

Nature and Scope of Intellectual Property Law: An Appraisal of Concepts, Issues and Prospects for Developing Economies

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Abstract

The relevance of Intellectual Property protection to our day to day activities has been repeatedly shown to be a settled matter. Humanity seems bent on creating a world economy primarily based on goods and services that take no material form or shape. And just as nature of property changes, so is the system of its exploitation. This paper looks at the evolution, nature and scope of the traditional fields of Intellectual Property Law that seek to protect the rights of inventors and authors to control or exclude others from unauthorised exploitation of their mental creations. The body of laws that evolve to provide this protection has unequivocally developed in to essential jurisprudence that is necessary for economic advance of the developed and more especially the developing countries. Although intellectual property systems vary from one national system to another, the basic principles of intellectual property law and practice seem to be the same in a number of ways, and thus, the paper attempts a general overview of the concepts and issues involved in this branch of law as well as the myriad of functions they strive to serve. It has been shown that the indispensable nature of intellectual property make it imperative to all stakeholders to work towards a healthy intellectual property system that will provide access to knowledge, experience and expertise that results to mutual benefit to all.

Keywords: intellectual property, copyright, patents, trademarks, design rights, world intellectual property organisation

1. Introduction

The term Intellectual Property covers “Patents”, which gives temporary protection to technological inventions; (Note 1) “Designs”, to the appearance of mass produced goods; (Note 2), and of course, “Copyrights” which gives longer-lasting rights in, for instance literary, artistic, musical creations, (Note 3) and the protection of Trademarks against imitation so long at least, as they continue to be employed in trade increasingly upon their superior corpus of new knowledge and fashionable conceits. (Note 4). As a result, there has recently been a great deal of political and legal activity designed to assert and strengthen the various types of protection for ideas as we shall see in the later part of this paper.

Intellectual property law is a legal concept that protects the creations of human ingenuity, its statutory provision dates back to one of the most important pieces of legislation in this field-namely the Paris Convention of 1883 which called itself the Paris Convention for the protection of industrial property and Art. 1(2) tells us that:

protection of industrial property has as its objects patents, unity models, industrial design, trademarks, service marks, trade name, indication of the sources as appellation of origin and the repression of unfair-competition (Note 5).

It is however apparent from the definition above that copyright is conspicuously absent in the lists and its addition gives rise to a broader term of Intellectual Property as it has come to be known. There are two statutory definitions of the subject matter that are worth mentioning in this introductory discussion.

Firstly, S.75(5) of the Supreme Court Act (1981) as amended by the Copyrights Act (1988) provides that:

Intellectual property means any patent, trade mark, copyright, design right, registered right, technical or commercial information or other intellectual property (Note 6).

Secondly, it is obvious that the above definition attempts to exemplify some types of intellectual property. The term is however generally defined by World Intellectual Property Organisation (WIPO) as:

Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce (Note 7)

2. The Nature of Protectable Rights

The notion of propriety rights in respect of abstract things that are far from being property *per se*, is the major preoccupation of intellectual property. Taking the common law principle of propriety rights into consideration, one can readily identify rights given by intellectual property statute as a kind of property; and like the tangible properties, it can be subject to ownership, it can be protected from invasion, it can be assigned or leased but it cannot be taken into physical possession and can only be realized through an action in court.

Justice Holmes of U.S. Supreme Court assessing the unique character of copyright as a property was quoted to have said:

The notion of property starts, I suppose, from confirmed possession of tangible object... but in copyright, property had reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is now in vacuo, so as to speak. It restrains the spontaneity of men, where, but for it; there would be nothing as they saw fit. It's a prohibition of conduct remote from the persons or tangible about the party having the right. It may be infringed by a thousand miles from the owner and without his ever becoming aware of the wrong (Note 8).

The above does not however mean that all the rights are held as property, there are non-proprietary rights which are also protected by intellectual property law. Confidential information and the law of passing off (Note 9) are handy examples of these categories of rights. The consequence of the above categorisation of intellectual rights as property is that it confers on the owner or producer exclusive rights that can be assigned, licensed, mortgaged and bequeathed (Note 10).

In other words, the creator of an idea and manufacturer of its embodiment, if different person, have interest in gaining rewards for their efforts and expenditure and in making profit from the enterprise. This is only possible if there is protection of such ideas against the risk of imitation. Intellectual property law provides steps in that protection and hence it comprises a discrete body of rights which applied to many forms in which human intellect manifests or expresses itself. The common feature that lies behind each intellectual property law is that they seek to confer owners the right to stop others from taking their creations (Note 11). This preserves to a reasonable extend, the integrity of, and reserves the exploitation and representation of such creations for the right owners. It is however necessary to lastly add that although intellectual property rights owners have natural rights to their creations, and interest in just reward, the public also has interest in access to, and use of intellectual property and hence a balance must be stricken in - between such interests. In other words, this study will attempt to analyse what risk this protection may engender and on whom the outcome will affect worst.

3. Features of Intellectual Property Rights

Having highlighted the nature of intellectual property rights above, it is pertinent to take a brief look at their common features. In other words, in spite of the different branches, intellectual property has some common characteristics that distinguish them from other rights. For instance, Intellectual property rights are, naturally, proprietary in nature. They can be bought and sold, mortgaged and licensed just like any other type of property. A valuation can be put on them for contractual or accounting purposes. Nevertheless, it is very important to be able to distinguish between the property rights which exist in a tangible item and the intangible intellectual property rights which may be embodied in that item. For example, if 'A' writes a letter to 'B', the piece of paper received by 'B' will belong to 'B' as it was intended as a gift by the sender. However, the copyright in the words contained in the letter will belong to the creator, 'A'. Further, 'A' may use a pen to write the letter. The pen will be 'A's personal property, but there may well be a patent for the pen belonging to 'C' Ltd, or perhaps, if the pen is of an unusual shape, 'C' Ltd might own a design right in respect of the pen. The fact that there are intellectual property rights over the pen does not prevent the use or ownership of the tangible item by 'A', just as 'A's ownership of copyright in the letter does not affect 'B's ownership of the piece of paper on which the letter is written. Other characteristics are stated below:

