FDI and Nigeria's IP landscape

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Abstract

Nigeria is easing her framework for Foreign Direct Investment (FDI). This has been signified by the unprecedented issuance of three executive presidential orders. With Nollywood becoming one of the largest film industries in the world, a burgeoning music industry and a fast rising software development industry that caught the attention of Mark Zuckerberg who could not resist a visit recently, securing and enforcing IP in Africa's largest market has never been more exciting. This paper outlines the framework for foreign direct investments in Nigeria. Although Nigeria is yet to pass relevant Intellectual Property (IP) Bills aimed at improving her IP landscape, the paper demonstrates how ingenuity on the part of right holders and their advisers can plug the gaps in the law.

It highlights imminent changes derivable from IP Bills before the National Assembly and Federal Ministers and urges the international community to join the local lobby for reforms. It suggests investors can align the law on the book with the law on the street in terms of enforcing IP. The paper is a crusade campaigning that the regulatory framework for FDI and IP in Nigeria is sufficiently robust with incentives to attract and increase FDI.

1.0 Introduction: Why Nigeria is now a market to watch and play in

Nigeria is a member of the World Trade Organization and the United Nations. She is party to many significant international treaties that make her a reasonably good destination for foreign direct investments. If Africa is the most viable of the emerging markets and Nigeria is the largest market and the largest economy in Africa, you cannot afford to ignore Nigeria. With a population of over 150 million with a majority being under thirty, Nigeria offers enormous potential especially for foreign direct investments (FDI).

Nigeria witnessed some instability many years back and no one can say that Nigeria presents its rosiest season today. Some foreign investors like Pfizer, EMI, and Sony deserted the Nigerian market in such difficult times. The decision to withdraw from a

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market during harsh times is not a light one. Interestingly, many of these foreign investors are either back or they are considering re-establishing Nigerian entities. If conglomerates who deserted the Nigerian market are eager to and are re-entering the market, it suggests that there are prospects that must not be ignored.

One of such is evidenced by the return on investments (ROI) in Nigeria's telecommunications sector. When Nigeria switched to mobile phones around 1999, her tele-density was not more than 700,000 lines. The leading international Telco's were wary of the Nigerian market. They decided not to invest. Within two years, the foreign Telco investors who took the plunge had made significant return on investments beyond what the best economists projected. One such Telco, MTN, a South Africa company has now made Nigeria its headquarters as it's ROI in Nigeria is significant. Nigeria's Nollywood and entertainment industry has attracted attention and increasing funding and is changing business models. MTN, a Telco recently became Africa's largest music distribution platform.

This paper is divided into two parts. Part I outlines the framework for foreign direct investments in Nigeria. It briefly etches on-going reforms by the government and discusses how the anti-corruption crusade is positively affecting the regulatory landscape. It suggests why and how investors should respond to the process of law making and lobbying in Nigeria. It allays the fears of investors against expropriation and highlights justice sector reforms. Whilst concluding that foreign corporations can sue and be sued in Nigeria, it demonstrates why foreigners doing business in Nigeria should set up a Nigerian entity and not rely on their foreign incorporation. It deliberates on why foreign investors need to align their employment policies beyond Nigerian standards to international standards. Part I ends with a short note on justice sector reforms in Nigeria and how the foreign investor may contribute to the process.

Part II etches Nigeria's intellectual property (IP) landscape. With Nollywood becoming one of the largest film industries in the world, a burgeoning music industry and a fast rising software development industry that caught the attention of Mark Zuckerberg, IP has come to the fore of investment issues. This paper demonstrates how ingenuity on the part of right holders and their advisers can plug the gaps in the law. It contends that securing and enforcing IP in Africa's largest market has never been more exciting. It highlights imminent changes derivable from IP Bills before the National Assembly and Federal Ministers and urges the international community to join the local lobby for reforms. It suggests investors can align the law on the book with the law on the street in terms of enforcing IP.

I am a crusader. My aim is to campaign and persuade you that the regulatory framework for FDI and IP in Nigeria is sufficiently robust with incentives to attract and increase FDI.

Part I

2.0 Reforms by Government

The signal given by successive Nigerian governments portends towards increasingly friendly business environment. The government has an array of incentives ranging from tax holidays to free trade zones and more can be negotiated by investors seeking to engage in Nigeria.[2]

In the last couple of weeks, the Nigerian government in what appears to be an unprecedented move, issued three executive orders to streamline her objective of encouraging local and foreign investments.[3]

Two of these executive orders are apposite to our discussion: **The promotion of transparency and efficiency in the business environment Order** are directives to government Ministries, Departments and Agencies (MDA) to facilitate the ease of doing business in Nigeria through a more efficient, and transparent process. Apart from obliging MDAs to publish the guidelines for obtaining approvals, licenses and the like, MDAs now have time lines to act on the applications, else they must refuse the application with reasons. Where they fail to do this, applications are to be regarded as having been granted and the MDAs can be reported. Tourist and business visas are to be granted within 48 hours. Reforms are being effected at the Ports. The second executive order is **the Support for local content in public procurement by the government agencies Order.** This second order seeks to promote the use of local content by MDAs who are making public procurement. The MDAs are already implementing measures to comply with the executive orders.

The government is building on its privatization programme to intensify public private sector partnership particularly in infrastructure projects, opening opportunities for FDI.

Incentives

3. Anti-Corruption Issues

Anti-corruption is fast becoming a worldwide fad even in territories that raised perpetual red flags. Nigeria is no exception. Anti-corruption is perhaps one of the vanguards of the Buhari government. Anti-corruption regulations are not new. Nigeria has a myriad of

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[2] S.22 Nigerian Investment Promotion Commission Act

[3] http://www.vanguardngr.com/2017/06/government-action-executive-orders/ accessed June 3, 2017.

laws fashioned after the US Foreign Corrupt Practices Act, 1976, the UK Anti-Bribery Act. The Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC) are two stalwarts of the anti-corruption campaign in Nigeria.[4] Lessons have been learnt from the extra-territorial reach of the United States of America and the United Kingdom. These two countries extend the territorial reach of their jurisdiction to penalize and lift the veil of US or UK companies that operate in Nigeria and are involved in corrupt practices.

There is a toning down of corrupt practices in Nigeria. Many companies now have policies of zero tolerance to corrupt practices and these are signed on by staff. Hardened persons still indulge in corrupt practices, some people are more discreet whilst many more "reluctantly" avoid corruption practices altogether. On the lighter note, researchers may wish to investigate how Africans can balance the number of African proverbs that suggests that it's a part of our culture, to the move against corrupt practices. The number of African proverbs that condemned thieves shows that our forebears did not tolerate corrupt practices.

