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Mr. Adebambo Adewopo

THE ROLE OF IP ADMINISTRATION IN FORMULATING APPROPRIATE IP LEGISLATION, REGULATIONS AND PROCEDURES: NIGERIA'S EXPERIENCE

Introduction

Effective IP regime in any country not only required the enactment of an adequate IP law but also need to be complemented with the establishment of an institution that will be saddled with the responsibility of administering the law. The vital role of such an institution in the formulation of appropriate IP policy, legislation, regulations and procedure cannot be over emphasized. From our experience in Nigeria, one can confidently say with some degree of boldness that very little progress can be made in any country where there is no clearly defined administrative agency responsible for IP matters to give life to the letters and spirit of the law. The progress made so far in the field of copyright following the establishment of the Nigerian Copyright Commission in the formulation of appropriate copyright frame work for an effective copyright administration in formulating appropriate IP legislation indeed, confirms the importance of well focused administrative machinery.

Overview of the Legal Framework and Structure of IP in Nigeria

The IP system and structure of a country consists of rules, regulations and institutions created and protected by the state to foster respect for the creation of intellectual exertion of its citizens. The main areas of intellectual property protection in Nigeria are Patents, Industrial Designs, Trademarks, Copyright and Neighbouring rights. Statutory provisions are made for each of these branches of IP and in some cases there are subsidiary provisions in addition to the main statute. The main features of the statutory provisions will now be examined.

Patent

In Nigeria, Patent is protected under the Patents and Designs Act¹ (PDA), enacted in 1971. Under the PDA, an invention is entitled to a grant of Patent if it is new, results from inventive activity, and is capable of industrial application; or if it constitutes an improvement upon a patented invention and is also new, results from inventive activity and is capable of industrial application². An invention is deemed to be new if it does not form part of the

¹ Cap P2 Laws of the Federation of Nigeria 2004. The Act came into force on 1st December 1971

² Section 1(1) (a) &(b) PDA

state of the art in the particular subject of application; and it will be adjudged to result from an inventive activity if it does not follow from the state of the art, either as to the method, the application, the combination of methods, or the product which it concerns, or as to the industrial result it produces.³ What in essence is required is that the invention must be different from what was previously known to be in existence judging from the state of the art. In terms of the Act, state of the art comprises everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever (by means of written or oral description, by use or in any other way) before the date of the filing of the Patent application relating to the invention.⁴ What this means is that once a product or process or information concerning same is available to the public, such renders any subsequent invention in that field unpatentable. The invention accordingly, is said to have been anticipated. It does not matter where, when or the manner in which the information is presented to the public. The determination of novelty in the light of prior information involves the construction of both the document which forms the prior publication, and the claim which is subject matter of the Patent application. Upon comparison, and it is found that substantially the same process is described in the two documents, the current claim is said to have been anticipated, and therefore not Patentable.

The PDA makes provision for the procedure of application and registration. Every application for Patent shall be made to the Registrar of Patent stipulating all the necessary particulars like the name of the applicant, the description of the relevant invention; and shall be accompanied by the fees.⁵ The Registrar conducts only a formal examination as distinguished from substantive examination.⁶ Consequently, provision is made for Patents to be declared null and void if subsequently it is adjudged that the subject matter is not patentable or does not conform with stipulated requirement.⁷ The rights of a holder of patent includes the right, in the case of a product patent, to preclude others from making, importing, selling or using the product, or stocking it for the purpose of sale; in the case of a process patent, to preclude others from applying the process or doing in respect of a product obtained directly by means of the process, the making, selling, importing etc

³ Section 1(2) (a) &(b) *ibid*

⁴ Section 1(3) *ibid*

⁵ See section 3 *ibid*.

⁶ See Section 4 (1) *ibid*

⁷ See Section 9 *ibid*

of the product.⁸ The rights apply only to acts done for industrial or commercial purposes.⁹ The Patent holder may however assign his right, or licence a third party to use the invention. Where a licence has been granted, there is provision for registration of such licences. In appropriate circumstances, the state may issue a compulsory licence for the use of the invention.¹⁰ The term of protection is 20 years from the date of filing the Patent application¹¹. It must be noted that even though patent is generally available for all inventions, the Patent and Designs Act excludes from patentability certain subject matter. Consequently, patent will not be granted in respect of plant or animal varieties or essentially biological processes for the production of plants or animals (other than microbiological processes and their products). A patent will not also be granted in respect of inventions the publication or exploitation of which would be contrary to public order or morality.¹²

