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**“YOU AND IP LAW – THE SYSTEM THAT
PROMOTES INNOVATION AND CREATIVITY”**

Presented To:



**STAFF AND STUDENTS OF THE FACULTY
OF LAW**

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YOU AND IP LAW- THE SYSTEM THAT PROMOTES INNOVATION AND CREATIVITY

-John C. Onyido, Esq.¹

***There was a young lady of Wight
Who travelled much faster than light.
She departed one day,
In a relative way,
And arrived on the previous night.***

1. The Process of Innovation and Creativity

The late Stephen Hawking in his memorable work, A BRIEF HISTORY OF TIME² discussed the concept of time travel popularized by H.G. Wells over a century ago. At the time Henry George Wells wrote the TIME MACHINE³ in 1895 the concept of Time as the fourth dimension after the spacial dimensions of length, width and depth was unheard of, at least not until Albert Einstein published his paper on special relativity in 1905. Although H.G. Wells portrayed the concept of time travel as scientific fiction, Hawking observes that the first promising indication that the laws of physics may accommodate time travel arrived in 1949 when a gentleman known as Kurt Gödel introduced a new time-space hypothesis inherent in the general relativity principle.⁴ Gödel proposed that the universe was rotating, and it was conceptually possible for an astronaut to set out in a spacecraft and return to earth before he left. Although it has since been verified that the universe is not rotating, science has established that it is indeed expanding. Other more recent theories that seem to allow for time travel into the past are the concepts of the interior of a rotating black hole and space-time containing two cosmic strings that move past each other at

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² Stephen Hawking, **A Brief History of Time**, Bantam Books 1988, 1996 Ch. 10 pp. 159 – 169.

³ H.G. Wells, **The Time Machine**, (Illustrated Classic Editions, adapted by Shirley Bogart) Playmore Inc., New York 1997.

⁴ **A Brief History of Time**, supra, pp. 159 – 161.

great speed. It is generally acknowledged that to successfully engage in time travel the subject must be able to move faster than the speed of light. Hawking states that one way to break the speed of light barrier would be to warp space-time considerably and thus to shorten the travel duration from point A to point B through a wormhole.⁵

I am certain at this point that you'd be wondering why this brief excursion into the realms of theoretical physics, but time and again it has been verified that several of our mind-bending achievements were initially attributable to an overactive imagination eventually reduced into tangible form. From the electric lightbulb to the latest innovations in telecommunications and transmission devices, from advancements in aeronautics, jet-propulsion and space travel to self-driving autonomous vehicles, man continues to push the boundaries of what is possible within a three-dimensional world and at each stage considerably shrinking the time lag between advancements in technological innovations.⁶ The current juggernauts in science and technological innovation and advancements realize the vital role that foresight and deliberate planning play in attaining such global status as well as the need to nurture individual creativity and innovation through the creation of an enabling environment for these to thrive, and when necessary, based on drastic measures.⁷

Apart from instituting a strong educational system, a love for learning, adventure, and curiosity, the protection of these creative works through legal institutions/channels in the form of intellectual property rights has been largely successful over the years. It has been empirically proven that to encourage the continued generation of technological innovation and creativity, it is expedient to allow the owners of various types of IPRs to recover their investments over a reasonable time period after which

⁵ Ibid, at pp. 163-64. Our obsession with time travel is evident in the litany of motion picture portrayals like 'The Time Traveler's Wife', 'Back to the Future', 'Timeless', 'Time After Time' and '12 Monkeys' (the series) among others.

⁶ The relatively short span of time it has taken to render communication devices in miniaturized formats through the reduction in the size of chipsets and semiconductors are a great example of this astronomical growth in technological advancement.

⁷ Nations sometimes go to extremes to acquire technological secrets and know-how to kick-start their national innovation base. From the United Kingdom, the United States and Germany to the emerging economies of Southeast Asia, some methodologies adopted so far include corporate espionage, reverse engineering, non-recognition of foreign patented technologies and copyright in multifarious forms. See Ha-Joon Chang, **Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism**, Bloomsbury Press, 2008 pp. 127-34.

these rights become available to the state/masses.⁸ This tacit understanding between the state and the owners of IPRs is what facilitates the continued advancement of society and the justification for the sometimes extensive rights accorded to rights-holders in this unique trade-off.⁹

