

# Understanding Trademarks and Its Standing in the Nigerian development process of Intellectual Property Laws

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Since the dawn of the human race, mankind has always been eager to 'mark their territories', sometimes as a show of supremacy over the other or a way to represent and identify that a particular thing, place, and even person belonged to them. This singular act has transcended and evolved over centuries into various modes and forms, ranging from legally defined geographical territories, to patriotic symbols like flags, crests, drawings and so on.

Intellectual Property Law aims to protect ideas, innovation, creations, crafts among others and this need to *mark territory* has inadvertently and deliberately transcended into the realm of intellectual property and has been adopted by persons (natural or artificial) to purposely 'mark territory'. This concept is popularly referred to as a "**Trademark**".

A Trademark is a design, symbol or expression which identifies services or products as that of a given undertaking. An owner of a Trademark can be a business organisation, an individual or any legal entity. A trademark can be placed on a product, label or a package. Trademarks of companies are commonly displayed on corporation buildings, advertisements and billboards. The primary goal of the Trade Mark Law in Nigeria is to prevent the use of the marks of an undertaking or adoption of similar or identical trademarks by non-registered persons without license to use them. The primary laws on trademarks in Nigeria are *Trademark Act, CAP T13, Laws of the Federation, 2004 and the Trademark Regulations 1990*. There exists other subsidiary legislations and disputes arising over the intellectual property rights or protection of a particular trademark right holder constitute cause of action and can be settled in a court. According to **Section 67(1)** of the Trademarks Act,

*“Trade mark’ means, except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means,*

*in relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of this Act”.*

It is important to note that the components of intellectual property can be independent one from another as a single product might have more than one type of intellectual property. Take an iPhone for example;

- i. The iPhone instructions or manual are protected by the copyright
- ii. The iPhone Design is an Industrial Design
- iii. The parts and processes of an iPhone are protected by patent
- iv. The Apple symbol on the iPhone is protected by the **Trademark**

Consequently, unauthorized use of the Apple symbol on any device, product or services may amount to an infringement of the rights of the Apple Company. In the Nigerian case of *Alban Pharmacy Ltd V. Sterling Products International Inc* [1968] 11 NLR , the appellants, Sterling Products International Inc were the proprietors of the registered trademark "Castoria" in Nigeria. The mark was registered on November 26, 1958 in Class 3 for medicinal products. On May 3rd 1962, the respondent Alban Pharmacy Ltd applied to the Registrar of Trademarks for the registration of the word "Castorina" in Class 3. The applicants objected to the respondent's application to use the word Castorina for laxative for Children and growing children, medicine of the same type as those sold by the appellant. The case rose all the way to the Supreme Court where the Court gave several summations. Ademola C.J.N who was of the opinion that in determining an infringement, "the mark sought must when compared with what is already registered, deceive the public or cause confusion". It establishes that in determining the likelihood of confusion between two marks, it is necessary to compare the marks visibly and also phonetically.

Registration of a trademark in Nigeria is a prerequisite for an action for breach or infringement of trademark. It should also be noted that Nigeria operates a "first to file" system and the trademarks Act grants the owner of a registered trademark exclusive rights to use the trademark and protect it from any form of infringement, This position was aptly upheld by the Supreme Court in *Ferodo LTD v Ibeto Industries LTD* [2004] LPELR-1275 (SC), *Alliance International Limited v Saam Kolo International Enterprises Limited* [2010] NIPJD-L141 (CA).

This means that the first to register a trademark has the right to prevent others from using an identical or confusingly similar trademark for the same goods or services or description of goods or services in respect of which the trademark was registered. However, there are certain

instances where the owner of a registered trademark is not allowed to interfere with the use of a mark which is identical or confusingly similar to his trademark. Such instances include where the use of the unregistered trademark predates the use or registration of the registered trademark as established in *American Cyanamid Co. v. Vitality Pharmaceuticals Ltd.* [1991] LPELR-461 (SC) where the Nigerian Supreme Court held that the rights of the owner of an unregistered identical or confusingly similar trademark may override that of a later registered proprietor, where the owner of that unregistered trademark proves that he had been using his mark continuously for some period before the registration of the later registered trademark which may have been carried out in bad faith. In this case, the court held that although, the mark was first registered by the plaintiff/appellant, the defendant/respondent is the rightful owner of the mark, having continuously put it to use before the registration by the Plaintiff/Appellant.

Application for registration of trademark is made by authorized agents, usually legal practitioners, on behalf of the owners of the mark in question. It is important that undertakings and individuals register their trademarks so as to enjoy adequate legal protection in relation to association with their goods and/or services. It is important to note that unregistered trademarks are protectable under the preserved common law tort of ‘ Passing-off’ . This point has also been established in a prominent case *Niger Chemist v. Nigeria Chemist* [1961] ANLR 180

In conclusion, it is important to bear in mind that the Nigerian business sector remains a place of canny and sharp-witted competition as manufacturers have not ceased to produce goods similar to already existing ones, for same purposes with or without noticeable modifications as to its utility. A vivid example is the well-known Bigi Cola, manufactured by Rite Foods and whose features and purpose, is similar to the already existing and popular Coca-Cola in the Nigerian market. Another relatable instance is the Darling Superstar hair extension by the African based manufacturer – Darling Africa, whose feature and purpose is similar to the already existing X-Pression hair attachment in the Nigerian market. With the nature of competition in the markets, is it necessary to establish a strong connection between a person and goods and/or services. Below are some of the prominent Trademarks of multi-national companies;



Thus, the next time you have a special mark, sign, logo, design or name for the goods you sell or services you provide, do well to contact a lawyer to help you with trademark registration and in the event where you come across a person using same mark, sign, logo, design or name as yours especially in a similar business, it is a good ground to contact your lawyer for legal advice and assistance on steps to take next.

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