THE CONVERGENCE OF INTELLECTUAL PROPERTY RIGHTS AND INFORMATION TECHNOLOGY IN NIGERIAN LEGAL SPHERE: THE GOOD, THE BAD AND THE UGLY SITUATIONS

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Abstract

Advancement in technology has increased streams of income for intellectual property right holders. Rights holders, particularly artistes in the creative industry, now have multiple streams of revenue, a development made possible by information technology. On the other hand, the information technology age exposed the loopholes in Nigeria's intellectual property laws and rendered redundant and impracticable some of its provisions. The use of technological devices to protect fundamental intellectual property rights in the technological age has eroded the rights of users to information. Likewise, several products are not anticipated or protected under the extant laws. Lamentably, the information technology age advanced with some untoward, undesirable, situations. In this paper, the writer examines various situations where the advancement of information technology has impacted on the intellectual property rights of right holders in Nigeria. For convenience, these situations are grouped into the good, the bad and the worst-case scenario, which is the ugly situation. The focus of this paper is on Nigeria, and the relevant Nigeria laws viz: The Copyright Act, Patents and Designs Act and the Trademarks Act. However, juxtapositions were made with other foreign jurisdictions where necessary. This paper will outline the deficiencies within the scope of the current Nigerian laws and calls for reactive measures on the laws to meet the realities of the information technology age.

Keywords: *Intellectual property; Nigeria; creative and entertainment industry; copyright; information technology; intellectual property rights.*

1. Introduction

One of the primary reasons for the introduction of intellectual property rights (IPRs) in the *Uruguay Round of Trade Talks* is the understanding by many stakeholders that intellectual property rights play a significant role in encouraging innovation, technological change and technology transfer. With the assurance and protection of intellectual property laws, innovations and inventions occur to make life better, more comfortable and more informed for the people. Advancement in technology has also increased streams of income for intellectual property rights holders. Artists and others in the creative industry now have multiple streams of revenue owing to several media channels made possible by information technology. Information technology creates an opportunity for artists to reach out to a large number of fans. This is good.

However, the Information Age has exposed the loopholes in Nigeria's intellectual property laws and rendered redundant and impracticable some of its provisions. The use of technological devices to protect fundamental intellectual property rights in the technological age has eroded the rights of users to information. Likewise, several products, intangible and tangible are not anticipated under the existing laws and thus not covered or protected by them. This situation has, of course, necessitated the amendment of several intellectual property laws to meet the realities of the *Information Technology Age.* This is bad.

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Lamentably, the information age created some untoward and undesirable situations, a *volte-face* from the constructive principles of intellectual property laws. Artists and other stakeholders in the creative industry cannot but bemoan and count their losses as a result of technology-aided infringements. Cited as an example in the Nigerian entertainment industry is the case of the blockbuster movie '*The Wedding Party*'[1] released in December 2016. A few weeks after the movie premiered in Nigeria and before it could be screened in the cinemas; pirates had made the film available on several online media platforms. Authors and writers no longer expect much profit from the sales of their books because as soon as a single copy is released into the market, pirated copies will flood the same market at a far cheaper rate. This is an ugly situation.

In this paper, the writer examines various ways in which the advancement of information technology has impacted intellectual property rights in Nigeria. These situations have been conveniently grouped into the good, the bad and the worst-case scenario, which is the ugly situation. The focus of this paper is on Nigeria, and the relevant Nigerian laws *viz*: The *Copyright Act*, *Patents* and *Designs Act* and the *Trademarks Act*. However, juxtapositions were made with other foreign jurisdictions where necessary. The methodology employed in gathering information and data for this work is the desk-based research, and our primary sources are the Nigerian legislation, both extant, and draft bills pending at the National Assembly, while the secondary sources consulted were books, articles, newsletters, amongst others. Views were also gathered from relevant stakeholders, specifically artists in the creative industry and lawyers in the intellectual property field. This paper does not boast of being all-inclusive and ultimate in its findings and recommendations but seeks to evoke the current situation of intellectual property laws in the era of information technology and calls for reactive measures on the laws to meet the realities of the Information *Technology Age*.

For the sake of clarity, this paper is discussed in three parts. The first part gives an introduction and explains the key terms used in this paper. The second aspect of the article is the discussion of the impact of technology on Nigeria's IP laws, looking at the triple effects of technology on Nigeria's IP laws: good, bad and ugly. The third aspect of the paper is a discussion on the expectations on how to overcome the adverse impact of information technology on IP laws in Nigeria and the author's recommendations. This aspect of the paper also concludes the discussions and findings in the article.

1.1 Information technology

Information technology does not lend itself to easy and a universal definition. The Merriam-Webster online dictionary defines information technology as 'the technology involving the development, maintenance, and use of computer systems, software, and networks for the processing and distribution of data'.[2] Chambers defines it as: 'the use, study or production of a range of technologies (especially computer systems, digital electronics, and telecommunications) to store, process and transmit information'.[3] Carter defines information technology as the use of technology to aid the capture, storage, retrieval, analysis and communication of information,

[1]Kemi Adetiba, *The Wedding Party* (2016) The Elfike Film Collective: EbonyLife Films, FilmOne Distribution, and Inkblot Productions <http://www.imdb.com/title/tt5978822/> accessed 11 January 2019. A hilariously funny, heart-warming, romantic movie, it tells the story of an inter-tribal wedding with all the characteristics and idiosyncrasies a typical of a lavish Nigerian wedding. From uninvited guests, overbearing in-laws and plenty of drama. The movie left audiences pleasantly entertained.

