

(c) An invented word or invented words.

(d) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

(e) And any other distinctive mark:

Provided that a name, signature, or word or words other than such as fall within (a) to (d) above, shall not be registrable under (e), except upon evidence of its distinctiveness

The right accruable under the Trade Marks Act is deemed infringed by any person who not being the proprietor or registered user, uses a mark nearly resembling as to be likely to deceive or cause confusion in the course of trade in relation to any goods in relation to which it is registered. In other words as stated by the Supreme Court in the Case of **Ferodo Limited V. Ibetto Ind. Limited 1999 2 NWLR part 592 page 513** "Infringement of a trade mark consists of the unauthorized use or colorable imitation of a trade mark on substituted goods of the same class as those for which the mark has been appropriated."

Intellectual Property Rights protection ensures the free flow of continued inspiration required to drive innovation, by reducing the incidence of piracy, counterfeiting and other forms of infringement.

That is why its' protection is being advocated by stakeholders globally. Especially in the light of new innovations such as a phone that has a built in P.O.S in it, use of Cloud Technology, etc.

Finally in speaking about effect on the infringing party of an enforcement of one's Intellectual Property Rights, it will be apt to mention the recent decision on 15th of June, 2015 of the New York Federal Court in the case of **Beastie Boys V. Monster Energy Company**, the court made judgement against the defendant in the sum of \$667,849.14, being the Plaintiff's attorney fees, this is in addition to the sum of \$1.7 million in damages previously awarded by the jury in the lower trial court, because the Plaintiff was able to prove that Monster Energy aired a video on its website that used portions of five Beastie Boys songs as its' soundtrack and made other references to the group, without proper permission from the Plaintiff Beastie Boys, also referred by the jury as willful Copyright Infringement and a "reckless disregard" for the Plaintiff's Copyright.

Unfortunately for the Defendant, this gruesome nightmare will get worse as Capitol Records, LLC, the co-owner of the copyrights in the sound recordings, and Universal-Polygram International Publishing, Inc., the co-owner of the copyrights in the musical compositions written by the members of the Beastie Boys, have also sued the Defendant Monster Energy in a related case, which has been stayed pending final disposition of this first case.

It therefore goes without saying that it is a huge financial risk not to get the requisite licenses from third party Intellectual Property Rights Holders before using their works. Proper investigation as to who truly owns any Intellectual Property Right is time consuming but mitigates financial risks in the long run.

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Do have a pleasant read.

A WALK DOWN MEMORY LANE

It was a typical Friday evening and as usual the work team of G.O Sodipo and Co were set for our weekly chamber meeting. As we discussed the cases coming up in the following week, we couldn't help but recount recent successes our efforts had gained. It was clear that as a firm we had succeeded, with the use of the machinery of the rule of law and the court system in putting a lot of companies out of business due to their infringement of our various clients' intellectual property rights.

One of such instances was in the case of **TEXACO INC. & ANOR. V MR. VINCENT**, G.O Sodipo and Co were retained by the Plaintiff to institute this action for the infringement of their trademarks in "URSA"; We filed papers and obtained an Anton Pillar Order which was successfully executed, judgment was subsequently obtained against the Defendant for the infringement of the Plaintiffs trademark.

The effect of an Anton Pillar Order on the alleged infringing party is that it enables the right owner to enter and search the infringing party's premises and seize all infringing evidence without prior warning. Once the evidence of infringement has been obtained, it is easy to prove in court and consequently we obtained judgement against the infringing party.

Another case we remembered with a smile is that of **SOCIETE BIC V SPARKLE & CRYSTAL**, The Plaintiff retained us to ensure the cancellation of their mark, which was being used by the Defendant without licence or permission, despite the fact that it was pre-existing as the Plaintiff's mark prior to the Defendant filing it at the Trademark registry as its own mark. We were able to secure a Judgement in favour of the Plaintiff.

Recently, we facilitated a settlement out of court between the Nigerian Copyright Commission and MTN in relation to copyright infringement by the latter of the Hail Mary Prayer.

In fact success is all around us at G.O Sodipo and Co, for yet again on the 28th of May 2015 we succeeded in ensuring that our client, the defendant in the case of **Musical Copyright Society of Nigeria V. I. Touch Global Concepts Nigeria Limited** get final judgement in his favour at the Federal High Court Lagos.

The facts of the case are that the Plaintiff had sued for damages due to the infringement of his rights, however it was not statutorily competent to do so, as under the provisions of section 17 and 39 of the Copyright Act CAP C28 LFN 2004, the Plaintiff being a company that represents assignees of musical works locally and internationally, with over 50 members which means it can also be called a collecting society, for which it ought to be authorized by the Nigerian Copyright Commission via a certificate enabling it to engage in such a business.

The reality however is that the Plaintiff did not have the requisite authority from the Nigerian Copyright Commission and therefore is a banned illegal entity pursuant to section 39 of the Copyright Act.

The Court consequently held that it lacked jurisdiction as the plaintiff was an illegal party, with no locus standi to institute the action.

