google.com/search?q=definition%2C+piracy&rlz=1C1GCEU\\_enNG821NG821&oq=definition%2C+piracy&aqs=chrome..69i57j0i22i30l8.5441j0j15&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=definition%2C+piracy&rlz=1C1GCEU_enNG821NG821&oq=definition%2C+piracy&aqs=chrome..69i57j0i22i30l8.5441j0j15&sourceid=chrome&ie=UTF-8) accessed 30 March, 2021.

<sup>7</sup> Dorcas A. Odunaike, 'Personality Merchandising in Nigeria: Prospects and Challenges', (2016) 55, *Journal of Law, Policy and Globalization*, ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) <<https://iiste.org/Journals/index.php/JLPG/article/view/34237/35209>> accessed 16 February, 2021.

Enforcement means the act of ensuring that a system is adhered to or obeyed.<sup>8</sup> According to the Black's Law Dictionary, enforcement is an act or process compelling obedience or compliance with a law, mandate, command, decree or agreement.<sup>9</sup> In terms of IPRs, enforcement refers to the prevention of infringement of rights or obtaining remedies for infringement of conferred rights. The importance of enforcement of IPR cannot be underestimated, enforcement of right is important since without it, the law is of no use to those it seeks to protect.<sup>10</sup> A survey conducted by the World Intellectual Property Organization's Advisory Committee on enforcement<sup>11</sup> indicated that an under-estimation of the value of IPRs has contributed to ineffective enforcement overall.

Existing IP laws confer legal protection on IPRs to ensure that beneficiaries of these rights get maximum benefit due from the exploitation of their creative works. However, the total enjoyment of these benefits is being tampered with by persons who make fake products from these original creations or rob the original creators of their goodwill by imitating the original products. Hence, the need to ensure proper enforcement of IPRs through effective laws in order to prevent piracy, counterfeiting and unauthorized copying of creative works.<sup>12</sup>

## 2.0 International Framework on Enforcement of IPRs

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (WTO).<sup>13</sup> The TRIPS Agreement, which came into effect on 1 January 1995 sets down minimum standards for the regulation by national governments of many forms of intellectual property (IP).<sup>14</sup> The agreement introduced intellectual property law into the multilateral trading system for the first time and remains the most comprehensive multilateral agreement on intellectual property till date.<sup>15</sup>

Of great relevance to this article is the provision on enforcement of IPR, embedded under Part III of the Agreement. Article 41 falls under this section and it provides that member states should make provisions for specified enforcement procedures

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<sup>8</sup> Adetola Adeleye, 'Intellectual Property Rights Enforcement in Nigeria: Regulatory Agencies to the Rescue' (2016) *Journal of International Law*, <<https://pennjil.com/intellectual-property-rights-enforcement-in-nigeria-regulatory-agencies-to-the-rescue/>> accessed 16 February, 2021.

<sup>9</sup> Bryan A. Garner, *Black's Law Dictionary*, (8th Edn. Thomson West Publishing Coy, 2004), 569.

<sup>10</sup> Ifeoluwa A. Olubiyi 'A Comparative Analysis of Copyright Enforcement Provisions in Nigeria: Maximizing the Current Legal Regime' (2014) 5 *Nnamdi Azikiwe University, Journal of International Law and Jurisprudence*, <<https://www.ajol.info/index.php/naujilj/article/view/136305>> 89-104.

<sup>11</sup> UN WIPO Advisory Committee on Enforcement, 8th Sess., UN Doc.WIPO/ACE/8 (December, 19-20, 2012).

<sup>12</sup> KM Waziri, 'Intellectual Property Piracy and Counterfeiting in Nigeria: The Impending Economic and Social Conundrum' (2011) 4 *University of Abuja Journal of Politics and Law* 196.

<sup>13</sup> World Trade Organisation: Overview: the TRIPS Agreement <[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 19 February, 2021

<sup>14</sup> See Article 1(3) of the TRIPs Agreement <[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm#:~:text=The%20TRIPS%20Agreement%20is%20a,own%20legal%20system%20and%20practice](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#:~:text=The%20TRIPS%20Agreement%20is%20a,own%20legal%20system%20and%20practice)> accessed 19 February, 2021.

<sup>15</sup> *Ibid.*

under their laws to allow effective actions to be taken against infringers of IPRs.<sup>16</sup> Such enforcement procedures shall be fair, equitable, reasonable, quick and affordable.<sup>17</sup> It however provides that it is not compulsory to have a distinct court for matters that pertain to enforcement of IPRs.<sup>18</sup>

Articles 42-49 provides for civil and administrative procedures and remedies. The purport of the provision is that member states should in the course of civil and administrative procedures for enforcement of IPRs ensure that such procedures are fair and equitable<sup>19</sup> It further provides that decisions shall be reached based on evidence presented before the two parties<sup>20</sup> and if the decisions were reached by an administrative authority, there shall be an opportunity for judicial review.<sup>21</sup>

Article 44-46 provides that member states should make provisions for right holders to have access to the following remedies when seeking enforcement of their IPRs, namely injunction,<sup>22</sup> payment of damages which may include recovery of profits and payment of cost of the case and such damages must be compensatory and commensurate with the injury suffered as a result of the infringement,<sup>23</sup> order of destruction of the infringing goods and that for trademark, removal of unlawfully affixed trademark is not sufficient reason to not destroy the infringing goods,<sup>24</sup> order to infringer to inform right holder of the identity of third persons involved in the production and distribution of the infringing goods or services.<sup>25</sup> To promote fairness the Law also provides that member states should provide that persons who abuse enforcement procedures should indemnify the party who suffered the abuse. <sup>26</sup>

Article 50 mandates member states to put in place provisional measures to prevent infringing goods from entering the channel of commerce.<sup>27</sup> This section contains provision on special requirements on border measures, to the effect that member states should adopt procedures to ensure right holder suspecting the importation of infringing goods can with provision of adequate evidence and proof lodge complaints with competent authorities who would inform the custom authorities to suspend the release of such goods into free circulation.<sup>28</sup>The importer or owner of the goods shall be notified of the suspension<sup>29</sup> and may have an action instituted against them by the right holder.<sup>30</sup> The detained goods may be inspected by the parties involved.<sup>31</sup>There must also be a provision that allows the destruction of

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<sup>16</sup> Article 41(1) TRIPs Agreement.

<sup>17</sup> Article 41(2).

<sup>18</sup> Article 5.

<sup>19</sup> Article 42.

<sup>20</sup> Article 43.

<sup>21</sup> Articles 3 & 4.

<sup>22</sup> Article 44.

<sup>23</sup>Article 45.

<sup>24</sup> Article 46.

<sup>25</sup> Article 47.

<sup>26</sup> Article 48.

<sup>27</sup> Article 50.

<sup>28</sup>Article 51.

<sup>29</sup>Article 54.

<sup>30</sup> Article 55.