[2] www.merriam-webster.com/dictionary/information%20technology.

[3] Chambers 21st Century Dictionary, updated edn., (1999) 696

whether in the form of data, text, voice or image.[4] Information technology is a term which encompasses the notion of the application of technologies to information handling.

1.2 Intellectual property

Intellectual Property (IP) has been defined in the *Black's Law Dictionary*[5] as a category of intangible rights protecting commercially valuable products of the human intellect. In a similar vein, *Osborne's Concise Law Dictionary*[6] defines IP as a category of intangible rights protecting commercially valuable products of the human intellect. Several authors have also offered different definitions of intellectual property. Davies[7] refers to IP as 'products of the mind' while Williams[8] sees it as 'that body of legal rights which arise from mental and artistic endeavour'. According to Subbaram:

> 'Intellectual Property Rights are the exclusive rights granted by the State to their holders as a reward for the disclosure of the inventions resulting from their creative and innovative activities. The rights so acquired can be bought, sold, licensed, exchanged or gratuitously given away like any other form of property. In addition, the owner of IP has also the right to prevent the unauthorized use or sale of the property'.[9]

Intellectual Property Rights (IPRs) are statutorily granted[10]and protected though there are still protections and enforcement rights under common law.[11]These rights are exclusive and attached to them is the right to exclude third parties from dealing with the protected work unless with the permission of the rights holder. Under Part II of the *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994*, seven different forms of *IPRs* were identified. These are Copyright and Related Rights, Trademarks, Geographical Indications, Industrial Designs, Patents, Layout-Designs (Topographies) of Integrated Circuits, Protection of Undisclosed Information.[12] However, under *Nigerian Laws*, four sets of these rights were statutorily provided for: copyright[13], industrial designs, trademarks and patents.

2. Impact of Information Technology on Nigeria's Intellectual Property Laws

Over the years, the internet has grown in leaps and bounds and is having a direct impact on all aspects of our lives. Due to its sheer pervasiveness – over 4.2 billion or 55.1% of the world's population had access to the Internet as of 2018.[14] This potential is altering the way we interact with each other online and offers a selection of choices through which we can share, earn and

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[4] R. Carter *Students' Guide to information Technology* (1990) 2-3.
[5] Bryan Garner (ed.) *Black's Law Dictionary* 8ed.(2004) 824.
[6] Leslie Rutherford and Sheila Bone, 8ed. (1998) 181
[7] Jennifer Davies *Intellectual Property Law* (2001) 1.
[8] F. John Williams *a Manager's Guide to Patents, Trademarks, and Copyright,* (1981) 8.
[9] N.R. Subbaram *Patent Law Practices & Procedures* 2 ed.(2007) 467.
[10] The IP laws in Nigeria are the Copyright Act Cap. C28 Laws of the Federation of Nigeria (LFN) 2004; Patents and Designs Act Cap. P2 LFN 2004; Trademarks Act Cap. T 18 LFN 2004.
[11] As in the tort of passing off for trademarks, see *Niger Chemists Ltd. v. Nigeria Chemists* [1961] 1 All NLR p. 171.
[12]Justin Malbon, Charles Lawson and Mark Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (Edward Elgar Publishing 2014) <http://www.elgaronline.com/view/9781845424435.xml> accessed 21 March 2019.
[13] Performers and broadcasters' rights are subsumed under neighbouring rights and are protected under the Copyright Act, see section 23 of the Copyright Act (n18).
[14]Internet World Stats, available online at https://www.internetworldstats.com/stats.htm (accessed 10 January 2019)

live.[15] Countries have over the years found the need to legislate for the emerging trends from information technology due to the understanding that ordinary laws made for regular offline interactions are not adequate to tackle the challenges of the online world.[16]

It is in Nigeria's national interest to harness potentials that exist in the information-driven age through the deployment and exploitation of information technology to facilitate socio-economic development.[17] However, it is also essential to keep the laws abreast with the pace of the developments in information technology, thereby necessitating several amendments of the laws to meet the realities of modern times. It is asserted that information technology has expanded the confines of the various *IP* protections, negated some of the provisions of the existing *IP* laws while rendering some of the provisions of the laws inoperative, redundant and unenforceable. Nonetheless, Nigeria must take more steps to accommodate the dynamics of information technology in its *IP laws*; these are the good or beneficial impact, the bad impact, and what we call the ugly impact, which in this paper is the worst.

2.1 The Good

One of the benefits of information technology on the *IPRs* of authors and creative artists is the creation of numerous avenues/channels for the distribution of *IP* protected works to the public. These avenues are sources of income for the IPR owner. *IP* protected works are no longer only distributed in traditional ways. There are so many online platforms where musical works and cinematograph films could be placed or uploaded for purchase by members of the public. These works can then be streamed online or downloaded upon payment of a subscription fee. Another good aspect of this is that information technology has widened the potential audience of the *IPR* owners. A work published in Nigeria and placed for purchase online has the potential of being purchased beyond the shores of Nigeria. This, in turn, expands the fan base of the artists or authors while ensuring that the IPR owner has multiple streams of income. Several other online channels or media where musical works or cinematograph films are streamed online also have a monetisation strategy which ensures that through adverts placed in the course of streaming the musical or film works online the *IPR* owners still get some revenue from the free online streaming.

