THE ROLE OF RIGHT HOLDERS IN PROTECTING THEIR RIGHTS AND RESOLVING INTELLECTUAL PROPERTY DISPUTES

By

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INTRODUCTION

This is the age of intellectual property. The playing field of business is now the globe.National boundaries are no longer business boundaries. Spectacular technologies advances, especially in medicine, computers and communications coupled with profound political changes such as those in Europe and the Soviet Union, and most recently in Nigeria, are causing the "globalization" of business. Companies in all countries are shifting from a national to a world wide field of action and, especially, of vision. Indeed, the very term "international business" has become redundant, since the present day business has international dimension, connection and application. What is more, businesses of all sizes, large and small are searching for the entire world for customers and suppliers, for partners and labors, for know-how and finance. IBM enters into a joint venture with Siemens of Germany to do research on semiconductors; Toyota and General Motors built a plant to produce cars in the United States; Daimler Benz signs a strategic alliance with Mitsubishi to cooperate on everything from autos to aircraft. But the globe is not the playground of giant firms or the industrialized nations alone, small businesses and the developing nations are also active players.

The effect of all these is to make the subject of intellectual property as one commentator said, one of the sexiest fields of this century. The need to gain competitive advantage; the need to obtain intellectual property rights- protect patent ant trademarks- has never been more important than it is in the present day global village.

In this paper, I shall examine the relationship between globalization and intellectual property rights. Mention shall be made of the technological revolution and how reverse engineering has become a major disincentive to research and development. More to the point, this paper shall examine the crucial role of rightholders in protecting their rights, inventions and investment with the submission that the future of a sound intellectual property world lies in Alternative Dispute Resolution (ADR).

To this end, I shall recommend a strong ADR industry as the viable and most credible option to the enforcement of intellectual property rights and resolution of intellectual property disputes. To take advantage of the renaissance in the country, I shall conclude that the combination of ADR and IPR is not only a good incentive but also holds special promise for, partnering, foreign interest and investment in Nigeria. Let me begin with a succinct definition of intellectual property.

INTELLECTUAL PROPERTY

Intellectual property is a generic term denoting patents, registered designs, copyrights, trademarks, technical know-how and trade secrets. However, the term has acquired a considerable degree of universal acceptance as a nomenclature for only patents, designs, trademarks and copyrights. This is exemplified by the United Nations adoption of the name in describing its agency, World Intellectual Property Organisation (WIPO), the World Police which oversees the standardization and modernization of intellectual property legislation and practice worldwide. What is Patent, Trademark and Copyright?

Patent:

A patent is a legal monopoly which is granted for a limited time to the owner of a new invention, which is capable of industrial application. In essence, a patent is concerned with new technology in the form of novel machines, processes and substances.

In Nigeria, the grant of a patent is in the form of a document containing the number of the patent in the order of grant, the name and addresses of the patentee and the dates of the patent's application. However, for an invention to be patentable, it must be new, results from inventive activity and be capable of industrial application, or if it constitutes an improvement upon a patented invention, and also is new, results from inventive activity and is capable of industrial application. The life span of a patent is twenty years from the registration date.

Trademarks

These are marks or names which are used by manufacturers or traders to distinguish their products or goods from that of similar products or goods of other rivals. Invariably, the marks are essentially for differentiation purposes. They range from the names, words, color, distinct mark, signs to figures. Trademarks also serve as quality guarantee and means of identifying particular products. Upon registration, the registered proprietor or user is conferred with exclusive right to use the mark and can sue for infringement. The right is however subject to the vested right of a prior unregistered user, who has been using it continuously. In addition, the exclusive right is subject to renewal from time to time.

Copyright

Copyright is the exclusive legal right vested in an author or an artist to copy, reproduce, publish, sell or transfer his creative works. It also encompasses the author's moral right to have his work preserved substantially in its original form without being subjected to any distortion, alteration or mutilation. Unlike Patents and Trademarks, there is no requirement of registration of copyrights in Nigeria.

Copyrights vests automatically in a qualified person if is work is copyrightable. Under the Copyright Act, copyright works range from literary, musical, artistic, cinematographic films, sound recordings and broadcasts.