Industrial Designs

The Patent and Designs Act (PDA)¹³ govern the rights of creators of industrial designs. In the context of the Act any combination of lines or colours and any three dimensional form, whether associated with colours is an industrial design, provided it is intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not intended solely to obtain a technical result.¹⁴ To be registrable under the PDA, a Design must be new, and not contrary to public order or morality¹⁵. At the time of filing an application for registration a design is presumed to be new except if before the date of the application, it has been made available to the public anywhere and at any time by means of description, use or in any other way, unless it is shown to the satisfaction of the registrar that the creator of the design could not have known that it had been made so available¹⁶. An industrial design will however not be deemed to have been made available to the public solely by reason of the fact that within six months preceding the filing of the application for registration, the creator has exhibited it in an official or officially recognized exhibition.¹⁷

⁸ See Section 6(1) *ibid*

⁹ See section 6 (3) (a) *ibid*

¹⁰ Sections 10 & 11 *ibid*

¹¹ Section 7 *ibid*

¹² Section 1 (4) *ibid*

¹³ Cap P2 Laws of the Federation of Nigeria 2004

¹⁴ See Section 12 *ibid*

¹⁵ Section 13 (1) *ibid*

¹⁶ Section 13 (3) *ibid*

¹⁷ Section 13 (4) *ibid*

The Procedure for registration of an industrial design is similar to Patent in terms of form, except that the applicant is required to deposit with the Registrar a specimen of the design or a photographic or graphic representation of the design with any printing block or other means of reproduction from which representation was derived.¹⁸ A single application may relate to any number of industrial products not exceeding fifty if the products to which the designs relate are of the same kind.¹⁹ The rights conferred by registration on the creator of an industrial design include the right to preclude other persons from reproducing the design in the manufacture of a product, importing, selling or utilizing for commercial purposes a product reproducing the design; and holding such a product for the purpose of selling it or of utilizing it for commercial purposes.²⁰ These acts are only infringing in so far as they are done for commercial or industrial purposes. The right of the design proprietor shall not also extend to acts done in respect of a product incorporating a registered design after the product has been lawfully sold in Nigeria. A registration is valid for five years from the date of the application and is renewable for a further two consecutive periods of five years subject to payment of appropriate renewal fees.²¹

Trademarks

The substantive law on trademarks in Nigeria is the Trade Marks Act 1965²² (hereinafter referred to as the TMA). There under, trade mark is defined as follows:

Except in relation to the certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark whether with or without any indication of the identity of that person, and means in relation to certification trade mark, a mark registered under section 43 of the Act.²³

¹⁸ See Section 15 (1) (a) & (b) of the PDA. It states all the content of the application.

¹⁹ See section 15 (2) *ibid*

²⁰ See Section 19 *ibid*

²¹ See section 20 (1) *ibid*.

²² Cap T13 Laws of the Federation of Nigeria 2004. The Act came into force on 1st June 1967. There is also the Trade Marks Regulations made pursuant to Section 42 and 45 of the Act. The regulations came into force on 18th July 1967.

²³ Section 67(1) of the Trade Marks Act.

For the purpose of the TMA, a mark includes “a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof”.²⁴

The TMA provides for registration of marks under two registers, namely Parts A & B. it outlines the essential particulars for registration that an applicant must establish before the mark can be registered in any of the two registers.²⁵ Generally, distinctiveness of a mark is the basic requirement for registrability of a mark. Accordingly, registration of Marks in either part of the register depends upon the ability of applicants to show whether the mark was adopted to distinguish or capable of distinguishing. A prospective applicant for registration of a mark may apply to the Trade Mark registrar for advice as to whether the trade mark appears to the registrar prima facie to be inherently adapted to distinguish, or capable of distinguishing as the case may be.²⁶ An application for the registration of a trade mark may be made by any person claiming to be the proprietor of a trade mark used or proposed to be used by him, in writing to the Registrar in the prescribed manner either in Part A or in Part B of the Register. The Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations if any as he may think right.²⁷ Where the registrar refuses, he has to state the grounds of refusal in writing if demanded by the applicant, and such decision is subject to an appeal to the court.²⁸ The court may make an order determining whether, and subject to what amendments, modifications, conditions or limitations, if any, the application is to be accepted.²⁹ Where an application has been accepted (whether absolutely or subject to conditions or limitations), the Registrar shall as soon as may be after the acceptance, cause a notice of the application to be published in the Trade Marks Journal and the notice shall set out all conditions and limitations subject matter to which the application has been accepted.³⁰ Any person with adverse claim or sufficient cause may within two months of such publication give notice of opposition to the Registrar.³¹ When the application has been accepted, either without an opposition, or when the