4.0 Corporate Governance & the Changing Regulatory Landscape

The increasing significance that investors are having to pay to compliance is perhaps one of the notable features of the evolving corporate governance and regulatory landscape. It confirms that this government is keen on its drive for transparency and anti-corruption. It is no longer business as usual.

Apart from the rules for corporate governance enshrined in Companies Act known as the Companies and Allied Matters Act 1990 Cap C20 LFN 2004, several sectoral codes have been issued to improve corporate governance. Investors are advised to be acquainted with the Codes as I foresee a rising zeal on the part of regulators to enforce the Codes. Given that the Codes guide corporate structure by giving guidelines for example on independent directors, investors may have to review the structure of their companies. The bar has also been raised on disclosure requirements and possible personal liability of directors.[5]

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[4] Money Laundering Prohibition Act 2011, Money Laundering (Prohibition) (Amendment) Act 2012, Corrupt Practices and Other Related Offences Act 2000, Economic & Financial Crimes Commission Establishment Act (2004), Terrorism Prevention Act 2013

[5] Bankole Sodipo, "Corporate Governance failings in Financial Institutions and Director's Legal Liability", delivered on May 3 and May 4, 2017, at the National Judicial Institute Conference for Judges, Abuja; Bankole Sodipo & Veronica Ekundayo, "Corporate Governance in Banking", Oladapo Olanipekun (ed). *Banking: Theory, Regulations, Law and Practice*, Au Courant, Lagos (2016) p. 81 at 85-87. Sola Ephraim-Oluwanuga, "Corporate disclosure rules and review of Sarbanes-Oxley Act", being paper delivered at the Year 2007 Chief G.O. Sodipo memorial lecture. See also the doctorate thesis of Dr. Veronica Ekundayo of the Babcock University School of Law and Security Studies that she wrote under my supervision.

Prior to the emergence of the current government, investors were not averse to breaching regulations or the process of making regulations. Maintaining good relations with regulators was often sufficient insurance that an investor is not penalized even in the face of blatant breaches of regulations. Things have changed. Regulators are keen to show the government that they are working.[6] One way to do this is to discipline erring investors. Regulators are more inclined to penalise investors. The penalty meted out to the Telco attests to this trend.

What does this teach investors? To watch the process of making regulation and contribute to this in order to ensure that the regulators will not impinge on good business practices and profitability. To ensure that there is compliance, compliance, and yet again compliance, through capacity building in the area of compliance, review of business approach and through engaging regulators. Most regulators did not go to school to learn how to regulate. My experience suggests that it is a wise investment for stakeholders to continuously interrogate regulators with a view to working out how best they can achieve the same results without strangling business. This has helped in sorting out problems clients have had with various industry regulators.

Investors may also have to become pro-active in challenging regulators. Growing regulatory zeal may lead to arbitrariness. Nigeria has a fair body of administrative law permitting affected parties to challenge regulators. Regulators are reticent about challenge from the sector they regulate so care and tack must be exercised so there is no backlash. I confirm from a number of cases handled that it is possible to sue a regulator and maintain a good relationship with the regulator.[7]

Two questions must be asked when decisions are being made by investors: The first is "Does the law permit us to do what we want to do?" And the second is "What steps does the law stipulate we must take in doing what we want to do?"

5.0 Process of Law Making – Lobby Efforts

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[6] Three examples will suffice: NAFDAC's temporary shot down of Chocolat Royale 2015; NCC's fine on MTNN- it was reported on June 10, 2016 that MTN Nigeria on Friday resolved with the Nigeria Communications Commission (NCC) to settle their differences over the $3.4 billion (N1.04 trillion) fine imposed on the telecoms firm in October 2015. see http://www.premiumtimesng.com/news/top-news/205085-n1-04-trillion-fine-ncc-mtn-structure-payment-till-2019.html. After nearly six months of negotiation, both sides have agreed that MTN should pay only N330 billion from the N780 billion it was earlier reduced to.; FRCN's fine on Stanbic IBTC Bank, see http://www.stanbicibtcbank.com/Nigeria/AboutUs/News/Stanbic-IBTC-Holdings-meets-disclosure-requirements-of-International-Financial-Reporting-Standards; http://nigerianpilot.com/sanction-court-dismisses-stanbic-ibtc-suit-against-frcn/; accessed May 29 2017.

[7] We have made successful claims against the following among others: National Agency for Food Drug Administration and Control NAFDAC, National Broadcasting Commission NBC, Nigerian Copyright Commission, NCC, Lagos State Tax Board LIRS. We have issued notices to some others that we were going to issue actions or move for mediation: Financial Reporting Council of Nigeria FRCN etc.

Investors may be pleased to note that there are several Bills in the National Assembly that seek to alter how businesses are run or how they are regulated. Irrespective of the legislative intention, if passed in their current state, some of the Bills will have positive impact whilst some may have a negative impact on businesses.

It is therefore imperative to maintain a watch on the legislative process. It is imperative to lobby for reforms in laws and in the Bills. It will be a distraction for companies to do this on their own. However, investors need to band together and stress that their various groupings should be active in legislative advocacy. We have several Bills that touch on IP in the National Assembly and the reason they have not been passed in over a decade is that there is insufficient cohesion in the private sector to lobby for the requisite reforms.

6.0 Guarantees Against Expropriation

One fear that investors should no longer entertain is the possibility of the Nigerian government expropriating their investments. This is because there are constitutional, statutory and treaty guarantees against expropriation of property. Section 44 of the Nigerian Constitution and s. 14 of the African Charter of Human and Peoples Rights give constitutional and treaty guarantees and obligations on the government to avoid expropriation, unless in accordance with law.

The Nigerian Investment Promotions Commission Act (NIPC Act), guarantees that foreign investors can transfer their capital, profits and dividends.[8] The NIPC Act guarantees that no enterprise can be nationalized or expropriated and no one will be compelled to surrender his interest in the capital of any enterprise to another.

Where there is no dispute resolution agreement between a foreign investor and the government of Nigeria, the NIPC Act provides guidelines that bind the government. It stipulates that disputes will be submitted "within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties" or according to the ICSID rules.[9] I have had cause to render legal opinion that investors in the oil and gas sector found useful and successfully relied on ICSID when the government of Nigeria attempted to annul its oil block without due process.

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[8] Section 24, Nigerian Investment Promotions Commission Act, NIPC Act. It provides: "a foreign investor in an enterprise to which this Act applies, shall be guaranteed unconditional transferability of funds through an authorized dealer, in freely convertible currency, of-

a dividends or profits (net of taxes) attributable to the investment;
b payments in respect of loan servicing where a foreign loan has been obtained; and
c the remittance of proceeds (net of all taxes), and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to the investment."

