

## THE WTO-TRIPS AGREEMENT AND INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT IN NIGERIA\*

### **Abstract**

*Nigeria is regarded as one of the “piracy capitals” of the world due to the massive volume of piracy and counterfeiting in the pharmaceutical, ICT, manufacturing, entertainment and other industries. The informal structure of the economy, the massive unemployment which promotes criminality, the general lack of awareness and unwillingness of most IP owners to enforce their rights when infringed has fomented an IP infringement culture. There is a steep divide between the provisions of various IPR protection instruments which substantially comply with the WTO-TRIPS Agreement and the actual enforcement of these rights. The laws require only minimal upgrade but the intelligence, assets and systems for IPR enforcement must be radically improved if the country is to maximize the awesome potential of creative Nigerians. This paper examines the emergence of the WTO and the provisions of the TRIPS Agreement on the international enforcements of IPR’s, the legal and institutional framework in Nigeria for the enforcement of TRIPS in Nigerian jurisprudence. The doctrinal legal methodology was employed to evaluate the level of compliance with the TRIPS Agreement. Legislative, policy and practice recommendations were proffered to strengthen the IPR enforcement mechanism for sustainable national economic development.*

**Key Words:** *WTO-Trips, Intellectual Property Rights, Piracy and Counterfeiting, IP Enforcement Measures, IP Regulatory Agencies, Economic Development*

### **1. Introduction**

Intellectual Property (IP) refers to creations of the mind, such as inventions, literary and artistic works; designs; and symbols, names and images used in commerce.<sup>1</sup> Intellectual property falls into two major categories: Industrial Property which is made up of patents, trademarks and industrial designs and Copyright which protects original literary, artistic and musical works. Patents apply to protect registered product and process inventions; Trademarks reserve distinct words, symbols and pictures for the identification of a particular product or service whilst Industrial Designs refers to the unique aesthetics in shape, pattern or colour of produced commodities.

The purpose of an intellectual property law (IPL) is to assign legal rights to creative works and inventions and controls who gets to use such works.<sup>2</sup> Intellectual property rights (IPR’s) enable people to earn recognition and/or economic benefit from what they invent or create. A well designed and efficient IPR protection and enforcement system is crucial for

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<sup>1</sup>World Intellectual Property Organization (WIPO) “What is intellectual property?” WIPO Publication No. 450(E) available at [www.wipo.int/about](http://www.wipo.int/about), accessed 29 October 2019

<sup>2</sup> What is intellectual property law? Available at <https://legalcareerpath.com/intellectual-property-law> accessed 29 October 2019

economic growth because it allows businesses to recoup from their investments in innovation and industry. The economy thrives when businesses compete to create solutions and innovations in response to consumer demand and feedback.

IPR also seeks to ensure an equitable spread of useful information to the public so as to prevent a monopoly of knowledge in the hands of a few. The survival and advancement of the human race relies on its ability to take advantage of new technologies and intelligence to improve well being and combat threats to humanity. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish for the benefit of all.<sup>3</sup>

The exclusive right granted to an owner of intellectual property can be infringed upon when it is exploited by a third party without the owner's consent or permission. Infringements on intellectual property rights are enforceable in a court of law by way of civil and criminal litigation and by administrative procedures.

## **2. Emergence of the World Trade Organization (WTO)**

Like tangible property, IP can be bought, sold and transacted upon in various ways. Trade in IP often crosses national borders to allow for international exchange of ideas, services and expertise. The ongoing trend of globalisation has led to an increased volume of trade in IP necessitating an international regime for the protection of IPR's in the world economy. Whilst most developed countries had detailed and sophisticated laws which enhanced free trade in IP, the protection of intellectual property rights in developing countries was often inadequate.<sup>4</sup> The IP regimes in some countries were so different from IP laws used by the rest of the world, or so restrictive in application that such countries could be regarded as not having internationally relevant IP laws at all. A number of international treaties<sup>5</sup> were made to build a common international legal framework for the protection of IPR's, especially as it concerns trade.