In contrast to the law of patents where protection is given to the "pith and marrow" of the invention and not merely to the specific form of its expression, copyright neither protects ideas nor give monopoly to any particular form of words or design. The statutory requirement in originality, which is a *sine qua non* for copyright protection, has been held to be no more than the originality of the thought in writing, rather than the idea itself. Copyright monopoly is limited in time

GLOBALIZATION AND INTELLECTUAL PROPERTY

During the late 1980s a new term entered popular discourse: globalization. Globalization is a process that has been going on for the past 5000 years,but it has significantly accelerated since the demise of the Soviet Union in 1991. Elements of globalization include transborder capital, labour, management, news, images and data flows. From a humanist perspective, globalization entails both positive and negative consequences: it is both narrowing and widening the income gaps among and within nations, intensifying and diminishing political domination; and homogenizing and pluralizing

cultural identities. More importantly, globalization brought competition into the playing field and gaining competitive advantage became extremely important to businesses, not only within nationals but especially between foreigners.

The relationship between globalization and intellectual property is made manifest by the technological revolution which accompanied the competitive revolution occasioned by globalization. The technological revolution is directly linked to intellectual property in two ways. Technology requires a tremendous amount of research and development as the cost of developing a new pharmaceutical product or software, for example, is simply staggering. With technology advancement, coupled with the advent of the photocopy and reverse engineering, it became extremely easy for infringers to copy inventions and sell cheap. Understandably, this became a great disincentive to creativity and innovation and, at the same time, a challenge.

Confronted with this challenge, the industrialized states, in the early 1980s, began a campaign for all nations to have their legislations brought to standard, or modernised to protect intellectual property rights and create a level playing field. The campaign succeeded in achieving an impressive record with the beefing up of intellectual property treaties and conventions; and many countries introducing legislation on intellectual property where they were previously absent; and ensuring adequate improvements where the laws were ineffective. The period has also witnessed the birth of many agencies set up to ensure the effective enforcement of intellectual property rights. Effective enforcement has remained a major challenge in intellectual property.

In addition to legislative campaign, there is the recent round of talks which led to the Agreement on the World Trade Organisations (WTO) and the TRIPS Agreement - The Trade Related aspects of

Intellectual Property - which was signed at Morrakesh in Morocco on April 15, 1994 by 118 members of GATT [General Agreement on Tariff]. The TRIPS Agreement created standards to which all WTO organisations were required: to adhere: developing countries were given up till the year 2006 to comply with TRIPS; while the more advanced nations have until the end of 1999. Even though it is often argued that the TRIPS Agreement, to a large extent, strengthens and reinforces the protectionist stance of developed countries and their technologies; my view has always been that it is the basic right of every inventor or intellectual property holder, irrespective of his domicile to have his invention adequately protected. He has an inalienable right, to the exclusion of all without authorisation, to the enjoyment of his invention and investments.

The concessions granted to the developing countries under the various revisions to treaties and conventions from the 1886 Berne Copyright Convention, the 1883 Paris industrial Convention, the 1952 Geneva Universal Copyright Convention, the 1948 General Agreement on Traffic and Trade[GATT], to the WTO of TRIPS Agreement notwithstanding,the developing nations is a collective, certainly have much more power than they think. No doubt, the issue of enforcement has remained a major challenge in spite of all legislations, treaties and conventions

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHT

Traditionally, intellectual property right was viewed as a private right. It was argued that the grant of a patent, trademark or copyright was primarily a private grant and thus incumbent upon the grantee to enforce his right. The machinery of government was considered inapplicable in the enforcement of intellectual property rights. However, all that has changed and the enforcement of intellectual property rights is now as much a government responsibility as it is the private sectors.

Although several multilateral intellectual property treaties prescribed minimum standards, prior to TRIPS, the question of effective enforcement of national obligations remained the biggest challenge and most significant issue under the treaties. With TRIPS, emphasis switched from the copious legislative provisions contained in the books protecting intellectual property, to their enforcement. The provisions had to be enforceable to be worth the efforts of the legislators and, for that matter the pressure groups. The pressures brought to bear on countries to beef up their enforcement mechanisms and process, included adequate investigation and a strong and efficient judiciary which can dispense justice effectively and oversee enforcement. Therein lies the problem.

