

**ISLAMIC UNIVERSITY IN
UGANDA**

JOURNAL OF COMPARATIVE LAW

EXAMINING THE EFFECT OF THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS ON THE COPYRIGHT ACT, 2004, LAWS OF THE FEDERATION OF NIGERIA

By

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Abstract

Every country has its laws which seeks to protect the intellectual property of its citizens. However, in 1994 Nigeria signed an Agreement which deals with trade related aspects of intellectual property otherwise known as the TRIPS Agreement. The essence of this agreement it is alleged is to safeguard the interest of developing countries. The reverse is however said to be the case. The crux of this work is to examine the effect of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement on the Nigerian Copyright Act, 2004. It follows therefore that the emergence of the Trade Related Aspect of Intellectual Property (TRIPS) brought with it the intention to enhance global trade and promote intellectual property rights. Developed countries are to take advantage of the Agreement to try to ensure that Developing countries advance trade through the provision of the enabling environment for trade to strive and to protect intellectual property rights. Copyright is a key factor in the promotion of creativity hence the motivation for this article. It was found that the TRIPS Agreement has an effect on the Copyright Act, 2004 which is the principal legislation for the promotion and protection of intellectual property in Nigeria. The effect range from conflict in the duration for protection of copyrightable materials to enforcement of rights of copyright owners. It is majorly recommended that the law be amended to tally with the provisions of the TRIPS Agreement and the Copyright Act for better protection of copyright owners in Nigeria.

Introduction

The emergence of the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) has revolutionized the conventional attributes of intellectual property rights (IPR) and altered the institutional landscape of the global trading system. Developing countries attempted to achieve a variety of goals in addition to participating in the global trading system. However, they have found the promise of long-term benefits elusive and the administrative costs and policy problems a significant burden. This has led to a view that the need for, and benefits of, stronger IPR protection varies with economic strength and technological sophistication, and thus TRIPS requirements should be adjusted to the specific conditions of particular states. Accordingly, it is no surprise that the relationship between developing and developed countries concerning the protection of IPR is delicate, and that it is at the cutting edge of the debates as to the constituent components of sustainable development.¹

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This largely accounts for the struggle between developed and developing Nations such as Nigeria in bringing about sustainable development to its citizens. The society today rates development base on the knowledge of citizens of a country to enhance creativity, innovation and bring about inventive ways of attending to issues. The basic question however is how the TRIPS Agreement has positively affected the protection of owners of copyrightable materials within the scope of its objective? In relation to Nigeria, the issue is how the Agreement influence has or affect the operations of the Copyright Act? The essence of this work therefore is to examine the effect of the TRIPS Agreement on the Copyright Act, 2004 in Nigeria.

Contextual Clarification

i) Intellectual Property Rights

Property is key to determining ownership of property for the purposes of ascertaining liability, rights, interest and protection by the law. Corporeal property is what one can see physically. Intellectual property are incorporeal property which end product results in an invention, or an innovative endeavours are a creative outlook. The law recognises the product of ones intellect and confers property rights on same. According to the World Intellectual Property Organization (WIPO)² the term Intellectual Property Rights implies:

The Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions.

Kur on the other hand defines Intellectual Property Rights as those: “Rights conferred by statute on an individual or a corporate body with respect to the product of his or her intellect, guaranteeing the exclusive control of his

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¹ Wei S., 2016. ‘Retrieving The Missing Ladder: Excavating Flexibility Of The Trips Mechanism’, , *Conn. J. Int'l L.* 217,: *Connecticut Journal of International Law Connecticut Journal of International Law, Connecticut Journal of International Law* 31 Pp. 1-2

² World Intellectual Property Organization (WIPO), 2017. ‘What is Intellectual Property?’ available at <http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf> on 31st October. p. 3

work for a limited period. The object of protection here is usually a work of the mind or human intellect”.³ This definition however has a positivist approach to intellectual rights in the sense that unless a right is conferred by statutes it cannot be exercised as an intellectual property right.