As IP became increasingly interwoven with, and the subject matter of global business transactions, the General Agreement on Tariffs and Trade (GATT) had to restructure itself to handle the changes. On 1<sup>st</sup> January 1995 vide an agreement signed in Marrakesh, the World Trade Organization (WTO) officially replaced the GATT having expanded from a mere 23-members to over 100 member states.<sup>6</sup> Generally speaking, the WTO regulates global rules of trade between participating countries by providing a framework for negotiating trade agreements and a dispute resolution mechanism aimed at enforcing adherence. WTO agreements are signed by representatives of member governments and ratified by their parliaments. The WTO's top

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<sup>3</sup>*Ibid*

<sup>4</sup> World Bank Discussion Papers, "Protection of Intellectual Property in Developing Countries," World Bank.

<sup>5</sup> Such as the 1883 Paris Convention on patents, trademarks and other industrial property rights, and the 1886 Berne Convention for copyright protection, 1961 Rome Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organisations (Neighbouring Rights to Copyright), 1970 World Intellectual Property Organisation (WIPO) responsible for the worldwide promotion of intellectual property and which in 1974, became a United Nations (UN) specialised agency.

<sup>6</sup> The GATT had been in operation since 1948. See History of the World Trade Organisation, available at <<https://en.m.wikipedia.org/wiki/history-of-the-world-trade-organization>> accessed 29 October 2019. WTO now has There are now up to 164 member states as at 2019.

decision making body is the ministerial conference, which is normally held every two years.<sup>7</sup> Nigeria has been a WTO member since 1 January 199.<sup>8</sup>

### 3. The TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) came into force on the same day that the WTO was formed although negotiations on TRIPS had been ongoing ever since the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in and 1990. TRIPS is an international legal agreement between all the member nations of the World Trade Organization (WTO). It sets down minimum standards for the regulation by national governments of many forms of intellectual property (IP) as applied to nationals of other WTO member nations.<sup>9</sup> The TRIPS agreement introduced intellectual property law into the multilateral trading system for the first time and remains the most comprehensive multilateral agreement on intellectual property to date.<sup>10</sup> TRIPS require member states to provide strong protection for intellectual property rights. For example, under TRIPS

- a. Copyright terms must extend at least 50 years, unless based on the life of the author,<sup>11</sup>
- b. Copyright must be granted automatically and not based on any formality; such as registration.<sup>12</sup>
- c. Computer programs must be registered as ‘literary works’ under copyright law and receive the same terms of protection.<sup>13</sup>
- d. Patent must be granted for inventions in all field of technology, provided they meet all other patentability requirements (although exceptions for certain public interests are allowed,<sup>14</sup>
- e. Exceptions to exclusive rights must be limited, provided that a normal exploitation of the work and normal exploitation of the patent is not in conflict,<sup>15</sup>
- f. Legitimate interest of third parties have to be taken into account by patent rights,<sup>16</sup>
- g. In each state, intellectual property laws may not offer any benefits to local citizens of other TRIPS signatories under the principle of national treatment (with limited exception).<sup>17</sup> TRIPS also has a most favoured nation clause which requires national intellectual property regimes to provide most-favoured-nation (MFN) treatment and national treatment to the nationals of WTO trading partners.<sup>18</sup> Bilateral agreements that provide higher protection than that found in the TRIPS must afford that same level of treatment to the nationals of all other WTO Members on a MFN basis.

<sup>7</sup> Hans Dembowiski, A brief History of the WTO, available at <<https://www.dandc.eu/en/article/brief-history-wto>> accessed 28 October 2019

<sup>8</sup> See Nigeria-member-information-wto available at <[https://www.wto.org/english/Nigeria\\_e](https://www.wto.org/english/Nigeria_e)> accessed 29 October 2019

<sup>9</sup> See TRIPS Art 1(3) at <<https://www.wto.org>> trips\_e>intech\_e> accessed 30 October 2019

<sup>10</sup> See TRIPS Agreement, available at <[https://en.m.wikipedia.org/wiki/TRIPS\\_Agreement](https://en.m.wikipedia.org/wiki/TRIPS_Agreement)>. accessed 30 October, 2019

<sup>11</sup> Art. 12(14)

<sup>12</sup> Art. 9

<sup>13</sup> Art. 10(1)

<sup>14</sup> Art. 27 (2)(3)

<sup>15</sup> Art 13&30

<sup>16</sup> Art 30

<sup>17</sup> Art 3&5

<sup>18</sup> Art 10(1)

- h. The TRIPS Agreement specifically mentions that software and database are protected by copyright, subject to originality requirements.<sup>19</sup>