In the first place, there is no judiciary in the world which has sufficient time on its hands. This is even more so in Nigeria where the Federal High Court, which has exclusive jurisdiction in intellectual property matters, is not only lacking in modern equipment and infrastructures, its dockets are heavily congested and judges with expertise in intellectual property matters are very few. Invariably, the transaction cost of attempting to resolve intellectual property disputes in the court are rather perplexing, both in terms of finances and frustration which accompanies the delay.

APPLICABLE LAW

Quite apart from the problem of delay, expense and destruction of business relationships, another drawback for the judiciary or the courts in resolving all manner of intellectual property disputes relates to the applicable law. As most intellectual property disputes involve foreign corporations, there is a natural inclination for the foreign investor who is unfamiliar with the legal system of country of investment to be suspicious. He is unlikely to view whatever differences which exist between the investor's judicial system and the local's merely as differences but rather, as deficiencies. This would explain why in the negotiation of Licence Agreements in intellectual property

transactions, strong pressure is brought to bear to have dispute clauses incorporated stipulating that resort should be had to the investor's own country using the investor's Laws in resolving disputes.

CORRUPTION

Corruption is another major hindrance to the enforcement of intellectual property rights. Examples abound of warehouses becoming churches overnight as an attempt is made to enforce a court order. Alternative Dispute Resolution (ADR) holds the biggest appeal in ameliorating these drawbacks and possibly, eliminating them.

IMPORTANCE OF ADR TO INTELLECTUAL PROPERTY DISPUTE

The importance of Alternative Dispute Resolution (ADR) to intellectual property is becoming more manifest as the world continues to shrink into one single market place. The consequences of globalization have been far-reaching for all businesses, large and small. For one thing, they have made meaningless, the old, neat distinction between domestic and international business, once so basic in the minds of executives. For another, they have forced all businesses of any significance to develop a global vision to survive and to become as concerned, about an efficient dispute resolution enforcement mechanism, as they have traditionally been about the protection of intellectual property rights.

The relationship between intellectual property and ADR is becoming more and more important in the new world order. In appreciation of the relevance of ADR to intellectual property matters, the WIPO created Mediation and Arbitration Centers to deal specifically with matters related to intellectual property. Part of the appeal of ADR to IPR includes the speed, efficiency,

confidentiality, the cost and most especially, the resolution of the dilemma over the appropriate legal system.

Negotiation, Mediation and Arbitration are three ADR processes which holds the most promise in Licence Agreements, resolution of intellectual property disputes and enforcements.

Negotiation:

The present day business executive spends the most part of his time negotiating. Negotiation is an art that requires training and know-how. With globalization, business executives are regularly required to negotiate the terms of Licence Agreements and other transactional arrangements. The nature and quality of Agreements would be determined by the style, skill and expertise of the business executive. The relevance of negotiation is by no means limited in application to contracts; negotiation is equally essential in the resolution of intellectual property-related disputes.

Communications in negotiation, centre on the search for common ground and compromise. While traditional negotiations include the incremental change in "positions" as the primary communicative device, "principled" negotiation focus on the underlying interests, needs, fears and aspirations of both parties by utilizing a problem-solving approach, characterised by brainstorming for contract terms and outcomes with which both are mutually satisfied. Negotiation is an invaluable tool both in crafting the terms of Licence Agreements and resolving Intellectual Property-related disputes. Intellectual Property rightholders have a responsibility to train their executives in the art of negotiation and ensure that Intellectual property attorneys with requisite negotiating skills are involved at an early stage.

Mediation

Mediation is negotiation assisted by a third party. Negotiations often run up against roadblocks that a mediator can help remove. A mediator may be able to move the negotiations forward by encouraging the would-be partners or disputants to vent their emotions and acknowledge the other's perspective. A mediator can help parties move past a deadlock over positions by getting them to identify their underlying interests and develop creative solutions that satisfy their interest.

This was the situation in the well celebrated intellectual property disputes between two computer giants: IBM and Fujitsu.

Arbitration

Arbitration is an ADR process whose major difference from Negotiation and Mediation is the decision-making role of the expert third party neutral. The first case to directly address the issue of the appropriateness of arbitrating patent validity and infringement was **Zip Manufacturing Co. v. Pepsi Manufacturing Co.,** a Delaware District Court case which initially laid the foundation for a general attitude against arbitrating patent issues by giving the Arbitration Act a strained and artificial interpretation.

