

INTELLECTUAL PROPERTY AND COMMUNICATION TECHNOLOGY

Volume 1

EDITOR'S NOTE

In this quarter's newsletter we take a look at Intellectual Property and Communication Technology law, highlighting the current developments in the ICT sector as relates to intellectual property issues and its regulation worldwide, with special emphasis on Nigeria. ICT drives socio-economic growth and therefore needs to be properly regulated. We will showcase some legal cases, events and opinions currently trending in the ICT world.

In writing this issue of our newsletter we have also highlighted the opinion of various legal luminaries as to the intellectual property issues raised by the wide use of communication technology in Nigeria.

Unfortunately Nigeria is yet to pass into law its various bills relating to Information Technology, it is our hope that they be made laws soon, as this will facilitate the growth of the ICT sector and also address the intellectual property issues. The proposed laws are listed below:

- ⦿ The Computer Security and Critical Information Infrastructure protection Bill 2005
- ⦿ Cyber Security and Data protection Agency Bill 2008
- ⦿ Electronic Fraud Prohibition Bill 2008
- ⦿ The Nigerian Computer Security and Protection Agency Bill 2009
- ⦿ The Computer Misuse Bill 2009
- ⦿ The Electronic Transaction Bill 2011

The issue of enforcement of intellectual property rights in the digital environment is quite challenging, especially for right holders to detect and stop the dissemination of unauthorized digital copies, which is now done with unimaginable speed.

There is therefore the need for workable systems of online licensing, and reliance on technological methods such as encryption, passwords, fingerprinting, copy proof compact disc that prevent CD's from being played on computer disc drives etc. to protect intellectual property rights from infringement via communication technology such as the internet.

Other intellectual property law issues that arise with the use of communication technology, are protection of database, peer to peer file sharing systems such as Napster, responsibility of online service providers etc.

Do have a pleasant read.

"The internet has made the world a global market".
Barrister B.V. Enwesi.

The innovations in Information Communication Technology has made it easier to enter into contracts across borders thereby:

- **Increasing the nations foreign revenue**
- **Improving the nations international image**
- **Ensuring seamless technology transfer.**

2-06-14

INFORMATION COMMUNICATION TECHNOLOGY (ICT) AND INTELLECTUAL PROPERTY RIGHTS

In the ICT world, it is becoming increasingly cumbersome for the proprietors of copyright, trademark, trade secrets and patent rights to get economic reward for their intellectual creativity. One can access with ease and for free most creative works, so much so that in the area of copyright protection, fair use appears to be the rule and not the exception.

We must therefore remind ourselves of the negative effect these recent developments in communication technology could have on the passion, productivity and innovativeness of authors, inventors and creators. It is not hard to see that the less the incentive to create or invent, the less the quality and quantity of creations and inventions. Hence, there is need for a balance between access to information by users and quantum of economic reward earned by creators.

The scope of protection given by the various intellectual property right laws in Nigeria appears to sufficiently cover works accessed and infringed upon via Information Communication Technology.

For instance the Patent and Designs Act 2004 provides protection to software patents (which are the novel ideas, systems, algorithms and methods embodied in a software product; user interface features operating systems techniques, display presentations, etc.), thus anyone selling or making the patent without the patent owner's authorization is guilty of infringement.

While the Copyright Act 2004 provides for the protection of original software, such that the author has the exclusive right to copy, create modified versions of it, and distribute copies by license, sale or otherwise. It also protects against indirect copying such as unauthorized translation of the code in another programming language.

In the ICT sector, trade secrets could be software code or ideas. Trades secrets such as the formula to Coca-Cola, last forever and are protected by the owner's secrecy, trade secrets are not subject to infringement, but can be stolen, to succeed in an action, the plaintiff must prove that the trade secret was not generally known and reasonable steps were taken to keep it secret. In addition a proprietor/right owner can enforce his rights under civil law contract and criminal law forgery/counterfeiting. For instance in a case of an infringer selling as genuine, pirated copies of an original computer software by suing for a breach of the licensing agreement.