3.1 Territoriality

One of the basic characteristics of intellectual property since it is a creation of statutes; is that it is confined to the territory where it is created even though the importance transcends national boundaries. It is as a result of this recognition that intellectual property conventions (Note 12) provides for protection of intellectual property

across frontiers. Harmony has also been achieved as a result of World Intellectual Property Organisation (WIPO) (Note 13) which carries out wide variety of activities and services that includes establishment international standard for intellectual property laws and practices (Note 14) and providing registration services (Note 15) that allow patents, trademarks and designs to be protected in many countries. All this is made possible by way of implementing international treaties that defines internationally agreed basic standards of intellectual property protection in each country (Note 16). However, the territorial nature of intellectual property laws remain an attribute because membership of such world bodies is still at the discretion of member states (Note 17). So, what is protected in one country may not be protected in another (Note 18).

3.2 Divisibility

Another notable feature of intellectual property rights is that as different as they are, they exist independently of each other. They are however capable of being sliced in many different ways. For instance, the rights in different countries can be sold (Note 19), licensed to different people (Note 20) and each type of intellectual property is itself a bundle of rights (Note 21). E.g. copyright comprises the exclusive right to authorise reproduction...etc.

3.3 Volatility

Finally, intellectual property is indeed volatile. Before printing was invented, literally works require no protection; they resided in the memory of the author (Note 22). Trademarks only became important when society moved on from one in which individual traded their products. Moreover the intense demand of intellectual property protection is as a result of technological development in area of production of goods and services. Intellectual property is no doubt a field that evolve all the time responding to the process of periodic, even daily creation as individuals and communities take up challenges presented by their social and physical environment. As such, the subject has gone in variety of directions over recent years and is continually diffusing in too many areas that are hitherto unprecedented. The increasing economic significance of this branch of law to countries with any degree of industrial development is making it both international and more complex (Note 23).

4. Fields of Intellectual Property (Note 24)

We have seen from the above introduction that the term intellectual property covers a variety of fields, and in our attempt to render a definition, we have stated that it is not only restricted to industrial property which comprises of patents, utility models, trademarks, services mark as mentioned in the Paris Convention of 1883, but also includes copyrights which give protection to literally and artistic creations as provided for in the Berne Convention. There is no iota of doubt that what amount to intellectual property changes almost on daily basis as old rights are extended to cover some new areas and a times, entirely new rights are been created!

As a result of this, no discussion of the fields of this branch of law would be exhaustive. It should be noted however, that some major spheres are identifiably prominent as the "traditional branches" so to speak. We shall attempt to introduce these areas of Intellectual Property and IP rights.

4.1 Patents

4.1.1 Meaning and Historical Origin of Patents

A patent is a monopoly of right to the exclusive use of an invention (Note 25). The right last for a duration of 20 years provided renewal fees are paid on time (Note 26). It is granted in consideration of complete disclosure of the invention (Note 27) so its knowledge is available to anyone interested (Note 28).

In the case of Nigeria, the Patent and Design Act (Note 29) also provided that a patent shall expire at the end of the twentieth year from the date of the filling of the relevant patent application but it will lapse if the prescribed annual fees are not duly paid in respect of it. The Act however provided for a grace period of six months within which payment can be made although with additional surcharge, once the fees and the extra are paid, the patent shall continue as if the fees are duly paid (Note 30).

Lord Oliver in the popular case of *Asahi kasei kogyo KKS* application; stated that:

The underlying purpose of patent system is the encouragement of improvement of innovation; in return for making known his improvement to the public; the inventor receives the benefit of a period of monopoly during which he becomes entitled to prevent others from performing his invention except by his license (Note 31).

The patent system has been around for a very long time. Government's grant of exclusive property right to inventors dates back to fourteen century but their purpose has varied through history (Note 32). As far back as the 15th and 16th centuries, some kinds of grants were given to inventors of 'new arts' and machines in England, Germany and so on. But somewhat ironically, some evidence suggests that these early monopoly grants were

also designed to liberate innovators from the rifling constraints of the Guilds. By late 15th century, the English monarchy increasingly used monopoly privileges to control the industry but not to encourage invention. However, this was not without some opposition. In fact, it was the opposition to patent rights that precipitated the creation by the English Parliament in 1623 of the Statute of Monopolies which inadvertently is considered the model for most of modern patent law.

In an article by Peter Aubrey, (Note 33) the patent system is described as;

... not a spontaneous legal aberration but a set of laws and procedures evolved over a great length of time and tried in the light of experiences recorded by its users.

So, a patent is granted under the law to protect an article that is new (Note 34) or essentially better in some way (Note 35) than what was made before, or for a better way of making it (Note 36). The jurisprudential interest in patent law flows naturally from the fact that right to stop the commercial activities of others have been given the status of right of property (Note 37).

Patent rights generally provide incentive to individuals by offering them recognition for their creativity and material reward for their marketable inventions, it follows that the patent owner has the right to decide who may or may not use the patented invention for the period for which the protection lasts. He may however give permission to, or license other parties to use the invention on mutually agreed terms (Note 38). The owner may also sell the right to someone else (Note 39), who now becomes the new owner of the patent, and when a patent expires, the protection ends and such invention enters the public domain and becomes susceptible to commercial exploitation by others.

Most authors in this field have confessed that the process of applying for patent protection for an invention is more often lengthy and complex (Note 40). It, most of the times require the engagement of patent agent for expert assistance. The simplest description of the procedure obtainable in Nigeria and indeed most countries is, the filing of patent application indicating the applicant's full name and address (Note 41); detailed description of the relevant invention (Note 42); claim or claims if any; fees and where appropriate; and a declaration that the applicant is the true owner of the invention. The application form should contain the detailed description of the invention followed by usual materials or diagrams and then 'claims' which determines the extent of the protection granted and such other matter as may be prescribed (Note 43). As Lord Chelmsford said, "the office of a claim is to define the limit of what is claimed to have been invented and therefore patented." (Note 44). And as such a claim cannot stand if it does not satisfy the requirements (Note 45).