The various types of Intellectual Property Rights (IPRS) include patent, copyright, trademarks, trade secrets, passing off, industrial design, geographical indication, confidential information, databases, and plant breeder’s rights. Obviously, there are many similarities and difference between the various rights that make up intellectual property law. Some rights give rise to monopolies, while others merely prevent the unfair use by others of an existing work or article. Since the rights are not mutually exclusive, two or more of the rights can co-exist in relation to a certain thing. Sometimes the rights will progressively give protection, one right taking over from another over a period of time during the development of an invention, design or work of copyright.⁴ Be that as it may, the essence of conferring rights on products of the human intellect, (intellectual property) is not far from the need to continue to encourage creativity, inventions and innovations for the development of the society. Thus, where intellectual property is harnessed and protected, especially in view of the TRIPS Agreement countries such as Nigeria may stand to benefit immensely. This is made evident in view of the objectives of the TRIPS Agreement.

ii) Copyright

Copyright is generally a form of legal protection provided by the laws of the state to authors of original works of scholarship such as literary, dramatic, musical, and artistic and other intellectual works. It grants the creator of an idea (creator of an original work) exclusive right to use and distribute its idea or work for a number of years. To Nwabueze, copyright is a right that arises automatically at no cost to the creator. It protects result of creative effort, including but not limited to original test, artwork, computer programs, photographs, recordings, broadcasts, musical scores and films; as such, in rewarding authors for their creativity as a basis for stimulating further creativity, the copy right system allows the exercise of monopolistic powers that must be balanced by ensuring that the goods protected by the system are available to sustain creativity that provides information needed for development. In copyright protection, information is of critical importance.⁵ It is pertinent however to note that in Nigeria, for a work to enjoy the

³ Kur J.J., 2015. *Intellectual Property Law and Entrepreneurship in Nigeria: Principles and Practice*, Makurdi: Aboki Publishers, p.28

⁴ *Ibid*

⁵ Nwabueze U. J. and Shikyil S. S., 2007. *Intellectual Property Law and Practice in Nigeria: An Introduction*, Jos: Mono Expressions Ltd, P.32

protection of the law, such a work must satisfy two basic conditions that is: originality and fixation.

Originality could be expressed in different forms. However, it suffices to show that the work in question is the sole idea and effort of the person who lays claim to the copyright in such a material. Fixation on the other hand, pertains to the medium through which such an idea is expressed. It must be in a definite and comprehensible form. Those who have access to

Legal Regime Governing Intellectual Property Rights in Nigeria

Nigeria's current Intellectual Property regime is encapsulated in the Copyright Act, the Trademark Act, and the Patent and Designs Act. Currently, Nigeria has no IPRs legislation covering geographical indications, layout-designs (topographies) of integrated circuits, protection of undisclosed information and control of anticompetitive practices in contractual licenses. The reason is that, all the available IPRs legislation were enacted prior to the coming into existence of TRIPS agreement on 1st January, 1995. It therefore follows that while Nigeria may be argued to have a robust IP legal regime, some of the regimes are statutorily based both while others are regulated under common law.⁶

It follows therefore that the legal regimes governing intellectual property rights in Nigeria is encapsulated in Nigerian Legislation, Decisions of Courts in Nigeria and International Conventions to which Nigeria is a signatory. The principal legislations providing for intellectual property rights in Nigeria as stated above include the Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004, the Trade Marks Act, Cap. T13, Laws of the Federation of Nigeria, 2004 and the Patents and Designs Act, Laws of the Federation of Nigeria, 2004.

At the international level, Ocheme gave the reason for the protection of Intellectual property rights especially as it relates to copyrights thus: protection at the international level is needed now more than ever before due to the advancement in global communication. A book or novel or periodical, for example, may be read in many countries and in many different languages into which it is translated. Artistic works, if unhindered by problems of language and culture, may be enjoyed and copied regardless of national boundaries. Music as acknowledged by many is a universal language; and the development of broadcasting, sound recordings and cassette technology has enabled the dissemination of music to every part of the world. Films and television programmes reach audiences far beyond the territorial boundaries of their countries of origin by satellite transmission.⁷

⁶ Joseph Jar Kur, Note 3 above, p. 35

⁷ Ocheme P. 2000. *The Law and Practice of Copyright in Nigeria*, Zaria: Arewa Green Pastures Co. Ltd., p. 151

According to Asein⁸ Nigeria is signatory to the following international instruments, imposing on it certain obligations, many of which find expression in the Copyright Act, namely:

1. Universal Copyright Convention;
2. Berne Convention for the protection of Literary and Artistic Works (Berne Convention);
3. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention).
4. Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) within the framework of WTO Agreement.