[9] S.26, NIPC Act.

Nigeria is also obliged by treaty to eschew expropriation of investments. Nigeria is party to the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA). Nigeria ratified the International Centre for Settlement of Investment Disputes (ICSID) Convention as far back as August 23 1965. The ICSID Convention has been implemented in Nigeria through the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act (Cap 120, Laws of the Federation of Nigeria, 2004), while on the 12th day of April, 1988, an international convention (MIGA Convention) established Multilateral Investment Guarantee Agency (MIGA) as the newest member of the World Bank Group and Nigeria was amongst its original members.

No one can vouch that the Nigerian government can never attempt to appropriate anyone's investments. What we can say categorically is that the Nigerian government[10] or private investors[11] who have sought to appropriate investments or annul contracts without due process have paid dearly. As such, lessons have been learned and the chances of such misappropriation are few and far between. After exploring out of court resolution of disputes, foreign investors are encouraged to pursue arbitration or litigation.[12]

7.0 Foreign Companies can sue and are treated as persons, no discrimination

There is no discrimination against foreign companies in terms of their right to sue or be sued in Nigeria. Foreigners and foreign companies can sue and be sued in Nigeria pursuant to the rules of comity and statute. A foreign company can sue a Nigerian company in Nigeria for any claim including winding up or a challenge on any arrangement or amalgamations of the shares of the Nigerian company.

However, Nigerian courts will not exercise jurisdiction over a claim for the winding up or a challenge on any arrangement or amalgamations of the shares of any foreign company. The rationale is that companies are creations of statutes and only the courts of the countries where they are incorporated should exercise jurisdiction on things like winding up, or any arrangement or amalgamations of the shares of any company. Thus, Nigerian courts frown at the decision of the English Court per Burton J in *Access Bank v*

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[10] The author has been involved in enforcing some rights accruing from government construction projects that were annulled by the government and the government had to pay the full sum of expected profit. There was a provision in the contract obliging the government to pay 100% of the expected profits if the contract was annulled without due process.

[11] *Celtel Nigeria BV vs. Econet Wireless Ltd, & Ors,* CA/L/895/2012, LN-e-LR/2014/30 (CA); LPELR-22430(CA)

[12] See *IPCO v NNPC* [2015] EWCA Civ 1144 at para 164/ 2017 UKSC 16- The appeal was about whether NNPC should put up a further USD10m security in addition to USD80m already provided in respect of a Nigerian arbitration award which the respondent IPCO had been seeking since November 2004 to enforce in the United Kingdom.

Akingbola,[13] where the issue revolved around the alleged fraudulent dealings in the shares of a Nigerian incorporated bank. It is highly unlikely that the decisions of the English courts on that issue will be enforceable in Nigeria.

Unless exempted, it is unwise for a foreign company doing business in Nigeria not to set up a Nigerian company as this is a crime and it can equally open up the foreign company to the nullification of its contracts in Nigeria. Foreign companies may be exempt from obtaining the incorporation of a local entity if they were invited by the Nigerian government to come and execute some projects in Nigeria.

8.0 Setting Up in Nigeria

Non-governmental business entities can be set up pursuant to applications to the Corporate Affairs Commission (CAC) under the Companies and Allied Matters Act, 1990 (CAMA). CAMA operates like a Code as it has reasonably detailed provisions governing the operations of companies, sometimes allowing the company's constitution to override the statutory provisions. These provisions largely incorporated many principles of common law with modifications to suit local circumstances. There are also a number of sectoral and general legally enforceable Codes of Corporate Governance. Investors must ensure that the arrangements they seek to operate is permissible under Nigeria law. Generally, shareholders' agreement executed before a company is incorporated is enforceable. This may be enforceable against the company upon incorporation when ratified as a pre-incorporated agreement. Where a pre-incorporated shareholders agreement is not ratified, it is still enforceable by the parties to the agreement or against other parties or their successors in title.

Any person can set up a company in Nigeria and it is immaterial that such a person or corporation is not a Nigerian citizen or a Nigerian corporation. The only requirement is that unlike the position in some countries where one person can set up a company, a Nigerian company can only be set up with a minimum of two persons.

Once set up, the veil of incorporation protects the persons who set up the Nigerian company such that having been born in Nigerian, the Nigerian entity has all the rights and privileges of a Nigerian citizen. A Nigerian company has a separate legal personality from its members. A Nigerian company may be wholly owned by foreigners.

Nigerian companies can engage in almost all sectors of the economy. However, in some highly regulated sectors such as petroleum, banking, and broadcasting, foreigners may need to team up with locals in order to meet up with local content rules.

There is an increase in Mergers, Acquisitions and disposals as foreign companies. Where

[13] (2014) 3 CLRN.

the Nigerian company is wholly or mainly owned by a foreign company, the arrangement could be made by a dealing with the foreign entity. This will more often than not, require nothing more than notifications to the Security and exchange Commission (SEC). Where the transaction is such that there is a direct dealing with the shares of a Nigerian company, in addition to notifications to SEC, approvals of SEC must be obtained. The approvals are often given, unless there are significant issues often surrounding negative effect the transaction may have on competition.

9.0 Employment Law – Investors should apply international standards

Labour issues are playing more of a front stage for many investors. There is a growing trend by the National Industrial Court to lean in favour of employees and to rely on treaties Nigeria is party to but ordinarily should not have force of law in Nigeria. The Nigerian Constitution provides that no treaty has the force of law in Nigeria unless to the extent that the National Assembly has passed a law giving the treaty effect. Traditionally, the position of Nigerian courts is that Nigeria may have signed a treaty but it is not effective in Nigeria until a law incorporating its provisions have been passed.

Strangely, the constitution was amended to permit the National Industrial Court (NIC) that deals with employment issues to apply treaties signed by Nigeria even where there is no local statute giving effect to it. This means that the NIC can apply rules of the International Labour Organisation (ILO) even where Nigeria has no local statute. It is submitted that until this bizarre rule of the NIC is reversed, investors must review their employment policies to align them with international standards.

10.0 Justice Sector Reforms and Litigation

Nigerian courts have continued to review her processes although significant impact is yet to be made. Litigation in Nigeria is still as the English law lords, Lord Mance agreeing with Clarke LJ opined, subject to "delay, which appears, to me in large measure, to result from the workings of the Nigerian legal system".[14] Where investors opt for arbitration and alternative dispute resolution, they must remember that they will need the courts to assist them in enforcing the awards and orders of the arbitral and ADR panels. Consequently, justice sector reforms cannot be ignored.