One central issue in patent law is what amounts to an invention especially because the word 'invention' itself was not statutorily defined. However, from the indirect provisions of the Patents and Design Act, it is deducible that some conditions must be satisfied for an invention to be properly so called. For instance, it must show some elements of *novelty*; must result from some *inventive activity*; must be capable of *industrial application*; and must of course fall within the category of *patentable inventions* under the law (Note 46).

An application for patent shall be made to the Registrar and will first be examined by the Registrar to ensure conformity with Section 3 of the Act (Note 47). And search must be made to ensure that the invention has not already been patented. If the search is carried out and the applicant satisfies the requirements, the patent would be granted (Note 48), the applicant is notified, a grant is issued, the patent is registered and a publication to that effect is made by the registrar (Note 49). The patent takes effect from the date of filing and continues in force for 20 years subject to renewal (Note 50). Consequently, the inventor is free to exercise his rights as he may choose. Where there is an infringement taking place in respect of the patented invention, action can be instituted in the court and award of damages follows if it succeeds (Note 51). The implication of this is that the patentee apart from being empowered to preclude others; he is also entitled to claim and seek to recover damages upon any act done by another in infringement. Infringement occurs where someone without the licence of the patentee or design owner does or causes the doing of any Act which he is precluded from doing under sections 6 and 9 of the Act (Note 52). There are also a lot of issues regarding what amount to infringement, for instance, in deciding whether patent infringement has occurred or not, it is necessary to determine the scope of the protection of the patented invention. When the scope of the protection is unclear, a third party cannot predict what kind of act falls under patent infringement, and legal stability is lessened (Note 53). A patent right may also be revoked. There are several grounds for which the right of a patentee may be revoked e.g when the rights were fraudulently acquired or when false statements are discovered in the declarations filed by the patentee.

4.2 Trademarks

4.2.1 Meaning and Nature of Trademarks

Trademarks have been defined as:

A word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish his product(s) from those of others (Note 54).

Trademark has also been simply defined as a word, syllable or other signifier used to distinguish a good or service produced by one firm from the goods or services of other firms (Note 55). Thus SANKA designates a decaffeinated coffee made by General Food Corporation; XEROX the dry copier made by XEROX CORPORATION; the MICHELIN tyres made by the MICHELIN COMPANY; a distinctly shaped brown bottle is a trademark of GUINNESS BREWERY NIGERIA PLC; while a stylized penguin with a rainbow colour represents the trademark of SWAN WATER NIGERIA LTD.

More simplified still is the definition given by WIPO which states that trademarks is a distinct sign to identify the goods offered by a manufacturer or a salesman and the services offered by a provider of services (Note 56). They further defined a trademark as any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitor (Note 57). A trademark is therefore a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise (Note 58). Its origin dates back to ancient times, when craftsmen reproduced their signatures or 'mark' on their artistic or utilitarian products (Note 59). It is therefore a badge of origin and it prevents one trader appropriating the reputation of another (Note 60). It is as such concerned with preventing unfair competition (Note 61). Trademarks are by products of market enterprise and market place competition and it has come all the way from the use of trademarks by potters in Roman times to internationally known marks such as *Mcdonald* or *Coca-Cola* used today, it is evident that the use of trademark is not static but rather continues to respond as new means of unfair competition evolves (Note 62).

Trademark law also legislatively recorded a rapid development especially in the U.K from the Trademark Act of 1938 which was old and fell behind trading practices, to the new Trademark Act (Note 63). Historically, the habit of making marks on ones goods goes back to the very ancient times as a mark of ownership to recognize ones property especially where there were similar goods. The earliest known use of trademarks occurred in Pro-Roman Times when it became common for Potters to put their names on each item of pottery for identification purpose (Note 64).

In Nigeria, The history of trademarks and its legislation dates back to the history of Nigerian legal system itself. The trademarks law which came into existence by proclamation in 1900 and was applicable in Nigeria before independence has a corresponding English law. The first case reported was in the matter of *Lagos Stores Ltd vs. Black Stock & Co.* (Note 65) in 1914 when the Southern and Northern protectorates of Nigeria were amalgamated, an ordinance was promulgated which made the British trademarks applicable to the entire country. The ordinance provided for proprietors or trademarks registered under 1900 proclamation in southern protectorate who wanted their trademarks to be applicable to the entire country and to the registrar of trademarks for re-registration.

4.2.2 Functions of Trademarks

The essence underlying this legal protection can be seen from three broad distinguishable perspectives (Note 66). Firstly, the '*origin function*' by which marks deserve protection so that they may operate as indicator of trade source from which goods and services come or are connected in some way. This 'primary and proper function' of trademark is alluded to also by U.S. Supreme Court in the leading case of *Handover Star Rolling Co. V Metcalf* (Note 67), that it is to *identify the origin or ownership of the goods to which its affixed* (Note 68).

The second perspective is "*quality guarantee function*" which points to the fact that marks deserve protection because they symbolises quality associated by consumers with certain goods and services and guarantee that the goods and services measures up to expectations.

It is reasonable that such marks should have rapidly acquired a second function as an indication of origin or source since in the case of wines for example; we know that some reputation of some areas is extremely ancient. The reputation of origin means that a mark also carries a notion of quality, which may be related, independent of its geographical origin, to a manufacturer who dominated the market. This with the significance of trade and other forces later gave rise to the idea of conferring a market monopoly as an incentive to innovation. This of course was possible only as long as it would not hurt trade or cause general inconvenience. Thirdly, there is what is called '*the investment or advertising function*' by which marks are seen as ciphers around which investment

and promotion of product is built and investment is a value which deserves protection as such, even when there is no abuse arising from misrepresentations either about origin or quality (Note 69). The truism in the author's postulation above becomes more glaring if we consider that as a result of emotional preference intermingle in the myriad of choice confronting consumers, trademarks become even more crucial elements in the process of reaching decisions about what to buy.