The focus of this work however is the effect of TRIPS on the Copyright Act, 2004.

Trade Related Aspects of Intellectual Property (TRIPS)

Intellectual property issues gained prominence at the Uruguay Round of the Multilateral Trade Negotiations on the General Agreement on Tariffs and Trade (GATT) with intellectual property being viewed as a crucial component of the multilateral trading system. The result of this was the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) concluded as part of the World Trade Organization (WTO) Agreement. The Agreement became effective from 1st January 1995. Considering its broad base, TRIPS is easily the most comprehensive multilateral agreement on intellectual property, covering copyright and related rights, trademark, geographical indications, industrial designs, patents, layout designs of integrated circuits, undisclosed information, and the control of anti-competitive practices. The Agreement also contains separate and detailed provisions on the enforcement of intellectual property rights.⁹ This separate and detailed provisions often times have negative or positive effect on the local enactments of member States.

As an international intellectual property and trade instrument, TRIPS has been commended for its bold attempt in addressing the most crucial trade-related issues in the major intellectual property subjects. In its stride as an “instrument of liberalization”, it makes provision for a wide range of normative structures on virtually all the major intellectual property law subjects. Apart from redefining standards in these areas, it also lays down new rules and principles on the enforcement of rights and a detailed dispute settlement process. The requirement under TRIPS that all parties adhere to the substantive obligation of the Paris text and of the Berne Convention has helped to close the difference between member countries.¹⁰ However, despite

⁸ Asein, J.O. 2012. *Nigerian Copyright and Practice*, 2nd edn, Garki- Abuja: Book and Gavel Ltd., p. 381

⁹ *Ibid* Pp. 388-389

¹⁰ *Ibid*

the above, there are agitations and struggle between developed and developing countries as to how best to give life to these provisions.

The TRIPS Agreement embodies the basic principles of national treatment and the most favoured nation principle. It attempts to provide adequate standards and principles for the determination of such fundamental matters as the availability, scope and use of trade related aspects of intellectual property rights. It also provides for a more effective and conducive strategy for the enforcement of those rights, while stipulating some minimum standards on the procedure and formalities for the acquisition and maintenance of intellectual property rights.¹¹

Kur summarized the essence of TRIPS when he posits that: the main objective of the TRIPS is to compel developing countries to adopt minimum level of intellectual standards for national laws. TRIPS has therefore, set the stage for the globalization of intellectual property rights. However, the developing countries concern and fear is that, even this “minimum” level of protection is still not favourable to their circumstances.¹² This must be affirmed by Babafemi when he asserts that “Trips also has its own code of obligations relating to performers, sound-recording, producers and broadcasting organizations.¹³ This separate code of obligation often serves as a source of dispute between parties.

However, taking a survey of global views it may be discovered that the initiation of TRIPS Agreement marks a peculiar time in the history of intellectual property by creating standard level of protection which are to be enforced worldwide. This medication has been criticized because to a large extent it reflects the views of the United States and other industrialized countries and raises many unanswered questions.¹⁴

Copyright and Related Rights under TRIPS

It is pertinent to note that the TRIPS Agreement relates to all aspects of intellectual property rights namely: Copyrights, Patent, Industrial Design, Trade Mark, Trade Secret and the likes. However, Part II, Section 1 deals specifically with issues bordering on Copyright. Article 9 of the TRIPS Agreement makes it mandatory for member to the agreement to comply with the provisions of Article 1 through 21 of the Berne Convention. However,

¹¹ *Ibid*; reference is also made to Articles, 3, 4, 9, 41 and 62 of the TRIPS Agreement to buttress these points.

¹² Kur, J.J. 2008. “Globalization of Intellectual Property Rights and Regime for the Protection of New Plant Varieties; A Nigerian Perspective” *Journal of Private and Public Law (Maiden Edition)*, Faculty of Law, Benue State University, Makurdi, Nigeria, P. 238.

¹³ Babafemi, F.O. 2007. *Intellectual Property the Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria*, Ibadan: Justinian Books Limited, p. 100

¹⁴ Endshaw A. 2002. ‘Paradox of Intellectual Property Law Making in the New Millennium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot’ *10 Cardozo Journal of International Comparative Law*; Pp 47-45.

member's rights under Article 6b of the above convention is expressly exempted.