Aside from the download and streaming of the copyrighted works, information technology has made it possible for musical works to be used as ringback tones.[18]This also ensures that income inures to the copyright owner. The telecommunication company using the musical work as ringback tone will always have an arrangement with the copyright owner or the relevant collecting society wherein it will be agreed on how the income generated from the subscription of the ringback tones will be shared, and this is usually done on a percentage basis.

On the entertainment and the film industry in Nigeria, the sequel to the movie, '*The Wedding Party*'[19]'*The Wedding Party 2*'[20] released on December 15, 2017, did much better, raking in ₦73

[15] Michele Marius, "Can a Mutually Beneficial Relationship Exist Between IP and IT" available online at http://www.ict-pulse.com/2012/04/can-a-mutually-beneficial-relationship-exist-between-ip-and-it/(accessed 10 June 2018

[16] Dr B.O. Jemilohun and Prof. T. I. Akomolede, 'Regulations or Legislation for Data Protection in Nigeria? A Call for a Clear Legislative Framework' (2015) Vol. 3, No. 4. *Global Journal of Politics and Law Research* 1-16 2.

[17] UNECA & NITDA, "ICT4D Strategic Plan for Economic Sectors of Nigeria" November 2014 publication, p. 19. Available at http://www.nitda.gov.ng/documents/ICT4D%20PUBLICATION.pdf accessed 23 January 2019.

[18] A. Adewopo 'Analysis of Copyright in Digital Music: Implications for New Media Licensing for Ringtones under the Nigerian Copyright Act' (2017) *Gravitas Review of Business and Property Law* vol. 8 No. 1 pp. 1-3.

[19] See footnote 1

million in its first weekend,[21]and this was mainly because of information technology. The movie described as Nigeria's first international box-office hit beat out all other films in Nigerian and foreign cinemas including *Star Wars: The Last Jedi*.[22] The film was advertised on YouTube as a short-form version, in addition to conventional trailers. The producers posted excerpts from the film as short drama clips. This is a perfect illustration of the benefits of information technology. Again, Nigeria recently recorded her first NETFLIX movie, *Lionheart*[23] which became Netflix's first original Nollywood film after the streaming giant purchased worldwide rights in September 2018. Thus, because of information technology, the Nigerian film industry, popularly referred to as *Nollywood*[24] is currently enjoyed and appreciated worldwide, not just on the African continent. The internet created a platform for *Nollywood* to take its place as one of the most prominent players on the global stage.[25]

In the aspect of trade, rapid strides in the field of technology have made e-commerce a viable platform for trade, accessible to ordinary retail buyers and sellers separated geographically, who would otherwise not have contemplated any transaction between themselves.[26] Trademarked products are being placed on e-commerce sites for purchase. By this action, brands are popularised even beyond their local market. What this implies for brands aside from income, is that it helps trademarks become well known across many countries and may enjoy the well-known status of a trademark[27] even in a country where it is not in use. In considering the well-

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[20]Niyi Akinmolayan, *The Wedding Party 2: Destination Dubai (2017)* EbonyLife Films, FilmOne Distribution, and Inkblot Productions <http://www.imdb.com/title/tt7827944/plotsummary> accessed 18 February 2019. The movie kicked off from where the first movie stopped. The culture clash between a Yoruba and Igbo family is further complicated by the introduction of the bride's British family to a destination wedding set in Dubai.

[21]'Â€˜The Wedding Party 2â€™ Rakes in N73m on Opening Weekend' (*THISDAYLIVE*, 20 December 2017) <https://www.thisdaylive.com/index.php/2017/12/20/the-wedding-party-2-rakes-in-n73m-on-opening-weekend/> accessed 23 November 2018. The movie went on to open in 17 other African countries and the United Kingdom, where it had the biggest single-day opening for a Nollywood film. The producers capitalised on the fact that many people were talking endlesslessly about the first movie and decided to use the opportunity to decry the pirating of films, and there was a public campaign on all social media platforms against watching pirated copies of films. There was film awareness on these platforms, and enlightenment campaigns went on for many months before the release of the sequel movie in cinemas.

[22]Rian Johnson, *Star Wars: Episode VIII - The Last Jedi* (2017) <http://www.imdb.com/title/tt2527336/> accessed 21 January 2019. Lynsey Chutel, 'A Nollywood Wedding Rom-Com Is Nigeria's First International Box-Office Hit' (*Quartz Africa*) 1 <https://qz.com/africa/1172784/wedding-party-2-breaks-box-office-records-in-nigeria-uk-and-takes-nollywood-to-global-cinemas/> accessed 18 January 2019.

[23]ToyaSharee, 'Netflix Nabs Deal For First Original Nigerian Film With "Lionheart"' (*MadameNoire*, 9 September 2018) <https://madamenoire.com/1039500/netflix-acquires-rights-to-first-nigerian-original-film/> accessed 23 October 2018. Genevieve Nnaji, *Lionheart* (2018) <http://www.imdb.com/title/tt7707314/> accessed 18 January 2019.

[24]'Nigeria Surpasses Hollywood as World's Second Largest Film Producer – UN' (*UN News*, 5 May 2009) <https://news.un.org/en/story/2009/05/299102-nigeria-surpasses-hollywood-worlds-second-largest-film-producer-un> accessed 9 March 2019.