The Court in Zip did not allow the controversy to go to arbitration despite there being an arbitration clause in the agreement on the grounds of its rather strained definition of "commerce". However, 39 years after Zip, the Supreme Court in the case of **Lear, Inc, V**. **Adkins,** breathed new life into the practice of barring arbitration of dispute involving patent infringement or validity. The Supreme Court was able to use a public policy defence to keep patent issues from being arbitrated. The rules against arbitration of patent validity and infringement became deeply rooted in case law despite the

infirmities of its reasoning. It was not until 1**982,** as part of a general revision of the patent statutes that the US Congress acted to reverse this federal common law rule by creating S.294 of the Patent Act which allows voluntary arbitration of issues regarding patent validity and infringement.

Neither the Nigerian Patent and Designs Act nor the Copyright act makes any provision as to the arbitrability of questions regarding the validity and infringement of patent or copyright. All copyright issues, except questions regarding validity and infringement have been held to be arbitrable. However, the attitude of court is fast changing and copyright validity is seen as an arbitrable subject. This is demonstrated by the opinion handed down by the court of Appeal in **Saturday Evening Post** Vs. **Rumbleseat Press Inc.**

The plaintiff, **Saturday Evening Post**, gave the defendant, **Rumbleseat Press** an exclusive licence to make dolls of Norman Rockwell illustrations which appeared in the post. Later the post exercised its rights to cancel the licence which consequently meant that Rumbleseat had to stop making the dolls. However, **Rumbleseat** continued making the dolls; and the **Post**, pursuant to an arbitration clause in the Licence Agreement, demanded arbitration. After several months of preparing for arbitration, **Rumbleseat** informed the post that it intended to enjoin the arbitration which led the post to bring a suit. The **Post** raised among others, a preliminary objection against **Rumbleseat's** withdrawing from the arbitration. **Rumbleseat** counter-claimed, charging breach of contract and copyright infringement. The district court ordered arbitration before three lawyers who, subsequently handed down an award to the **Post** restraining **Rumbleseat** from making the dolls and transforming all of **Rumbleseat's** copyrights in the dolls to the Post. **The Post** moved the district court to confirm the award which the court did.

One interesting issue which came out of the post case is the arbitrability of copyright validity. Defendant **Rumbleseat's** main argument against arbitrating copyright validity was that Congress' decision to give Federal Courts exclusive jurisdiction of copyright actions, implicitly precludes arbitration of disputes over the validity of a copyright. The court noted that the original dispute to be arbitrated was compliance with a copyright licencing agreement, and that copyright validity issues that arise from a contract can be decided by a state court. The court held that a Federal law does not forbid arbitration of the validity of a copyright, at least where that validity becomes an issue in the arbitration of a contract dispute. The court, confirming its judgment on the issue at hand, stopped short of giving its endorsement of arbitrating unlocked copyright validity and infringement issues. However, the tone and language of the opinion suggest that there would be no harm in allowing arbitration of infringement and validity issues without having them litigated.

The benefits of ADR to intellectual property are enormous. Statutory endorsement of mediation and arbitration would assure the parties most especially foreign investors that they can avail themselves of the numerous advantages ADR offers without the need of having to reargue the dispute in court. The advantage of ADR to Intellectual Property are many: it is usually cheaper and faster than litigation; it has simple, procedural and evidentiary rules; it minimizes hostility and is less disruptive to on going and future business dealings between the parties; it is often more flexible in regard to scheduling of times and places of hearings; and more importantly, mediators and arbitrators are better versed than judges in the area of trade customs and the technology involved in specific intellectual property disputes.

All these advantages make the need for statutory provision of ADR in intellectual property legislation imperative. Allowing mediation and arbitration of intellectual property disputes and

codifying it in a federal statute reduces the time the Federal High Court now spend on complex, and in the case of patents, technologically specialized suits, and ultimately enhances the patent and copyright system.