According to WTO,<sup>20</sup> the areas of intellectual property that TRIPS covers are; copyright and related rights(the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellation of origin; industrial designs; patents including the protection of new variety of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data. Three main features of the Agreement are:

- a. **Standards:** In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each member.<sup>21</sup> Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of the Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exceptions of the provision of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS member countries.<sup>22</sup>
- b. **Enforcement:** The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measure<sup>23</sup>and criminal procedure,<sup>24</sup>basically, the procedures and remedies that must be available so that right holders can effectively enforce their rights.
- c. **Dispute Settlement:** The Agreement makes dispute between WTO members relating to TRIPS obligations subject to the WTO's dispute settlement procedures.<sup>25</sup>

#### **4. The TRIPS Agreement and Intellectual Property Rights Enforcement in Nigeria**

Enforceability is the quality of being enforceable.<sup>26</sup> Enforceability of a contract is when someone can be compelled to observe or forced to obey.<sup>27</sup> For the purpose of this discourse, enforceability is the implementation or bringing into effect or compliance to the provisions of an agreement. Enforcement is the last stage of the judicial process after legal rights, claims or interests have

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<sup>19</sup> TRIPS: A more detailed overview of the TRIPS Agreement. available at <[https://www.wto.org/English/traptop\\_e/trips\\_e/intelz\\_e.htm](https://www.wto.org/English/traptop_e/trips_e/intelz_e.htm)> Retrieved 30 October 2019

<sup>20</sup> *Ibid*

<sup>21</sup> See Art 1(1)

<sup>22</sup> Art 2(1), Art 9(1)

<sup>23</sup> Art 51

<sup>24</sup> Art 61

<sup>25</sup> Art 64(1)

<sup>26</sup> See Enforceability define at <<https://www.translegal.com/enforceability>> accessed 2 November 2019

<sup>27</sup> See Enforceability: Everything you need to know available at <<https://www.upcounsel.com/enforceability...>> accessed 4 November 2019

ended in a judgment or an award.<sup>28</sup> It is a process whereby a judgment or order of a court is enforced or to which it is made effective according to law.<sup>29</sup> In this segment, we shall explore the level of compliance to the TRIPS agreement in the Nigeria intellectual property jurisprudence.

The TRIPS Agreement in part III sections 1 – 5, elaborates in 21 Articles, the enforcement procedures that members have to make available to promote prompt and effective action against infringement of intellectual property rights covered by the TRIPS Agreement. It is divided into five sections: General obligations,<sup>30</sup> Civil and administrative procedures and remedies,<sup>31</sup> Provisional measures,<sup>32</sup> Special requirements related to border measures<sup>33</sup> and Criminal procedures.<sup>34</sup>

#### **4.1 General Enforcement Obligations:**

Members must make enforcement procedures available in their national law to enable right holders to take effective action against infringement of the intellectual property right covered by the TRIPS Agreement. This obligation implies granting the competent authorities, judicial or others, the authority to order certain legal measures. Enforcement procedures must include expeditious remedies to prevent infringement, and remedies to deter further infringements.<sup>35</sup> Other obligations of members include: to avoid the creation of barriers to legitimate trade; to provide for safeguards against the abuse of such procedures; procedures must be fair and equitable for all parties involved; parties to enforcement proceedings must have an opportunity for review by a judicial authority of final administrative decisions.

Nigeria has creditable compliance in this regard because the various IP enactments and laws are styled and/or inspired by the TRIPS and its predecessors. Some of the laws governing intellectual property rights and protection in Nigeria include:

- a. Copyright Act (as amended),<sup>36</sup>
- b. Patent and Design Act,<sup>37</sup>
- c. Trademark Act,<sup>38</sup>
- d. Merchandise Marks Act,<sup>39</sup>
- e. Trade Malpractices (miscellaneous offences) Act,<sup>40</sup>

These laws directly provide enforcement procedures that are available to IP right holder to explore in case of infringement. With regard to the processing of evidence proffered by the parties, the Evidence Act,<sup>41</sup> the Federal High Court (Civil procedure) Rules,<sup>42</sup> and the Copyright

<sup>28</sup> See what is enforcement? available at <<https://thelawdictionary.org>> accessed 31 October, 2019