[25]UNESCO REPORT, 'Nigeria's Creative Ability: Booming Nollywood, Music, Fashion and Much More' (*Diversity of Cultural Expressions*, 12 May 2017) <https://en.unesco.org/creativity/news/nigerias-creative-ability-booming-nollywood-music> accessed 9 March 2019.

See also Rebecca Jagoe, 'From Living in Bondage to the Global Stage: The Growing Success of Nollywood' (*Culture Trip*) <https://theculturetrip.com/africa/nigeria/articles/from-living-in-bondage-to-the-global-stage-the-growing-success-of-nollywood/> accessed 14 January 2019.

[26] A Roy and D Kanjamala, 'India: The Cross-Border E-Commerce Conundrum' Mondaq available online at http://www.mondaq.com/article.asp?articleid=709128&email_access=on&chk=2351086&q=1641958 (Accessed on 12 June 2019).

[27] See Section 32 of the Trade Marks act (n18).

known status of a particular trademark, the online presence of such products embodying the trademark either in advertisement or e-commerce sites is put into consideration.[28]

Intellectual Property Law is an indispensable source of protection for new technology.[29]The need for protection of intellectual property is crucial today because of increased competition in both foreign and domestic markets. It helps to avoid the menace of pirating technology. The economic benefits of technological innovations that result from research and development programs are quickly lost if *Intellectual Property Laws* are not used aggressively.[30] Thus, *IP laws* incentivise innovation and research and development in the technology field and protect the same when developed. Technology transfer from developed nations to developing nations is also encouraged with the presence of strong *IP laws*. No company would like to bring in its patented technology into a country where there is no reliable patent protection and as such, render it's patent open and liable for manipulation and exploitation.

2.2 The Bad

The advancement in information technology and the increase in the use of the internet made it a potential marketplace where business owners target and reach out to customers. The commercialisation of the internet has led to some conflicts between trademark owners and internet users who have registered domain names that potentially infringe the rights of those trademark owners. These disputes illustrate vividly the competing interests at stake and the types of controversies that the system of domain name registration has caused.[31] There have been several occasions where domain names have been registered in breach of existing trademarks.[32]

Redundant IP Laws

Many provisions of the IP laws in force in Nigeria have either been rendered redundant, impracticable or unenforceable. A few examples are discussed in this section.

- Section 44 of the *Copyright Act*, which restricts the importation of printed works which infringe the copyright of the copyright owner, is submitted as no longer feasible in this Internet Age. Physical copies of works are no longer necessary to be imported through traditional means. Infringement of copyright works is done with ease electronically and the infringing works can be transferred all over the world without any control or search by any Customs authority.

- Under section 40 of the *Copyright Act*, a levy is required to be paid 'on any material used or capable of being used to infringe copyright in a work.'[33] This material is not defined under the *Act*, but as Olubiyi stated: 'these are essentially devices that are likely to be used in infringing copyright."[34]Under the *Copyright* (*Levy of Materials*) *Order 2012*, materials used or capable of being used for the infringement of copyright were listed under the schedule to the order. Such materials such as mobile phones, CDs, USB flash drives, memory cards and personal

[28]*Procter & Gamble Co. v. Global Soap and Detergent Ind. Ltd*. (2013) 1 NWLR 209

[29] A. Beckerman-Rodau, 'The Impact of Technology on Intellectual Property Law', *The Ohio Northern University College of Law WRIT (Winter 1990-1)* available online at www.lawprofessor.org (accessed on 13 June 2018).

[30] *Ibid.*

[31] Gayle Weiswasser (n46) 227

[32] See for example, Case No. DSC2014-0001*; Konga Online Shopping Limited v. Rocket Internet GmbH, Arnt* Jeschke, Decision delivered by WIPO AMC on 4 September 2014.

[33] See section 40 Copyright Act Cap. C28 Laws of the Federation of Nigeria (LFN) 2004

[34] I A Olubiyi 'Imposition of a Copyright Levy in Nigeria: Legal Justifications and Comparative Analysis' *Afe Babalola University Journal of Sustainable Development Law and Policy* Vol. 4 Iss.1 (2014) 88

computers amongst others were listed. It is obvious and unfortunate that tracking these materials in Nigeria would be a great difficulty. This levy is to be paid by importers of these materials at the point of entry; or by the manufacturers or the person assembling, for products manufactured or assembled in Nigeria.

- With increased technological developments, private copying has become stress-free.[35]This would lead to a decrease in the sale of copyright works, primarily literary and musical works as well as cinematograph films. Information technology also makes it almost impossible for performers to control the broadcasting of its live performances as provided under section 26 of the *Copyright Act*. During live performances, the audience sometimes streams the performance live on social media like Facebook, *Instagram*, amongst others, some record the performance and upload on their channels on *YouTube* and various other websites.