There has been continuous capacity building for Nigerian judges in the last ten years aimed at international best practices and this is yielding some fruit. One of the missing links is the absence of sustained drive to reform the administrative arm of the judiciary: the court clerks, bailiffs, registrars et al. Very little has been done to reform these significant stakeholders. It reminds me of the television series YES MINISTER. We assume the judges are in charge, we ignore the support staff at our peril.

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[14] *IPCO v NNPC* [2015] EWCA Civ 1144 at para 164 or 2017 UKSC 16

If the international community gives sustained support for reforms in the Nigerian judicial system in the next five years, the effect will be felt all over Africa and Africa will be transformed. May I use this opportunity to call for more capacity building and justice sector reform support and collaboration from the international community.
Investors are enjoined to band together with Organizations recognized by the National Judicial Institute for supplying justice sector reforms and capacity building for the judiciary.

Part II

11.0 Nigeria's IP regulatory framework

Copyright is governed in Nigeria by the Copyright Act, 1988. Trade Marks is governed by the Trade Marks Act 1965 (a replica of the English 1938 Act), the Merchandise Marks Act 1916, a number of other statutes such as the Counterfeit and Fake Drugs Act and the common law action of passing off. Patents and Designs are governed by the Patents and Designs Act, 1970. Nigeria is party to the most significant IP treaties, the Berne, the Rome, the Paris Convention m the Universal Copyright Convention, the WIPO Copyright treaties and the Trade Related Aspects of Intellectual Property, TRIPS. Although her laws predate TRIPS. Nigerian intellectual property laws conform to TRIPS to a large extent.

Nigerian Copyright Act, 1988 is TRIPS compliant in some respects, whilst it is TRIPS plus and TRIPS minus in some other respects.[15] Nigerian copyright law is TRIPS compliant as she provides protection for computer software, databases and criminal sanctions against copyright infringement. Nigeria is TRIPS plus in that it grants rental rights beyond the TRIPS requirement. She grants more rights for sound recordings than is required by TRIPS and she provides a longer duration of copyright for some works. Nigeria is TRIPS minus in that her exceptions from copyright control may not always accord or conflict with the normal exploitation of a work or reasonably prejudicial to the legitimate interest of copyright owners.

Nigerian trade mark law is TRIPS compliant in that it offers registration with possibility of opposition to applications and cancellation for non-use after five years. The Trade Marks Act, 1965 is a replica of the English Trade Marks Act, 1938. Nigeria's trademarks law is not TRIPS compliant in some respects including her weak regime for well-known marks and the absence of geographical indications of origin. Nigeria's patent law is TRIPS compliant in that there is no discrimination in terms of the sector of technology and rights can subsist for up to twenty years provided annual dues are paid. Patents are Designs are governed by the Patents and Designs Act, 1970. There is inadequate protection for plant or animal variety as these are not patentable.

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[15] For more discussion on this, see Bankole Sodipo, *Copyright: Principles, Practice & Procedure*, 2nd ed, para.15.1.8, Swan Publishers Lagos.

Right holders have remedies including inspection and seizure orders, forfeitures, injunctions, damages, account for profits and other administrative measures such as border seizures by the customs.[16] Investors may be pleased to note that Nigeria has witnessed the adjudication of intellectual property for over a century.[17]

12.0 Remittance of Royalties and Fees: NOTAP Approval

Foreign investors who operate with licensed patented technology (including software), trademarks, franchising or who operate under management services must seek to register their agreements with the National Office of Technology Acquisition and Promotion (NOTAP).[18] NOTAP may request that changes be made to the agreement before approval is given and NOTAP certificate issued. NOTAP encourages efforts aimed at increasing local content input to efforts aimed at curbing seemingly anti-competitive clauses in agreements.

The Central Bank will not give approval for any accruing royalty or fee to be remitted unless a NOTAP approval certificate accompanies the application for remittance. Although such monies may be remitted through the secondary market at significantly higher costs, this may not be commercially viable and it may arguably be a breach of regulations.[19] It has therefore become increasingly important to seek advice on compliance with NOTAP regulations.

One of the largest banks in Nigeria was recently fined over N1 Billion by a regulator for failure to register an agreement with NOTAP.[20] A partner of the bank's auditors, one of the large four, was sanctioned whilst the chairman and a director of the bank were also sanctioned.

With respect, it is submitted that the Court of Appeal has held that failure to register agreements that are registrable with NOTAP does not nullify the agreements neither does it make the transaction unenforceable[21] or illegal. In effect, the Court of Appeal held that

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[16] See Bankole Sodipo, "Enforcement of IP: Surfing Nigeria's IP Kaleidoscope" a paper prepared for the 2017 Fordham Annual IP Conference.

[17] The earliest local reference to a trade mark case is probably *Lagos Stores Ltd v. Blackstone & Co.*, (1901) and the *Houtman's* case 1912, both unreported but referred to in *W.B. Maclver & Co Ltd v. Campaign Francaise de L'Afrique Occidental* (1914-1922) 3 NLR 18 at 19. The first reported Nigerian patent litigation is probably *Rhone Poulenc and anor. v. Lodeka Pharmacy* (1965) LLR 9. Probably the earliest reported copyright case appears to be *Yusuf Ladan v. Sha Kallo Publishers* [1972] NCLR 428. 1968.

[18] Sections 4 & 6 of the National Office of Industrial Property Act, 1979.

[19] In the last one year, the difference between the bank rate and the secondary market has varied between N20 to $1 to over N80.

[20] http://www.stanbicibtcbank.com/Nigeria/AboutUs/News/Stanbic-IBTC-Holdings-meets-disclosure-requirements-of-International-Financial-Reporting-Standards; http://nigerianpilot.com/sanction-court-dismisses-stanbic-ibtc-suit-against-frcn/; accessed May 29 2017.

[21] *Beecham Group Ltd v Essdee Food Products Ltd(1985) 3 NWLR (part 11) 112;* [1997-1989] 2 I.P.L.R. 239.

the only penalty for failure to register an agreement with NOTAP as provided by the Act is that foreign exchange will not be released for the agreement. The remittance of foreign exchange through the secondary market that is significantly higher will only be illegal if a statute makes such remittance illegal. It is therefore doubtful whether the court dealing with the *Stanbic IBTC v FRCN* litigation would have come to the same conclusion if the appellate court's binding decision was brought to its attention.

13.0 Poor Due Diligence in IP Transactions

Foreign investors should ensure that there is due IP diligence in transactions. In transactions such as a take-over, merger, demerger, licensing, care must be taken to ensure that the transactions are properly recorded in the names of the relevant parties.