Ironically, the developed countries at the forefront of enforcement of strong IP regimes globally were not always so protective. In the not too distant past, most of these countries barely recognized the IP rights of other countries and fought stridently against the recognition of certain of these rights.¹⁰ A lot has changed over the years with the clear appreciation of the role that IP protection can play in lifting a country from the doldrums of poverty and deprivation to strong economic growth and development. The seemingly sudden realization of this key factor partly culminated in the establishment of the WTO and the annexation of various trade agreements including an IP regime in the form of the TRIPS Agreement within the world trading platform.¹¹ This deviation from the path that led to the prosperity of most of the leading developed nations (i.e., weak IP protection and use of protective measures) and the prescription of divergent economic recipes to developing economies needs to be properly understood and internalized as we strive to institute strong and robust fiscal and economic policies. While we have a responsibility to protect IPRs as broadly as possible, we also need to do so in a manner that facilitates our quest for economic independence.¹² The challenge faced by developing economies is figuring

⁸ Other driving motives of innovation include the temporary technological monopoly that results from the stiff learning curve required to absorb new technology, reputational advantage and the head-start enjoyed by initial innovators all create some form of entrepreneurial profit without reference to IPRs. Still other motivating factors are scientific curiosity and the sheer altruistic desire to benefit society. Ibid at pp. 124-27.

⁹ See Stefan Bechtold et al, *Innovation Heuristics: Experiments on Sequential Creativity in Intellectual Property*, available at: <http://ssrn.com/abstract=2704107>, accessed August 24th, 2018. See also, John Onyido et al, *Who is a Proper Plaintiff in the Enforcement of Copyrights in Nigeria*, available at: <http://www.spaaibade.com/resources/wp-content/uploads/2017/01/Proper-Plaintiff-in-an-Action-for-the-Enforcement-of-Copyrights-in-Nigeria-Review-of-the-decision-in-Musical-Copyright-Society-of-Nigeria-Ltd-v.-Nigeria-Copyright-Commission.pdf>.

¹⁰ Ha-Joon Chang, *supra*, p. 134. The Germans refused to recognize foreign trademarks, the Swiss neglected to enforce foreign patents for chemical substances, while the Americans declined to recognize foreign copyrighted material.

¹¹ GATT/WTO Agreement 1995. The Marrakesh Agreement establishing the World Trade Organisation by virtue of Art. 1 of the WTO Agreement, registered in accordance with Art. 102 of the UN Charter. See Art. XVI:6 WTO Agreement.

¹² John Onyido and Bolaji Gabari, *International Trade Under the GATT/WTO Multilateral Regime vis-à-vis Developing and Least Developed Economies: Spotlight on Nigeria* in **A Review of Contemporary Legal Trends in Nigerian Law**, LexisNexis 2017 pp. 166-68 para. 9.10.2.

out how to properly balance the commercial demand for strong IP protection alongside public interest needs.¹³

2. The Nigerian IP System

Nigeria's recognition of IP rights came alongside colonial rule and the need for the colonial administration to effectively achieve its goal of commercial exploitation and the acquisition of vital raw materials for their local industries.¹⁴ These form part of our received English laws covering areas like patents and designs,¹⁵ copyright and allied rights,¹⁶ trademarks and tradenames¹⁷ and merchandise marks.¹⁸ While these various sub-heads are subject to varying legal principles and enforcement mechanisms, IPRs are best viewed as an aggregation of rights. Consequently, a single product can be capable of multiple IPR protection for maximum exploitation.¹⁹ While some of these rights are only recognized after the owners have complied with certain formalities, others like copyright, trademarks and trade secrets do not require compliance with registration or agency requirements. Patents have a validity period of 20 years, the protection for copyrights vary depending on the nature of the right, while both trademarks and trade secrets can exist in perpetuity once the relevant mark remains in use or is renewed periodically²⁰ and in the case of trade secrets, the secrecy of the confidential information is preserved.²¹

As earlier stated, we have largely borrowed our IP regime and conceptual framework from the western world and majorly without a good appreciation of the rationale and foundational premise for most of the concepts we have adopted. In addition to the adoption of enforcement strategies which may sometimes be inimical to our developmental trajectory,²² we have for the most part neglected our peculiar

¹³ Ha-Joon Chang, *supra*, at pp. 142-44.

¹⁴ G. Sipa-Ajah Yankey, **International Patents and Technology Transfer to Less Developed Countries: The Case of Ghana and Nigeria**, Avebury 1987, p. 106.

¹⁵ Cap P2 LFN 2004.

¹⁶ Cap C28 LFN 2004.

¹⁷ Cap T13 LFN 2004.

¹⁸ Cap M10 LFN 2004.

