

The Challenges of Enforcing Intellectual Property Rights across the Economic Community of West African States: The Nigerian Experience

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Abstract

Intellectual property rights are those rights that protect the result of creativity, inventiveness and the result of the human intellect. Generally speaking intellectual property is broadly divided into industrial property and copyrights. The first include such intangible but significant properties such as patents, trademarks, industrial designs, trade names as well as goodwill, which are often referred to as incorporeal hereditaments. The second is a separate and distinct head of law (ownership right) known as copyright. There are challenges of enforcing intellectual property rights in West African States and these have its attendant devastating effect on the economy in the region. It is obvious that consequent upon the emergence of industrialization in West Africa many people have resorted to infringing works of other people in order to reap where they did not sow thereby depriving the owners of such work of their labour, time and expense. It is for this reason that the law frowns at it by seeing that the owners of these work are not unjustifiably expropriated or reaped by people who are not the producers of such labour. This has rooted deep in our society today thereby reducing the pace of development in West Africa. In this paper we shall substantially highlight the meaning of the concept of intellectual property rights; the meaning of intellectual property, the nature and scope of intellectual property and the challenges of enforcing intellectual property rights in West Africa and recommendations on ways to tackle these challenges.

Keywords: Intellectual property rights, challenges, recommendations.

Introduction

The primary function of intellectual property right under the law is to protect from exploitation the rights of a person's work. This protection is of relevance to actors, playwrights, performers and other artists, to musicians, authors, publishers, to broadcasters, to makers of cinematograph films, photographers, producers of computer systems, manufacturers of goods and products, those who trade in goods and products, those who trade in goods and products using specified trademarks and trade names, technicians and technologies, pharmacists, engineers, lecturers, artists, lace designers, designers of other types of products etc. In West Africa the importance of intellectual property right can hardly be over-emphasized. In this region, book piracy, film piracy, music piracy still reign supreme. We now see so many fake products with marks imitating the trademarks and names of the genuine manufacturers being smuggled into the region from foreign countries. Apart from these fake products which are imported, many other fake products also carry marks which imitate often times the trademarks and names of the genuine manufacturers. There are also those that copy the inventions and designs of others. Effective laws to combat these malpractices and other problems are necessary. However, there are some challenges to effective enforcement of intellectual property rights in West Africa. These challenges have made the enforcement of intellectual property rights in the region to be a mirage. In the paper we shall substantially highlight the meaning of the concept of intellectual property rights, the meaning of intellectual property, the nature and scope of intellectual property, the challenges of enforcing intellectual property rights in the region and recommendations on ways to tackle these challenges.

Meaning of Intellectual Property Right

Intellectual property rights are those legal rights associated with creative effort or commercial reputation and goodwill¹.

¹ David Bainbridge: Intellectual Property, Financial Times Pitman Publishing; 4th ed., London; 1999; P.11

Intellectual property right is used to describe the right which a person has over an invention, an innovation, a copy right, a patented product or design, a trademark and all other such corporeal hereditaments which are recognized in law as property¹.

THE MEANING OF INTELLETUAL PROPERTY

World Intellectual Property Organization (WIPO) describes intellectual property as the property in intellectual creations, particularly technological inventions and literary and artistic works. Property means that protected inventions and can be used only with the consent of the inventor, author, or other owner of the rights. Intellectual property rights exist also in the protection of marks

Intellectual property can be described as all those things which emanate from the exercise of human brain such as ideas, inventions, poems, designs, micro computers etc.

Intellectual properties are those intangible aspects of human creation, they are choses in action, outcome of a man's ideas and ingenuity that no other man before him has had. These ideas once put into writing or creativity and sort to be protected under the law, becomes an exclusive reserve of the owner of the ideas or inventor, no one else can use it without the permission of the owner

W. R. Cornish in his book intellectual property defined it as some of the finer manifestation of human achievement*

Intellectual property are in general creations of the mind. It is an intangible property created by the human mind. They are the ideas that make invention.