This gap nearly cost Zeneca a prized brand, TETMOSOL soap. Pursuant to the demerger of Imperial Chemical Industries (ICI), the chemicals part of the business was taken over by ICI whilst the pharmaceuticals and cosmetics business was taken over by Zeneca. Unfortunately, the assignment of TETMOSOL to Zeneca was not filed at the Trade Marks Registry. Prior to the demerger, ICI had licensed the manufacture of TETMOSOL to Jagal, a Nigerian company. Jagal refused to give up the brand to Zeneca and won an action by Zeneca to retrieve the mark from Jagal. The trial court rightfully held that the recording of the assignment made when the action between Zeneca and Jagal had commenced was not admissible under Nigerian law. Fortunately, unlike some foreign investors who give up easily, Zeneca appealed and had the decision reversed.[22]

14.0 Software patents and impending patent litigation in Nigeria

Nigeria's software industry was given a boost by Mark Zuckerberg's recent visit to Nigeria's "Silicon Valley". There is growing international interest in this industry. There is a noticeable increase in the level of local patent applications. The applications are mainly software patents for use on, or with mobile, communications or other technology. Technology companies in Nigeria have become targets of patent actions. Given that Nigeria operates a formal examination patent system, there is no substantive examination of the applications for novelty, obviousness etc. It is uncertain whether majority of the local applications can survive substantive examination, yet patents are granted.

Investors must be wary of this. Until a patent is set aside, the patentee who arguably should not have been granted a patent has a legal right to obtain an injunction restraining the business of an investor that arguably infringes the patent. I have suggested elsewhere that investors may need to consider maintaining a watch service that seeks to identify potential patent with false claims. Investors may wish to file actions against such applications or patents.

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[22] Effect of non - registration of assignment. Zeneca Limited & Ors v. Jagal Pharmaceutical Limited (2008) 21 W.R.N. 146; (2003-2007) 5, I.P.L.R page 409.

15.0 Confidential Information and Privacy

A number of business ideas do not fall into the rubric of traditional IP. Given the many characteristics of IP such as "copyright does not protect ideas per se", "copyright must be fixed", and "patents must be registered", some business ideas are not protected by traditional IP when they are shared with possible sponsors or investors. It has therefore become common place for major organizations who claim lack of interest in the business ideas shared with them, to "steal" the ideas shared by creative persons at a later stage. The good news is that the common law action for confidential information has been successfully used as the basis for one of such matters and the major consulting firm involved, settled for over a quarter of a million dollars.

Actions for breach of copyright against the organizations who use the personal photographs of distributors of their products of photographs of models have failed. This is because the law in Nigeria is that the author of the photograph is the owner of copyright in the photograph and not the person whose face appears in the photograph.[23] In responding to this, there is also a recent practice of relying on the constitutional provisions for the right to privacy as a basis for the unauthorized use of photographs of individuals. Section 37 of the Nigerian Constitution provides that "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected".[24] Although the practice of relying on this constitutional provision is of recent origin, it will be interesting to see how this develops.

Suffice it to say that Nigerian courts will enforce confidentiality clauses, non-circumvention agreements, and privacy.

16.0 Company Law, company name and trademarks: CITI & HONEYWELL

The significance of a company name to investors cannot be over emphasized. Innovative approach to problems was brought to bear expanding Nigerian jurisprudence on the protection of trademarks and company name by trademarks law *per se* and company law in cases affecting CITI Bank and Honeywell Inc.

When Citibank commenced operations in Nigeria as Nigerian International Bank, it registered the CITI mark but not CITI as a company. By the time it registered as CITI Bank several years later, about seven companies had registered companies with the CITI brand offering various services other than banking, for example CITI Motors. Given the common law rule of laches & acquiescence and the local statute of limitation, three prominent firms had rightly advised that an action for trade mark infringement would

[23] Section 51, Copyright Act.
[24] See Bankole Sodipo, *Copyright: Principles, Practice & Procedure*, (2017) Chapter 22,

likely fail. Disturbed by this position and the erosion of the CITI mark, CITI bank approached us.

We successfully issued a class action against all the CITI registered companies and the Corporate Affairs Commission (CAC, Nigeria's Registrar of Companies). The claim was not brought as a trade mark action. Instead, we pleaded that pursuant to the enabling Act of the CAC, it was ultra vires the CAC to register a company with a name identical to the registered trade mark of another company.[25] The court agreed with us and ordered the mandatory and perpetual injunctions against the CAC. The court ordered the companies to change their names and the CAC to strike out the word mark CITI from the names of the companies. This has changed the practice at the CAC and a number of cases have been instituted where the courts have come to similar conclusions.

The Honeywell trade mark and company name cases involved three actions. Honeywell Inc., a US corporation that had been trading for over two hundred years with the HONEYWELL name recently incorporated a Nigerian subsidiary with the name. It has obtained some trade marks in Nigeria with the same name. Honeywell Nigeria had registered a Nigerian business entity with the same name in 1968 and incorporated a company with the same name around 1975 before the foreign company's trade marks were registered. Honeywell Nigeria also had trademarks registered in different classes.

Honeywell Nigeria was able to obtain an injunction against Honeywell Inc. on the use of HONEYWELL as part of its subsidiary's company name, not because of trade mark law per se but because of company law.[26] The parties settled on use of trade marks but with Honeywell Inc removing HONEYWELL from the name of its Nigerian subsidiary.

17.0 Artistic Copyright in Unregistered Marks

It is a good thing for the Nigerian economy and Nigerian trademarks agents for all investors to register their marks. But this is sometimes impracticable. But a foreign investor who fails to register his mark cannot sue for trade mark infringement. He may be unable to sue for the common law action for passing off where he has local goodwill

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[25] Section 30(1)(d) of CAMA provides entitled "**Prohibited and restricted names", provides that "**No company shall be registered under this Act by a name which in the opinion of the Commission would violate any existing trade mark or business name registered in Nigeria unless the consent of the owner of the trade mark or business name has been obtained. Section 31(4) of CAMA provides that "Nothing in this Act shall preclude the Commission from requiring a company to change its name if it is discovered that such a name conflicts with an existing trade mark or business name registered in Nigeria prior to the registration of the company and the consent of the owner of the trade mark or business name was not obtained".

[26] Section 30(1)(a) of CAMA provides that "No company shall be registered under this Act by a name which is identical with that by which a company in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the Commission requires."

in that the mark is not known in Nigeria. That was the situation Cadbury experience in the recent past. Their CHOKI mark for a confectionary, comprising the word was very popular in Asia and Latin America but not in Nigeria. As such, traditional trade mark law thinking suggests there was no remedy.

Fortunately, there is copyright in artist works in Nigeria. That was what we explored and used as a basis for Cadbury to proceed against an unfair competitor.[27] Cadbury successfully sued for the infringement of its artistic copyright in the trade mark in obtaining injunction and the matter settled. But for this approach, a foreign investor would have concluded that Nigeria did not offer sufficient protection for its IP yet the foreign investor would probably not have taken responsibility for failure to register its mark in Nigeria.