¹⁹ See **Introduction to Intellectual Property Law**, SPA Ajibade & Co., Online Training Course available at www.tacora.ng.

²⁰ See generally, John Onyido, *Understanding Trademarks*, being a presentation to the IP Law Club of the Obafemi Awolowo University, Ile Ife on 21st July 2018. [available on file with author]

²¹ John Onyido, *The Role of Trade Secrets in the Protection of Intellectual Property Rights*, The Gravitas Review of Business & Property Law, Vol. 6 No. 3 2015 pp. 51-66.

²² Aurelia J. Schultz, *Africa's Been Raided Enough: Collateral Damage to Intellectual Property Systems and Alternatives to Obtain Value*, available at: <https://academic.oup.com/jiplp/article-abstract/12/3/168/3059561> accessed August 22nd 2018.

environment and our unique innovative endowments and cultural heritage. Efforts to recognize unique IPR protections for the expressions of folklore, traditional knowledge, the deleterious effects of biopiracy, and the cultural heritage embodied in stolen African art forms are veritable attempts to stall the dissipation of our unique attributes and claw back what is rightfully ours. Because most of these uniquely indigenous IPRs are not amenable to established IP concepts the need for a regime of largely *sui generis* rights are necessary to ensure their recognition and enforcement both nationally and globally.²³

3. Impediments to Innovation and Creativity

Although the country can boast of an arsenal of laws providing for the recognition, protection and enforcement of IP rights, a cohesive articulation of an IP and development policy for the country which proactively links up the divergent efforts into a coherent, logical narrative remains lacking. To channel the vast possibilities of IPRs, it is essential to have a plan of action, strategic preparation, reasonable but firm time lines and the right individuals in positions of authority overseeing the implementation of such policy initiatives.²⁴ As the topic of this lecture suggests IPRs contribute to the creation and innovation process in a quantifiable and perceptible form. However, they are not ends in themselves but constitute only one facet of the creative and innovative process which requires other factors to be actualized. Consequently, the promulgation of laws regulating the various types of IPRs is insufficient to propel the country to its desired destination of self-reliance and self-sufficiency.

According to a learned author,²⁵

“Promoting innovation involves setting the strategy to generate creativity, innovative products and processes and new service delivery models. It entails putting in place an effective national innovation system that generates ideas, creativity and inventiveness. It means establishing a national innovation framework and infrastructure that

²³ See De Beer et al, *Innovation, Intellectual Property and Development Narratives in Africa*, in **Innovation & Intellectual Property Collaborative Dynamics in Africa** (De Beer et al eds.) UCT Press 2014, pp. 1-22, available at: <http://ssrn.com/abstract=2659844>, accessed August 27th, 2018.

²⁴ See generally, John Onyido, *Teaching Intellectual Property Law as a Pedagogical Imperative at the Faculty of Law University of Ibadan*, July 2018. [available on file with author].

²⁵ James Otieno-Odek, ***Intellectual Property in the Context of Developing Countries: Quest for National Innovation System***, NIALS Founders Day Lecture Series 2017.

produces a self-sustaining and indigenous innovation system. It involves a paradigm shift to set up a critical mass of knowledgeable, skilled, analytical, abstract thinking and problem solving workforce. It involves nurturing an opportunity, recognizing technical and problem solving workforce.”²⁶

The absence of an enabling environment for creativity and innovation to thrive is one of the most obvious impediments to a strong and sustainable economy.²⁷ Some other ostensible impeding factors would also need to be addressed.

- 3.1. Archaic Laws:** Apart from a few tweaks here and there, especially in copyright law, the vast majority of our IP laws are in dire need of an overhaul. Efforts to accomplish this have been on-going in a pragmatic and objective form since 1991²⁸ and till the time of writing remain in abeyance. The Trade Marks Act has remained static since 1965, the Patents and Designs Act since 1970 and while the Copyright Act witnessed some amendments in 1992 and 1999, respectively, a few more updates are necessary. On the other hand, the Merchandise Marks Act has remained largely intact since 1916 when it was enacted under the then colonial administration. Other aspects of IPRs do not even enjoy statutory recognition like franchises²⁹ and trade secrets.³⁰ The new Industrial Property Bill and the proposed amendment to the Copyright Act are presently before the legislative houses awaiting review.³¹
- 3.2. Poor Enforcement Mechanisms:** Flowing from the lack of adequate and up-to-date statutory regulation of IPRs is the twin aspect of enforcement. No matter how well-

²⁶ Ibid, pp. 5-6.