<sup>31</sup> Article 57.

such infringing goods without prejudice to other rights of action open to the right holder.<sup>32</sup> However, there should also be a provision by the member states, that should the detention of goods be wrongful, the importer and the owner of the goods must be indemnified.<sup>33</sup>

By Article 61 member states are mandated to make provision for criminal procedures and penalties applicable in cases of wilful trademark counterfeiting or copyrights piracy on a commercial scale and other IPR infringements. It provides that punishments in such instances should serve as deterrent to others and must correspond with gravity of offence committed.<sup>34</sup> The punishments may include: fines, imprisonment, seizure, destruction and forfeiture of goods.

The provisions of Part III of TRIPS as reviewed above are the minimum standards required to be provided for by every member state as far as enforcement of IPRs is concerned. Countries are however, allowed to provide for stiffer penalties. Every WTO member is expected to ratify TRIPS because all WTO agreements are compulsory for WTO members and TRIPS is part of WTO agreement.<sup>35</sup> However, countries were given transition periods depending on what category they belong to. Developed countries had one year, developing countries and transitioning economies had four years, least developing countries had eleven years which all expired January 1 1996, 2000, 2006 respectively.<sup>36</sup> This implies that by this year 2021, all member states of the WTO should have implemented all the provisions of TRIPS. Unfortunately, several countries, Nigeria inclusive, are yet to implement all the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights.<sup>37</sup>

### **3.0 Legal Framework of Enforcement of IPRs in Nigeria**

Laws prohibits infringements of rights, thus existing intellectual property laws enhance defence of IPRs against infringements by 3<sup>rd</sup> parties. This section focuses on the examination of enforcement of IPR as provided for under the Copyright Act,<sup>38</sup> the Trade Marks Act,<sup>39</sup> Trade Mark Malpractices (Miscellaneous Offences) Act,<sup>40</sup> Patent and Industrial Designs Act,<sup>41</sup> Counterfeit and Fake Drugs and Unwholesome Processed Food (Miscellaneous Provision) Act,<sup>42</sup> Cybercrimes

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<sup>32</sup>Article 59.

<sup>33</sup>Article 56.

<sup>34</sup>Article 61.

<sup>35</sup> World Trade Organization, 'Intellectual Property TRIPS-Frequently Asked Questions' <[https://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm#Who'sSigned](https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who'sSigned) >accessed 24 November 2020.

<sup>36</sup> Ibid.

<sup>37</sup> See 'Members Discussed TRIPs Waiver, LDC Transition Period and Green Tech Role for Small Business' <[https://www.wto.org/english/news\\_e/news21\\_e/trip\\_11mar21\\_e.htm](https://www.wto.org/english/news_e/news21_e/trip_11mar21_e.htm) > accessed 30 March, 2021.

<sup>38</sup> Cap C28 Laws of the Federation of Nigeria, 2004.

<sup>39</sup> Cap T4 Laws of the Federation of Nigeria, 2004.

<sup>40</sup> Cap T11 Laws of the Federation of Nigeria, 2004.

<sup>41</sup> Cap P2 Laws of the Federation of Nigeria, 2004.

<sup>42</sup> Cap F34 Laws of the Federation of Nigeria, 2004.

(Prohibition, Prevention, etc.) Act 2015 and Merchandise Marks Acts<sup>43</sup> among others.

The Copyright Act 1988, as amended, is the applicable law on copyright matters in Nigeria. The Act makes provision for works that are eligible for copyright protection, namely literary works, musical works, artistic works, cinematography films, sound recordings and broadcast.<sup>44</sup> The copyright holder is vested with the exclusive right to control the production, publication, performance and distribution among others of the copyrighted works.<sup>45</sup> The author of the copyrighted work is also vested with moral right to claim authorship of the work<sup>46</sup> and the economic right to share in the proceed from sales of the work<sup>47</sup> Anyone who without the authority of the copyright holder engages in any act with regards to the copyright work which violates the right of the owner of the copyright shall be guilty of copyright infringement.<sup>48</sup> Section 16 of the Act provides that infringement of copyright is actionable and the copyright owner, his assignee or executive licenses can institute an action in the Federal High Court located in the jurisdiction where the infringement occurred.<sup>49</sup>

The Act also provide for remedies that may be sought when bringing an action for infringement. Such remedies are: damages, injunction and account for profit among others<sup>50</sup> The copyright holder also has the right to convert the equipment used for producing infringing goods to his own as such equipment are deemed to be the property of the copyright owner, assignee or exclusive licensee under the Act.<sup>51</sup>

Section 20 makes provision for criminal liability of persons who make or cause to be made for sale, import or cause to be imported, possesses, sells, lets for hire or distributes infringing copies of copyrighted works. Depending on which of the crimes the infringer is guilty of he may be fined ₦1000 per copy or 2 years imprisonment or ₦100 per copy or 2 years imprisonment with an order by the Court for destruction of such goods.

Section 21 of the Act allows the Nigerian Copyright Commission (NCC) with the consents of the minister to prescribe anti-piracy device in connection with any copyright work. Anyone who contravenes such anti-piracy device shall be guilty of an offence and upon conviction is liable to a fine of ₦100000 or imprisonment for a term not exceeding 12 months or both. Any person who import into Nigeria or possesses the anti-piracy device without the consent of the commission shall be guilty of an offence and is liable on conviction to a fine not more than ₦500000 or imprisonment for a term not exceeding 5 years or both.<sup>52</sup> Anyone who possesses,

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<sup>43</sup> Cap M10 Laws of the Federation of Nigeria, 2004.

<sup>44</sup>CRA 2004 Section 1.

<sup>45</sup>CRA 2004 Section 6.

<sup>46</sup> CRA 2004 Section 12.

<sup>47</sup> CRA 2004 Section 13.

<sup>48</sup> Section 15.

<sup>49</sup> Section 16.

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*

<sup>52</sup> Section 21 (3).

reproduces or counterfeit prescribed anti-piracy device shall be guilty of an offence liable to imprisonment of not more than 5 years jail term or a fine not exceeding ₦500000 or both.<sup>53</sup> Anyone who fails to keep the copyright register as required or causes a false entry into the register and pillows such false entry to be produced in evidence shall be guilty of an offence and liable to a fine not exceeding ₦10000.<sup>54</sup> Section 24 provides that civil and criminal action can be taken concurrently for the same infringement.