Having taken a look at the functions of trademarks, we cannot but accept that a law protecting marks and trade names is an inevitable ingredient in a capitalist economy. In fact, as modern capitalism has grown, the drive to sell products and services by means of some marks, brand or name, has invaded more and more fields of production. This recognition is not altogether new, for, as far back as 1927 an author was quoted to have said that a mark reaches over a retailers' shoulder and across the counter straight to the customer and sell the goods (Note 70). In line with this conviction, trademarks right became no less a frontier in intellectual property protection.

4.2.3 Registration of Trademarks

For a mark to be protected, it has to be duly registered. Hence, a system of registration evolved to grab for the owner the required exclusivity. Trademarks offices therefore exist in most countries where an application for trademark is filed such offices could be national or regional as the case may be. In the case of U.K, the Trademark Act of 1994 simplified the application procedures. Any person can apply and the contents of the application are specified by S. 32 of the Trademark Act of 1994. For instance, the application must contain clear reproduction of the sign filed for registration including any colours, forms or three dimensional features. It must also contain a list of goods and services to which the sign will apply. Some of the conditions such a sign must fulfil include distinctiveness and must neither mislead nor deceive others or violate public order or morality. A grant of right would follow some search and examination and the absence of third parties who claim similar or identical rights. However it is pertinent to add that the effect of such registration is limited to country where it is national or regional office maintains the records of all registration and renewals (Note 71).

Trade Marks registration and protection in Nigeria is regulated by the Trade Marks Act, 1965 (Note 72). Application for registration of a Trade Mark is usually made by the applicant or his authorized Agent to the Registrar of Trade Marks at the Trade Marks Registry (Note 73).

The Trade Mark application is then advertised in the Nigerian Trade Mark Journal published by the Registrar of Trade Mark ((Note 74). The application will then be open for opposition for a period of 2 (two) months from the date of the advertisement ((Note 75). Opposition proceedings are heard by the Registrar and there is a right of appeal to the Federal High Court (Note 76). Where no objections are received within the said period, the Registrar will issue a certificate of registration with the date of the initial filing as the date of registration (Note 77). The certificate is usually issued within an average of 4 (four) weeks from the end of the opposition period or the disposition of the opposition. The duration of registration is seven (7) years but renewable from time to time (Note 78) but the Registrar may remove the trade mark from the register for non – payment of renewal fees (Note 79). Trade mark registration in Nigeria will not cover any other African country. Separate applications are required for other countries. There is no provision by which one application in an African country will cover the rest of Africa.

It is worthy of note also, that in order to avoid the need to register with each national or regional office. World Intellectual Property Organisation (WIPO) administers a system of international registration of marks. This system is governed by two international treaties-namely, The Madrid Agreement Concerning International Registration Marks of 1891 and the Madrid protocol of 1989 (Note 80). A registered trade mark is assignable and transmissible in respect of either all or some of the goods (Note 81).

4.3 Industrial Designs

4.3.1 Meaning and History of Design Rights

This field of intellectual property seems to fill in the gap between the inventive, functional product processes which falls into the purview of Patents, and the creative, artistic ingenuity which falls into the sphere of Copyright (NOTE 82). In other words, Design rights protect those features, either of appearance or arrangement of a commercially exploited article which would otherwise fall between Patents and Copyright. Industrial design in a lay or general sense refers to the creative activity of achieving a formal or ornamental appearance for mass-produced items that fall within the available cost constraints, satisfies both the need for the item to appeal visually a potential consumers and the need for item to perform its intended function efficiently. In a legal sense, design refers to the right granted in many countries pursuant to a registration system, to protect the original,

ornamental and non-functional features of an industrial article or product that results from design activities (Note 83).

The Patents and Designs Act (Note 84) described design as:

Any combination of lines or colours or both, and any three-dimensional form, whether or not associated with colours, is an industrial design, if it is intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not solely to obtain technical result.

It is evident from the definition above that the subject matter of the legal protection of industrial design is not articles or products but rather the design which is applied to or embodied in such articles or products.

Until recently (Note 85), there has always been at least in the U.K, an overlap between the scope of Copyright and the field of Design. In the earlier English Copyright Acts of 1911, 1956 and the Design, Copyright Act of 1968, attempts were made to avoid the overlap between the two spheres, however this did not succeed until 1988 Act which came as a result of parliamentary attention aroused by the decision given by the House of Lords in the case of *British Leyland V Armstrong Patent* (Note 86), where House of Lords *per* Lord Griffiths removed designs protection and set out its peculiarities. And consequently the new CD&P Act of 1988 instituted a protection for designs subject to registration.

Historically however, the emergence of protection for industrial design is intimately connected with the growth of industrialisation and methods of mass production. In the United Kingdom, the first law giving protection to industrial designs was the designing and printing Linens, Cotton, Calicoes and Muslins Act of 1787. Since then, protection of industrial design contributed immensely to the development of textile industries in the UK. Consequently, growing recognition and expansion of industrialisation and of possible application methods of mass production of goods led to the extension of design protection to other fields of endeavour until the English Design Act of 1842 which extended design protection to wide range of areas.

In Nigeria, the history of design protection is not much different from that of the United Kingdom. Undoubtedly, The UK Design Act was the law in force in Nigeria until 1970 when the Nigerian Patents and Designs Act was passed and which ultimately provides for original registration of industrial design in Nigeria.

4.3.2 Functions of Design Protection

Design rights are adopted to cater for competition, compatibility and industrial scale production, the competition function focuses squarely on design in a market full of other brands of same product. For example, sales potentials of children lunchbox depicting Tom and Jerry or the Disney character may not be the same with the one without, and in fact, where the design concerns a functional feature in an article, it's only natural that the manufactures may need to protect the feature to produce spare parts or compatible products or indeed, to make a competing product at all (Note 87). And so also, where the product is to be marketed in an industrial scale, then copyright may not be appropriate in protecting its aesthetic design and hence the separate design right (Note 88).