18.0 Unregistered Designs and Copyright

Of all IP laws, designs law is probably the most dissimilar from one nation to another nation. This leaves many investors in a dilemma. Whilst Nigerian designs law has its roots in the 1911 English Act, there is a significant point of departure from its origins in that English law has changed. Nigerian designs law remains substantially embedded in the 1911 Act.

Section 22(1) of the 1911 Act provides: "This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except **designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process**".

The 1988 Copyright Act like its 1970 ancestor draws from the 1911 Act in that it provides that artistic works are not eligible for copyright protection if at the time the artistic work was made the author of the artistic work intended the work to be used as a model or pattern to be multiplied by any industrial process.[28] Such designs will only be protected if they are registered as industrial designs under the Patents and Designs Act, 1970. I have argued elsewhere that

> The test is the intention of the author of the artistic work at the time the work is created. The intention of the author after the work is created is not material under the Act. If it can be established that when the work was being created, the author of the work intended the artistic work to be used as a model or pattern to be

[27] *Cadbury Nigeria Plc v A.P. Foods* unreported FHC/L/CS390/2004.
[28] S.3 op cit.

> multiplied by any industrial process, the work will not be eligible for copyright protection in Nigeria. The work may remain an artistic work, but it is not eligible for copyright protection. This does not mean that the work is not protectable at all. Such artistic works can be protected as industrial designs.[29]

This means that the owners of the designs in textiles, shapes of equipment, shapes of containers, parts of equipment and integrated circuits must register their designs in Nigeria if at the time the designs were made, there was an intention by the owner for them to be used as a model or pattern for industrial replication. This creates a problem for the foreign investor who wrongly imagines that he can rely on copyright law in the circumstance.

A major international textiles company had to abandon its claim recently when it discovered that it was wrongly advised. It had issued a letter before action to another multinational for the infringement of copyright in its designs. It attached contracts of employment transferring the copyright from its employee authors. It was clear form the contract that the intention behind the contract of employment was that the designs will be created to be used as a model or pattern for industrial replication. It is therefore necessary for the investor to register his designs in Nigeria if there is an intention that they will be used as a model or pattern for industrial replication.

19.0 No Competition Law in Nigeria (What of Statute of Monopolies?)

Foreign investors may be tempted to assume that there is no competition law in Nigeria because there is no single statute known as Competition or Anti-Trust Act. They must reject this temptation. There are a couple of competition regulations or regulations akin to competition rules administered by the Security and Exchange Commission, the Nigerian Communications Commission and the National Office of Technology Acquisition and Promotion.

Nonetheless, an investor who is not regulated by these agencies may be frustrated by unfair practices of dominant market players. This was the position with a satellite broadcasting company that needed to add the CNN channel to its bouquet but was blocked by the agreement between CNN and Africa's dominant satellite distribution channel DSTV. The investor, TITV found the Broadcasting Commission's Code that promotes competition and sharing for sports unsatisfactory to deal with the CNN issue. We relied on the English 1623 Statute of Monopolies as a statute of general application in

[29]Bankole Sodipo, *Copyright: Principles, Practice & Procedure*, 2nd ed, para.3.15, Swan Publishers Lagos.

force in Nigeria in arresting the attention of CNN in a letter before action. The issue was resolved without a writ being filed. Investors may have to work tirelessly with their lawyers to find solutions until new laws are passed.

20.0 Microsoft and Foreign Investors have no copyright in Nigeria

Investors should never be weary and abandon cases they ought to appeal. This was the spirit exhibited when the South African courts handed down the decision in the McDonalds trade mark issue, the international business community called for a reversal of the decision and pursued the appeal until it was overturned.[30] It is therefore appalling that Microsoft has failed to file an appeal against the decision in *Microsoft Corporation v Franike Associates Ltd*.[31]

The Court of Appeal affirmed the decision of the trial court that there was no evidence that the Nigerian Copyright Act 1988 was extended by federal gazette to protect US works as such Microsoft was not protected by copyright in Nigeria.

I have argued elsewhere that this decision and similar line of authority[32] were made *per incuriam* and must be reversed or should not be followed.[33] Counsel should have brought it to the attention of the law lords that the Nigerian government issued and gazetted the Copyright (Reciprocal Extension) Order, 1972 (1972 Order) under the 1970 Act. The Order extended the protection of Nigerian Copyright Act to certain works emanating from 57 countries listed in the Order. The list includes the United States and most countries in Europe. The 1972 Order has not been repealed. Paragraph 3(3) of the Fifth Schedule, the transitional and savings provisions to the 1988 Act provides:

> "Any subsidiary legislation made under the repealed Act which was in force immediately before the commencement of this Act, shall remain in force, subject to any necessary modifications, as if it had been made under this Act, and may be added to, amended, revoked or varied accordingly.

It is rather unfortunate that Microsoft has refused to appeal. This authority is going to be used to cause trouble for other foreign investors as it is not all high court judges that will depart from precedent and hold that the Court of Appeal was wrong!

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[30] http://www.law.harvard.edu/faculty/tfisher/PILMcDvJob.htm accessed April 11 at 10.05pm. See also http://www.sdaweb.com/lib/judgment.html.

[31] (2011) LPELR-CA/L/573/2008; (2012) 5 CLRN 145.

[32] *Island Records Ltd and Ors. v Pandun Techinical Sales and Services Ltd.* (1993) FHCLR 318; *Societe Bic S.A. v Chargin Industries Limited and Anor* (1997) FHCLR 727, [1990-1997] 2 IPLR 335.

[33] Bankole Sodipo, *Copyright: Principles, Practice & Procedure*, 2nd ed, paras.15.9-15.10, Swan Publishers Lagos.

21.0 Cyber-Crimes and Cyber-Squatting[34]

Nigeria now has a specific statute that deals with cybercrimes. This is the Cybercrime (Prohibition, Prevention, etc) Act, 2015. Prior to 2015, cybercrimes were prosecuted under other statutes that were found wanting. Prior to the passage of the Act, Nigerian courts had granted injunctions for infringements on the world wide web based on our intellectual property laws.

The Act criminalises cyber-squatting (the unauthorized use of another person's trade mark or domain name) and several electronic crimes. Investors with "well known" marks that are not registered in Nigeria may be happy to learn that the unauthorized dealing with the mark include the intentional use of marks that are not registered in Nigeria. In addition, the Act criminalises other acts such as cyberstalking,[35] fraudulent issuance of e-instructions,[36] cyber-threats,[37] identity threats and impersonation,[38] child pornography,[39] phishing, spamming, spreading of computer virus[40] and card related fraud,[41] among other crimes. The penalties under this Act are somewhat deterrent for instance, they include of N5 Million or a term of imprisonment of up to two years or both.