According to Section 25, the court upon an ex-parte application supported by an affidavit proving reasonable cause for suspecting infringement may order inspection of premises at a reasonable time by day or night accompanied by police-officer not below the rank of an Assistant Superintendent of Police and should infringing goods be found, allow the seizure and detention of such goods. Any person who provide false information leading to the court granting an order for inspection shall be liable to a fine of ₦1000.<sup>55</sup>

Part II provides for protection of neighbouring rights, this include performers right and expression of folklore. Infringement of performers right is actionable by the right holder and the court can grant remedies which may include damages, injunction, account for profit or conversion.<sup>56</sup> Furthermore, such persons would also be criminally liable, ignorance or lack of awareness that his conduct constitutes an infringement may exempt him from liability. If found guilty, an offender may be fined at most ₦10,000 as an individual or at most ₦500,000 as a body corporate.<sup>57</sup> For infringements of rights in expressions of folklore ₦100,000 or 12 months or both, ₦500,000 for body corporate.<sup>58</sup>

In respect of trademark, there are several laws governing the administration of trademarks in Nigeria, such as the Trademarks Act 1965, The Merchandise Marks Acts 1887,<sup>59</sup> The Trade Mark Malpractices (miscellaneous offences) Act,<sup>60</sup> Counterfeit and Fake Drugs and Unwholesome Processed Food (Miscellaneous Provision) Act<sup>61</sup>and the Cybercrimes (Prohibition, Prevention etc.) Act 2015.<sup>62</sup>

The Trademarks Act (TMA) defines trademark as

a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person and

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<sup>53</sup> Section 21.

<sup>54</sup> Section 23.

<sup>55</sup> Section 25 (2).

<sup>56</sup> Section 29.

<sup>57</sup> Section 30.

<sup>58</sup> Section 33.

<sup>59</sup>Cap M10 Laws of the Federation of Nigeria 2004.

<sup>60</sup> Cap T12 Laws of the Federation of Nigeria 2004.

<sup>61</sup> Cap C34 Laws of the Federation of Nigeria, 2004.

<sup>62</sup>[https://www.cert.gov.ng/ngcert/resources/CyberCrime\\_Prohibition\\_Prevention\\_etc\\_Act\\_2015.pdf](https://www.cert.gov.ng/ngcert/resources/CyberCrime_Prohibition_Prevention_etc_Act_2015.pdf) accessed 19 February, 2021.

means in relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of this Act.<sup>63</sup>

The TMA protects trademark under two parts; Part A and Part B. Trademark registrable under Part A are marks that contain one or more of the following particulars:<sup>64</sup>the name of a company, individual or firm represented in a special manner; the signature of the registration applicant or a predecessor in his business; an invented word or words; any word that is not directly descriptive of the goods or services and not a geographical name; any distinctive mark.

Part B allows the registration of a mark that is not sufficiently distinctive to qualify for registration under Part A in as much as the mark is capable of being distinctive.<sup>65</sup> “For a mark to be registrable under this part, it must be capable of distinguishing goods in respect of which it sought to register”.<sup>66</sup> Hence be it registration under Part A or B one can state that for a mark to be registered as a trademark it must be distinctive.

According to the Court in *J.H Henkes Distelery v Netherlands Distileries*<sup>67</sup> the onus is on the applicant to satisfy the Registrar or Court that the Trade Mark sought to be registered is not likely to deceive or cause confusion. Upon registration the proprietor of a registered trademark is vested with the exclusive right to the use of the trademark in respect of the goods it was registered for.<sup>68</sup> Where an identical mark is published for registration, he can file oppositions within sixty days of the publication of the identical mark in the trademark journal and such opposition is filed by filing a notice of opposition and statutory declaration.<sup>69</sup>

According to Kelly,<sup>70</sup> “a trade mark is infringed if a person other than the proprietor or permitted user, uses in relation to goods covered by the registration one or more of the Trade Marks’ essential particulars. The identification of an essential feature depends partly upon the Court’s own judgement and partly upon the burden of evidence”.<sup>71</sup> Where the trademark owner suspects that infringement has occurred and infringing goods are being made, he can apply to court for an order for search and seizure of such infringing goods. He can decide to collaborate with law enforcement agencies dealing with the sector where such infringement is happening for instance NAFDAC if it is pharmaceuticals. He can decide to alert the public of the acts of the infringer through publications such as newspapers. He can apply to court for injunction reliefs, damages and other monetary reliefs, Anton-pillar order and account of profit among others.

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<sup>63</sup> Section 67, Trade Marks Act, Cap. T4 Laws of the Federation of Nigeria, 2004

<sup>64</sup> Section 9.

<sup>65</sup> Section 10.

<sup>66</sup> Adejoke O. Oyewunmi, *Nigerian Law of Intellectual Property* (University of Lagos Press 2015) 146.

<sup>67</sup> (1917-1976) 1 ILPR, 53 at 54.

<sup>68</sup> Section 5, Trade Marks Act, Cap T4 Laws of the Federation of Nigeria 2004.

<sup>69</sup> Section 20.

<sup>70</sup> Kelly on Trade Marks, 8<sup>th</sup> Edition at 264, cited in *Oladipo & Tinuola v Thawardas* (1917-1976) 1IPLR 189 at 193.

<sup>71</sup> *Ibid.*

The Act provides that the falsification of trademark register and false representation of a mark as registered are criminal acts and anyone found guilty of such pays a fine of ₦200 or 7 years imprisonment.<sup>72</sup> The trademark Act is silent on the remedies available for infringement of rights of trademark owners. However, there are other laws which provides for punishment for infringement of trademarks, these laws are examined hereunder. It is noteworthy that the Court has held in *John Sinclair v British American Tobacco*<sup>73</sup> that while “broad principles laid down in English cases should be applied, the trade mark laws in this Country should be administered with regard to local conditions”.

The Trade Mark Malpractices (Miscellaneous Offences) Act provides that the following shall constitute criminal act; false packaging, false labelling, offering for sale or sale or advertising of any product that is false or likely to create wrong impression as to quality, brand name and value among others. Anyone guilty of these offences shall be liable to a fine not less than ₦50,000.

The sale, distribution, importation and possession of fake drugs or unwholesome processed food is prohibited and made criminal under counterfeit and fake drugs and unwholesome processed food (miscellaneous provision). Any person found guilty of this shall upon conviction be liable to fine, imprisonment or both as well as forfeiture of the proceeds of such trade.

The Cybercrimes (Prohibition, Prevention, etc.) Act 2015 imposes criminal action for unauthorized usage of trademark online. Section 25 of the Act provides as follows:

A person who, intentionally takes or makes use of a name, business name, domain name or other word or phrases registered, owned or in use by any individual, body corporate or belonging to either the Federal, State or Local Government in Nigeria, on the internet or any other computer network, without the authority or right, and for the purpose of interfering with their use by the owner, registrant or legitimate prior user, commits an offence under this Act and is liable on conviction to imprisonment for a term of not more than 2 years or a fine of not more than ₦5,000,000.00 or both.

The Merchandise Marks Act (MMA) makes provision for the offences relating to trademarks and trade descriptions. Anyone who forges or falsely apply to goods any trademark, has possession of any instrument used for forging trademarks is guilty of an offence and such persons shall be liable to imprisonment for a term of two years or to a fine upon conviction to a High Court.<sup>74</sup> If it is a summary conviction before a magistrate court such person shall be liable to imprisonment for a term of 6 months or a fine of #100. Furthermore, they shall also forfeit anything be it equipment or chattel in relation to which the offence has been

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<sup>72</sup> Sections 60 and 61.