<sup>29</sup> Tope Adebayo, An analysis of enforcement of judgment and court orders in Nigeria legal system. available at <<https://topeadebayollp.wordpress.com/2011/06/09/an-enforcement-of-judgment-and-court-orders-in-the-Nigerian-legal-system>> accessed 1 November 2019

<sup>30</sup> Art 41

<sup>31</sup> Art 42 – 49

<sup>32</sup> Art 50

<sup>33</sup> Art 51 – 60

<sup>34</sup> Art 61

<sup>35</sup> Art 41(1)

<sup>36</sup> Cap c28 LFRN 2004

<sup>37</sup> Cap P2 LFRN 2004

<sup>38</sup> Cap T13 LFRN 2004

<sup>39</sup> Cap M10 LFRN 2004

<sup>40</sup> Cap T12LFRN 2004

<sup>41</sup> Cap E14 LFN 2004

<sup>42</sup>(2009) S1 3 LFRN

Act<sup>43</sup> provide guidelines to ensure that parties are given adequate opportunity to present their cases.

#### **4.2 Civil Procedures and Remedies:**

Section 2 of part III of TRIPS Agreement provides that a right holder must be able to initiate civil judicial procedures against an infringer of intellectual property rights covered by the Agreement. Civil and administrative procedure must be fair and equitable.<sup>44</sup> Concerning remedies, judicial authority must have the authority to award three types of remedies: injunctions, damages and other remedies.<sup>45</sup> Nigeria has shown conformity with this provision. For example, the Copyright Act allows for civil and criminal action can be taken simultaneously in respect of the same infringement.<sup>46</sup> Infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of the copyright, and relief is available by way of damages, injunctions, account of profit.<sup>47</sup> Legal process can even be initiated by *ex parte* application supported by an affidavit.<sup>48</sup> Civil remedies available for infringement of intellectual property rights in Nigeria can be classified into two categories namely pre-trial and post-trial remedies.

##### **4.2.1 Pre-Trial Remedies**

**a. Anto Pillar Order<sup>49</sup>:** This is an order which will enable the claimant, accompanied by his solicitors, law enforcement agents and bailiffs to enter the premises where the offending materials are kept to search and seize it. It is an order *ex parte* that is provided by the Copyright Act.<sup>50</sup> In *Musical Copyright Society Nigeria Limited v Details Nigeria Limited*,<sup>51</sup> the court made an Anton Pillar order on behalf of the plaintiff in respect of inspection and copying of documents. Also in *Ferodo Limited v Unibros stores*,<sup>52</sup> an Anto Pillar order was granted because the plaintiffs who were the sole distributors in Nigeria of Ferodo linings, claimed that their product were being sold by the defendants who were not their customers. More recently, on 8<sup>th</sup> August 2019 in the case of *Western Lotto Nig. Ltd v. K.C. Gaming Networks Ltd*,<sup>53</sup> the Federal High Court in sitting in Abuja granted an Anton Pillar order authorizing Sheriffs of the Federal High Court Lagos to raid the ‘Bet9ja’ Lagos office to recover a seal suspected to infringe the copyright of ‘Lotto9ja’, a rival gaming lottery company.

**b. Interim and Interlocutory Injunctions:** An Injunction is a court order directing that certain acts be done, or refrain from being done pending the final determination of the case. It usually the first relief sought to suspend the infringement. Interim injunction is made to maintain the *status quo* until a named date. The principles which govern the grant of interim injunction are laid down in *Kotoye v CBN*,<sup>54</sup> such as urgency and imminent danger to the property of the

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<sup>43</sup> Sect. (34) (35)

<sup>44</sup> Art 42

<sup>45</sup> Art 45(1)

<sup>46</sup> See sect. 21 Copyright Act

<sup>47</sup> Ibid sect. 15(1)

<sup>48</sup> Ibid sect. 22(1)

<sup>49</sup> *Anton Pillar AG v Manufacturing Process Limited*, (1976) 1 ALL ER 55

<sup>50</sup> Sect.22(1)(a)(b), sect. 25

<sup>51</sup> (1996) FHCLR 473

<sup>52</sup> (1999) 2 NWLR 509

<sup>53</sup> Suit No FHC/ABJ/CS/925/2019.

<sup>54</sup> (1989) 1 NWLR 419

claimant. Interlocutory injunction is any other order made in the course of the proceeding, and a perpetual injunction when the case has been concluded to totally stop the use of the mark.