- Ordinarily, there are exceptions or defences traditionally built into copyright and other *IP laws*. *Article 9* (2) of the *Berne Convention*[36] permits the '*Member States'* to make exceptions to copyright provided the exceptions are as '*special case*', 'do not conflict with a normal exploitation of the work' and do 'not unreasonably prejudice the legitimate interest of the author.' One of the exceptions to copyright infringements under the *Nigerian Copyright Act* is the exception of 'fair dealing' provided for under paragraph (a) of the *Second Schedule to the Copyright Act*. Hence, the doing of any of the infringing act by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events etc is permissible. This exception based on 'Fair Dealing' is similar to the 'Fair Use' concept applicable in the United States although Fair Use is in general, broader than the concept of fair dealing because it is not confined to specific purposes such as research, study, criticism and review or news reporting.'[37]

Technological protection of works restricts Fair Dealing

Information technology makes it possible for many copyrighted works to be made available online. To avoid the massive and stress-free infringement of copyright works on the online space, copyright owners make use of technological protection measures (TPM) to ensure that their works available on the online space is not infringed. As much as this innovation in protecting copyright works available on the online space is lauded, it has however eroded traditional defences to infringement of copyright. This is one of the bad instances of the impact of information technology on *IPRs* and *IP laws*. The existing *IP laws* make no provision for this kind of situations. With the use of *TPMs*, it has been noticed that some articles found online cannot be copied, saved or even printed because such articles or write-ups are protected with *TPMs* – a form of digital rights management technology.

Itanyi and Anya had written that fair dealing and other commendable defences to copyright infringement apply somewhat effectively only to information in the analogue environment.[38] The

[35] M Kretschmer 'Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe' UK Intellectual Property Office 2011 64.

[36]The Berne Convention for the Protection of Literary and Artistic Works (as revised as Paris) Paris Act 1971

[37]Tobias Schonwetter and Caroline Ncube, 'New Hope for Africa? Copyright and Access to Knowledge in the Digital Age' (2011) 13 info 64, 67 <http://www.emeraldinsight.com/doi/10.1108/14636691111131457> accessed 22 January 2019.

[38] N. Itanyi and S.N. Anya 'Mitigating the Copyright Law and Policy for Wider Access to Knowledge in the 21st Century' (2012) 1 *Journal of Contemporary Law* 197-210.

defences do not apply extensively to digital information because of available *TPMs*.[39] An illustration follows: 'A student, for instance, can make a photocopy of a book for private educational purpose, and this is an exception to copyright infringement.' However, if there is only an electronic copy of that book, the student can be barred by *TPM* from accessing the book. *TPMs* do not recognise students and their peculiar circumstance. So there appears to be stronger *IP* created barriers to information in the digital environment than in the analogue, due to the existence of tighter digital rights management technology.[40]

Amendment Bills proposed to accommodate IT Impact on IP Rights

Under the extant *Nigerian Copyright Act*, *TPMs* or digital rights management technologies are not recognised. Legislative bills seeking the amendment of the *Nigerian Copyright Act* to recognise these new technologies have been proposed by the *Nigerian Copyright Commission* (*NCC*). The *NCC* is driving the current review of Nigeria's copyright law the obectives being to ensure that the law keeps pace with technological advances, is useful in clamping down on copyright infringement and is responsive to present-day operating realities. It is the sponsors of the *Draft Copyright Bill 2015* presently before the House of Representatives in Nigeria.[41]The Bill has been approved by the National Executive Council to be forwarded to the National Assembly for passage into law. There are few other relevant *Bills* before the *Legislative Houses* worthy of mention.

Bill SB.03 2011,[42] seeks to amend the *Copyright Act* by introducing several provisions relating to technological measures in protecting copyright and decompilation of copyrighted works. The *Amendment Bill* provides for situations where an internet service provider must terminate an account of a repeat infringer.[43] The *Amendment Bill* allows the use of *TPMs* and further prohibits any circumvention of *TPMs*. This is commendable as it seeks to protect the rights and interests of the copyright owner, but caution is to be held in the enforcement of the law to ensure that the reasonable interests of interested parties under fair dealing are protected. This *Bill,* seems to have been abandoned as it has not been raised under the current eighth legislative house.

Another *Amendment Bill*, [44] under consideration, is *Bill SB. 510 2018* which proposes to amend section 6 of the *Copyright Act* by providing for works on the internet such as email, webpage and links. The ammendment seeks to empower the copyright owner to authorise and control the publication or posting of work on the internet; sell the work through the internet platform; to distribute the work to the public through the internet for commercial purposes. It is noted that these activities are already being practised, albeit, without statutory backing. The *Bill*, however, created a new precondition to the enforcement of rights over works published on the internet: if

[39] S.N. Anya 'Overcoming Intellectual Property-Created Barriers to Information: perspective on Nigeria as a Developing Country' (2014) 7 *Law and policy Review* 31 – 55 41-42.

[40] *Ibid.* p. 42.

[41] 'DRAFT_COPYRIGHT_BILL_NOVEMBER-_2015.Pdf' <http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER-_2015.pdf> accessed 26 October 2018.

[42] 'A Bill for an Act to Amend the Copyright Act Cap. C28 LFN 2004 For The Purposes of Making Provisions for technological Measures in Protecting Copyright and for Other Related Matters" sponsored by Senator Aloysius Akpan Etuk.

[43] Clause 3 of the Copyright Amendment Bill

[44] SB. 510 2018. "A Bill for an Act to amend the Copyright Act Cap. C28 for the purposes of making provisions for works on the internet in which copyright subsists, prohibits the infringement of such works, prescribe penalties for and other matters connected thereto' Fatima Raji Rasaki, 'Copyright Amendment Bill SB. 510 2018' <https://nass.gov.ng/document/download/9643> accessed 21 March 2019.

any work on the internet is infringed, the rights owner is obligated by law to file his complaint first with the *Nigerian Copyright Commission* (*NCC)* before filing any other charges or lawsuit. This provision will work hardship against the copyright owner and will delay the enforcement of copyright infringement. The provision would have been made in the alternatives; if the copyright owner intends that the *NCC* should enforce his right, then he should report to *NCC* if not, the copyright owner should proceed and enforce his rights against an infringer. Infringement of any work on the internet for commercial purposes attracts a fine not exceeding ten million naira or three years' imprisonment.