<sup>73</sup> (1917-1976) 1 ILPR 48 at 49.

<sup>74</sup> Section 3, Merchandise Marks Act, 2004.

committed.<sup>75</sup> A person is guilty of forging a trademark is without the permission of the proprietor of the proprietor of the trademarks makes that trademark or something closely similar to that trademark or he falsifies any genuine trademark.<sup>76</sup> Section 11 provides that forfeited goods may be destroyed or disposed as directed by the court. The Act provides for limitation of prosecution and the time for such limitation is 3 years after the commission of the offence or 1 year after the discovery by the prosecutor.<sup>77</sup> The Act also prohibits importation into Nigeria of goods which will be liable forfeiture under the Act.<sup>78</sup> Any person guilty of false representation as to warrant shall be liable on summary conviction to a fine of #40.<sup>79</sup> The court can make an order for payment of cost by the defendant to the prosecutor or by the prosecutor to the defendant depending on the circumstance of the case.<sup>80</sup>

In Nigeria, Patents and Industrial Designs are regulated by the Patents and Designs Act 1970 (PDA).<sup>81</sup> Section 6 provides for the right of the patentee which includes the right to prohibit another person from making, importing, selling or using a product, act of applying a process and so on without his consent. Section 19 makes provision for the right of the registered owner of an industrial design. He shall have exclusive right to reproduce the design and to sell, import or utilize for commercial purpose a product reproducing the design. The tenure of registration is five years at first instance and can be renewed for two further consecutive period of five years.<sup>82</sup> Section 24 provides that the patentee or owner of an industrial design can assign, transfer by succession or hold in joint ownership his patent or design. However, the assignee or transferee must also register the patent or design and pay prescribed fees.<sup>83</sup>

The PDA further provides that any person who does any of the acts mentioned in Section 6 and 19 with regards to another's patent or design without consent of the patentee or registered owner of the design is said to have infringed their IPRs. The rights of the patentee and the owner of the designs are only infringed when the patented invention or innovation or the design are used for commercial and industrial processes. Furthermore, anyone who does or causes anyone to do any of these acts without the permission of the registered owner has infringed the IPR of the registered owner.<sup>84</sup> The jurisdiction to hear matters arising from PDA is vested in the Federal High Court.<sup>85</sup> Section 28 of the Act provides that the Federal Civil Service Commission shall appoint a Registrar of patents and designs and that he shall keep register of patents and designs.

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<sup>75</sup> *ibid*

<sup>76</sup> Section 4.

<sup>77</sup> Section 13.

<sup>78</sup> Section 14.

<sup>79</sup> Section 18.

<sup>80</sup> Section 12.

<sup>81</sup> Cap P2, Laws of the Federation of Nigeria 2004.

<sup>82</sup> Section 20.

<sup>83</sup> Section 24 (3).

<sup>84</sup> Section 25 (1).

<sup>85</sup> Section 26.

Section 29 provides that a patent or registered design shall have the same effect against the state as against an individual. This means in simple terms that both the state and individuals are not allowed to infringe on the rights of the patentee or the registered owner of the design and the patentee or design owner shall have the right to take action against anyone who infringes on his right be it the state or an individual.

#### **4.0 Regulatory Mechanisms by Administrative Bodies**

There are some administrative agencies that were established by statute to regulate copyright and matters related to it. Although some of these sectors are not directly responsible for the regulation and enforcement of IPRs they nonetheless assist in curbing circulation of counterfeiting goods which are often times produced through means that infringe on IPRs. Some of these administrative agencies are the Nigerian Copyright Commission (NCC) and National Agency for Food and Drug Administration Control (NAFDAC), Nigerian Custom Service (NCS), among others. Details of their activities related to enforcement of rights are explained hereunder.

The Nigerian Copyright Commission (NCC) is a corporate body established under the Nigerian Copyright Act (CRA). Section 34(1) established the commission and the commission is to carry out the following functions: enforcement of the provisions of the CRA; supervise Nigeria's position on copyright related international conventions and advise the government on what to do with regards to such conventions; regulate bilateral or multilateral treaties on copyright which the country may decide to conclude with other countries; enlighten the members of the public on copyright; keep data of Nigerian authors and their works.

The summary of the functions of the commission is to administer, regulate and enforce Copyright in Nigeria. Since its formation, the commission has adopted several measures to achieve its aims and carry out its functions. The commission is headed by a Director General (DG) and the current DG is John Asein under whose control the commission has been divided into various active departments. The departments are: regulatory department, enforcement department, public affairs department, administrative department, legal unit, governing board and the internal audit department.<sup>86</sup>

In the bid to curb piracy, the NCC in 2005 launched the Strategic Action Against Piracy (STRAP) which has an alternative dispute resolution arm named the Copyright Litigation and Mediation Programme (CLAMP).<sup>87</sup> A similar strategy with STRAP created under the current administration is the Medium Term Corporate Plan and Strategy (MTCPS) which was designed to meet ten goals.<sup>88</sup> Some of the goals being to generate funds for the commission, improve legal

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<sup>86</sup> Nigerian Copyright Commission, 'About the Commission' <<http://www.copyright.gov.ng/index.php/about-us/about-the-commission>> accessed 11 December 2020.

<sup>87</sup>WIPO Magazine, 'STRAP and CLAMP-Nigeria Copyright Commission in Action' <[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 15 December, 2020.

<sup>88</sup>ibid.

framework of copyright and create awareness for copyright among others.<sup>89</sup> STRAP was implemented on three main pillars which are: enlightenment and education of copyright holders and users, enforcement of copyrights and administration of copyrights. It was reported that CLAMP settled 11 cases out of court.<sup>90</sup>

In furtherance of the provision of the CRA that the NCC can make regulations on copyright matters, several regulations have been made since the last amendment to the CRA, some of which are Copyright Reciprocal Extension Regulation 1972, Copyright Security Devices Regulation 1999, Copyright Video Rental Regulation 1999, Copyright Optical Disc Regulation 2006, Copyright Collective Management Organization Regulation 2007 and the Copyright Levy on Materials Order 2012.

The commission has made effort to work with right holders to enhance enforcement of IP and as a result established collecting societies which are “association of copyright owners formed with the objective of negotiating and granting copyright licence and collecting royalties on behalf of copyright owners and distributing same to them.”<sup>91</sup> Examples of such collecting society are, Reproduction Rights Organization of Nigeria (RERONIG) a collecting society for literary works and publishing, Musical Copyright Society of Nigeria (MCSN) a collecting society for musical works, among others.