Industrial design is therefore what makes an article attractive and appealing (Note 89); hence they add to commercial value of the product and increase its marketability. It is in the light of this the owner who could be a person or an entity in case of corporation, is assured an exclusive right against unauthorised copying or imitation of the design by third parties (Note 90).

4.3.3 Registration of Designs

Unlike the other rights that virtually involves complex procedures, industrial design can be relatively simple and inexpensive to develop and protect and also reasonably accessible even to small and medium sized enterprise. In fact, individual artists or craftsmen in both industrialized and developing countries are known to have enjoyed this protection.

Like trademark, a design must be registered in order to be protected under the industrial design law. As a general rule, certain conditions must be fulfilled before a product design becomes registerable (Note 91). The requisite conditions are generic even though different countries have varying definitions for such terms. One of such conditions is that the design must be 'new' or 'original', 'new' here means no identical or very similar design is known to have existed before (Note 92). Another very important condition is that the design must not be contrary to public order or morality (Note 93).

The procedure of registration also varies from one country to another depending on the national law involved and the nature of the design. In Nigeria, the process of registration begins with an application to the registrar (Note 94) which must contain some basic information (Note 95) and must be accompanied by the prescribed fees

(Note 96) as well a signed statement of declaration where that is appropriate. This will be followed by examination by the registrar, once the registrar is satisfied, the design will be registered and then a design certificate is issued and a term of protection commences subject to renewal (Note 97). In the U.K however, the term has been extended to 25 years by the statute (Note 98) renewable in a 5 year interval.

Although the scope of the right is limited to the country in which the protection is granted, there are international treaties administered by World Intellectual Property Organisation (WIPO) (Note 99), the membership of which ultimately culminates to a protection in as many number countries of the treaty as the applicant wishes. It is also apparent from the discussion above that the indispensability of design right manifests increasingly and the realization of its importance led to its gaining independence from the wider umbrella of copyrights (Note 100)

4.4 Copyrights

4.4.1 Meaning and Historical Origin of Copyrights

Simply put, copyright is a legal term describing rights given to creators for their literary and artistic works. The dictionary meaning of term is:

The right of literary property as recognized and sanctioned by positive law. An intangible incorporeal right granted by statute to the author or originator of certain literary or artistic production, whereby he is invested a limited period, with sole and exclusive privilege of multiplying copies of the same and publishing or selling them (Note 101).

In other words, Copyright serves to control the copying of the intellectual materials existing in the field of literature and arts; protecting the writer or artist from unauthorized copying of his materials. It is a statutory property rights conferred in the U.K by the CDPA 1988 and subsist in a work, thereby conferring exclusive rights on the copyright owner for a sustained period which varies according to the type of work. Since the quantum of every legal right is measured by reference to the law creating it, it is safer to at this point, refer to the definition of the term as offered by the Copyright, Design and Patents Act 1988 (Note 102).

In section 1, it states that:

1. Copyright is a property right which subsists in accordance with this part in the following description of works;
2. Original literary dramatic, musical or artistic works; sound recordings, films, broadcasts, or cable programs, and
3. The typographical arrangement of published editions.

Similarly, the Nigerian Copyright Act provides for the category of what is eligible for copyrights to include literary works; musical works; artistic works; cinematograph films; sound recordings and broadcast (Note 103).

Historically, Copyright traces its origins in the monopoly privileges for authors of literary and artistic works which postdates the first appearance of patents by almost a century. The origin of rights in literary properties can clearly be tied to the development of the printing press. Copyrights were created by governments not only to capitalize on the economic opportunities of printings, but also to give monarchs censorship powers over printed materials during a time of political and religious turmoil in the UK. For instance in 1550s attempts were made to stem the growing influence of the Protestants by censorship of the press which was seen as the greatest weapon for mass production of seditious and heretical materials. The stationer's company (forerunner of today's publishers) was established in 1556 by the Royal Charter with monopoly over the business of printing. Through a form of registrations, the stationers were able to perpetuate their monopoly in the publishing trade, and hence were the chief proponents of exclusive right against copiers with the powers to search and destroy books printed in contravention (Note 104). This process continued until the middle of the 17th century when the activities of the stationers was outlawed and concern over censorship had diminished while concern over the cost of monopolies had risen. Guild privileges in response to agitation by the stationers and after by the prolonged debate, in 1709 the Statute of Anne was created which was indeed characterized as the first modern copyrights law. It was christened the Copyright Act 1710 (Note 105).

The 1710 copyright statute re-established monopoly rights but made them available to everyone – not just the guild. It also emphasizes the role of authors in Copyright (Note 106). The Copyrights provisions were extended in 1842 Act which was eventually repealed in 1911 by a new copyright Act. However, it is also worthy of note that while all this was going on, parallel developments had occurred in the areas outside the book industry and of course, similar developments were going on all over the world (Note 107). However, the 1911 Act subsisted until the post war period when in 1956 Britain, another Copyright Act was promulgated to accommodate emerging entrepreneurial trends and meet the developments of the post war decade (Note 108). The area of

copyright continued to flourish and as a result of new dimensions of this right, there had always been constant need to revise the provision in the light of emerging issues in music, broadcasting etc., existing provisions were soon found inadequate and obsolete in some cases for dealing with advancement in technology and the increase in the exploitation of copyright through incidences of piracy and often copyrights abuse. This technological leap also began to demand for international adjustment to Copyright law which had direct repercussions to national system and necessitated in the U.K the promulgation of the Copyright, Design and Patent Act CDPA of 1988 (Note 109).

Expectedly, the Nigeria history of copyright is inadvertently intertwined with that of the UK and consequently, the first statutory law to be applied in Nigeria would appear to be the Copyright Act of 1911 which was extended to the Northern and Southern Protectorates (Note 110). In 1970 however, Nigerian copyright Act was promulgated along the lines of the English Act and later as a result of increased incidences of piracy, the 1970 Act was found inadequate and subsequently, the 1988 Copyright Act was passed which was later amended in 1992 and 1999 respectively.