Next is the *Industrial Property Commission of Nigeria Bill*, which seeks to overhaul the current *IP* regime in Nigeria comprehensively and makes provision for the registration and protection of trademarks, patents and designs, plant varieties, animal breeders' and farmers' rights. The *Bill* seeks to give patentability to computer programs, provided that such programs are not of a scientific or mathematical nature and do not contravene the provisions of the *Bill*.[45]

In the area of patents, the laws are redundant. Software patents are not registrable in Nigeria. While it is argued that a broad interpretation allows registration of software as inventions, in practice, the *Patents Registry* does not register software as patents in Nigeria. At best software codes can enjoy copyright protection, however, the extent of such protection is neither clear nor specific, more so because there is no formal registration for copyright. Simply put, these codes are protected by copyright, but these codes have no written documentation, as such, a person could adopt these codes in the production of rewriting of other software without the knowledge of the copyright owner. In the United States, the *Third Circuit Court* in the case of *Apple Computer, Inc. v. Franklin Computer Corp, [46]*declared that all forms of computer software were copyrightable. This decision, which has been universally followed, ended a dispute over whether certain types of software could be the subject of copyright protection. However, the scope of protection afforded computer software has raised some complicated issues.[47]

Protection of computer software as copyright is not full protection for the software developer although computer programmes are listed as part of copyrightable literary works.[48]Copyright law protects the expression of an original idea and not the idea itself. Hence, if the software codes are copyrighted, it does not stop anyone who has read the codes from using the knowledge gained in developing similar computer software and products. This is one of the issues caused by the absence of specific laws on the subject matter. On the flipside, patent law protects new inventions or an improvement on the state-of-the-art, which are useful in industrial application and involve inventive steps.[49] Despite the broad nature of the definition of patentable inventions, mathematical algorithms, mental processes or steps and few other things are not patentable. It can be argued that computer software is nothing more than an algorithm or a series of mental steps and as such, cannot be patentable.[50] Thus, it is not settled whether the existing *Patent Law* is enough to protect computer software.

[45] Mark Mordi and Ngo-Martins Okonnah, General Issues on Intellectual Property Rights Protection and Enforcement *The Intellectual Property Review* 5Ed Robert L. Baechtold, ed. 220 – 229 227
[46] 714 F.2d 1240 (3rd Cir. 1983)
[47] A. Beckerman-Rodau, (n25)
[48] Section 39 (1) (d) Copyright Act (n18); *Microsoft Corporation v. Franike Associates Ltd*. (2011) LPELR-8987 (CA)
[49] Section 1 of the Patent and Designs Act (n18)
[50] A. Beckerman-Rodau (n25)

Another area to examine is on the issue of the ownership of the works created by *Artificial Intelligence.* Machines, similar to human beings, are now capable of creating works even without human assistance; but the question is whether these works meet the criteria for intellectual property protection, particularly as to the requirement of the creator being a person/human.[51] A person may have developed the program or artificial intelligence, but the artificial intelligence program may create something that is unexpected or undesired by the creator who developed the program.[52] The question then is whether the developer will have the copyright in the produced work.

The question of whether tweets, updates on social media platforms can enjoy copyright protection is still uncertain. Though the provisions of the *Copyright Act* can be read to include such online write-ups, the absence of any legislative provision in that regard may lead to legal challenge as to its eligibility for copyright in the courts. While the author of such work online may have the automatic copyright as provided under the *Copyright Act,* the quick copying and repasting of the work all over the media will lead to difficulty in determining the original author of the work. This mostly applies to online works in transient forms, like the *Facebook* and *WhatsApp* stories.

Another effect of the use of information technology in businesses and trade competition is the rising and numerous cases of cyber squatting[53] and disputes between domain names and registered trademarks. Some trademarks/brands which have become so popular are threatened in this phase of information technology. Competitors adapt the trademark names not belonging to them and register a domain name to divert and misinform the customers of the popular trademark/brand. To further compound this problem, the *Nigeria Internet Registration Agency* does not have to conduct any search to ascertain that a proposed domain name is in conflict or confusingly similar to a registered trademark.[54] Thus, if a competitor to the proprietor of a well-known registered trademark applies to register a domain name of the proprietor of the well-known mark, the domain name will be registered in the name and for the use of the competitor. A notable case is that between *Konga Online Shopping Limited v. Rocket Internet GmbH Arnt Jeschke* involving Nigeria's two biggest online shopping competitors.[55]

Information technology has also led to an increase in bad faith filing of trademarks. International trademark owners who may not have registered their trademarks in Nigeria, but have advertised their goods and services in online media to make it accessible to Nigerians run the risk of having their trademarks registered by Nigerian entity in bad faith. As such, when such international