The NCC has an official website where it gives reports of its regulatory and enforcement activities. Its enforcement activities are carried out by its enforcement unit, whose main functions are, re-raid operations, surveillance activities and intelligence gathering and monitoring of copyrights violation, anti-piracy raid activities which involves identifying, entering and searching places suspected to contain counterfeited or pirated goods to examine such materials and seize them if the suspicions are true, post-raid activities which includes investigation for prosecution of cases and institution of cases in courts, management of exhibits gotten from raid to make it available and admissible in evidence, advising the DG regularly on means of promoting effective enforcement of copyrights.

In furtherance of its functions, the NCC arrested seven book pirates in Abia State during an enforcement operation and arraigned them on October 9, 2020. Four of the suspects were charged for importation, being in possession of, selling, exposing or offering to sell infringing goods while the other three were charged for being in possession of, selling, exposing or offering to sell infringing goods.<sup>92</sup>

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<sup>89</sup>ibid.

<sup>90</sup>ibid.

<sup>91</sup> Nigerian Copyright Commission, ‘Collective Management Organization’

<<https://copyright.gov.ng/collective-management-organizations/>> accessed 18 December 2020.

<sup>92</sup>Nigerian Copyright Commission, ‘Copyright Commission Arraigns Seven Book Piracy Suspects in Federal High Court Umuahia’ NCC News (Nigeria, 15 October 2020

)<<https://copyright.gov.ng/copyright-commission-arraigns-seven-book-piracy-suspects-in-federal-high-court-umuahia/>> accessed 23 December 2020.

In Lagos and Onitsha, NCC arrested 15 pirates during a raid which took place on September 3 2020.<sup>93</sup> Pirated Christian devotional books worth over half a million naira were confiscated by copyright inspectors on August 28 2020 during raids with armed police in Idumota, Ajegunle and Onitsha main market after a complaint by Apostolate of the Precious Blood of Jesus Christ, Olo in Ezeagu Local Government, Enugu.<sup>94</sup>

Some other activities of the commission as contained in its 2017 annual report include, conduct of ninety-nine anti-piracy surveillance, arrest of seventy suspected pirates, confiscation of three shipping containers of infringing goods, ratification of four treaties,<sup>95</sup> issued one thousand two hundred and thirty-seven Copyright Registration Certificate. Through its various activities, the commission ensure creation of awareness on copyright matters, the enforcement of copyright and the membership of Nigeria as a party to relevant international conventions on copyright.

The National Agency for Food and Drug Administration Control (NAFDAC) is a body responsible for the regulation and control of importation, exportation, manufacture, advertisement, distribution, sale and use of foods, drugs, cosmetics, medical devices, packaged water and chemicals, generally known as regulated products. NAFDAC can help enforce IPR indirectly most especially patents and trademarks. Products that fall under the regulation of NAFDAC undertake mandatory registration. Part of the requirement for such registration is submission of ownership of trademark for branded regulated products. Where there is the use of an infringed trademark in respect of a NAFDAC regulated product, a petition can be presented to NAFDAC regarding such infringement.<sup>96</sup>

NAFDAC is known for the detection of counterfeiting products and ensuring that persons connected with the production and possession of the counterfeit goods are adequately punished.<sup>97</sup> Also on several occasion counterfeit products have been seized and destroyed by NAFDAC. Members of the public check for NAFDAC numbers on goods before purchasing to be sure they are not counterfeit. These acts of NAFDAC indirectly protect certain IPRs from infringement and by carrying out its mandates, NAFDAC has at several instances enforced IPR. Most counterfeit products are made through copying of industrial designs, trademarks and patented inventions or innovations of another person without seeking their permission to do so. Hence, prevention of counterfeiting is a mode of curbing violation of IPR and encouraging its enforcement.

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<sup>93</sup> Nigerian Copyright Commission, 'NCC Arrests 15 Pirates in Lagos and Onitsha Raids' NCC News (Nigeria, 3 September 2020) <<https://copyright.gov.ng/ncc-arrests-15-pirates-in-lagos-and-onitsha-raids/>> accessed 23 December 2020.

<sup>94</sup> *ibid.*

<sup>95</sup> Over the years, Nigeria acceded to a number of international agreements some of which are, WIPO Copyright Treaty, 1996, WIPO Performance and Phonograph Treaty, 1996, Beijing Treaty on Audio-Visual Performances, 2012, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind Visually Impaired or Otherwise Print Disabled, 2013 among others.

<sup>96</sup> Bunmi Binitie and Temitope Coker, 'Nigeria: (The Unwitting) Role of the NAFDAC in the Protection of Trademarks Rights' <<https://www.lexology.com/library/detail.aspx?g=8a5e6a9f-9dff-4509-a9ac-500066484ccf>> accessed 21 December 2020.

<sup>97</sup> *ibid.*

The Nigeria Customs Service (NCS) as an agency is regulated under the Customs and Excise Management Act.<sup>98</sup> They are in charge of border control and the safety of all goods entering and leaving the country. The agency has an enforcement, investigation, inspection and intelligence department. These departments work together to protect the international borders from various acts of smuggling and transportation of illegal or prohibited goods. The NCS has the power to do anything lawful to prohibit importation of counterfeits or pirated goods.<sup>99</sup> Any person found guilty of engaging in the importation of prohibited goods shall forfeit such goods and be sentenced to imprisonment for a term of five years without an option of fine.<sup>100</sup>

In 2014 an IPR unit was established in the Nigeria Customs Service as a result of a decision by Economic Community of West African States (ECOWAS) members at 2009 IP Seminar held in Accra, Ghana that every custom agency should have a unit in charge of IP matters, thus the NCS has partnered with several regulatory bodies that deal with enforcement of IPRs such as NCC, NAFDAC and SON among others. This resulted in the NCC and NCS signage of an agreement for better border management of copyright infringement imports.<sup>101</sup> The result of this collaboration is evident in the interception and destruction of N613 million counterfeit goods by NCS and NAFDAC.<sup>102</sup>

The Nigerian Custom Service also collaborated with relevant bodies to tackle counterfeiting of goods, for instance the collaboration between the Anti-Counterfeiting Collaboration of Nigeria (ACC) and the NCS in 2018 resulted in the training of 124 officers on IP enforcement.<sup>103</sup>

The NCS also has the Customs Intelligence Unit (CIU) which has trained officials who obtain information necessary for combatting counterfeiting and piracy. NCC and NCS on February 19, 2015 impounded pirated works worth over one billion Naira from Apapa Wharf Terminal in Lagos.<sup>104</sup>

NAFDAC and NCS taskforce also destroyed 14.7 billion naira worth of tramadol in March 2020.<sup>105</sup> While it is evident that the NCS has made effort to prevent

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<sup>98</sup> Customs and Excise Management Act, LN 54 of 1969, <<http://gazettes.africa>> accessed 30 March, 2021.

<sup>99</sup> Section 24, Customs and Excise Management Act, Cap C45 Laws of the Federation of Nigeria 2004.