A learned writer gave possible description of intellectual property on two facets:- Colloquial and legal. According to him the colloquial description of intellectual property (a phrase which embraces industrial property is that it comprises all those things which emanate from the exercise of the human brain such as ideas, inventions, poems, designs, micro computers and micky moused. The description in the legal sense focuses on the legal rights which are enjoyed in the product of the mind rather than on the product. This right is exclusive in the sense that it excludes all others from enjoying the fruit of another person's work emanating from an idea expressed by such person rights.

The Nature and Scope of Intellectual Property

The subject matter of intellectual property is very wide and includes literary and artistic works, films, computer programs, inventions, designs and marks used by traders for their goods or services. The law deters others from copying or taking unfair advantage of the work or reputation of another and provides remedies should this happen. Intellectual property encompasses numerous aspects of human endeavour. The object of intellectual property is the creations of the human mind, the human intellect. That is why this kind of property is called "intellectual property". In a somewhat simplified way, one can state that intellectual property relates to pieces of information, which can be incorporated in tangible objects at the same time in an unlimited numbers of copies at different locations anywhere in the world. The property is not in those copies but in the information reflected in those copies.

There are several different forms of rights or areas of law giving rise to rights that together make up intellectual property. They are: copyright which is for the protection of literary and artistic works and associated products, Trademarks which is for the protection of goodwill attaching to marketing products, patents which is for the protection of inventions and industrial design which seeks to protect the design of industrial products.

Intellectual property like other distinct branches of the law, have sources to which references are usually made and from which its growth and development derive. These sources are international laws, like treaties such as World Intellectual property organization (WIPO), Trade Related aspect of Intellectual Property Rights (TRIPS) etc. Regional Laws like the African Economic Community Treaty whose objective is to attain a state of integration for the free movement of goods and services in member West African Countries, National laws for various countries. The other source is of course case law which has developed over time.

Intellectual property rights give rise to a form of property that can be dealt with just as with any other property and which can be assigned, mortgaged and licensed. For example where the ownership in the whole or part of a right is transferred. Intellectual property gives rise to rights and duties. It establishes property rights which give the owner the right to do certain things in relation to the subject matter. For example, if the right is a copyright and the subject matter is a piece of music, the owner of the copyright has the exclusive right to make copies of the music and to control the performance of the music. However, the owner also has the negative right to prevent others from doing such things in relation to the music. Since intellectual property is concerned with rights. Conversely it must create duties, for according to the legal theories Hohfield² every right has an

¹ C. O. Muo: Public Lecture Nnamdi Azikiwe University, Awka 25/1/2007.

² W.N. Hohfeld: Introduction of Jurisprudence; stereos; London 4th ed; 1979; pp. 260 – 266.

associated duty. There cannot be one without the other. The right is a right to do certain things, such as making copies of a work of copyright. The correlative duty is a duty which exists even if the person infringing the right does not know of it¹.

In the area of intellectual property, the law strives to strike a balance between conflicting interests, to reach a justifiable compromise. Therefore the duty not to infringe is often curtailed by way of exceptions to infringement. For example the right given to copyright owners does not extend to a person who is using the work for research purposes. The honest use by a trader of his own name will not infringe a trademark comprising the same name in other words, it is possible to exploit a work even if the owner of the right is vehemently opposed to this. The final limitation on intellectual property rights concerns their duration. Most of the rights are limited in time.

Intellectual property rights are very diverse in nature. Some are informal and arise automatically whilst others can only be acquired by applying for registration.

Challenges

1. Hegemonia Paranoia

One challenge of Economic Community of West African States (ECOWAS) integration for harmony of laws is the fear by some West African countries of Nigeria's hegemonic ambition, which they regard with a degree of suspicion and tantamount to sheer harassment, intimidation or victimization. This has greatly affected a uniform application of copyright laws in West African Countries, because ECOWAS member states are unsure whether or not a uniform Law or Rules may lead to usurpation of values or some kind of monopolistic tendencies. The hegemonic paranoia is a highly orchestrated but unfounded fear.