In *Soul Publication Limited v Sweet Hearts Publication Limited and Anor*.<sup>55</sup> the court upheld the plaintiffs claim to an interim injunction. In *Dyktrade Limited v Omnia Nigeria Limited*,<sup>56</sup> an application for interlocutory injunction by the appellant was refused by the Supreme Court on the basis that they did not prove the existence of legal right in the trademark warranting protection because it had not been registered as a proprietor.

#### 4.2.2 Post-Trial Remedies

The Copyright Act<sup>57</sup> provides the remedies available to a successful claimant in copyright infringement as damages, injunctions (final) and account of profit.

**a. Damages:** Damages are calculated with the intention of putting the claimant in the position he would have been had the infringement not occurred. In the case of *Beech Group Limited v Esdee Food Product Nigeria Limited*.<sup>58</sup> The plaintiffs who were the registered proprietor of the trademark “LOCOZDE” had brought action for infringement of their trademark by the defendants who called their own product “GLUCOS-AID”. The learned judge upheld the plaintiffs’ claims and went on to award a mere five thousand naira (N5,000) as damages even though the plaintiff had pleaded five hundred thousand naira (N500,000). The assessment was affirmed by the Court of Appeal. The principle governing the award of damages in intellectual property rights are set out in the case of *General Tyre and Rubber company v Firestone Rubber Company Limited*.<sup>59</sup>

In *Nneoma Anosike v. Wema Bank Plc*<sup>60</sup> the plaintiff averred that the defendant bank had advertised her photograph without her consent with so as to exploit and profit from her fame and popularity as an international model. The defendant bank used her picture for an advert which showed the bank’s corporate logo beside her face and the words, “Be yourself, everyone else is taken” The Plaintiffs claimed N75 million as general damages for passing off her services and N2million as special damages. The Federal High Court, Lagos awarded damages in the sum of N10million against the defendant for passing off and an injunction restraining the defendant from further passing off or enabling others to pass off the plaintiff’s professional services.

**b. Final Injunctions:** A final injunction in an IPR infringement proceeding perpetually restrains the defendant from further infringing the work. In the case of *Yemitan v Daily Times of Nigeria*,<sup>61</sup> the court granted final injunction against the defendants from any further sale, use or dealings in plaintiff’s work.

**c. Account of Profit:** The alternative to damages is an order to reimburse the profits the defendant made as a result of his infringement. The quantum of an account is the profit, that is, the gain made by the defendants attributable to the infringement and not the wholesale or retail

<sup>55</sup> (1997) FHCLR 369

<sup>56</sup> (2002) 12N NWLR 1

<sup>57</sup> Sect. 15(1) Copyright Act

<sup>58</sup> (1999) FHCLR 477. See also *Masterpiece Invest Limited and Anor v WorldWide Business Media Limited and Ors* (1997) FHCLR 496 where the court awarded sixty thousand naira (N60, 000.00) to the plaintiff for infringement of his unregistered copyright in a literary work.

<sup>59</sup> (1976) 893 RPC 197

<sup>60</sup> Nigerian Law Intellectual Property Watch (NLIPW), “Copyright Cases in Nigeria” accessed 20<sup>th</sup> January 2020.

<sup>61</sup> (1980) FHCLR 186, See also *Nneoma Anosike v Wema Bank Plc (supra)*

value of the material. A claimant cannot have both damages and account of profit, but must elect between them. The Copyright Act<sup>62</sup> provides for account of profit to be rendered in case the defendant was not aware and had no reasonable ground for suspecting that copyright subsisted in the work to which the action relates.<sup>63</sup> In the case of *Plateau Publishing Company v Adophy*,<sup>64</sup> the Supreme Court held that the remedy of account of profits was not applicable to this case as the respondents were not innocent infringers. The damages of twenty-five thousand naira (N25,000) which they were asked to pay by the Court of Appeal was affirmed by the Supreme Court.

**d. Additional Damages:** The Copyright Act,<sup>65</sup> provides that in an action for infringement, where it is established that there is flagrancy or that the benefit of the infringement accruing to the defendant would not be enough to satisfy the relief available to the plaintiff, the court shall have power to award additional damages. In the case of *Peter Obe v Grape Vine Communication Limited*,<sup>66</sup> the court awarded additional damages from 5 million to 10 million naira.