<sup>100</sup> Section 47.

<sup>101</sup>Nnenna U. Awa, 'Building Respect for IP: Nigeria Customs Service on the Frontline' (WIPO Magazine 2018) <[https://www.wipo.int/wipo\\_magazine/en/2018/si/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2018/si/article_0002.html)> accessed 12 December 2020.

<sup>102</sup> See NAFDAC Destroy N613million Counterfeit Goods in Kano, The Guardian, (5 March, 2021) <<https://guardian.ng/news/nafdac-destroys-n613m-counterfeit-goods-in-kano/>> accessed 31 March, 2021.

<sup>103</sup> Awa (n97)

<sup>104</sup>Bob Aroture, 'Copyright Commission Confiscates Pirated Works Worth 1.5 Billion Naira/ NLIPW Newsroom' NPIL Watch (Nigeria, 19 February 2015) <<https://nlipw.com/copyright-commission-confiscates-pirated-works-worth-n1-5-billion-naira-nlipw-newsroom/>>accessed 19 December 2020.

<sup>105</sup> Nathaniel Adebayo, 'Nigeria news/ NAFDAC, Customs Destroys 14.7bn Worth of Tramadol' NLIP Watch (Nigeria, 10 March 2020) <<https://nlipw.com/nigeria-news-nafdac-customs-destroy-n14-7bn-worth-of-tramadol/>> accessed 19 December 2020.

importation of infringing goods into Nigeria, the agency still has more work to do in order to ensure effective border control in Nigeria and thereby reduce importation of counterfeit goods to the barest minimum.<sup>106</sup>

### **5.0 Enforcement Strategies by Enforcement Agencies**

The Nigerian police, copyright inspectors and the customs are the enforcement agencies responsible for enforcement of IPR in Nigeria. The role of Nigeria Custom Service are as discussed above. This section will highlight enforcement strategies by Nigerian Police and Copyright Inspectors.

Copyright inspectors came into being through the Nigerian Copyright Council Notice of 1997, which made provision for the appointment of persons who were “engaged in the duty of monitoring, reporting or enforcing the provisions of the copyright Act”<sup>107</sup> as copyright inspectors. Their enforcement strategies as provided for in the CRA includes, to enter and inspect buildings or premises which they suspect is being used for infringing activities;<sup>108</sup> arrest anyone who is reasonably believed to be guilty of copyright infringement;<sup>109</sup> examine, inspect, make copy of register kept under section 14 of the CRA;<sup>110</sup> request information from persons in suspicious premises and get evidence necessary for prosecution of infringement cases;<sup>111</sup> prosecute defend, conduct before a court any matter be it civil or criminal arising under the CRA;<sup>112</sup> carry out such other functions as the NCC may delegate.<sup>113</sup>

In respect of copyright matters, the copyright inspectors have the powers to carry out the functions of a police officer as provided in the Police Act<sup>114</sup> Anyone who obstructs copyright inspectors while carrying out their duties shall be guilty of an offence and shall upon conviction pay a fine of five hundred naira or three months imprisonment or both.<sup>115</sup>

The main agent responsible for enforcement of the law is the Nigerian Police. Section 4 of the Nigerian Police Act<sup>116</sup> makes provision for the general duties of the Nigerian Police Force (NPF). Some of these duties are: prevention and detection of crimes; apprehension of offenders; preservation of law and order; protection of life and property; due enforcement of laws and regulations.

Section 5 of the Act makes provision for the police to enforce constitutional rights and work with government agencies. Based on these pivotal roles played by the NPF, effective enforcement of IPR would be impossible without the assistance of

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<sup>106</sup> Joachim Jarreau, ‘A Border Patrol Force is Unlikely to Solve Nigeria Smuggling Problem’ (The Conversation) < <https://theconversation.com/a-border-patrol-force-is-unlikely-to-solve-nigerias-smuggling-problem-127450>> accessed 31 March, 2021.

<sup>107</sup> Appointment of Copyright Inspectors Notice 1997.

<sup>108</sup> Such entry and inspection must be done at a reasonable time see Section 38(2)(a).

<sup>109</sup> Section 38 (2) (b).

<sup>110</sup> Section 38 (2) (d).

<sup>111</sup> Section 38 (2) (e).

<sup>112</sup> Section 38 (3).

<sup>113</sup> Section 38 (2) (g).

<sup>114</sup> Section 38 (5).

<sup>115</sup> Section 38 (4).

<sup>116</sup> The Nigerian Police Act 2020.

the NPF. The need for raids, arrests, investigation, prosecution and so on while dealing with enforcement of IPR makes it extremely essential to have the assistance of the NPF since all those things are under the general obligation of the NPF.

For instance, the CRA specifically makes provisions for the roles of the police in its administration. Section 25 (1) makes provision for search upon an ex-parte application made to the court by the copyright holder. If the court authorizes the search, police officer not below the rank of an Assistant Superintendent of Police (ASP) would accompany the copyright holder and they can seize infringing copies and arrest persons found to be with the infringing copies. The NPF is expected to work hand in with other IPR enforcement agencies to ensure the effectiveness of enforcement of IPR especially in respect of infringements that are criminal in nature.

## 6.0 Enforcement Action

Intellectual property being territorial in nature is enforced within the ambits of the national laws of each state and the courts have a decisive role to play in enforcement of laws. As indicated in all IP related statutes, the Federal High Court (FHC) has exclusive jurisdiction over IP related matters.<sup>117</sup>

Jurisdiction of Courts in enforcement action is predicated on (i) place of action (ii) residence of the Defendant. However, where the infringement occurred in several divisions, action may be instituted at any of the places where the infringement occurred.<sup>118</sup>

The FHC in reaching its decisions on IP related issues has as guidelines for its proceedings the Federal High Court Rules. The FHC practices a frontloading system therefore all documents to be used at trial by parties are to be filed ahead.<sup>119</sup> The court would entertain all interlocutory applications before setting the matter down for trial after the parties have exchanged pleadings.<sup>120</sup> The court can grant interim and interlocutory injunction to preserve the rights of the applicants pending when final judgement will be given. Interim injunctions are granted in cases of emergency upon receipt of an ex-parte application and usually for a short period of seven to fourteen days.<sup>121</sup>

Although parties are bound by their pleadings,<sup>122</sup> the court must be guided by the evidence before him.<sup>123</sup> In appropriate cases, Counsel can use interrogatories to compel a party to disclose relevant documents or materials useful for the proper

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<sup>117</sup> M.J.Umaru, *Intellectual Property Law in Nigeria its Evolution and Challenges* 2013 (Ahmadu Bello University Press Limited, 2013) 210.

<sup>118</sup> *ibid.*

<sup>119</sup> Order 3, Federal High Court (Civil Procedure) Rules 2000, see *Amavo Limited v Bendel Textile Mills Limited*, (1990-1997) 3 IPLR, 161 at 164. where the court held that it is settled that Section 7 of the Federal High Court Act No.13 of 1973 confers exclusive jurisdiction on the Federal High Court in matters relating to Patents and Designs.