The important point to convey to intellectual property law practitioners is that they should not hesitate to tell their clients that ADR is a viable alternative to both patent and copyright validity and infringement suits. Of course, the practitioners should inform the client of how ADR works and the possible confirmation processes by the court, if so desired. But the bare fact that ADR is being discussed at all, would probably be a new element in a typical initial consultation, and mediation or arbitration, a choice perhaps unknown to authors, artists and other individuals with limited resources who want to protect their rights, can be consideration as an alternative to litigation.

Between Mediation and Arbitration, in resolving intellectual property disputes, my view is that they both hold special promise but attempt should be made towards mediation, before resort is had to Arbitration. Indeed, it is advisable that Licence Agreements and intellectual property legislation contain requisite provision on both Mediation and Arbitration, with the former being the very first procedure.

Commercial Mediation is a "forum in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement and understanding". That is how the American State of Texas' Alternative Dispute Resolution (ADR) Act of 1987 defines it. Commercial mediation has also been defined as a private, voluntary and informal process where a party-selected neutral, assists disputants to reach a mutually acceptable agreement. Already in some

jurisdictions such as many parts of the USA and, recently, in Britain, parties are expected to attempt mediation before they can go to Court. (See the Lord Woolf's Civil Justice Reform (1999).

As Jide Olagunju summarised in his book, Commercial Mediation , commercial mediation is used to do the following ten things: {1998, p.7-8},

- Full expression of feelings
- Reduction of hostility to establish effective communication
- Appreciate the other party's concerns and needs
- Reveal the root of the dispute
- Formulate issues relevant to parties' concern and needs
- Brainstorm for possible solutions
- Make each party's views attractive rather than hostile
- Moderate unrealistic proposals
- Test the other party's receptiveness to a party's view
- Help craft agreements which solve current problems, safeguard relationships and anticipate future needs.

In summary, commercial mediation would help each party in an intellectual property dispute to understand itself, its needs, motives and situation as well as understand the other party. There is no question of who is 'right' or 'wrong' which is the purview of adversarial dispute resolution but rather of what is required of both disputants to ensure a true end of the dispute, one that both sides can live with. This is what IBM and Fujitsu did in their IPR *locus classicus* case in 1982 whereupon they came up with the original resolution which no adversarial system, be it litigation or arbitration, could

have fashioned out for them. Even when full agreement is impossible, commercial mediation helps the parties to seek a specific and amicable *agreement* to *disagree,* which safeguards areas of agreement and provides for some form of relationship in the future, allowing for regular review of the situation.

The NCMG Centre for Dispute Resolution; the first ADR Centre in Nigeria provides parties options ranging from Mediation, Early Neutral Evaluation (ENE) Mediation-Arbitration (Med-Arb) and Arbitration in the resolution of all manner of business disputes. Intellectual Property Disputes is no exception.

It is important to mention that ADR is by no means the golden bullet that meets all the difficulties associated with intellectual property. Certainly ADR has no relevance when there is the need to secure an injunctive relief against an unscrupulous pirate in the remote reaches of the East or Western part of the country. However, it is quite possible to introduce negotiation or mediation after a restraining order has been obtained, or have ADR run concurrently with litigation.

RECOMMENDATIONS

- **LEGISLATION ON ADR**

The Nigerian Act and the patent and design ACT should be amended to accommodate ADR, particularly Mediation and Arbitration. The provision could read thus:

> "A contract involving an intellectual property may contain a provision requiring mediation and or arbitration of any dispute relating to the contract. In the absence of such a provision, the parties to an intellectual property dispute may agree **in** writing to settle such disputes by mediation or arbitration. Any such provision or agreement shall be valid, irrevocable and enforceable, except for any grounds that exist at law or in equity for revocation."

- **PRACTICE DIRECTION**

The rules of Court should be amended to accommodate mediation and arbitration for Intellectual Property matters and give judges power to refer cases to mediation. As an immediate measure, the Chief Judge of the Federal High Court should be encouraged to issue Practice Directions authorising the use of ADR as a first step in intellectual property matters.

- **PANEL OF MEDIATORS**

Right-holders and Intellectual Property practitioners should work with ADR providers to form a panel of competent mediators to be train to deal with IP disputes.

- **ADR COURSES**

Right-holders and Intellectual Property practitioners should ensure that all Agreements contain properly drafted dispute resolution clauses, not only on arbitration but with Negotiation and Mediation as the first steps before resort is had to arbitration or litigation.

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