**e. Delivery up:** Where this remedy is granted, the infringing goods will be ordered to be delivered up to be destroyed.<sup>67</sup> This relief was granted in the case of *Beecham Group Limited v Esdee Food Products Nigeria Limited*.<sup>68</sup> Having found that the defendants product marked “GLUCOS-AID” drink infringed upon the plaintiff drink marked “LUCOZADE”, the court held, *inter alia* that the defendants should deliver upon oath for destruction all the goods, cartons, wrappers, blocks, discs, or stamps bearing any mark or material that would be in breach of the injunction which had been granted.<sup>69</sup>

#### **4.3 Enforcement of TRIPS through Administrative/Regulatory Agencies**

TRIPS Agreement provides for administrative procedures on the merit of a case which shall confirm to principles equivalent in substance to those set forth in the agreement.<sup>70</sup> In Nigeria, some government regulatory agencies have functions which can be utilized to enforce intellectual property rights. Only the Nigeria Copyright Commission (NCC), the Nigeria Intellectual Property Office (IPO) and more recently, the National Office for Technology Acquisition and Promotion (NOTAP) have IP regulation and enforcement as their main statutory functions. Other agencies have terms of reference which are ancillary to IPR protection such as the National Agency for Food and Drug Administration and Control (NAFDAC), the Consumer Protection Council (CPC) and the Standards Organisation of Nigeria (SON). NAFDAC for instance, has been at the forefront of impounding fake and counterfeit drugs and prosecuting offenders, SON prescribes minimum standards for manufactured goods and the CPC processes public complaints concerning adulterated, substandard or counterfeit goods.

Law enforcement bodies such as the Nigerian Custom Service (NCS), the Nigerian Police Force (NPF) are also key stakeholders in the enforcement of IPR's. The above-listed

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<sup>62</sup> Sect.15(3) Copyright Act

<sup>63</sup> *Ibid* Sect. 16(3)

<sup>64</sup> (1986) 4 NWLR 265

<sup>65</sup> Sect. 16(4) Copyright Act

<sup>66</sup>(2007) 40 NPJD FHC

<sup>67</sup>FO Babafemi, *Intellectual Property* (Justinian Books Limited 2007) 295

<sup>68</sup>(1981) FHCLR 177

<sup>69</sup>*Ibid* 188

<sup>70</sup>Art. 49



organizations work closely with them to search, investigate and apprehend IP infringers. Such collaboration was envisioned by the TRIPS Agreement. For example, Article 51 TRIPS Agreement empowers the Custom Service of member nation to suspend the release of goods found to constitute an infringement of intellectual property right, upon application by the intellectual property right owner. There is an identical provision in section 44 of the Nigerian Copyright Act.

#### **4.4 Provisional Enforcement Measures:**

The TRIPS Agreement requires members to have provisional enforcement measures for effective and expeditious actions against alleged infringements.<sup>71</sup> The Agreement obliges members to authorize the courts to order provisional measures in two situations:

- a. to prevent an IPR infringement from occurring, in particular to prevent goods from entering the distribution channels including imported goods immediately after customs clearance,
- b. to preserve relevant evidence concerning an alleged infringement (anton pillar orders, interim and interlocutory injunctions).

In this area, Nigeria has not recorded a great deal of success, not because the courts are not empowered to make such provisional orders, but because the efforts of the regulatory agencies are often insufficient to detect and stem the tide of pirated and counterfeit goods produced or imported into the country. For instance, Nigeria is notorious for the manufacture and trade of fake drugs - a perennially booming billion dollar industry despite the efforts of NAFDAC to quash it. A 2011 World Health Organisation (WHO) study found that about 64% of anti-malarial drugs in Nigeria were fake.<sup>72</sup> The distribution network for counterfeit and substandard drugs, processed foods and drinks is so expansive that over 50% of such goods sold in the open market are counterfeit.<sup>73</sup> The same sad story obtains in the ICT Sector where the Minister of Communications stated that 82% of software installed on personal computers in Nigeria are unlicensed, resulting an annual loss of about \$287 million to the industry.<sup>74</sup>

Ever before requests for provisional orders of Court are made, relevant regulatory agencies (discussed above) must have investigated and identified how and where infringement occurs and where offending materials are kept. Unfortunately, poor staffing and funding, lack of technical know-how in the industry, bribery, corruption and a lack of political will have crippled these agencies and make light of provisional court orders.