The subject matter of copyright includes every production in literary, scientific and artistic domain, whatever the form or mode of expression (Note 111). For a work to enjoy copyright protection, however, it must be an original creation (Note 112). The ideas in this work do not need to be new, but the form, be it literary or artistic, in which they are expressed must be the original creation of the author (Note 113). And while quality of a work is important as relate to creation, protection is independent of that or the value attached to the work. It will be protected whether it is considered a good literary or musical work or not and also notwithstanding the purpose of which it is intended, this is because the use for which a work may be put has nothing to do with its protection (Note 114). Practically, all national copyright laws provide for literary works which comprises among other novels, poems, short story, dramatic works, and other writings irrespective of their content (fiction or non-fiction) length or purpose (Note 115).

It is also worthy of repeating that the main basic right of the owner of copyright is to prevent others from making copies of one's works and as such, Recording rights, Motion picture rights, Broadcasting rights, Translation and Adaptation rights and of course, Moral rights are all granted to authors and requires authorization by the owners (Note 116). This is understood to refer to rights of performing artist in their performance, rights of producer of phonograms in their phonograms, and the rights of broadcasting organisations in their television and radio programs in their radio and television programs. Since the author of a work in which copyright subsist has perpetual, inalienable and imprescriptible right to claim ownership of his work (Note 117), it follows that any person who without license or authorisation does or causes any act to be done against the copyright of the owner would be said to have infringed on the owner right (Note 118) which is actionable by an action in court (Note 119).

5. General Prospects of Intellectual Property Protection

Intellectual Property protection generally play an important role in industrialization and the various rights protected have since become key factors in modern world of international trade and market-oriented economies.

Patents protection ensures fair practices among competitors by protecting individuals whose commercial well – being, moral right and intellectual integrity must be realized as necessary indices before any improvement of standard of living can be claimed. Patents protection also helps economies to establish, in consideration of available natural and human resources, their area of comparative advantage over other competing economies. A resultant increase from this is not only on the per capita net of the national income but also in real income per head. Patents also encourage investment which in turn galvanizes the wheels of development.

Trademarks encourage investment especially in the manufacturing industry. This is only possible where there are institutional measures put in place to ensure and assure investors that their trademarks or goods cannot be traded with nor falsified by another competitor. This inspires a sense of security in the investor (Note 120). An empirical study for the LDC's (less developed countries) confirm a positive relationship between investment and the growth of GDP (Gross Domestic Product).

Moreover, trademarks are cipher around which investment in the promotion of a product is built and that investment is a valuable that deserves protection as such, even when there is no abuse arising from misrepresentations either about origin or quality. As a focal point of economic development, trademarks when protected, are one way of encouraging entrepreneurial talent especially in the private sector and enhancing creativity and productivity and leads to economic emancipation both for the individual and the nation at large, this can help raise leaders of quality with the right attitude in ranks of government and help increase the per capita standard of living. This is because there is a close relationship between productivity and real income per

worker and since a nation must produce a more goods and services per worker to enjoy more goods and services which means a limited domestic market lack of demand for most non-agricultural goods, this could hamper with industrialization and make it difficult for one country to compete favorably with another country.

Designs protection also encourages technological advancement which is one the hallmarks of industrialization. Technological advancements in this case involve the development of new and improved techniques for the manufactured goods which is based on invention and innovation. This suggests that there could be no real industrialization in a country where there is absence of adequate Intellectual Property protection. It is also evident that this protection helps to ensure fair return of investment and inadvertently benefit the consumers and the public at large by promoting fair competition and honest trade practices (Note 121). There is also no shred doubt that a good and effective system of design protection encourages creativity and promotes more aesthetically attractive products.

Copyright industry represents, the fastest growing sector of economies especially the developing ones, creating considerable employment generation and having an increasing export performance and potentials. The contribution of this industry to the Gross National Product (GNP) is also bound to increase in the years to come, in a number of rapidly growing developing economies, which are taking up both the new challenges and the new opportunities thrown up by the increasing borderless dimension of trade and economy. The internationalization of socio-economic activities and the fillip it has provided to the information technology industry has made some developing economies active participants both as agents and beneficiaries of the change (Note 122).

6. Conclusion

It is obvious from the discussion above that Intellectual Property regimes are generally complex arrangements that seek to satisfy interests which are tripartite in nature. On one hand, it strives to satisfy the inventor or the owner by providing adequate protection for his work or invention and conferring on him absolute right to exclude others from making unauthorised benefit from it. It is this right that permits the owner to take action against any person exploiting his invention without agreement. This is primarily because, as we have seen in the discussion above, the right allows him to derive material benefits to which he is entitled to as reward for his intellectual efforts and work and a times as compensation for the expenses which his research and experimentation leading to the invention had entailed.

Secondly, it aims at ensuring that nations stand to benefit immensely by waxing stronger in the global economy as a result of the intellectual wealth of their nationals (Note 123). In other words, while the individual right to his work or invention is guaranteed, the industrial and technological base of the nation is also assured. There is no doubt that the rat race for development in industry and technology as a result of globalisation affects and is affected by intellectual property; a country's economic and social development nowadays is directly hinged on the strength of its intellectual property protection. After all, encouragement of intellectual creation is one of the basic perquisites of all social, economic and cultural development. This explains the various national laws and the general interest of nations especially developing ones, in harnessing as much as possible the economic rewards of the intellectual activism of their nationals (Note 124).

Then on the last end of the tripartite structure stands the ultimate consumer, whose interest too would have to be taken in to consideration especially as the use of, and the protection of inventions and creations, is a key means of ensuring better and more enriching life for instance, the Patent system that does not respect and balance the need of the creators and consumers is likely to deny the later some essential resources and services (Note 125). So, striking a balance between and among these various interests has been the major preoccupation of the intellectual property regimes.