Article 10 of the TRIPS Agreement¹⁵ reaffirms the protection of literary works under the Berne Convention with particular reference to Computer Programs and Compilations of Data. Sub-Section 2 of the said Article is to the effect that Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself. This is a bit confusing as one is left to wonder the rationale behind the protection of the compilation of data and not the data itself. Kur re-iterated this position when he assert that "the rationale for bringing database under the category of literary work is not very clear on the face of the law and even if the contrary were to be the case, one could still argue that most databases would still qualify as literary works as they are in most cases compilations of works expressed in words".¹⁶ However, this may also be as result of the principles of fair use and the need to encourage creativity using available data.

Articles 11-14¹⁷ addresses the protection of other forms of creative works such as the Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations, issues relating to rental rights, terms of protection which is pegged at 50 years, limitations and exceptions to exclusive rights under special cases.¹⁸ The above Articles also made applicable *mutatis mutandis* related provisions of the Berne and Rome Conventions as it relates to the above issues.

Nevertheless, the debate and queries in relation to the TRIPS Agreement revolve round concerns relating to 'rich versus the poor' developed versus developing, greedy pharmaceutical industries versus dying AIDS patients in many developing countries.¹⁹ In these circumstances developing countries and least developed countries question the genuineness of the efforts and some aspects on the implementation of TRIPS Agreement, particularly 'the continuous use of unilateral' pressures and lack of actual implementation of Articles 66 and 67 on technical assistance to developing countries.²⁰ For the sake of clarity, it is expedient to enumerate the content of

¹⁵ Kur, J.J Note 3 above, P.47

¹⁶ Kur, J.J. Note 3 above, p. 51

¹⁷ TRIPS Agreement.

¹⁸ Part II TRIPS Agreement.

¹⁹ Malbon J. and Lawson C. ed. 2008. *Interpreting and Implementing the TRIPS Agreement. Is it fair?* Multilateral TRIP and Developing Countries by Xuyi Chong, Elgar Cheltenham, P. 49

²⁰ Carrea C. 1999. 'Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries, 2 *Journal of World Intellectual Property*, P. 939

the above Articles. This will further throw light as to the authenticity of the claim of this writer. Article 66 is to the effect that in view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

The Agreement further stipulates that Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base. These exceptions provided to the least developed countries is hardly being exploited in practice. The obligation imposed by the Agreement on Developed country Members is rather observed in breach than practice. For instance, Nigeria was refused the permission to purchase TECNANO Aircrafts for the purposes of fighting Boko Haram insurgency in the North East part of the country by the Obama administration. Even effort to purchase same from Israel was frustrated by the administration. It is only recently that the Trump administration facilitated the sale of those Aircrafts. Article 67 on the other hand provided the necessary steps that must be taken by Member countries in order to enhance the provisions of the Agreement. The Article clearly shows that in order to facilitate the implementation of the Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel. Taking a cursory look at the above, it may be argued that Article 67 simply give room for interference by the Developed Member countries to interfere in the way and manner the domestic laws of the least developed countries in relation to intellectual property should be prepared and enforced. When considered in relation to copyright, it may be concluded that the end result of this could be imposition of foreign ideologies and culture into the laws of the least developed countries. It is a backdoor to neo-colonialism. It is insignificant that the Article talked about request and mutually agreed terms between countries. The fact that they are least developed put them at a disadvantage. A bigger at the end of the day may have no choice.

Moreso, it is observed that TRIPPS and GATT (General Agreement on Tariffs and Trade) were found to protect the finished goods of the industrialized nations. They were not in any way to favour developing nations who have no goods to protect or market. It makes the developing nations a dumping ground for the goods of the developed nations. This is because though the grant of patent, industrial design, trade mark and copyright, to the goods already produced, the lands of the developing nations are closed in the area of invention. The likes of TRIPPS and GATT were formed when industrialized nations saw the need to perpetually enslave African nations, through constant and aggressive supply of finished products at an affordable rate. The standards of these finished products are not checked as expired and adulterated goods are imported along the line.²¹ It is pertinent to note that goods within this context may extend to intangible items which may be subject of copyrights.²² This assertion is given credence in the light of Articles 66 and 67 of the Agreement as adumbrated upon above.