²⁴ *Ibid*

²⁵ Section 9&10 *ibid*

²⁶ See Section 17(1) *ibid*

²⁷ Section 18 *ibid*

²⁸ Section 18 (4) *ibid*. The Federal High Court has jurisdiction for trade mark matters. See section 251(1) (F) of the 1999 constitution

²⁹ Section 18 (5) *ibid*

³⁰ Section 19(1) *ibid*

³¹ Section 20 (1) *ibid*

time for the opposition has expired; or where there is opposition, but has been decided in favour of the applicant, the Registrar shall, unless the application has been accepted in error, register the trade mark in Part A or Part B as the case may be.³²

Registration confers a right of action against infringement of a mark. However, common law action for passing off is also possible for infringement of unregistered marks.³³ The remedies against infringement and passing off include damages, injunctions and other pre-emptory relief in the nature of an Anton Piller order or opposition proceedings. There is however provision for transfer or assignment of a trade mark; and their registration can be with or without the goodwill of the business. Use of trade mark is the primary basis for the sustenance of its registration under the TMA, with effect that a mark can be removed from the register on the ground of non-use,³⁴ among other reasons. The TMA also provides six months priority for registration of Trademarks for which application had already been made in a convention country.³⁵

There is restriction on the use of the Nigerian Coat of Arms or that of any state without authorization of the appropriate authority; or the use of any emblem or title in a manner calculated to lead to the belief that the user is employed by or supplies goods to the President or the Government of a state in his capacity as such. These acts are offences under the TMA.³⁶ It is instructive to note that the only trade marks (i.e. marks used in relation to goods) and certification marks can be registered in Nigeria. There is no provision for the registration of service marks, collective marks, the distinctive shape of goods, sensory marks (i.e. marks indicative of sound, smell, taste etc). Similarly, the TMA does not, prima facie, make provision for the registration of a mark indicative of geographical origin or geographical name.³⁷ Upon, registration, the owner of the mark is entitled to

³² Section 22(1) *ibid*

³³ Section 3 *ibid*. See *Paktun Industries V. Niger Shoes* (1988) 5 NWLR, Part 93, at 138

³⁴ See Section 31. Other grounds for expunging a mark from the register are when it becomes (a) deceptive, and (b) ceases to be distinctive. See *Bell & Co V. Godwin Aka*, (1972) ALL NLR 34; *Alban Pharmaceuticals V. Sterling Products* (1968) ALL NLR 292; *Proctor & Gamble V. Global Soap* (1989) FHCLR 357

³⁵ See Section 44 of the Act.

³⁶ See Section 62 *Ibid*

³⁷ See Section 9(1) *ibid*.

the right thereon conferred for seven years. Such term may be renewed from time to time in accordance with the provisions of the TMA.³⁸

Copyright

Copyright is protected in Nigeria by the Copyright Act.³⁹ Section 1(1) of the Act lists the broad categories of works, which are eligible for copyright protection to include literary works, musical works, artistic works, cinematograph films, sound recordings and broadcast. The Act also provides protection for live performances⁴⁰ and expressions of folklore⁴¹. What constitutes these categories of works is listed in the definition of each work. The nature of the rights guaranteed to each category of works differs. Generally speaking however, the author or owner of copyright in a protected work is entitled to control the doing of any or all of the following acts:

- i. Reproducing the work in any material form;
- ii. Publishing the work;
- iii. Performing the work in the public;
- iv. Producing, reproducing, performing or publishing any translation of the work;
- v. Making any cinematograph film or record in respect of the work;
- vi. Distribute to the public, for commercial purposes, copies of the work by way of rental, lease, hire, loan or similar arrangement;
- vii. Broadcasting or communicating the work to the public by loud speaker or any similar device;
- viii. Making an adaptation of the work;
- ix. Doing in relation to the translation or an adaptation of the work, any of the acts specified in relation to the work in subparagraphs (i) to (vii).⁴²

The doing of any of the aforementioned acts without the express authorization of the author or owner of copyright in a work is an infringement of copyright for which the law prescribes both civil and

³⁸ Section 23 (1) *ibid.*

³⁹ Enacted as Decree No. 47 of 1988, the Act has been amended by Decree No. 98 of 1992 and Decree No. 42 of 1999. It is in Laws of the Federation Cap. C28 2004.