2. Language Barrier:

There are over 1000 indigenous language groups in the ECOWAS sub-region with French and English language as the two official languages with which government business is conducted. The generality of the populace of the sub-region are not fluent in the two official languages simultaneously. Hence language poses a barrier to the officials of government who are charged with conducting the affairs of states as it pertains to Intellectual Property Rights enforcement. As an illustration, if an IP-Right owner in Conakry, Guinea is being violated at Lome, Togo language will not pose a barrier as they are Francophone cities of West Africa. In the contrary, if the violator is at Tema; Ghana, language becomes the first hurdle that must be crossed for a meaningful investigation and a successful enforcement to be realized.

3. Legal System Dichotomy

The existence of different legal systems in ECOWAS is a major problem of cross border practice and is also a major cause of the slow pace of intra regional trade and intellectual property right protection across the ECOWAS states.

4. International Border Management Challenge

Harassment and extortion at border posts seems to defy solutions due to official collusions, abuse of power, greed and prejudice within the relevant law enforcement agencies. The abolition of visas has not spared citizens of the community administrative harassment and extortion at border posts. In many ways, regionalism and the quest for integration in West Africa has become a mirage. A more coordinated regional community will drastically minimize the carriage of pirated copies of copyright works across the borders, thus checking the infringement of copyright across West African Countries.

5. Poor Communication Network

Poor communication links by road, railway, air and sea is a problem to cross border practice in the ECOWAS community. Thus wholesome or objective pursuit of intellectual property rights protection has been and will continue to be adversely hindered by this factor.

6. Institutional Challenge of Government Agencies

Weak institutions and poor governance, lack of political and institutional accountability and refusal by relevant authorities to take or accept responsibility for results of their performance or even the failure of the relevant agencies to perform at all, is a contributory factor to the incidence level of copyright infringement in West Africa.

7. Sabotage of the Legal System

Insufficient (and often totally lacking) respect for the rule of law, inchoate economic transformation, non-transparent privatization process, insecure or questionable property rights and stupendous wealth, most often help to stifle intellectual property rights protection in West Africa.

¹ Knowledge of the existence of the right may be relevant in terms of the applicability and measure of some of the remedies for infringement.

8. **Crime Management Challenges**
corruption, smuggling and illegal activities justified by broad circles of the population as a means of survival, together with a low literacy level in West African nations all hinder genuine efforts to protect intellectual property rights in ECOWAS nations.
9. **Lack of Awareness**
There is a very low level of awareness of intellectual property rights among the generality of the populace as well as among educated people. As such the infringers take advantage of this public ignorance against the public
10. **The Judiciary**
Across West Africa, the judiciary of the respective member states are highly challenged public institutions. The court room often is the most uncomfortable work environment with cobwebs and dusty window-sills perfuming the court room air. The epileptic electricity Supply makes a mockery of the air conditioning system if it is installed and the poor file storage system hampers administrative work within the court complex. This impacts negatively on the quality and pace of conduct of court business.
11. **Educational Training Awareness**
In the academic curriculum of most tertiary institutions in West Africa. Intellectual property Law is not taught to none-law students. In this, is the irony of the legal training in that the prospective clientele of the trainee – lawyers lack the requisite legal awareness which will make them to seek the service of solicitors. As such prospective inventors in the field of science and engineering, as well as authors of literary works graduate with knowing the address of the copyrights commission of their home country.
12. **Legal Lacuna**
In most ECOWAS member states Nigeria inclusive, before the benefit of an international treaty such as the Berne convention, there must be a specific national legislation re-enacting the provisions of the treaty as a national law or otherwise recognizing the treaty's provisions as provisions of law which can be enforced vide the courts of law.
13. **Economic Disempowerment**
Many owners of intellectual property rights invested their life time earnings to develop the work or product over which the intellectual property Right exists. Thus as at the point in time when their product arrives the market most are in a poor financial state. This places the intellectual property Rights owner at a disadvantage in the race against shylock marketers and pirates.
14. **Status as a Challenged Person**
Some intellectual property Rights owners are physically or mentally challenged persons and this makes them most vulnerable to criminal exploitation by business operators who undertake to market their products for them. In some parts of the world, the standard of ethnic ordinarily observed by the corporate world has done away with such base level of human exploitation. Hence the inventor of the teddy bear who was a blind lady was paid her due proportion of the fortune that was earned from the sale of the teddy bear world wide. Across West Africa, physically or mentally challenged persons are readily exploited in the world of business hence many die unfulfilled despite the abundance of human talent that they must possess.
15. **Over Bureaucracy of Government**
The business of governance in West Africa is conducted through a labyrinth of government bureaucracy and administrative red tape. For an instance, it takes about 30 days for a letter submitted at a government office to make the rounds of administrative tables that are required to comment thereupon before a reply can be issued out. The situation is made worse if the letter requires interministerial attention. The ECOWAS secretariat at Abuja Nigeria is not left out. Letter from individuals or non-government offices are treated at snail speed and often are never replied.
16. **Absence of Social Security**
In most West African states the social security system has failed most woefully. This has foisted upon the people the burden of individually providing for their own social security in retirement. This has foisted upon the people the burden of individually providing for their own social security in retirement. This has engendered the craze to acquire and accumulate excessive wealth by every means available. A mad-march race have become the ordinary order of the day in the economic life of West Africans. The world of business dealing in intellectual property rights products and services is not unaffected by this state of affairs. The owners of intellectual property rights hope to earn income and provide for their own social security from trading in their intellectual property rights. While often their business associates hope to exploit the intellectual property rights owner so as to thereby earn income and provide for his or her own social security. Unless checked by legislation this is a self destructive behaviour pattern that will culminate in the death of brilliant minds without our sub-region.