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Notes

- Note 1. Cornish, W. R. (1999). *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights* (4th ed). London: Sweet & Maxwell, P. 3.
- Note 2. *Ibid.*, P.4
- Note 3. *Ibid*; P.5
- Note 4. *Ibid*; p. 6
- Note 5. Art. 1 (2) of Paris Convention of 1888.
- Note 6. Cap. C28, LFN 2004
- Note 7. WIPO Publication No. 450 (E) retrieved from <http://www.wipo.int/freepublications/en/intproperty/450/> On the 9th of December, 2011.
- Note 8. Quoted in Asein J.O.(1994) *'The Nigerian Copyright with Introductory Notes'* A publication of the Copyright Council NCC (1994).
- Note 9. See the decision of Lord Upjohn in *Boardman v Higgs (1967) A.C* at page 28 cited in W.R Cornish *supra* note 1.
- Note 10. Hillary P., & Clifford M. (1990) *Commercial Exploitation of Intellectually Property* Blackstone Press Ltd.
- Note 11. *Ibid.*,
- Note 12. For example, the Berne Convention and Paris Convention whose provisions are reflected in the national legislations like the Copyright, Designs and Patents Act, 1988 (S.154) and of course the Nigerian Patent and Designs Act of 1990. See Peter G. J. (1997) *Source book on Intellectual Property* London: Cavendish Publishing limited, pp. 14 – 16.
- Note 13. World Intellectual Property Organization is a specialized agency of the United Nations and it dates back to 1883 and 1886 when the Paris and Berne Conventions were adopted respectively. It was formerly known as BIRPI and later on some revisions were made to the former treaties and WIPO came to existence in 1970.
- Note 14. Among WIPO's principal tasks is promoting the progressive development and harmonization of intellectual property laws, standards, and practices among its member states. Encouraging the growth of international common principles and rules governing intellectual property requires extensive consultations with states and other interested groups. See: http://www.wipo.int/activities/en/development_iplaw.html
- Note 15. E.g. The PCT System (which gives patent protection in large number of counties), The Madrid System (which offers trademark owners to protect their marks in multiple countries) The Hague System (which allows the protection of designs in many countries) and the Lisbon System (which facilitates the international registration of appellations of origin).
- Note 16. For instance, the preamble to Berne Conventions reads “to protect in as effective as uniform manner as possible, the right of authors in their literary and artistic works”
- Note 17. Presently, there are 185 member states. See <http://www.wipo.int/members/en/> for the comprehensive list of member states.
- Note 18. See Article 2 of the Paris Convention 1883.
- Note 19. Peter Grooves J, *supra* note 12, P. 21
- Note 20. *Ibid.*,
- Note 21. *Ibid.*,
- Note 22. *Ibid.*,
- Note 23. World Intellectual Property Organization Handbook (2004) *Law, Policy and Use* WIPO Publication.

Note 24. Also known as traditional branches of Intellectual Property.

Note 25. Peter, G. J. (1997) *supra* note 12, P. 103

Note 26. *Ibid.*,

Note 27. *Ibid.*,

Note 28. Benko R.P. (1987) *'Protecting Intellectual Property Rights : Issues and Controversies*, AIE Washington D.C: P.15

Note 29. Section 7 (1) & (2) of Patents and Design Act of 1970 CAP P2, LFN, 2004.

Note 30. See also sub 2 (b) *supra* note 29.

Note 31. (1991) R.P.C 485 (HL).

Note 32. Benko R. P. (1987) *supra* note 28, P. 16.

Note 33. This was written by Peter Aubrey who was then the Head of Department, Courtaulds Plc.

Note 34. Section 1 (1) of the Patent and Design Act *supra* note 29.

Note 35. That is if it constitutes an improvement upon a patented invention. See also Section 2 (a) and (b) of the Act.

Note 36. Section 2 (b) and (c) of P & D Act *supra* note 29.

Note 37. Cornish, W. R. (1973) Cumulative protection of Industrial Design *University of Columbia Law Review*. Vol. 8, No. 2

Note 38. See Section 10 *supra* note 29.

Note 39. Section 32 and 12 of the Act *supra* note 29. and also see *Uzokwe v Daisy Industries (Nig.) limited (2002) 2 NWLR (Pt 752) 528 @ 545*

Note 40. See the *dictum* of Jessel, M.R in *Printing and Numerical v. Sampson (1875) 19 Eq 402*

Note 41. Section 3 (1) (a) and (b) of the Act *supra* note 29.

Note 42. See also Section 2 of the Act, *supra* note 29.

Note 43. See also Rule 8 of Patent Rules of 1971.

Note 44. *Harrison v Anderson Foundary Company (1976) App. Cases 574 @ 581*

Note 45. See Section 8 (2) of the Act *supra* note 29.

Note 46. See Section 1 (1) (a) note also that Section 1 (4) and (5) of the Act *supra* note 29 provided for inventions that cannot be patented.

Note 47. The registrar will ensure that the patent application contain all the necessary details and is accompanied with the prescribed fees; the description of the invention is sufficient; and that it relates to only one invention except where there are claims.

Note 48. Section 4 of the Act *supra* note 29.

Note 49. Section 5 (1-3) of the Act *supra* note 29.

Note 50. Section 7 of the Act, *ibid*,

Note 51. Section 26 of the Act, *ibid*,

Note 52. Section 25 of the Act, *ibid*,

Note 53. Waziri, K. M "Optimizing Economic Development And Industrialization Through Patent Rights Protection In Nigeria" (Unpublished PhD thesis submitted to Faculty of Law, University of Jos, Nigeria PG-LAW/UJ/0008/06,)P.80.

Note 54. Bryan A. Garner (1998) *Black's Law Dictionary* (7th ed)

Note 55. Peter J. Grooves. (1997) *supra* note 12 P. 10

Note 56. *supra*, note 55, P. 11

Note 57. WIPO Intellectual Property Hand Book *Law, Policy and Use* [2000]

Note 58. For a Statutory definition of Trademark see Section 67 (1) of the Trade Marks Act, 1965 Cap T13, LFN, 2004.