⁴⁰ See section 26 – 30 of the Copyright Act.

⁴¹ See section 31 – 33 *ibid.*

⁴² See Section 6 - 9 of the Act for a specific break down of the rights applicable to each category of work.

criminal sanctions.⁴³ An infringer may be prosecuted for copyright infringement where such acts constitute criminal violation. Punishment includes imprisonment, and fines consistent with the gravity of the offence.⁴⁴ Other deterrent measures include order of seizure, forfeiture and destruction of infringing works as well as materials and implements used in committing the offence.⁴⁵ In civil cases, the remedies are available to compensate the copyright owner for the economic injury suffered as a result of the infringement. This is normally by way of damages, injunctions, accounts of profit and conversion.⁴⁶ The relief to be sought at any given time depends on the nature of the infringement. For instance in cases where the defendant pleads innocent infringement, the court may not award damages but may order account in favour of the plaintiff.⁴⁷ The law however makes provision for exceptions and limitations to copyright control. Consequently, some acts may be done without reference to the copyright owner in respect of a work. Such includes the doing of any act by way of fair dealing for the purpose of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast.⁴⁸ The construction of these provisions often involves the delicate balancing of the interest of the user as against that of the copyright owner. The courts will likely consider the purpose and character of use including its commercial nature; the nature of the work; the proportion that was taken and the economic impact of the taking. Generally, a use that is non-profit yielding is likely to be adjudged fair.⁴⁹

Initial ownership of copyright is vested on the author of a work.⁵⁰ The author is basically the creator of a work⁵¹. There is however an exception to the general position, in the case of a literary, artistic or musical work created by an author in the course of employment by a proprietor of a newspaper,

⁴³ See Sections 15, 16 & 20 of the Act.

⁴⁴ Section 20 deals specifically with criminal violations. For instance, the making or importing or having in ones possession equipment for making infringing works is punishable by fine of an amount not exceeding N1,000 for every copy involved, or imprisonment for a term not exceeding five years.

⁴⁵ See Section 20(4) & (5) of the Act

⁴⁶ See section 16(1) & section 18 *ibid*

⁴⁷ Section 16 (3) *ibid*

⁴⁸ See Second Schedule to the Act for general provisions on exceptions. Third schedule contain exceptions in respect of a sound recording of a musical work

⁴⁹ International instruments like the Berne Convention allow countries to make these exceptions on the condition that such permissible use shall be allowed only in special circumstances and should not be prejudicial to the normal exploitation of the rights of the author. See Article 9(2) of Berne Convention

⁵⁰ See Section 10 of the Act

⁵¹ See section 51(1) of the Act for the definition of authorship in respect of all categories of works.

magazine or similar periodical. In such a case, the proprietor of such publication will be deemed to own the initial copyright in the work so published. Such ownership is restricted to the purpose of the publication only.⁵² Besides, initial ownership of copyright can also be varied by an assignment, testamentary disposition or operation of law. Where an assignment or an exclusive licence is granted, it must be done in writing.⁵³ A non-exclusive licence on the other hand may be written, oral, or inferred by conduct.⁵⁴

Ownership of copyright is central to the issue of enforcement of the right. Section 16 of the Act vests the right of action in respect of infringement of copyright on the copyright owner, his assignee or exclusive licensee. Such actions can only be brought at the Federal High Court exercising jurisdiction in a place where the infringement occurred.⁵⁵ To ease the problem of copyright owners who turn to judicial process in enforcing their rights, the law has made some provisions to facilitate proof of vital facts. Section 42 of the Act allows a court to receive affidavit evidence of a copyright owner resident outside the jurisdiction of the court, in lieu of the usual oral evidence, which might prove costly and time consuming. Section 43 makes presumption in favour of the author in respect of the prove of some facts. For instance, it is presumed that copyright subsists in the work subject matter of litigation, and that the plaintiff is the owner of the work; and that the name appearing on the work as the name of the author is accordingly the author of the work. Section 25 (1) permits the author to obtain a court order *ex parte* permitting him to enter upon a premises where infringement is being carried on, or suspected to be carried on for the purpose of searching, seizing, and detaining any document, contrivance or evidence relating to such infringement. The essence of the provision is to forestall the concealment of evidence, upon the defendant being given notice of an action. Section 24 of the Act allows simultaneous prosecution of both civil and criminal actions in respect of an infringement. This is against the usual practice of discouraging double action. Its inclusion in the Act demonstrates the pro-author slant of the Act.