We have a plethora of good memories of meeting our clients' needs, so much that cannot adequately be covered in this newsletter, suffice to say we are optimistic

that our progress shall not relent but rather grow beyond our dreams and expectations.

Call us today and let us give you a solution to your legal challenge and add another feather to our hat of achievements. You are welcome.

THE ISSUE OF JURISDICTION IN ONLINE INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT

Jurisdiction can be described as a foundational question considered by parties to an action, the answer to which, will determine whether the court before whom the action is commencing has the requisite authority to hear the case and decide on a judicious judgement.

Jurisdiction is such an important factor, that the question on whether a court has jurisdiction can be raised at any time during the pendency of a case, even on the day of final judgement.

Parties therefore are encouraged to ascertain the proper jurisdiction to which they ought to bring their petitions for redress before filing a law suit. A specially heightened consideration of jurisdiction is required in matters that occur on the internet as they are carried out across an array of geographical locations and legal systems.

The main problem being that some legal jurisdictions may prohibit the action that has given rise to a suit, while others may be indifferent towards it, or even promote it. For example recently the United States Supreme Court has declared gay marriage legal, while in Nigeria anyone caught having gay relations is committing a criminal offence.

The legal world globally still struggles to come up with a definitive rule for determining jurisdiction in matters that arise from activities on the internet.

One suggested way of determining jurisdiction is by using the Internet Provider (IP) address to locate where the offensive act is emanating from. However in recent times some IP address are miles away from the actual offender using his laptop to break an existing law.

When it comes to Infringement of Intellectual Property Rights on the internet, some websites have made it easy to simply make a report as an author or agent of an author and the infringing material will be taken off the website.

In Nigeria a speedy legislation of a law governing activities on the world wide web is essential to solving the issue of jurisdiction.

It is with great expectancy that all stakeholders await the passage by the National Assembly of the Cyber Security/Electronic Transaction Bill 2011. Some of its provisions has sought to address the issue of Jurisdiction. For instance section 22 provides as follows:

Jurisdiction to try offences under this Act:

The Federal High Court or High Court of a State or the Federal Capital Territory shall have jurisdiction to try offences, hear and determine proceedings arising under this Act.

For the purpose of this Act, a person shall be subject to prosecution in Nigeria if the:

offence is committed either wholly or partly within the territory of Nigeria; The act of the offender committed wholly outside Nigeria constitutes a conspiracy to commit an offence under this Act within Nigeria; and an act in furtherance of the conspiracy was committed within Nigeria, either directly by the offender or at his instigation; or act of the offender committed wholly or partly within Nigeria constitutes an attempt, solicitation or conspiracy to commit an offence in another jurisdiction under the laws of both Nigeria and such other jurisdiction.

For the purpose of this section, an offence is presumed to have been committed in Nigeria if the offence or any of its elements substantially affects a person or interest in Nigeria.

The bill and above provision though not exhaustive, is a step in the right direction, and with continuous application, innovative suggestions will arise to make it work better in tackling the issues that arise in cyber space.

The recently enacted Cyber Crime Act 2015, tackles the issues from the perspective of deterring criminal behavior, and provides in section 50 that "the Federal High Court located in any part of Nigeria regardless of the location where the offence is committed shall have jurisdiction to try offences under this Act **if committed in Nigeria**, in a ship or aircraft registered in Nigeria, by a citizen or resident in Nigeria, if the person's conduct would also constitute an offence under a law of the country where the offence was committed or **Outside Nigeria** where the victim of the offence is a citizen or resident of Nigeria or the alleged offender is in Nigeria and not extradited to any other country for prosecution.

FREEDOM OF INFORMATION ACT 2011 AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

The Nigerian Freedom of Information Act signed into law on the 28th of May, 2011 states among other things that it is an Act to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matters.

Furthermore an applicant under this Act need not demonstrate any specific interest in the information being applied for and the public institution must make known the title and address of the appropriate officer of the institution to whom an application for information under this Act shall be sent, provided that the failure of any public institution to publish any requisite information shall not prejudicially affect the public's right of access to information in the custody of such public institution.

Public institutions in the Act, refers to all authorities whether executive, legislative or judicial agencies, ministries, and extra ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, and private companies utilizing public funds, providing public services or performing public functions.

Generally information applied for, must be made available within 7 days, and then based on certain conditions an extension of nothing more than 7 days is also possible under the Act.

Section 7 of the Act says inter alia that where the Public Institution is denying an applicant access, it must do so by a notice in writing, in which it must state whether or not the information exists and the grounds for refusal.

There are enactments similar to the Act in other jurisdictions, and some jurisdiction in other to protect intellectual property rights have had to practice exceptions rather than the general rule when it comes to the access to information.

In Canada for instance, the Court of Appeal in the case of **R V. Kelly** 2015 ABCA 200 (CanLII), <<http://canlii.ca/t/gjj1s>> retrieved on 2015-07-15 held inter alia that a court may curb access to court trial documents in situations where there is a risk of a party publishing confidential information with a view to harass the other party or to use for any other improper purpose.

In this instant case the accused during his 36 day trial for a charge of criminal harassment, kept posting the trial documents and other court disclosure on the internet with a view to escalate a hate campaign.