[51] Andree-Anne Perras-Fortin 'ARS EX Machina: Artificial Intelligence, The Artist' Mondaq available online at http://www.mondaq.com/canada/x/723118/Copyright/Ars+Ex+Machina+Artificial+Intelligence+The+Artist(accessed 12 June 2019); see also A Bridy "Coding Creativity: Copyright of the Artificially Intelligent Author" (2012) Stan. Tech. Rev., 1; The United States Ninth Circuit Court of Appeals in the case of *Naruto, a Crested Macaque, by and through his Next Friends, people for the Ethical Treatment of Animals (PETA) v. David John Slater, et al.reaffirmed that non-humans cannot enjoy copyright ownership and in extension, any intellectual property right, available online at* https://qz.com/1261828/the-monkey-selfie-case-demonstrates-nonhumans-can-make-constitutional-claims/ *(accessed 12 June 2018); similar decisions in Australia also agree with the principle that copyright can only be owned by a humans Achohs Pty Ltd v. Ucorp Pty Ltd (2012) FCAFC 16.*

[52] J Wagner "Rise of the Artificial Intelligence Author" (2017) *The Advocate* 75, 527.

[53] The offence of cybersquatting is punishable under section 25 of the Cybercrimes Act of Nigeria 2015.

[54] See the NIRA Domain Name Policy and the NIRA General Registration Policy both of version 1.0, May 5, 2008.

[55] Case No. DSC2014-0001 *Konga Online Shopping Limited v. Rocket Internet GmbH, Arnt Jechke* (www.wipo.int/amc/en/domains/search/text.jsp?case=DSC2014-0001)

trademark owner now considers Nigeria as a potential market, he is faced with challenges from the local trademark owner.

2.3 The Ugly Situations

One of the distinct challenges that has emerged with the advent and advancement of information technology, due to the relative anonymity and, to varying degrees, the absence of geographical borders the internet affords, is the numerous opportunities to infringe on the IP rights of others for financial gain.[56] Also, information technology makes it easier and faster to violate or create infringing copies of copyrighted works. Once a musical work or cinematograph film is produced, the making of infringing copies becomes more accessible and faster. Even before the original works are distributed, and at times even before the authors/artists have recouped their expenses, the infringing copies would have flooded the market. Worst still is the fact that such infringing copies could be made available on the online space for further infringement.

The internet is a global, interconnected web of computer networks that links millions of computer users and permits them to share and assign services and information.[57]The internet is not organised or regulated by any central authority.This makes it difficult for activities on the internet, including infringement of IP protected works, to be monitored and controlled.[58]

Information technology has also made it problematical for enforcement of IP infringement. Infringement of trademark rights in an e-commerce site comes along with the problem of who is to be held liable.[59] The e-commerce sites most times do not offer goods for sale and by their terms and conditions, limit their liability for any infringement occurring on the e-commerce marketplace. However, where a registered online store infringes the trademark of a trademark proprietor, and the proprietor writes to the e-commerce site to give details of the online store and/or take down the online store, if the e-commerce site does not comply with these demands, the line of action to be taken against the online store is obscure.This is because trademark laws do not apportion liabilities in cases like this. At any rate, the trademark proprietor whose rights are infringed cannot be left without a remedy under the principle of *ubi jus, ibiremedium*– where there is a right, there is a remedy.

Jurisdiction of the court to handle infringement matters online is also an issue. Online infringements could be cross-border, thereby making it difficult to prosecute or enforce the rights.[60] *IPRs* are territorial; the internet is not. A work protected in Nigeria may via the internet

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[56] Michele Marius (n3)

[57]See generally W.Gary Hamilton *Trademarks on the Internet: Confusion, Collusion, or Dilution?* 4 TEx. INTEL. PROP. L.J. 1, 2 (1995); L. Dan Burk *Trademarks Along theInfobahn: A First Look at the Emerging Law of Cybermarks, I* RICHMOND J.L. & TECH. 1, $ 2 (April 10, 1995) <http://www.urich.edu/jolt/vli/burk.html>. See also Gayle Weiswasser *Domain Names, the Internet, and Trademarks: Infringement in Cyberspace* (2003) 20 Santa Clara High Tech. L.J. 215 216.

[58] In *Spanski Enterprises v. Telewizja Polska* 883 F.3d 904 (2018) the defendant, a site owner, argued that only the end users could be held liable for the infringement of the copyrighted works on his site. The court did not agree with this argument. The content of the site and the viewership was held to be in the Defendant's control and thus should be liable for infringement.

[59] D Kaesmacher and J Dumoulin *Anti-counterfeiting 2008 – A Global Guide* (2008) 31-34, 33

[60] See J F Delaney "Copyright's Long Arm: Foreign Website Found to Infringe U.S. Copyright Law by Providing U.S. Viewers Access to Site Content" Mondaq available online at http://www.mondaq.com/unitedstates/x/722746/Copyright/Copyrights+Long+Arm+Foreign+Website+Found+to+Infringe+US+Copyright+Law+by+Providing+US+Viewers+Access+to+Site+Content?type=popular (accessed on

find its way to another jurisdiction where it does not enjoy the protection and will be exploited at will. Infringement of a work protected by copyright in one jurisdiction may occur in another jurisdiction through an internet site owned and operated by another person yet in another jurisdiction.[61]

Another major problem in enacting laws regulating *IP* and information technology is that IP and IT are specialised areas; laws have to be made by persons knowlegeable in that field. The legislators have to first understand the subject matter, its facets and dynamics before passing any law in that regard. This is necessary because over-regulation or uninformed regulation can prevent innovation or create ineffectual laws. Calling for immediate amendments of laws to be in tune with the advancement of technology is asking the legislators to adapt quickly to new technologies that they may not understand. In the United States, for example, several laws to protect IP on the internet have been introduced both in the Senate and the House of Representatives; yet they could not be passed as laws because of several dynamics involved and the competing interests of stakeholders, the *Protect Intellectual Property Act*, *The Stop Online Piracy Act and the Online Protection and Enforcement of Digital Trade Act* are examples.[62] In effect, it is not an easy task enacting laws for the regulation of information technology or protection of IP in the online space.