17. **The Police**

The police of all West African states are highly challenged public institutions. The workforce are not provided with necessary working materials neither are they motivated with enabling conditions of service nor is their work environment such as to engender productivity in the work force. As such inefficiency, abuse of police powers, insider collusion with criminal networks, institutionalization of corruption and bare faced administrative hypocrisy is the order of the day. For this state of affairs, the state and the public who established the police force must be blamed.

18. **Over Criminalization of Business by the State**

Within the borders of most ECOWAS member states by the ordinary operation of the applicable laws over criminalization of business is the state norm in respect of its legislations that impact on business. The world of intellectual property business is not spared. In most if not all West African states street hawking without a permit is a criminal offence. Also street vending of products without a permit or licence is a criminal offence. Yet these are the two most common forms of employment open to the socio-economically disadvantaged group of West Africa's teeming city population. On account of the scourge of police arrest perpetuated upon them in the name of the law, the street hawkers and the street vendors have relocated their business into the rural heartlands. Consequently, they became out of reach for the law enforcement agencies and simultaneously became the best business partner for the operators of products piracy syndicates who have absorbed them into their criminal business operations.

19. **Personal Awareness Level of the Intellectual Property Right Owner**

Many potential intellectual property Rights owners and many deemed intellectual property rights owners lack awareness of the existence of the extant regime of statutory protection of the intellectual property Right. Worststill, most do not have the least inkling of how they may take steps to protect or enforce same.

20. **Occupational Group Awareness Level:**

Most occupational groups have very low level of awareness as regards their full range of intellectual property Rights are required to take so as to protect and enforce same against criminal violation. As such they are preyed upon by the criminal syndicates that carry on piracy as a criminal business across the ECOWAS states. The entertainment industry is the most affected economic sector in this wise.

Recommendations

Intellectual property awareness education should be compulsorily introduced into the curriculum of secondary schools and technical schools as an educational policy in West African states.

Intellectual property law should be made a compulsory elective course for all tertiary education students in West African state tertiary education institutions.

The ECOWAS secretariat under the auspices of the ECOWAS Executive Secretary should initiate a comparative study on the challenge of enforcing intellectual property rights within ECOWAS states across the ECOWAS sub-region with the object of developing a working document for consideration before the ECOWAS parliament.

The National copyrights commission of Nigeria should engage a Nigerian University to conduct a comparative study on the various copyrights commission Laws of ECOWAS states with the objective of producing a uniform charter for consideration by the ECOWAS parliament.

The institute of Advanced Legal Studies of Nigeria should in collaboration with the World intellectual property organization (WIPO) initiate a study on the challenge faced by the respective national courts of ECOWAS states and the criminal justice administration machinery at the management of intellectual property crime within the West Africans sub-region. The study should produce a draft uniform rules for the courts and for all segments of the criminal justice administration machinery that impacts on intellectual property rights protection in each ECOWAS state.