⁵² Section 10 (3) *ibid*

⁵³ Section 11 *ibid*

⁵⁴ For instance, if the author of a work places such work on internet, he may be deemed to have given a general licence for the work to be used by those who can accessed the work. Such licence may not cover commercial exploitation like making copies for sale.

⁵⁵ Section 16(1) *supra*. In a recent Court of Appeal decision in the case of *MCSN V. Adeokin Record* suit No. CA/L/498/97-unreported), the court affirmed the right of action as vested in the copyright owner or his assignee or exclusive licensee.

Administration of IP in Nigeria

It is worth noting that in Nigeria, IP administration is fragmented broadly between two government agencies *viz* Nigerian Copyright Commission and the Industrial Property Department of the Federal Ministry of Commerce. The Nigerian Copyright Commission deals with copyright matters while the Industrial Property Department of the Federal Ministry of Commerce handles Patents, Trademarks and Industrial Design matters. The Nigerian Copyright Commission was established by the Copyright Act 1988⁵⁶, as an agency of government responsible for all copyright matters in Nigeria⁵⁷. It is a body corporate with perpetual succession which may sue and be sued in its corporate name.⁵⁸ Its establishment is one of the most salutary provisions of the Act. With the 1992 and 1999 amendments of the Act, the powers of the Commission have been expanded to cover enforcement of the law. Consequently, the Commission can appoint Copyright Inspectors with powers analogous to that of a police officer⁵⁹ who can conduct investigation and prosecute copyright infringement cases.⁶⁰

The provision of a body such as the Commission in the Copyright Act has served an important function beyond facilitating the enforcement possibilities under Nigeria's treaty obligations. The Commission is the government focal point for the purpose of monitoring and advising on developments on international copyright issues and is responsible for all matters affecting copyright in Nigeria. More specifically, it has been assigned the duty of monitoring and supervising Nigeria's position in relation to international conventions and advise government thereon, advise and regulate condition for the conclusion of bilateral and multilateral agreements between Nigeria and any other country and enlighten and inform the public on matters relating to copyright. Other mandates are maintenance of an effective databank on authors and their works and responsibility for such other matters as the supervising Minister may from time to time direct.⁶¹

The broad statutory mandate of the Commission over copyright has placed it in a vantage position to play an effective and vital role in the formulation of

⁵⁶ As amended. See Cap. C28 Laws of the Federation 2004.

⁵⁷ Section 34 of the Act

⁵⁸ Section 34 (1) (2) *ibid.*

⁵⁹ Section 38 (5) *ibid.*

⁶⁰ See Section 38 (2) (3) *ibid.*

⁶¹ Section 34 (3) (a) (b) (c) (d) (e) and (f) of the Copyright Act.

appropriate IP policy, legislation, and the making of regulation and procedure for copyright administration in Nigeria among other things.

Formulation of IP Policy and Legislation

The Nigeria Copyright Commission has been playing the role of formulating policy and initiating legislation in the field of IP commendably. The Strategic Action Against Piracy (STRAP) initiative of the Commission launched on May 3rd 2005, represents Nigeria's national policy to combat piracy and a programme of action to ensure that right owners in the copyright based industries gets full value for their creative works. Former President Olusegun Obasanjo while launching STRAP declared that:

Nigeria cannot afford to be a piracy haven....the damaging effects of piracy is visible all around us: the waning zeal for creativity; the dearth of well-researched textbooks and reading materials in the education sector; the diminishing of the artistic and literary quality of our stage performances; and the increasing colourless and uninspiring products in the visual arts. Expectedly, the investors are wary, and the younger generation is not encouraged to pursue careers in the arts and entertainment industry. We are all confronted by an attack on our culture and future as people. We are faced with the reality of a declining economic resource and a source of pride as a nation.