Information technology has in no small measure increased and eased the dissemination of hate speech all over the world. A concocted story/hate speech written by a person in a particular setting and sent over any communication media could stir protests, killings and even war.[63] On social media, hate speech is a daily occurrence. Digital communication technologies are increasing avenues for more voices to exercise their freedom of speech and expression. New media are diversifying the audiences engaging in online communication.[64] Worst still, social media is hardly regulated, unlike conventional television, radio, newspapers and other media outlets. A person using online media, especially *Facebook* and *Twitter*, to spread hate speech can do so under hidden identity, either by using fictitious names or by imitating another person – cyber squatting. Most times, cyber squatters use names of known politicians, organisations and celebrities to get more listeners as followers of public figures readily believe statements

11 June 2018); see also *Spanski Enterprises v. Telewizja Polska* (n50); *London Film Productions Ltd. v. Intercontinental Communications, Inc.,* 580 F.Supp. 47 (1984); Sarah Bird "International Copyright on the Web: What Rules Apply to Me and What Court Will Apply Them" available online at https://moz.com/blog/international-copyright-on-the-web-what-rules-apply-to-me-and-what-court-will-apply-them- (accessed 11 June 2019).

[61] See *Spanski Enterprises v. Telewizja Polska* (n50); see also *RJR Nabisco, Inc. v. European Community*136 S.Ct. 2090 (2016) where the United States Court adopted the 'Focus' test as laid down in *Morrison v. National Australian Bank Ltd*. 130 S.Ct. 2869 (2010) in determining the issue of jurisdiction where several acts occurred in several jurisdictions. The Court stated that "if a conduct relevant to the statute's focus occurs in the U.S, then the case involves a permissible domestic application even if other conduct occurred abroad."

[62] J Newman 'SOPA and PIPA: The pros and cons' available online at https://www.infoworld.com/article/2618556/internet/sopa-and-pipa--the-pros-and-cons.html accessed 29 April 2019

[63] O.E. David Abuo, 'Investigation, Criminal Procedure and Evidence: Dealing with Cross-Border Crimes' in JB Daudu and Deji Adekunle eds *Reforming Criminal Law in Nigeria* (2012) 4.

[64] Nanjira Sambuli, 'The Importance of Monitoring Online Hate Speech' available at <http://www.dw.com/en/the-importance-of-monitoring-online-hate-speech/a-19104789> (accessed 8 May 2019).

supposedly made by their heroes. These followers could rapidly share false statements on social media and in effect, accelerate the spread of hate speeches and fake news.[65]

There is no gainsaying the fact that new technologies, mainly social media platforms, have in no small measure aided in the increase and ease of dissemination of hate speeches in Nigeria and beyond.

3. Conclusion and Recommendations

Having observed the significant impact of information technology on IP laws, it is agreed that the existing laws should be amended to bring the laws in tune with the realities of the modern age. However, as noted in the discussions above, the enactment of laws in this regard should not be rushed so as not to enact ineffectual laws. Information technology is a dynamic phenomenon having different facets and possibilities of constant change; thus, legislation passed to regulate it should take care of these peculiarities as well. Membership of the *Governing Board of the Nigerian Copyright Commission* should be extended to include a person knowledgeable in the information technology sector. This is necessary because information technology is a specialised sector. Thus, relevant rules and regulations require input from experts in the field.

The *Trademarks and Patents Registry* should be fully digitalised to ease the conduct of searches. This is necessary so that, before a domain name is registered, a search should be conducted on the online platform of the Trademarks Registry to ascertain if the proposed domain name conflicts with any registered trademark. The *Corporate Affairs Commission* has a functional online portal for searches on companies incorporated in Nigeria thus, the *Trademarks Registry* can do likewise. The *NIRA Regulations* should be amended to include in the requirements for registration of a domain name, that the applied-for domain name must not be in conflict or confusingly similar to a registered trademark in the name of another proprietor. In this regard, *NIRA* could form a synergy with the *Trademarks Registry* such that before any domain name is registered, the applicant must conduct a search at the trademark registry and get clearance from the *Registry*.

The defence of fair dealing in the era of information technology should be well defined to protect both the proprietor of a work and members of the public who wish to use such work for non-commercial purposes as permitted in the Copyright Act. as copying, and mass sharing of materials are quickly done through the new technologies. In conclusion, the advent and the advancement in information technology have made a tremendous impact, positively and negatively, on traditional *IP laws* and *IPRs*. To strike a balance between the functional and good aspects and the bad aspects, laws are needed. The legislation should have the input of experts because the subject matter is a specialised area. The legislation should also have to balance the interest of legitimate users of *IP* works and the interests of the *IPRs* owners.

[65] Nkem Itanyi Ch. 5 "Technology and Hate Speeches in Nigeria: Is the Cybercrimes Act 2015 Adequate?" in Handbook on Nigerian Cybercrime Law (2018) F.E. Eboibi ed. 317 – 347