However, another challenge is the fear of over protection of Intellectual Property Rights. It has been argued that faced with the dilemma of the current global IPR system, more and more commentators and policymakers have discerned a tendency toward overprotection of IPR, which leads to anti-competitive effects that are pernicious to both developing and developed countries because they dilute important liberties and freedoms. In the political realm, the harmonization of the universal TRIPS standards has been in some way depicted as a lever that allows developed countries to maximize their interests in the global marketplace. Taking copyright as an example, implementing a stronger IPR system in the short run should be judged not only by its ability to protect the interests of copyright owners, but also by its commitment to avoiding pitfalls caused by overprotection that may lead to cultural appropriation and hinder the pace of global civilization. This is apparently inconsistent with the long-term goal set out by the TRIPS Agreement.²³

A case law event that transpired partially in China and concluded in the United States seems to have recognized the concept of "international exhaustion." On March 19, 2013, the Supreme Court of the United States released its unprecedented opinion in *Kirtsaeng v. John Wiley & Sons*, a case involving the parallel importation of copyrighted works. The defendant was a Thai student who purchased textbooks in Thailand and then resold them at a profit in the United States. The Second Circuit Court of Appeals held that the first sale doctrine did not apply to foreign made goods, but the Supreme Court reversed this judgment, holding that, contrary to the judgments of the two lower courts, the first sale doctrine does apply to foreign-made works. In

²¹ Nwabueze U. J. and Shikyil S. S Note 5 above, Pp. 26-27.

²² *Ibid*

²³ Wei S. Note 1 above, at p 31empahsed this.

other words, the resale of the books did not constitute infringement of Wiley's copyright, as Wiley's rights of distribution of the books had been "exhausted" by the initial sale in Thailand. This implies that the law of the United States recognizes the concept of the "international exhaustion doctrine," at least in the context of copyright law.²⁴ The issue between China and United States may go beyond the contents of the TRIPS Agreement, it may have some other under tuning factors such as politics and struggle for economic superiority.

However, the above case clearly shows how difficult it is for the Agreement to influence the domestic laws of Member Countries. The courts in the United States placed more emphasis and reliance on its laws than that of the Agreement. In Nigeria, if similar situation arises, the court is more likely to side the provisions of the Copyright Act in resolving such disputes irrespective of the provisions of the TRIPS Agreement on the matter under consideration. It is trite law in Nigeria that where there is a conflict between the domestic law and the provisions of any Agreement or Convention of which Nigeria is part of, the provisions of the domestic law shall prevail.

Effect of Trade Related Aspects of Intellectual Property Rights on Copyrights Act, 2004

By the dint of the provisions of Section 5²⁵ Nigeria is obligated to confer copyright on international agreements. By this, it implies that the TRIPS Agreement is a document which provisions must be honoured by Nigeria having signed as a party to same.

However, the effect of trade related aspects of intellectual property rights on copyright Act, 2004 is reflected in some key areas namely the recognition and protection of data compilation, the limiting the period of protection to 50 years instead of seventy as provided under the Copyright Act.²⁶ Another area of influence on the Copyright Act is the limitation and exception Article. It provides thus: Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.²⁷

The above Article provides what is known as the three steps test (3 ST) in determining the limits and level of exceptions and protection under the TRIPS Agreement. This test limits the exclusive rights of the owner of a copyrighted material only to (1) certain special cases, (2) normal exploitation

²⁴ *Ibid*

²⁵ Copyright Act, 2004

²⁶ The Copyright Act, 2004 (First Schedule) provides that in respect of literary musical or artistic work other than photographs, copyright in the work will expire seventy years after the end of the year in which the author dies. While TRIPS Agreement in Part II provides for 50 years.

²⁷ TRIPS Agreement.

of the work and where (3) it does not unreasonably prejudice the legitimate interest of the right holder. The Agreement however did not provide the criteria or the yardstick with which one could use to determine what amounts to special cases, normal exploitation or what is not reasonably prejudicial to the interest of the right holder.