#### **4.5 Border Enforcement Measures:**

Apart from the above measures TRIPS enables IPR holders to obtain the cooperation of custom administrators to intercept infringing goods at the borders and to prevent the release of these goods into circulation.<sup>75</sup> This is termed “suspension of release” of the goods by the customs authorities; it is not the same as a full infringement action, and to be effective, must be followed by legal proceedings leading to a decision on the merits of the case. For effective enforcement of IPR, all hands must be on deck to checkmate the infiltration of counterfeit and pirated products

<sup>71</sup> Art 50

<sup>72</sup>Business Action to Stop Counterfeiting and Piracy (BASCAP) Nigeria, “Promoting and Protecting Intellectual Property in Nigeria,” <https://iccwbo.org/uploads>, accessed 20<sup>th</sup> January 2020.

<sup>73</sup>PWC, “Impact of Intellectual Property Infringement on Businesses and the Nigerian Economy” available at [www.pwc.com/gn](http://www.pwc.com/gn), accessed 20<sup>th</sup> January 2020.

<sup>74</sup>*Ibid*

<sup>75</sup> Art 51 – 60

both locally and internationally. The TRIPS Agreement recommends that member states have surveillance at their various borders to intercept infringing products at the borders and to prevent the release of such goods into circulation. The NCS (Nigeria Customs) is the principal agency in charge of all goods entering, transiting and leaving the country through the borders. The NCS has enforcement, investigation, inspection and intelligence units responsible for various aspects of custom duties. It also collaborates with other agencies to carry out joint examination of cargoes at the borders. For instance, it was reported in 2012 that with the combined efforts of the NCC (Copyright Commission) thirteen containers stacked with pirated items were confiscated at different seaports in Nigeria.<sup>76</sup> Similarly in 2015, NAFDAC, along with the NCS impounded over five containers containing suspected counterfeit drugs with N270 million.<sup>77</sup>

**4.6 Criminal Procedures:** The TRIPS Agreement stipulates that criminal procedures and penalties are only mandatory in cases of willful acts, trademark counterfeiting or copyright piracy and acts carried out on a commercial scale.<sup>78</sup> In Nigeria's intellectual property regime, criminal punishments can only be found in Copyright and Trademarks Acts. Section 20(1) of the Copyright Act penalizes direct(primary) infringement of copyright with a fine not exceeding N1,000 for every copy dealt with or to a term of imprisonment not exceeding five years or to both such fine and imprisonment upon conviction. The infringing acts under this caption are the making, importing of infringing works or having in possession any device used for the making of any infringing copy of such work. Sub-section 2 of the same section 20 penalties indirect (secondary) infringement with a fine of hundred naira (N100) for every copy dealt with or to a term of imprisonment not exceeding two years or to both fine and imprisonment. The infringing acts under this caption includes the selling, hiring, having in possession for the purposes of trade, any infringing copy of the work. The penalty for distributing infringing copies of a copyrighted work for commercial purposes is a fine of hundred naira (N100) for every copy or imprisonment for six months or both such fine and imprisonment.

We look at some decided cases. In *NCC v Sunday Ayodele*<sup>79</sup> the accused person a trader popularly known as "Young Alaba" was arraigned on a charge of being in possession and offering for sale, copies of fake optical disc including CDs and DVDs. He was convicted and sentenced to 6 months imprisonment on each of the 3 counts and to pay a fine of two hundred and fifty thousand naira (N250, 000) cumulatively. Also in *NCC v CVL Technologies Limited*<sup>80</sup> a case relating to copyright infringement, possession and sale of sound recording and cinematograph films, illegal sale of Optic Disc. The accused admitted all charges and was sentenced to a fine of one hundred and fourteen thousand naira (N114, 000).

Under the Trademark Act, the sole offence is as regards the Trademark register. Section 60 and 61 criminalize falsification of register and false representation of a mark as registered. The penalty for the latter is fine of two hundred naira (N200) and the former is an imprisonment not exceeding seven years upon conviction. These criminal penalties are grossly inadequate relative to the offence committed and the amount of profit made by the infringer. Indeed, some

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<sup>76</sup>Amaka Okafor, Counterfeiting and Piracy: The need for an effective Border Control Regime; available at <<https://barcodestillwaterslaw.com/2014/02/11>> accessed 10 November 2019

<sup>77</sup>*Ibid*

<sup>78</sup> Art 61

<sup>79</sup>(2012) 55 NIPJD. KD 18C

<sup>80</sup>(2012) 55 NIPJD. FHC

infringers may opt to continuously pay such fines if they would be allowed to carry on with their infringement unregulated. It is usually a bad idea to include specific sums of money in legislation because the circumstances which prevailed at the time of making the law may change, rendering the specified amounts either inadequate or excessive.