22.0 Anti-Piracy Devices and Technology Protection Measures

Section 21 of the Copyright Act headed Anti-Piracy Devices, outlines Nigeria's attempt to encourage the use of devices that prevent copying or prevent the circumvention of copying. The provision deals more with holograms and similar devices and contrivances for making such holograms and similar contrivances. The Act criminalizes various acts with regards to devices that are prescribed as antipiracy devices. Whilst this provision is a potentially good framework to curb infringements, it is limited to the NCC prescribing an article or device as an anti-piracy device. Several devices or software can circumvent anti-copying technology especially in the broadcasting and software industries. None of these can attract criminal liability under section 21 of the Act unless they have been so prescribed by the NCC. Even then, courts may not hold that persons found in possession of these devices have committed a crime unless the devices can only be used for circumventing the copyright. As such, the Nigerian court in *NCC v Edolo*[42] acquitted the defendant on the grounds that the contrivances in his possession could have been used

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[34] Bankole Sodipo, "Intellectual Property and the Obligation of Company Officials under the Cybercrime (Prohibition, Prevention, Etc) Act", delivered at the Centre for Law and Business Cybercrime Symposium October 14, 2015 Oriental Hotel, Victoria Island, Lagos; Bankole Sodipo, "Cyberpiracy: Recurring Issues in Intellectual Property on the Internet with focus on Domain Names and Trade Marks", at the seminar to mark the elevation of Professors Osinbajo and Osipitan to the rank of Senior Advocate of Nigeria SAN.

[35] S.24.

[36] S.20.

[37] S.21.

[38] S.22.

[39] S.23.

[40] S.32.

[41] S.33.

[42] 2008-2012 6 IPLR 1.

for other purposes other than cloning the smart cards and decoders of Multi Choice.

The Copyright Bill goes further as it seeks to criminalise the cloning of technology protection measures (TPMs) and the making of software or contrivances that can circumvent TPMs.[43]

23.0 ISPs and the DCMA

It is difficult and almost impracticable for internet and communications service providers to sift or edit content in order to avoid defamation actions and possible copyright infringements derived from injurious or unauthorized content placed on their platform. This has opened investors who are internet or communication service providers to litigation that may paralyse their operations. Although Nigeria is party to the WIPO Copyright Treaties that oblige her to make certain changes in her law, no law has been passed. The USA responded to this threat by passing the DCMA aimed at reducing the liability of the service providers once they respond to allegations by removing the injurious content. Unfortunately, there is no provision similar to the US DCMA in Nigeria.

Investors may be pleased to note that the Copyright Bill seeks to introduce a regime similar to the DCMA. The Bill has a regime that protects service providers from infringement actions where they take down infringing content on their platforms.[44] Investors must join the lobby campaign. Until the Bill is passed, investors may to review their business practices and introduce measures to curb possible litigation. We were privileged to conduct an audit and build a new architecture for the largest music distribution platform in Nigeria.

24.0 Criminal Prosecution of IP Offences

Several government agencies including the Customs, the police, and the Standards Organization of Nigeria, the Nigerian Copyright Commission (NCC) and the National Agency for Food Drugs Administration and Control, NAFDAC, are empowered to prosecute IP offences. The NCC has obtained over 50 convictions in the last five years.[45] with meagre fines but terms of imprisonment of up to two years. NAFDAC has powers to prosecute offences against food, drugs and cosmetics.[46] It has recorded many convictions with terms of imprisonment of up to five years with no option of fines.[47] NAFDAC is also active in anti-counterfeiting operations having seized and destroyed

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[43] See for example, sections 297-298 of the United Kingdom Copyright, Designs and Patents Act, 1988.
[44] Section 46-48 of the Bill.
[45] Bankole Sodipo, *Copyright: Principles, Practice & Procedure*, 2nd ed, para.14.14, Swan Publishers Lagos (2017).
[46] Act No. 15 of 1993 as amended by Act 19 of 1999 and now the National Agency for Food and Drug Administration and Control Act Cap N1 Laws of the Federation of Nigeria, 2004.
[47] See for example http://www.nafdac.gov.ng/index.php/component/k2/item/303-court-jails-graduate-five-years-for-manufacturing-fake-drugs accessed Friday April 14, 2017.

N29 Billion worth of counterfeit products in the last three years.[48] The Consumer Protection Council also has some powers to that can be used by right holders once it is shown that consumers are affected.[49] The international business community may wish to consider assisting these agencies and urging the Nigerian government to strengthen the agencies.

Investors must be aware that the corporate veil of offenders can be lifted such that officers of offending companies can be proceeded against in their personal capacity.[50] Provisions like this has influenced some companies to come to early settlement as the brains behind the companies would rather avoid criminal prosecution.

25.0 Enforcing IP: Reports to the Police and Warning Adverts

Investors must be aware that offenders may use the legal system to launch counter-measures against right holders. Two of the possible counter-measures will be considered.

The first is the possibility of an alleged offender instituting an action for trade libel or defamation against a right holder who issues an advertorial to the public about the "fake/offending" product of the defendant. This happened to the owners of the BIC mark. They had sued for trade mark infringement and issued an advertorial waring the public not to buy the alleged offender's products.[51] The offender's counter-measure was a case for trade libel against the owner of the BIC mark and this was fought up to the Supreme Court where it was held that the counter-measure was not an abuse of court process.[52] The Supreme Court dismissed BIC's arguments that the trade libel action was an abuse of court process given that the parties and the issues before the court were not the same. The trade libel action has been remitted to the High Court for trial. This does not mean an investor cannot issue advertorials. What it shows is that legal advice must be obtained in drafting an advertorial in order to protect the investor from such counter-measure.

The second possible counter-measure can derive from how the right holder handles his dealings with the police or law enforcement against when an alleged infringement occurs. Offenders may launch a counter-attack against a right holder who seizes allegedly infringing goods and reports an alleged infringement to the police on the basis that the ensuing action such as arrest is a breach of his fundamental rights.[53] I have successfully argued at the Supreme Court that a party who has sought and obtained a court's intervention by way of *ex parte* interim injunction must inform the trial judge if he wants

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[48] http://www.informationng.com/2017/04/n29-billion-worth-fake-drugs-destroyed-nafdac.html accessed Friday April 14, 2017.
[49] Act No. 66 of 1992.
[50] S.24 (2) *op.cit.*
[51] *Societe Bic S.A. v Chargin Industries Limited and Anor* (1997) FHCLR 727, [1990-1997] 2 IPLR 335.
[52] *Society Bic S.A. & ors v Charzin Industries Limited* (2014) LPELR-22256(SC).
[53] *Olufemi Aladetuyi v Daramola Taiwo* (2013) LPELR-20283(CA).

to report the same matter to the police, otherwise such a report will amount to self-help.[54] Investors must be guided in the steps taken and must give full disclosure of measures taken.