These is the need to constructively improve the working environment of the courts, the judicial officers, the judicial staff and the law enforcement agents of the respective ECOWAS states so as to engender an improvement in their work out put level and the exhibition of the professional service ethics among a greater percentage of the judiciary personnel.

The ECOWAS secretariat and the ECOWAS parliament should be open to receive individual works or private persons bills for consideration before the ECOWAS parliament with the object of enacting a uniform protocol charter for the enforcement of intellectual property Right Across West African States.

The High Court Civil Procedure Rules of all the West African States need to be harmonized under a uniform protocol in order to realize a uniform procedure rules for the filing of civil claims intended to enforce intellectual property Rights in any West African State.

The proposed uniform procedure rules should address the issues of instituting the action, payment of filing fees, exparte motion applications for Anton pillar injunctions, setting the substantive suit down for hearing,

the time frame of the trial, the enforcement of the judgement within the national boundary and the enforcement of the same judgement in any other West African state.

The proposed uniform procedure rules should also address applications by successors-in-title, by a person acting in-loco-parent's, by socio-economically disadvantaged owners of intellectual property Rights as well as, by physically and mentally challenged persons.

In countries such as Nigeria that has an overburdened police force, the available paramilitary agencies such as the National Security and Civil Defence Corps should by official gazette be mandated and empowered to render service to the court as sheriff and bailiffs. In this way the impact of police manpower challenge will not continue to work hardship on litigants seeking to enforce their intellectual property rights.

There should be a review of the applicable and varied laws which impact on the enforcement of intellectual property rights in West African states so as to harmonize the laws and thereby streamline the overlapping functions of various government agencies that operate in this area of law.

There is the need to establish in each West African state, a ministry of intellectual property affairs to adequately treat all matters thereto. The proposed ministry should be headed by lawyers with cognate experience in intellectual property law as to bring advantage to the people.

For countries like Nigeria that has a standing paramilitary organization such as the National Security and Civil Defence Corps their duties should be expanded to include law enforcement services so as to secure the enforcement of intellectual property Rights. Other West African State without such a paramilitary agency should establish one alongside the proposed ministry of intellectual property Affairs.

The relevant sections of the respective criminal laws of ECOWAS member states and the provisions of the criminal procedure laws of ECOWAS member states which relate to intellectual property rights need to be harmonized under a uniform protocol by the ECOWAS parliament. This can be done using the legal instrument of a charter prescribing inter alia a uniform imprisonment term and fine equivalent of N1000 per infringed copy.

Using the instrument of legislation, economically disadvantaged persons and economically disenfranchised persons who own intellectual property rights or whose intellectual property rights are recognized in law should be empowered to gain access to the due process of law in order to realize their intellectual property right by its enforcement.

The ECOWAS court should be conferred with the jurisdiction to entertain and determine all civil claims against IP-Rights violators who operate cross border violation syndicates within the sub-region. It should also be conferred with the criminal jurisdiction to entertain all cases of IP-Rights offenders who are charged for criminal violations on a cross-border basis.

The ECOWAS member states should simultaneously adopt the Berne convention Treaty and consequently enact within a set time frame, national legislations as to give effect to the intendment of the treaty within their national boundaries.

The Patents, Design, Copyright and Trademark law of ECOWAS member states must as of urgency be reviewed and thereby harmonized especially in respect of the registration procedure and the applicable fees. This will set the tone for the on-going monetary union process in the sub-region. The ECOWAS secretarial should commission a legal research group to review the extant legal regimes and thereupon produce a draft bill for consideration before the ECOWAS parliament.

Conclusion

We have overviewed what an intellectual property right is, the meaning of intellectual property, the nature and scope of intellectual property . We have also overviewed the challenges to enforcement of intellectual property rights in West Africa. With regards to the breadth of the challenges to enforcement of intellectual property rights within the ECOWAS member states, we preferred some recommendations to address the challenges.

It is when all these are done that we will have a well balanced effective and enforcement of intellectual property rights across the ECOWAS state.

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