Note 59. “mark” is define in the trade mark Act as “includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof” See also Section 67 (!) of the Act.

Note 60. Peter J. G. (1997) *supra*, note 12.

Note 61. *Ibid.*,

Note 62. Frank, I. S. (1925). The Rationale Basis of Trademark Protection *Harvard Law Review* 40(6), 1927.

Note 63. The current one Trademark Act 1994.

Note 64. WIPO Intellectual Property Law: Introductory notes.

Note 65. (1901) 3NLR 20

Note 66. Cornish W. R., *supra*, note 1. P. 612

Note 67. (1916) 240 US 403, 412

Note 68. See also the case of *Canal & Co v. Clark*, 13 WALL 311, (1871)

Note 69. *Ibid.*, P.612

Note 70. Wells, H.G., quoted in Uvieghara E.E.(1992). *Essays n Copyright Law and Administration in Nigeria* (ed) NCC Publication

Note 71. Retrieved from <http://www.wipo.int> on the 12 of Dec, 2011.

Note 72. Cap T13, LFN, 2004

Note 73. Section 18 (1) of the Trade mark Act, 1965, Cap T13, LFN, 2004.

Note 74. See Section 19 (1) *supra*, note 73.

Note 75. Section 20 *supra*, note 73.

Note 76. Section 21 *supra*, note 73.

Note 77. Section 22 (2) *supra*, note 73.

Note 78. Section 23 (1) *supra*, note 73.

Note 79. Section 23 (3) *supra*, note 73.

Note 80. More than sixty (60) countries are party to one or both of the agreements.

Note 81. See Section 26 (2) of the Patents and Design Act, *supra*, note 29.

Note 82. Catherine C., ‘*Principles of Intellectual Property Law*’ Cavendish Publishing Limited (1977), London.

Note 83. Intellectual Property handbook. *supra*, note 23.

Note 84. See Section 12 of the Act. *supra*, note 73.

Note 85. Until the enactment of Copyright, Designs and Patents Act of 1988.

Note 86. (1986) A. C 477

Note 87. Catherine C., (1977): *supra*, note 82. P. 279

Note 88. *Ibid.*,

Note 89. *Metropolitan industries v Industries Appl.* where Fatai Williams, JSC (as he then was) observed that “the emphasis is on external appearance, but not every appearance of an article that constitutes a design. There must be in some way a special, peculiar, distinctive, significant or striking appearance – something which catches the eye and in this sense appeals to the eye”

Note 90. See *Peter .E & Venture (Nig) Ltd. V Gazasomer Industries ltd.* (1998) NWLR (Part 555) 619 at 632.

Note 91. Section 13 Act, *supra*, note 29.

Note 92. *Ibid.*, S. 13 (3), *supra*, note 29.

Note 93. S. 13 (1) (b) *supra*, note 29.

Note 94. S. 15 (1) *supra*, note 29.

Note 95. The application shall contain a request for registration of the design; the applicants name and address or address for service in Nigeria; a specimen of the design and indication of the kind of goods or product for the design shall be used.

Note 96. Section 15 (1) (b) of the Act. *Supra*, note 29.

Note 97. After registration the protection is valid for five (5) years from the date of application and subject to renewal for two further consecutive periods of five years. See Section 20 (1) (a) and (b) of the Act, *supra*, no. 29.

Note 98. Copyrights, Design and Patents Act of 1988.

Note 99. E.g. the Hague Agreement Concerning the International Deposit of Industrial Design

Note 100. Peter J. G., *supra*, note 12.

Note 101. Black's Law Dictionary, *supra*, note 54. P.336 also quoted in Asein, J. O. (1994) '*Introduction and Notes to Nigeria Copyright Act*' A Publication of Nigerian Copyright Commission.

Note 102. See Section 1 (1) of the CDPA of 1988, *supra*, note 98.

Note 103. S. 1 (1) of the Nigerian Copyright Act of 1988, C28, LFN, 2004

Note 104. Peter J. G. (1997) *supra* note 12.

Note 105. Ransom 'The First Copyright Statute' (1956) and this was quoted by Cornish W. R. (1999) *supra*, note 1, P.340

Note 106. *Ibid.*, P.341

Note 107. Asein, J. O. (1994). *Supra*, note 101.

Note 108. Cornish, W. R. (1999) *supra*, note 1, P. 345

Note 109. *Ibid.*, P. 349

Note 110. The extension was done via an Order – in – Council dated 2nd of June, 1912.

Note 111. Section 1 (1) (b) of the Act, *supra*, note 103.

Note 112. *Ibid.*; S. 1 (a).

Note 113. *Ibid.*,

Note 114. WIPO Intellectual Property Handbook, (2004) *supra*, note 23.

Note 115. See *Exxon Corporation v Exxon Insurance (1982)*, it was held that Copyright exist in the expression of words not the information itself.

Note 116. These are otherwise known as Neighboring Rights and are distinct rights provided for in Section 26 – 30 of the Copyrights Act. *supra*, note 103.

Note 117. Section 12 (1) & (2) of the Act. *supra*, note 103.

Note 118. *Ibid.*, See Section 15

Note 119. Copyright is in the Exclusive Legislative List of the Constitution of Federal Republic of Nigeria, 1999 and hence it is the Federal High Court that entertains such matters. See also Section 251 (1) of the Constitution and Section 16 of the Copyright Act of 1988, C28, LFN, 2004.

Note 120. International Monetary Fund (1988) *World Economic Outlook* Washington: p. 76

Note 121. Cornish, W. R., Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights, 4th ed (London: Sweet & Maxwell, 1999)

Note 122. Shahid A. (2000) Socio-economic Benefits of Intellectual Property Protection in Developing Countries (*WIPO Geneva*,.) p.5

Note 123. WIPO Intellectual Property Handbook, (2004) *supra*, note 23.

Note 124. *Ibid.*;

Note 125. Peter J. G. (1997) *supra*, note 12

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