26.0 Collecting Societies

The NCC has licensed three sector led collecting societies in Nigeria: The Reproduction Rights Society of Nigeria (REPRONIG) for the book industry, the Audio-Visual Rights Society (AVRS) for the film industry and the Copyright Society of Nigeria (COSON) for the music industry. They all have international affiliations. COSON is the largest and one of the most viable in Africa. Collective management especially of music is one of the most litigious aspects of intellectual property in Nigeria as users who are not accustomed to paying for broadcast or public performance of music resisted until court decisions are handed down.

The Musical Copyright Society of Nigeria (MCSN), a collecting society for the music sector had operated before the Copyright Act 1988. It continued to operate when it was refused a licence by the Copyright Commission and argued that it was not operating as a collecting society but as the owner, assignee and exclusive licensee of works. The Court of Appeal in *MCSN v Adeokin Records*,[55] held that section 17 was inapplicable to the Appellant MCSN and could not divest it of the right to institute an action given that it had instituted the action before the amendment effected by section 17. The Court of Appeal in *Compact Disc Technologies v MCSN*[56] held that although it did not describe itself as a collecting society but as the owner, assignee and exclusive licensee of rights,

MCSN's statement of claim showed that it is a member of and affiliated to societies who functioned as collecting societies. Given that MCSN functioned as a collecting society, it was illegal for it to operate as a collecting society without the approval of the Commission. Three other Court of Appeal decisions have held that sections 17 and 39 of the Act are not unconstitutional, they limit the right of anyone who is operating as a collecting society without the approval of the Commission.[57] The tenor of the cases is that such persons cannot institute copyright infringement actions and their operations is illegal.

Strangely, it has been reported that the Attorney General has ordered the Commission to

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[54] *Duwin Pharmaceutical and Chemical Co. Ltd. v. Beneks Pharmaceutical and Cosmetics Ltd. & Ors* (2008) 4 NWLR (Pt. 1077) 376 at Pp. 399-400, paras. F-A; D-F; Pp. 419-420, paras. F-E; P. 399, paras. C-F.

[55] (2008-2011) 6 IPLR 39. Curiously, the missing word "OR MAINTAINED" accords with the Appellant's arguments that case that the amendment did not affect its case, as he had commenced the action before the amendment. MCSN did not advance any argument in suggesting that OR MAINTAINED had no effect on its case.

[56] (2008-2011) 6 IPLR 198.

[57] *NCC & ors v MCSN & ors* Unreported Suit No CA/L/350/2013 delivered on the 19th of October 2016; *MCSN v Continental Broadcasting Service Ltd* Unreported Suit No CA/L/576/2014 delivered on the 29th of December 2015; *MCSN v NCC* Unreported Suit No CA/L/575/2009 delivered on the 21st October 2016

approve MCSN and withdraw the 7 criminal charges against MCSN and its officers despite the crimes committed brazenly in the last twenty years. The Attorney General appears to have been misguided. It will be interesting to see if he can reverse four Court of Appeal decisions, give approvals without due process and withdraw criminal charges when the Buhari government is branded as anti-corruption government.

27.0 Imminent changes for Industrial Property[58]

There are at least a couple of versions of the Industrial Property Bill before the National Assembly.[59] The Bills seek among other things to set up an autonomous government agency known as the Industrial Property Commission to take over the activities of the Trade Marks Registry and the Patents and Designs Registry. The Bills seek to introduce a substantive patent examination system and introduce a Tribunal to hear opposition and other applications before the office. The Bills propose regimes for plant variety, animal variety and utility models. It creates a regime for geographical indications of origin, a stronger regime for well-known marks and criminal sanctions for various breaches of industrial property rights.

28.0 Imminent changes for Copyright[60]

Nigeria has a Copyright Bill with the Attorney General of the Federation. The Bill is the result of in-depth consultation with stakeholders by the Nigerian Copyright Commission. Nigeria's Copyright Bill seeks to fill several gaps identified in the 1988 Act. It grants film owners the exclusive right to "the broadcast of a film" as this is not specifically mentioned in section 6(1)(c) of the Act. It grants owners of works a separate right to control "the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them". It increased the criminal penalties including the fines and terms of imprisonment for various breaches.

The Bill has two sets of provisions dealing with online piracy: Part VI – Anti-piracy Measures (ss.44-46) and Part VII - Provisions Relating to Online Content (ss.47-54). Section 44 headed "Technological Circumvention Measures (TCM)", defines TCM to mean - avoiding, bypassing, removing, deactivating, decrypting or otherwise impairing a technological measure. A technological measure effectively protects a work under this Act if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits access to the work. It provides that "No person shall circumvent a technological

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[58] Bankole Sodipo, "Recent Developments and Imminent Changes in Nigerian Trademark Law and Practice", Volume 85, *Trademark Reporter*, (1995) p.447; Bankole Sodipo"Trade marks protection in Nigeria: infringement and remedies under the law", *Nigerian Law Reform Commission Journal*, 2012.

[59] The Intellectual Property Association of Nigeria IPLAN, set up by the author has been at the fore of the lobby and the drafting of the Bills.

[60] Bankole Sodipo "The Nigerian Copyright Act 1988, as it Affects The Entertainment Industry" [1993] 1 *Entertainment Law Review* 17.

protection measure that effectively protects a work under this Act." It further provides that "No person shall manufacture, import, sell, offer to the public, provide, or otherwise traffic in any technology, product, service, device, or part thereof, that— (a) is primarily designed or produced for the purpose of circumventing or is capable of circumventing protection afforded by a technological measure that effectively protects a work under this Act; or (b) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a work under this Act."

Section 45 of the Bill criminalizes the falsification, alteration or removal of electronic rights management information (RMI). RMI is defined to mean "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public".

It provides that

> "(1) No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement provide copyright management information that is false, or (2) No person shall, without the authority of the copyright owner, (a) intentionally remove or alter any electronic rights management information, (b) sell, offer for sale, distribute, import for distribution, broadcast or communicate to the public, works or copies of works knowing that electronic rights management information has been removed or altered without authority, knowing, or having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this Act.

29.0 Conclusion

I have come to the end of my campaign. Unlike a politician, my manifesto is backed with examples of success stories and measurable predictions. I hope you are convinced that that the regulatory framework for FDI and IP in Nigeria is sufficiently robust with incentives to attract and increase FDI. If so, help spread the news. If not, please feel free to take me on.

Thank you.