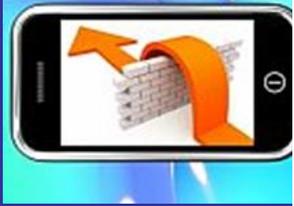
Maximizing the economic value of ICT tools such as a software asset, is determined by one's understanding of the intellectual property rights that apply and how best to use the available forms of legal protection to protect those rights.

In this electronic age, digital transfer of information through the Internet has simply become increasingly seamless. This exposes most copyright works particularly with entertainment value such as musical works, movies etc. to frequent copyright violation.

Upon the digitalization of works, they are reduced to a series of zeroes and ones. In this format, the network of computers forming the Internet can easily copy or duplicate copyright works without affecting the audio-visual quality of such works. In zero time, the digital works can be distributed to any location in the world. Each of these copies can in turn be easily downloaded by the receiver at a zero or near zero cost depending on certain factors.

The recent and well celebrated *Napster Case*^[1] brought to the limelight the dimension copyright infringement has taken on the Internet today. Napster operates servers that allow its users to locate and copy mp3-format digitalized music files for free.

In this case, record label owners brought an action against the company for contributory



“IF Nigerian’s had their rights fully protected under explicit consumer protection laws, they would seek to have them enforced more regularly than is the current situation”-
Barrister B.V Enwesi,
LLB, BL, LLM (E-commerce Law)





and vicarious infringement of copyright. The Napster system enables web surfers to make information stored on their hard drives available to other people in the Napster community. Napster users are able to swap sound recordings in the form of MP3 files, which are small compression format files that can be easily transmitted over the Internet. To facilitate this, Napster provides its user with fully-integrated technological infrastructure, such as a continually-updated database of links to millions of media files; and software to facilitate the rapid and efficient identification, copying and distribution of those files. All of these services are at zero cost to the user. This system has been described as one of the numerous new, Internet-based services that form a new generation peer-to-peer computing, facilitating the sharing of books, music and videos etc. that have turned the web into a giant free media exchange.^[2]

The United States district court for the North District of California on March 6th 2001 gave music-swapping Napster Inc. 72 hours to block song titles that the recording industry identifies as copyrighted work. The court in an action brought by record labels and artistes said that the recording industry must provide Napster with notice of copyrighted sound recordings by listing title, name of artiste, name of file available on Napster containing the work, and certification that the plaintiff owns the copyright. Once Napster receives "reasonable knowledge" from the recording labels, it has three business working days to prevent such files from being included in the Napster index, thereby preventing access.

There is no doubt that today Nigeria boasts of some of the most entertaining stars in the world. With the Nigerian film industry, popularly known as "Nollywood" being rated second biggest in the world after Indian's Bollywood,^[3] the fact is that copyright infringement on the Internet poses a great threat to the survival and sustained growth of the industry.

According to the Cable Network News, Nigeria has a USD250 million movie industry, churning out about 200 videos for the home video market every month.^[4] Of course, the music industry is easily the largest in Africa with quite a number of internationally celebrated Nigerian musicians such as Tuface, Asa, Banky W, Lagbaja, the late Fela Kuti and many others.

Against this background, Nigerian music and movies definitely need adequate protection for its copyright works. According to Ajakpovi, "the Napster case would not be considered a hypothetical event by the discerning musical artiste in Nigeria; and not be considered fiction by the progressively minded...It is highly likely Nigerian music features in the chart of music transferred and downloaded freely on the Napster website.^[5]

The Napster case's stance was similarly taken by the US court in the case of Metro-Goldwyn-Mayer Studios v Grokster (2005) 545 US 913, where Justice Breyer said amongst other things, that the Law leans in favour of protecting technologies and promoting new innovative communication technology development, such as the internet or mobile phone applications, rather than protecting the intellectual property rights that arise from such innovation. This is because of the neutrality of technology and the need to encourage its development. The general public policy being to simultaneously ensure communication technology advancement and compensation for infringement of intellectual property rights.