STRAP is envisaged to be a proactive and dynamic change agent that will positively impact on the socio-economic and cultural aspects of Nigerian people while also securing the material interest of foreign investors. Under STRAP, the Commission is determined to play the role of enabler, facilitator and regulator through effective copyright administration, protection, and enforcement in order to help the private sector to grow, create jobs and generate wealth for the nation.⁶²

STRAP deploys three basic intervention components, namely: proactive enforcement, administration of rights and public enlightenment. Its core principles are: to combat all forms of piracy and copyright abuses, create a conducive environment for the management and exploitation of the gains of

⁶² STRAP Working Document and Action Plan (Nigerian Copyright Commission Abuja, 2005)

the copyright system, evolve a suitable copyright environment which will benefit local and foreign investors as they are encouraged to explore the potentials of the country's copyright based industries as the largest market on the African continent, and restoration through awareness campaign, Nigeria's image as a country that upholds the ideals of creativity and innovation.⁶³

Components of the Strategic Action Against Piracy (STRAP)

(a) Public Enlightenment:

It has been recognized that lack of awareness about the law and administration of copyright constituted a major inhibition to the development of a sound copyright system in Nigeria. It was on this basis that public enlightenment was incorporated as a core component in the STRAP initiative. The public enlightenment arm of STRAP is not just aimed at making the Nigerian public aware of copyright, piracy and its ills, and their obligations under the law, but also to re-orientate their mindset from being passive to issues of piracy, to playing active role in the fight against piracy and encouraging the integration of copyright and IP perspective into national development strategies. In this respect, the mass enlightenment component of STRAP is an integrated media campaign tailored for different segment of the Nigerian Copyright community in its operations.

(b) Enforcement:

This is being used in STRAP not just because it is the cardinal statutory mandate of the Commission but also because its operational mode is such that easily elicit compliance in a pirate endemic environment. The enforcement tools are such that are meant to send out a clear signal to pirates and other poachers of intellectual property (IP) works that the fight to drastically reduce piracy is real and that government is more than ever before determined to do just that. The tools include anti-piracy raids, arrest and prosecution of pirates.

It is instructive to note that the enforcement component of STRAP is derived from the general power of enforcement provided in the Copyright Act which came with the 1992 and 1999 amendments of the Copyright Act.⁶⁴ This has enabled the Commission to appoint Copyright Inspectors who have powers analogous to the powers of a police officer⁶⁵ to handle copyright

⁶³ Adebambo Adewopo, "The Strategic Action Plan Against Piracy (STRAP) Initiative" *presented at 2007 International Law Enforcement Intellectual Property Crime Conference, held in Canada*

⁶⁴ The power is contained in section 38 of the Copyright Act

⁶⁵ Section 38 (5) *ibid*

infringement cases.⁶⁶ They can consequently investigate any allegation/complaint of piracy, arrest copyright offenders and carry out inspection of any place allegedly used for piracy activities or illegal production of copyright works. In addition, they can embark on raids and seizure of pirated materials and prosecute suspected pirates in court.

(c) Administration of Rights:

Another important pillar of STRAP is rights administration which is crucial to the realization of the underlying policy of the Copyright system. Under STRAP, the Commission is strengthening all existing rights management mechanism from both the regulatory perspective and from the perspective of encouraging the establishment of credible structures by the right owners in the respective copyright based industries. The main areas of focus are the regulation and monitoring of collecting societies, the review and realignment of the Copyright Notification Scheme, repackaging of the Video Rental Scheme, introduction of the Optical Disc Manufacturing Plant Regulation, Copyright (Security Devices) Regulation (Hologram Scheme), and implementation of the Levy on Copyright materials⁶⁷.

STRAP Initiative and Copyright Administration and Enforcement

The STRAP initiative has enabled the Commission to enlist, to a large extent, public-private sector participation in the anti-piracy campaign through a critical buy-in by stakeholders. STRAP has engendered unprecedented, enhanced anti-piracy enforcement in terms of intensified intelligence gathering and surveillance, raids⁶⁸ and seizures⁶⁹, public destruction of pirated products⁷⁰ and prosecution of suspected pirates⁷¹, while some have been convicted⁷².

⁶⁶ See Section 38 (2) & (3) *ibid*

⁶⁷ Section 40 of the Copyright Act empowers the Commission to introduce levies on materials that are capable of being used for the infringement of copyright. The essence of the provision is to create a means of compensating authors for the loss suffered by virtue of the private reproductions of their works for which there is no avenue of direct licensing. The revenue from the levies is to be shared among collecting societies, while the Commission may retain a percentage not above 30 % for administrative purposes.

⁶⁸ In the last one year, more than 60 anti-piracy raids and 316 inspections had been conducted in various parts of the country.

⁶⁹ More than 12,718,774 pirated items with an estimated market value of ^1, 900, 000, 000, .00 were seized by the Commission in 2006.