<sup>120</sup> Order 26.

<sup>121</sup> Order 28.

<sup>122</sup> *MIcheal Oredolapo v Lutfallah Bouari* (1917-1976) 1IPLR 63 at 65.

<sup>123</sup> *Oladipo & Tinuola Thawardas* (1917-1976) 1IPLR, 189 at 195.

determination of the case.<sup>124</sup> Evidences of parties are usually in writing under oath and also filed alongside other frontloaded documents. All the party has to do is to adopt the statement as his/her own while in court. Subpoenaed witnesses are not compelled to file statements on oath.<sup>125</sup>

It is trite that at common law mere proof of an infringement entitles Plaintiff to nominal damages, but in circumstances where the conduct of the Defendant resulted in loss of Plaintiff's trade goodwill or reputation, further damages may be awarded against the Defendant.<sup>126</sup> However, the court in considering the amount of damages to be awarded in an action for infringement of a registered design had to "consider all the facts of the case and the evidence led, those for injury and goodwill should be fair and temperate and those in respect of renewal period for registration should have regard for the relative popularity of those lines of goods and the probable duration of its popularity."<sup>127</sup>

The court may also grant interlocutory injunction in appropriate cases to restrain infringement of copyright, patent or trademark, it is worthy of note that an order for interlocutory injunction cannot be made as an incidental order to a non-existent application.<sup>128</sup>

The Court in *Married Media Limited v Lawrence Akapa & Another*<sup>129</sup> state what the claimant must establish in order to be entitled to the grant of an interlocutory injunction, per Kalgo J.CA, "in consideration of an application for an injunction, the Courts have over the years developed an inclination towards supporting an established business as against a new one. To be entitled to the grant of an interlocutory injunction the applicant must establish a probability or strong prima facie case that he is entitled to the right whose violation he complains. Once that is established, the governing consideration is the maintenance of status quo and the preservation of the matters pending the trial."<sup>130</sup>

In order that the overall situation and the circumstances of the case may be taken into consideration in the assessment of damages and the determination of other reliefs claimed by a party, the case may be referred back to the lower court for retrial limited only to the assessment of damages and the determination of the other reliefs claimed.<sup>131</sup>

According to the Court in *Sarg Aims Aluminium v Stanley Akagha & anor*<sup>132</sup> the measure of damages is prima facie the entire value of the infringing article. To deter infringers the Court of Appeal in the aforementioned case<sup>133</sup> determined

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<sup>124</sup> Order 20 Rule 8.

<sup>125</sup> Order 20 Rule 15.

<sup>126</sup> *The singer Company v Pius Asuzu* (1917-1976) 1IPLR 148 at 151.

<sup>127</sup> *Controlled Plastics Limited v Black Horse Plastics Ind. Limited* (1990-1997) 3 IPLR, 23 at 26.

<sup>128</sup> *Akapo v Akeem Habib* (1992) 6 NWLR (pt.247) 266 at 297.

<sup>129</sup> (1990-1997) 3 IPLR, 202 at 214.

<sup>130</sup> See *Saraki v Kotoye* (1990) 4 NWLR (Pt. 143) 144.

<sup>131</sup> *I.J Adenuga v Ilesanmi Press and Sons* (1990-1997) 3 IPLR, 138 at 159.

<sup>132</sup> (1990-1997) 3 IPLR, 202 at 214.

<sup>133</sup> *ibid.*

damages payable by examining “the capacity of the production, the price of the production, the nature of profit and the period covered by the violation.”

It is worthy of note that in an action for copyright infringement the Court may in appropriate circumstances “award additional damages for such matters as the author’s reputation or feeling, the vulgarization of the work, economic loss, unjust enrichment by the defendant as a result of the act of infringement, the conduct of the Defendants, the means of the parties, nonetheless the amount to be awarded must not be excessive”.<sup>134</sup>

It is settled law that no specific damages need be proved once infringement of copyright has been proved. The damages are at large and the Court can give any damages it thinks fit.<sup>135</sup> The Court can stay infringement proceeding where there is the case of validity of ownership of the IPR and jurisdiction among others.

At the FHC, there is no mandatory provision for alternative dispute resolution prior to commencement of trial. A judge however, has the power to allow a thirty-day period to encourage settlement out of court.<sup>136</sup> It is also worthy of note that where a process is in dispute in a patent, the onus of proof that they were indeed made by that process lies on the party asserting.<sup>137</sup>

Furthermore, an action for infringement of patents and designs can be instituted by the patentee or owner of the registered design, however, a licensee may institute an action in his own name if after notifying the licensor of the infringement the licensor fails to take action.<sup>138</sup> The measure of damages for infringement of patent is the actual loss caused to the Plaintiff.<sup>139</sup>

## 7.0 Challenges of Enforcement of IPR in Nigeria

Intellectual Property Law in Nigeria is governed by various laws and each law makes provision for enforcement. The enforcement provision include court system on enforcement of IPR. This court system offers civil and criminal liabilities and penalties for infringers. However, the adequacy of these provisions in allowing effective enforcement of IPR in Nigeria is worth questioning. Some of these laws are outdated and have not been amended for years.<sup>140</sup>

Hence, one can conclude that although IPRs are evolving, the contrary is the case with the laws enforcing IPR in Nigeria. The stipulated remedies and penalties seem ridiculous because they have not been made to adapt to current financial situation in the country. For instance, a penalty that seemed commensurate to a

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<sup>134</sup> *Masterpiece Inv. Limited & anor v Worldwide Business Media Limited & 2 Ors*, (1990-1997) 3 IPLR, 345 at 347.

<sup>135</sup> *Yusufu Ladan v Shakallo Publication and two others*, (1917-1976) 1 IPLR 270 at 272.

<sup>136</sup> Order 18.

<sup>137</sup> It is trite law that he who asserts must prove.

<sup>138</sup> PDA Section 25.

<sup>139</sup> *Pfizer v Polyking Pharmacy and another*, 1997-2003, 4 IPLR 215 at 217.

<sup>140</sup> For instance, the Copyright Act that enacted in 1988 is incapable of meeting the demands of the 20<sup>th</sup> century.

Also, the Trade Marks Act which was enacted in 1965 also needs to be amended or repealed to take care of emerging issues due to technological advancement.

crime in 1988 would not be commensurate penalty in 2021 for the same offence, considering the change in value of Naira and cost of living.

Also, Section 20 of the Copyright Act provides that the penalty for infringement of a copyrighted work is a fine of ₦100 for every copy of the infringing work sold and or a term of imprisonment not exceeding two years. Considering the possible gains these infringers make from the pirated copies, payment of such fine will not be a problem and since payment is easy this will not deter them from further infringement. This in turn undermines the correction and deterrent characteristics of the law.