Therefore it is not the communication technology that is unlawful, rather its illegal use. Recently in Nigeria there have been online news that the famous online store Konga is set to sue Jumia (Rocket Internet) for cybersquatting.

Cybersquatting could be described as a form of online copyright/trademark infringement that involves the practice of registering names, especially well-known company or brand names, as internet domains or trademarks, in the hope of reselling them at a profit.

Jumia allegedly registered Konga domains in at least 10 countries across Africa thereby depriving Konga of domain localization in those countries.





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In the United States, the federal law, Anti Cybersquatting Consumer Protection Act defines cybersquatting as registering, trafficking in, or using a domain name with bad faith intent to profit from the goodwill of a trademark belonging to someone else.

The World Intellectual Property Organization (WIPO) has since the year 2000, offered dispute resolution services in cases of cybersquatting, often offering arbitral processes/arbitration services which enables complainants who dispute the right to domain names to avoid potentially costly litigation, which can also be complicated when the parties reside in different countries.

WIPO's arbitrators are empowered to award complainants a domain name if they find that the accused party has registered it abusively, therefore to convince a WIPO panelist in the WIPO's Arbitration and Mediation Center, that someone is cybersquatting on your brand, you need to show that the disputed domain name is identical or confusingly similar to your trade mark and that the respondent does not have a right or legitimate interest in the domain name; and that the respondent registered and used the domain name in bad faith. WIPO It has also established a trademark database portal to facilitate preliminary trademark search for people who wish to register a domain name.

For instance in a recent cybersquatting case decided by the WIPO Arbitration Center, it took the domain name walmartfacts.biz away from Jeff Milchen, a Wal-Mart critic. The panel found that Milchen had "registered the name in bad faith," a term that has specific meaning under ICANN's Uniform Domain-Name Dispute Resolution Policy (UDRP). According to Evan Brown:

In taking this "totality of the circumstances" approach, the panel considered four factors to find that the domain name was registered in bad faith. First, the respondent had not used the domain name to post content constituting fair use or any other legitimate purpose. Second, the respondent knew of Wal-Mart's trademark rights when he registered the domain name in January of 2005. Third, the respondent's "admitted animus" was an indication of actual malice and ill will toward Wal-Mart. Fourth, the use of the entire Wal-Mart trademark in the domain name made it difficult for users of the Internet to infer a legitimate use of the domain name by the respondent.

Hijacking of domain names is another problem faced by companies. The fight to protect their trademarks from use by a third party of a confusingly similar misspelled domain name was forced on many companies, including the New York Stock Exchange, The Wall Street Journal, Air France, and Disney. The fight to protect their trademarks from being used to divert users to competitors' Web sites was fought on the discount travel front by US Airways, Lufthansa, British Airways, Hilton Hotels and Marriott Hotels.

All of these companies stopped the third parties' use of their misspelled trademarks through either the United Nations Trademark and Copyright Agency WIPO (the World Intellectual Property Organization) or the U.S. courts. The fact of having to spend time and money to do so can be reduced through registration and monitoring of both trademark and domain names.



[1] *A & M Records Inc. v. Napster Inc* 54 USPQ 2D (BNA)

[2] <http://www.napster.com/help/tutorial>

[3] Placing Nigeria ahead of the United States in terms of number of annual film productions. The rise of affordable digital filming and editing technologies have no doubt stimulated Nigeria's video film industry. See "The Best of African Film in 2004" CNN December 18, 2004 as cited in http://www.wikipedia.org/wiki/Cinema_of_Nigeria accessed on July 38, 2011.

[4] "Nigeria Surpasses Hollywood as World's second largest film producer - UN" United Nations May 5, 2009 as cited in http://www.wikipedia.org/wiki/Cinema_of_Nigeria accessed on July 38, 2011

[5] Ajakpovi M., "The Internet, Intellectual Property Rights and Legal Framework for e-Commerce in Nigeria" *op.cit* 177

(culled from www.nigerianlawtoday.com, Posted by Senator Ihenyen on Friday, January 11, 2013)

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