⁷⁰ Confiscated pirated materials with a market value of ^1,900,000,000.00 were destroyed in 2006 by the Commission in 2006

⁷¹ Till date more than 50 cases of copyright infringement are been prosecuted in the various Federal High Courts in the country.

⁷² 4 convictions have been secured till date.

Prosecution has indeed been intensified. For instance in March 2006, book pirates were successfully prosecuted at the Federal High Court Maiduguri, while 40 other cases are at various stages of prosecution at the Federal High Court across the country. The conversion measure of STRAP shows that hitherto diehard, big-time pirates are beginning to scramble for copyright licenses while some known piracy production plants and distribution outlets are now seeking to regularize their operations in compliance with Copyright Law.

Furthermore STRAP has succeeded in redesigning and strengthening the Commission's regulatory measures to serve as credible structures for the realization of the gains of the copyright system by genuine right owners and the creative industries. In its enhanced copyright administration drive, the Commission has boosted the implementation of the Copyright Notification Scheme, which is currently assisting in the creation of the databank of authors and works which is one of the major functions of the Commission. It has initiated the process of regulation of the Optical Disc Replicating Plants and the repackaging of the Hologram Scheme as an anti-piracy security mechanism at production level. The Video Rental Scheme is similarly being overhauled for effectiveness. Moreover, Government for the first time is exploring high level political will towards the resolution of the problem of collective administration of rights in the country.⁷³

STRAP prioritizes grassroots awareness campaign. By partnering with the media as a major stakeholder, sustained anti piracy public enlightenment programme is being pursued with a view to eliciting appropriate attitudinal change among the citizenry in appreciation of the fundamental values of intellectual property and indeed copyright protection. Moreover, institutional and manpower development drive that the implementation of STRAP necessitated has facilitated the repositioning of the Commission for greater efficiency and effectiveness.

Presently the Commission is playing an active role in the reform of Nigeria's IP laws through the initiation and preparation of the Nigeria Intellectual Property Commission (NIPCOM) bill that is before the National Assembly as an Executive bill. NIPCOM bill when enacted will overhaul the legal and institutional framework of Nigeria IP regime through a complete reform of

⁷³ An indication of this is the proposed new regulation that will soon be introduced.

IP laws and the merger of copyright administration under the Nigerian Copyright Commission with the Patent and Trademarks Registry presently under the Federal Ministry of Commerce under a single Commission with a holistic mandate on Intellectual Property administration and enforcement in Nigeria.

Moreover, realizing that the IP has always not been given the proper attention it deserves in government's plan and development strategy, the Commission is currently working in conjunction with other relevant government agencies particularly, the National Planning Commission on integrating IP into the national development and planning agenda. Positive effort in this direction commenced last year with the policy paper and documents submitted by the Commission as inputs into the preparation of the National Economic Empowerment and Development Strategy II (NEEDS II) Document⁷⁴ which is Nigeria's government policy response to the development challenges of the country.

Regulation & Procedure for IP Administration

For an effective and efficient IP administration in any jurisdiction, the IP administrator must be conferred with powers to make regulations and procedures. The Nigerian Copyright Commission has been empowered as such by the Copyright Act⁷⁵. Exercising this power, the Commission has roll out a number of regulations like the Copyright (Optical Disc Plants) Regulation 2006⁷⁶ to regulate the optical disc replicating industry in Nigeria, the Hologram Scheme⁷⁷, Video Rental Scheme⁷⁸ and the Collective Administration of Rights. A perusal of the Copyright (Optical Disc Plants) Regulation 2006 for instance would reveal the importance of these schemes

⁷⁴ The National Economic Empowerment and Development Strategy (NEEDS) I was launched in 2004. It was designed as the roadmap for economic development and prosperity which focuses on four key strategies: reorienting values, reducing poverty, creating wealth, and generating employment. See National Economic Empowerment and Development Strategy (NEEDS) Document (Abuja; National Planning Commission, 2004)

⁷⁵ Sections 45 (4) and 21 of the Copyright Act. Cap. C28 LFN 2004

⁷⁶ Copyright (Optical Discs Plants) Regulation 2006. Published as Government Notice No. 47

⁷⁷ Published as Government Notice No. 145 in the Federal Republic of Nigeria Official Gazette No. 63 Vol. 86 of 10th September 1999. This regulation prescribed the fixing of Hologram stamps in every film and sound recording work intended or offered for sale, rental, hiring lending or otherwise distributed to the public for commercial purposes in Nigeria for easy identification of original works from pirated copy.