Sections 6- 9 of the Copyright Act, ²⁸ clearly provides for the exclusive rights of the holder of a copyrightable work. These exclusive rights may be said to be what is sought to be protected under Part II of the TRIPS Agreement. However, Section 37 and the Second Schedule of the Act provides for situations where the Copyright Commission can provide compulsory licence to those who applied for same and acts that do not amount to infringement of the rights of an exclusive copyright holder. This amounts to statutory exceptions and limitations to the exercise of exclusive rights of copyright holders. This in relation to the three- step test mentioned above negatively impact on creativity and gives room in some situations for infringement on the rights of holders.

It has been observed that, while the three-step test can be interpreted as a flexible policy instrument, the transposition of the international three-step test into national law can fundamentally modify its operation. Specifically, when the three-step test is implemented in national law as an additional control mechanism with regard to E&Ls (Exceptions and Limitations) that have already been defined narrowly, the test is no longer performing the enabling function it has at the international level. Instead, it serves as a further restriction imposed on national E&Ls.²⁹ In other words, the three –step test can conflict with the related provisions of domestic laws of Member countries. This in the end may render the provisions of the Agreement ineffective.

The abstract criteria of the three-step test offer room for different interpretations. Various alternative approaches have been developed in literature and applied by national courts, including an understanding of the three-step test as a refined proportionality test, the use of its abstract criteria as factors to be weighed in a global balancing exercise and a reverse reading of the test starting with the last, most flexible criterion. In light of the need to balance copyright against competing interests, in particular freedom of expression and information, these flexible interpretations may prevail in the future.³⁰

The combination of the challenges of technology to the framing of rights and the difficulties with the three-step test together contribute to a

²⁸ Cap. C28, LFN, 2004

²⁹ Geiger, C., Gervais D. and Senftleben M. 2014. ‘The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’, *29 Am. U. Int’l L. Rev: American University International Law Review*, p. 616

³⁰ *Ibid* 622

framework problem with copyright. That framework problem arises because, rather than dealing with the relationship between the rights and exceptions and limitations in a wholesale manner where they work to balance each other, they are in conflict. The conflict is problematic because exceptions are too unpredictable and inconsistent, and owners' rights are not clearly defined. To be clear, litigants will continue to battle over exceptions and rights, and this is justifiable. But it is problematic when the relationship between the two is unclear in the international and legislative framework.³¹ It follows therefore that there is every need to review the provisions of the Copyright Act in Nigeria in order to create a balance between exceptions and the exclusive rights of owners.

Another effect the TRIPS Agreement on the Copyright Act may be traceable to the aspect of procedure and mode of enforcement. Part III of the Agreement generally deals with enforcement of intellectual property rights by Member countries. Article 41 (2) provides vividly for the procedure for enforcement. It states that procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays. What is fair and equitable cannot be universally ascertained. It depends largely on the claims of the owner of the copyright owner and that of the defendant who seeks to exploit it. In Nigeria, the Federal High Court is saddled with the responsibility of determining disputes relating to violation of the rights of a copyright owner.³² The court can only exercise jurisdiction where two conditions are fulfilled. The first condition is that the claimant must be an individual who is a citizen of or is domiciled in Nigeria and the other is that if the claimant is a body corporate incorporated by or under the laws of Nigeria, it can bring an action and the court will have jurisdiction to entertain the matter. In the Nigerian case of *Island Records and Ors v Pandum Technical Sales and Services Limited*³³ where six of the nine claimant companies were incorporated in the United Kingdom and the United States of America, the court held that it lacked jurisdiction to entertain the suit.

Moreso, proceedings in Nigerian courts are characterized with high cost, complexities and unwarranted delays. The TRIPS Agreement on its part did not help to eliminate such situations. Instead, the Agreement concedes in Article 41 (5) that it is understood that Part III of the Agreement does not create any obligation to put in place a judicial system by Member countries for the enforcement of intellectual property rights distinct from that for the

³¹ Susy F., 2015. 'The International Copyright Problem and Durable Solutions', *18 Vand. J. Ent. & Tech. L.: Vanderbilt Journal of Entertainment and Technology Law Vanderbilt Journal of Entertainment and Technology Law*, p. 39

³² Section 42 Copyright Act.

³³ (1993) F.H.C.L.R. 318

enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in that Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general. The drafters should have encouraged Member countries to put in place mechanisms to eliminate unnecessary cost, unnecessary complexities and delays in the procedure for enforcement of intellectual property rights.