Following the fact that the IP laws in Nigeria are majorly outdated, the enforcement provisions are no longer effective to deter infringement and does not meet international standards as set by the World Trade Organization (WTO) in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) which provides that all enforcement procedures in all member states must (i) permit effective action against any infringement; (ii) have the ability to prevent infringement and (iii) deter further infringement.<sup>141</sup>

For effective enforcement of IPRs law enforcement agencies are an integral part. The agencies saddled with various responsibilities aimed at ensuring effective enforcement of IPRs such as National Agency for Food and Drug Administration and Control (NAFDAC); Nigerian Custom Service (NCS);<sup>142</sup> Nigerian Copyright Commission (NCC),<sup>143</sup> The Nigerian Police Force (NPF)<sup>144</sup> discussed above, have several challenges some of which are, corruption, excessively complicated administrative procedure, lack of knowledge of due procedure, abuse of power among others, which inhibits their functions thus impeding effective enforcement of IPRs in Nigeria.

It has been established that the judiciary has a major role to play in the enforcement of IPR. Unless new laws are made, the judiciary in interpreting the law may not be able to fill the gap created by outdated laws and can only make little adjustments while interpreting and using their discretion, such is the case with the Copyright Act and other IP laws in Nigeria, which are long overdue for amendments.

Also worthy of note is the fact that IP is evolving especially in light of new possibilities made possible by technological advancement. However, some Nigerian judges and lawyers are not well versed in IPR matters as evidenced by the decision of the Court on enforcement of foreign copyright in *Microsoft Corporation v Franike Associates Limited*<sup>145</sup> which ought to have been decided otherwise had it been that the Court avers its mind to the membership of the existing Copyright Reciprocal Extension Order of 1972.

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<sup>141</sup> Article 1, TRIPs.

<sup>142</sup> Which handled detection of infringing goods and border control.

<sup>143</sup> The Commission is responsible for administration of copyright in Nigeria among others.

<sup>144</sup> Responsible for the arrest and prosecution of offenders.

<sup>145</sup> (2012) 3 NWLR pt.1287, 301.

Furthermore cases involving IPRs need urgent attention so as to deter infringers and ensure penalties that are commensurate to the infringement and loss (that has occurred as a result of the infringement) are given.

In recent times litigation process appears not to be able to adequately meet the requirement of urgency as a result of technicalities involved; it has therefore become necessary to explore other dispute settlement mechanisms such as Alternative Dispute Resolution (ADR), negotiation, mediation and arbitration, it is therefore recommended that this be provided for under the existing IP laws.

Although there are specific institutions (such as the Nigerian Copyright Commission, Trademarks, Patents and Designs Registry, NAFDAC, NCS as discussed above) responsible for the regulation and enforcement of IPRs in Nigeria, the absence of a single body saddled with the responsibility of generally overseeing all categories of IPRs in Nigeria is an impediment. Having NCC separate from Trademark and Patent creates unnecessary bureaucracy, Nigeria is ripe for having a commission in charge of IP matters generally such as we have it in developed countries like Australia where IP Australia serves as an umbrella body regulating IP matters.

Other challenges faced by regulatory bodies during enforcement of IPRs include shortage of funds, necessary equipment and manpower. Of great note is the issue of saboteurs and unskilled workforce. Hence, there is the need to ensure that the regulatory bodies have workforce that can work with integrity and offer relevant assistance to the judiciary and the legislature as far as enforcement of IPRs is concerned.

## **8.0 Conclusion/recommendations**

In conclusion, this article examined the provisions of TRIPS, the Nigerian legal framework on IPR enforcements, the different administrative and law enforcement agencies that assist with the enforcement of IPRs and the challenges of enforcement of IPR in Nigeria. The study found that existing laws on enforcement of IPR is not adequate in view of the lacuna in respect of online infringement of IPR. It identified corruption and other bureaucratic bottlenecks as an impediment to effective IPR enforcement and concludes that strategies for enforcement of IPR in Nigeria can be improved upon.

Although the Copyright Bill has incorporated some enforcement measure regarding online infringements, there is need for a more dynamic legislation to address the rapid development in the technology space in compliance with the WIPO Internet treaties.<sup>146</sup>

It has been pointed out that having Nigerian Copyright Commission, separate from Trademark and Patent creates unnecessary bureaucracy it is therefore recommended, in line with the pending Copyright Bill, that there should be Intellectual Property Commission with separate division for Copyright, Trademark and Patent.

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<sup>146</sup> *ibid.*

To explore dispute settlement mechanisms such as Alternative Dispute Resolution (ADR), negotiation, mediation and arbitration, it is recommended that the Copyright Act, Trademark Act and Patent and Designs Act should have a section dedicated to Alternative Dispute Settlement. Internationally, resolving IPR through ADR is being encouraged. This is the reason why WIPO has made guidelines for resolving IPR disputes through ADR mechanisms. The guidelines are contained in WIPO Arbitration Rules and WIPO Mediation Rules. This should also be encouraged in Nigeria. There should be guidelines on resolving IPRs disputes through ADR mechanisms so that the technicality of litigation does not frustrate the process of effectively enforcing IPRs.

To address the issue of outdated laws, it is appropriate to amend existing IP laws to accommodate minimum standards of protection provided under international conventions to which Nigeria is a signatory. To enhance the appreciation of the unique nuances of intellectual property law and practice, it is recommended that there should be Intellectual Property Rules of Procedure that will govern the IPRs litigation proceedings similar to what is obtainable under the Fundamental Human Right Enforcement Procedure Rules.

To create awareness on enforcement strategies, there is need for more extensive teaching of available IPRs to right owners through their association platform, radio jingles and billboards. In addition, since law is dynamic and not static the judiciary should be updated from time to time on existing IP laws through training of judicial officers. Furthermore, enforcement agencies should be trained from time to time on modern strategies and techniques to combat counterfeiting and piracy.<sup>147</sup>

To address shortage of funds, the appropriate Ministries should be well funded and equipped through the provision of vehicles, computer facilities, mobile devices and manpower increase. There should also be deployment of adequate resources for proper functioning particularly in obtaining/preserving electronic evidence. Also there should appropriate border control measures and collaboration between relevant agencies and parastatals in combating piracy of copyrighted works.<sup>148</sup>

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<sup>147</sup> John Onyido, Copyright in the Digital Age (Keynote address at the University of Ilorin Intellectual Property Summit, 2019) [http://www.spaajibade.com/resources/copyright-in-the-digital-age-keynote-address-at-the-university-of-ilorin-intellectual-property-summit-2019-john-onyido/#\\_ftn46](http://www.spaajibade.com/resources/copyright-in-the-digital-age-keynote-address-at-the-university-of-ilorin-intellectual-property-summit-2019-john-onyido/#_ftn46) accessed on 19th February, 2021

<sup>148</sup> *ibid*