⁷⁸ Copyright (Video Rental) Regulations of September 1999. The Regulation was intended to discourage the proliferation of illegal rental activities by establishing guidelines for operation of rental outlets in a manner that will guarantee compensation of right owners for commercial use of their works and equally facilitate general authorization for the conduct of rental activity.

in effective copyright administration and the tremendous facilitations of the attainment of the statutory mandate of the Commission for which it has received both local and international commendation.

Regulating Copyright-based industry: The Copyright (Optical Disc) Regulation 2006

The Copyright (Optical Disc) Regulation 2006 was officially launched in April 2007 by the Nigerian Copyright Commission. The imperative of regulating the optical disc replicating industry in Nigeria was informed by the realization of the fact that it is easier to check piracy if the source of reproducing copyright works and materials is controlled and regulated. The regulation of optical disc manufacturing plants is very vital in order to identify these plants and carryout periodic supervision of the outlets to ensure that illegal reproduction of work is not carried out. It will also enable the Commission to enforce the statutory duty requiring these plants to keep a register of all works produced by them showing the name of the author, title of work, year of production and quantity of work produced.⁷⁹ Presently, there are 13 registered plants in the country, and the possibility of existence of some clandestinely cannot be totally rule out.

The Copyright (Optical Discs Plants) Regulation empowers the Commission to monitor the operations of all local optical discs manufacturers and replicating plants, as well as the imports of such products with a view to checking the rising tide of piracy in Nigeria. The Regulation enable the Commission to monitor and control the production, importation and exports of optical discs (CDs, VCDs, DVDs etc), production parts, raw materials and manufacturing equipment in Nigeria, with a view to entrenching high standards of copyright practice in relevant industries⁸⁰. The basis of the Regulations is the powers vested in the Commission under section 45 (4) of the Copyright Act “to make regulations specifying the conditions necessary for the operations of a business involving the production, public exhibition, hiring or rental of any work in which copyright subsists under this Act”.

Highlights of the Regulation includes the mandatory registration of person and companies involved in manufacturing optical discs and production parts⁸¹, importers and exporters of optical disc duplicators⁸² and importers

⁷⁹ Section 14 of the Copyright Act

⁸⁰ See Guidelines for the Copyright (Optical Discs plants) Regulation 2006 issued by the Nigerian Copyright Commission, Abuja. p.1

⁸¹ Section 1 (1) of the Copyright (Optical Discs Plants) Regulations 2006

and exporters of optical disc and production parts with the Commission⁸³. All registered persons are obliged to adapt and use appropriate manufacturing code⁸⁴ prescribed by the Commission and to keep samples and records relating to their machinery and raw materials⁸⁵ and production. In addition, registered persons are duty bound to file periodic returns as may be required and in the manner stipulated by the Commission. To enforce compliance with the guidelines, the Commission's officials routinely make unscheduled inspection of the plants and business premises of the person or companies, and the companies are duty bound to give them cooperation and unfettered access to their premises⁸⁶. The violation of the Regulation attracts the penalties of refusal to register an applicant, suspension of registration and prosecution for breach. Registration is for a period of a year after which operators would apply for renewal⁸⁷. Moreover, the Commission must be notified of every importation and exportation by a registered company.

It is instructive to note that the Commission has put in a lot of effort in implementing the provisions of this Regulation. So far 13 optical disc replicating companies have been registered. In the last one year of implementation, two plants were shut down by the Commission for the violation of the Regulation. It is hoped that the full implementation of the Regulation would bring optical disc piracy to the barest minimum in Nigeria.

Conclusion:

There is no gain saying the fact the IP administration has an important role to play in the formulation of appropriate IP policy, legislation, regulations and procedures. The extent to which the administrator can go in this regard will be determined by the statutes establishing it and defining its powers. The holistic mandate of administration and enforcement of copyright given to the Nigerian Copyright Commission in this respect has enabled the Commission to admirably play these roles. It is our hope that when NIPCOM bill is enacted it would impact positively in a tremendous way on the administration and enforcement of IP in Nigeria generally.

⁸² Section 3 *ibid.*

⁸³ Section 2 (1) *ibid.*

⁸⁴ See section 4 and 5 *ibid.*

⁸⁵ See section 6 *ibid.*

⁸⁶ See section 9 *ibid.*

⁸⁷ See section 10 *ibid.*