Consequently the trial judge ordered that Mr. Kelly could access the documents by attending the Court's office, viewing them in private and taking notes as he needed. On appeal, Mr. Kelly who represented himself, argued that he had an unfair trial due to limited-access to court documents, the Court of Appeal held that the trial judge imposed a reasonable limit.

Therefore this decision is saying in the event of a party publicizing court documents on the Internet, the courts may give due attention to consider the purpose and effect of the posting in deciding whether to limit access to the court documents.

This case is instructive especially when one critically examines the rights under the Freedom of Information Act.

As highlighted above the Act in summary allows for access to information held by a public institution, except in cases exempted, for instance restriction to access to information in the interest of National Security or protection of trade secret, the latter being an Intellectual Property Right.

The Act says specifically that "A public institution may deny an application for any information, the disclosure of which may be injurious to the conduct of International affairs and the defence of the Federal Republic of Nigeria".

A public institution can therefore withhold an information if the public interest gained by restricting access far outweighs the public interest gained by a disclosure.

The above judicial decision albeit having only persuasive effect in Nigeria, shows another scenario where the courts may need to limit access to information in the interest of justice and protection of Intellectual Property Rights.

In this regard the Act is very helpful and aligns itself with the above court decision in that it provides in Section 12 amongst other things, that a public institution may deny an application for any information which

contains records compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, but only to the extent that disclosure would deprive a person of a fair trial or an impartial hearing, constitute an invasion of **personal privacy**, obstruct an ongoing criminal investigation, be injurious to the security of penal institutions, be reasonably expected to facilitate the commission of an offence.

Section 14, 15 and 16 are more explicit, providing that a public institution **must** deny an application for information that contains personal information, such as, personal information maintained with respect to employees, appointees or elected officials of any public institution or applicants for such positions, any applicant, registrant or licensee by any government or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline clients, patients, residents, students, or other individuals receiving social, medical, educational, vocation, financial, supervisory or custodial care or services directly or indirectly from public institutions, information required of any tax payer in connection with the assessment or collection of any tax unless disclosure is otherwise requested by the statute; and information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime, information subject to legal practitioner-client privilege, health workers-client privilege, journalism confidently privilege, and any other professional privileges.

Therefore the Act does give the courts a broad power to limit access to information where necessary. It is also important to note that the Act on the other hand gives whistle blowers protection, in that **Section 27 provides that nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, an information which he reasonably believes to show mismanagement, gross waste of funds, fraud, and abuse of authority.** This is much welcomed considering the gross looting that has pervaded the nation in recent times, an example of a public officer that can be protected under this Section 27 of the Act is Justice Folahanmi Oloyede of the Osun State Judiciary who recently accused Governor Rauf Aregbesola of corruption, asking for impeachment proceedings to be commenced against him via a petition to the Osun State House of Assembly dated the 9th of June, 2015. A copy was also sent to the Economic and Financial Crimes Commission.

Finally, one's intellectual property rights includes personal information/data and is protected in other jurisdictions under Data Protection Laws. Personal information encompasses amongst others one's name/brand, one's goodwill and reputation, trademark, trade secrets etc.

Therefore there must always be a balance between the Right to Access to Information or Freedom of the Press and the Right to Privacy or protection of one's Intellectual Property Rights.

CLIENT FEEDBACK

It is worth mentioning that our clients, colleagues, and international observers have been giving us positive feedback as to their satisfaction with our track record of success in the area of Intellectual Property Law.

Many have made comments ranging from appreciation to commendation and referrals.

Example of comments from clients, colleagues and international community include that of Mr. Victor Bassey and a host of others who have been extremely pleased that we were able to safeguard their intellectual property, his being in the form of registering his literary work at the Nigerian Copyright Commission to serve as a notification to others that his intellectual property is protected.

In the same vein our client Chocolat Royal was equally elated that we mediated between itself and NAFDAC to ensure smooth removal and destruction of expired products, which our client informed NAFDAC to access and dispose.

Recently also we successfully completed the NAFDAC registration renewal process for our client, who are representatives of Goya En Espana Sau.

Finally, but definitely not the least, Mrs. Temiloluwa Adeyemo was speechless on the day we were able to secure an interlocutory order of custody pending the disposal of proceedings for principal relief in matrimonial causes action.

She was filled with joy as she held unto her child, who was of tender age, knowing that she was now free to take proper care and control of her child, her rights having been upheld by the prevalence of Justice carried out judiciously by the Court.

The above are just snippets of feedback we have received over the years that encourage us to keep championing the cause of our clients towards victory.

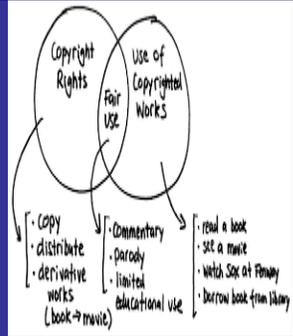
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“Speedy resolution of legal issues is the hallmark of G.O Sodipo and Co”- Barrister B.V Enwesi,LLB,BL,LLM(E-commerce Law)





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