## **5 Conclusion and Recommendations**

Nigeria as a signatory to WTO-TRIPS Agreement has shown substantial compliance in providing for most of the TRIPS provisions in her national laws. Having outlined the various IP enforcement laws in Nigeria and compared their contents with TRIPS requirements, it is safe to conclude that legislation-wise, Nigeria is a TRIPS compliant nation. Only a few legal provisions need to be fine-tuned or updated to achieve greater consonance with the TRIPS requirements and more importantly, a more efficient IP regime. For instance, the various IP laws should provide for punishment capable of deterring offenders from infringing on IPR as the current fines and imprisonment terms are not sufficiently deterrent. Again, section 21 of the Copyright Act should be amended to allow for either civil proceeding or criminal action against an infringer and not both simultaneously. There should also be speedier dispensation of IP cases in both criminal and civil proceedings because justice delayed is justice denied. It is also recommended that our IP laws make more detailed and technically appropriate provisions to combat the increasingly sophisticated techniques adopted by infringers, especially in the cyberspace.

It is critically important to consolidate IPR enforcement in the country because there is a strong correlation between IPR enforcement and economic development. Weak IP protection hinders research and development which leads to innovation, foreign direct investment and technology transfer. Worse yet, weak enforcement causes serious harm to consumers of fake and pirated goods. For instance, the country is estimated to lose about \$200 billion annually to counterfeit medicines and about 64% of malaria medications are fake;<sup>81</sup> little wonder that malaria remains one of the major causes of death in Nigeria despite having well known cures.

On the policy and practical aspects of enforcement, it is recommended that government should show more financial and political commitment to regulating the IP industry so as to curb the stem of IP violations in the nation. Enhanced inter-agency collaboration is needed to provide intelligence information between agents of the various security and administrative agencies that enforce IPR's. Likewise, there should be greater cooperation with international IP agencies. Leading IP experts and academics should be to IP offices across the country and systems put in place to develop competent manpower through continuous intensive training for IP enforcement officers. It is important to educate the public on the importance of intellectual property and the need to uphold and protect their IP rights.

Cautions must however be exercised because a uniform strengthening of TRIPS enforcement may cause grave harm to Nigeria's fragile economy. It has been persuasively argued that while developed countries benefit from strong patent protection which stimulates local innovation, developing countries rarely benefit similarly because they use mainly imported technologies

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<sup>81</sup>BASCAP, *ibid.*

from developed countries rather than local innovations.<sup>82</sup> Weak patent enforcement therefore helps indigenous inventive activities in the early stages by leaving room for some copying which can in turn, stimulate technological capabilities. TRIPS regime for enforcing strong patent to virtually all areas of technology is counterproductive to many developing countries that are still grappling with the challenges of technological development.<sup>83</sup> As the economy grows, IP enforcement becomes more financially beneficial. Industries rely on the adequate enforcement of their patents, trademarks, trade secrets and copyrights, while consumers benefit from purchasing quality and guaranteed products.

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<sup>82</sup> S Lall “Indicators of the Relative Importance of IPRs in Developing Countries”, in (2003) IPR and Sustainable Development, UNCTAD – ICTSD Project on IPRS and Sustainable Development, Issue paper No. 3; Ruth Okediji (2003), The International Relations of IP Narratives of Developing countries participation in the Global IP system. Sing. J.Y International and Comparative Law, Fink, C, Enforcing IPR: Economic Perspectives in ICTSD (2009) *The Global Debate on the Enforcement of Intellectual Property Rights and Developing Countries*, ICTSD IPRS and sustainable Development Program, Issue Paper No. 22, International Centre for Trade & Sustainable Development, Geneva, Switzerland, 2009.

<sup>83</sup> See Oguamanam, *Intellectual Property in Global Governance; A Development Question*, (Routledge 2012), 141-169.