On a general note, issues relating to enforcement of rights of copyright owners in relation to the Agreement is a big challenge to tackle in practice. For example, the flaws in the TRIPS enforcement regime became apparent when the United States unsuccessfully brought a complaint against China before the WTO's Dispute Settlement Body ("DSB"). Specifically, the United States argued, among other things, that China had failed to implement the appropriate Article 59 "destruction or disposal" measures, as well as establish a sufficient level of criminal thresholds under Article 61. The DSB panel concluded that China had satisfied its Article 59 obligations, because Chinese authorities could seize infringing goods even though the authorities refused to destroy or dispose of the infringing material. Further, the United States lost on its Article 61 claim--that China had failed to criminally prosecute "commercial scale" infringement--largely due to the case-by-case, amorphous definition of "commercial scale."³⁴

Aside the provisions of the Act, it has also been observed that the implementation and enforcement of the TRIPS agreement continues to be a big challenge in most West African countries, impeding the investment flow from developed countries to developing countries. On the one hand, the political commitment, *inter alia*, constitutes a major issue for the implementation and enforcement of IPRs in developing countries. Moreso, some TRIPS and TRIPS plus provisions seem not to take into consideration the complex political, social, and economic realities of developing countries. Some scholars are still questioning the fairness of the TRIPS agreement. According to Xu, "making rules for the protection of intellectual property rights (IPRs) involves finding a balance between the interests of right-holders and right-users. The balance is presently skewed unduly in favour of right-holders." It is important that the WTO addresses the imbalance between the interests of the right-holders and those of people in developing countries.³⁵ Where this is finally done, developing countries such as Nigeria must ensure that their domestic laws equally captures and address the said imbalance.

³⁴ Getsinger A. D. 2014. 'A New Approach to Combating the Piracy of Intellectual Property: Develop the Rule of Law and Increase the Supply of Legitimate Goods', 96 *J. Pat. & Trademark Off. Soc'y* 30: *Journal of the Patent and Trademark Office Society*, p.45

³⁵ Gassikia, G. 2014. 'Implementing and Enforcing Intellectual Property Rights in West Africa', *J. Marshall Rev. Intell. Prop. L.: The John Marshall Law School Review of Intellectual Property Law*, 13 p.792

Findings and Recommendations

In view of the above, the following findings were made:

1. That the essence of the TRIPS Agreement is to bring about equilibrium in the protection of trade related aspects of intellectual property rights;
2. That the TRIPS Agreement brought about dichotomy between the developed and developing countries (member States) as to the benefits and how the law affects domestic laws;
3. That effect of the Agreement on Copyright Act is better expressed in the area of protection offered under the Act, the introduction and protection of data compilation and the exceptions and limitations placed under the Agreement³⁶.
4. That the Agreement is not consistent in addressing the enforcement of the rights of copyright owners in relation to the provisions of the Copyright Act in Nigeria.

In view of the above, it is hereby recommended that the TRIPS Agreement especially the aspects dealing with period of protection for copyright holders and the exceptions and limitations be reviewed to take care of the concerns of the developing countries. This will eventually bring about the desired equilibrium among nations as it relates to trade related aspects of intellectual property globally.

The National Assembly should amend the current legal regime governing intellectual property rights in Nigeria. There is need to amend the Copyright Act, 2004 in order to position Nigeria as a country which promotes the protection of copyright holders within the objectives of the TRIPS Agreement. Issues relating to *locus standi* of claimants need to be addressed to enhance the jurisdictional capacity of the Federal High Court on issues dealing with copyright.

Nigerian Judges should be proactive on issues relating to enforcement of the rights of a copyright holder. There is need to avoid unnecessary complexities or delays in the procedure of the court. Ploys to delay proceedings by way of seeking adjournments should be sternly resisted.

Conclusion

The TRIPS Agreement is key in providing universally acceptable principles and code of obligations in safeguarding trade related aspects of intellectual property. However, the good intentions leading into coming into being of the TRIPS Agreement has been fraught with cries by developing countries of in- equilibrium and negative impact of TRIPS Agreement on their domestic laws. This has turned their countries into doping grounds. The

³⁶ Section 2 (1) of the Copyright Act.

shortfalls need to be amended by way of review of the Agreement and domestic legislative amendments.