²⁷ See **Innovation for Development** [OECD Publication] May 2012 pointing out that: “... one of the important lessons of the past two decades has been the pivotal role of innovation in economic development. The build-up of innovation capacities has played a central role in the growth dynamics of successful developing countries. These countries have recognised that innovation is not just about high-technology products and that innovation capacity has to be built early in the development process in order to possess the learning capacities that will allow “catch up” to happen. They also need innovation capacity and local innovations to address challenges specific to their local contexts (e.g. tropical diseases). Ultimately a successful development strategy has to build extensive innovation capacities to foster growth.” p. 4. <http://www.oecd.org/innovation/inno/50586251.pdf>.

²⁸ See *The Report on the Reform of Nigeria’s Industrial Property Laws 1991*, The Nigerian Law Reform Commission, Lagos.

²⁹ See Uche Ewelukwa Ofodile, *Regulating Franchising in Nigeria: Legal and Institutional Options to Consider*, BUSINESSDAY October 24th, 2013.

³⁰ John Onyido, supra, pp. 51-52.

³¹ **International Comparative Legal Guide to Trade Marks 2018**, [Section on Nigeria: Ch. 29] John Onyido and Yetunde Okojie, pp. 246-47, available at: <https://iclg.com/practice-areas/trade-marks-laws-and-regulations/nigeria>, accessed August 29th, 2018.

written the laws are, if they are not properly implemented and enforced they remain ineffectual in achieving the envisioned legislative objectives.³² The problem of inadequate enforcement is multifaceted and would encompass issues related to the proper understanding and appreciation of IPRs, training and educating lawyers and judges on the intricate nuances of IP law, empowering the government agencies and parastatals like the Customs, the NCC, NAFDAC, NOTAP, SON etc., to function as intended, allowing for co-ordination and collaboration between these agencies in the fight against piracy and counterfeiting, embracing new technologies and enforcement tools for improved efficiency and effectiveness. Under this rubric, the work of the Patent, Designs and Trade Marks registry needs to be optimized for increased efficiency and responsiveness.³³

3.3. Inadequate Regulatory Oversight: Because of inadequate funding and support from government, the enforcement agencies are handicapped in their abilities to get the job done! Most of these agencies, with perhaps the exception of the NCC, are not nearly as effective as they should be either in sensitizing and enlightening the public on their responsibilities and in carrying out frequent raids and enforcement activities with more consistency and on a broader spectrum.³⁴ The terms of reference of the NCC is limited to the regulatory oversight of issues relating to copyright law and there is no equivalent or comparable agency to the NCC for other types of IPRs.

3.4. Indigenous Peculiarities/Challenges: As a fledgling economic entity in search of its bearings,³⁵ Nigerian citizens are not sufficiently empowered and supported in the development, incubation and implementation of innovative ideas or in bringing promising creative ideas to the market. So many start-ups fizzle out long before they have barely begun, either due to lack of adequate funding or technical guidance from

³² Adejoke Oyewunmi, *Towards Sustainable Development of Nigeria's Entertainment Industry in the Digital Age: Role of Copyright Law and Administration* NJIP (Maiden ed.) November 2011 p. 74, 101-102.

³³ The digitalization of the database of these registries have been ongoing now for several years with still some ways to go. Until recently the TM Journals were not being published consistently leading to a backlog of trademarks awaiting advertisement. Likewise, opposition proceedings have been suspended for several years due to the absence of necessary resources and personnel to attend to such hearings.

³⁴ Oyewunmi, *supra*, p. 102.

³⁵ UNCTAD Country Profile on Nigeria for 2017, available at: http://unctadstat.unctad.org/CountryProfile/_GeneralProfile/en-GB/566/index.html, accessed on August 29th, 2018. Nigeria has been described as home to the greatest number of peoples living beyond the poverty level relative to its population, now estimated at close to 87 million of the country's poor. See <https://www.premiumtimesng.com/news/headlines/281681-nigeria-houses-largest-population-of-worlds-poorest-people-theresa-may.html>.

experts in the field. Such a stifling economic environment makes it extremely difficult to harness the innate creativity and resourcefulness of the citizens towards establishing an IP culture and a meaningful national innovation policy for the country. Early this year our firm assisted in organizing and hosting the Nigerian version of the very first global legal hackathon.³⁶ It was a truly inspiring event that brought together lawyers, law students, developers and app designers over a weekend to brainstorm on issues affecting access to justice and legal administration in the country. It was most deflating for the Nigerian contingent to the finals in New York to find little or no support from stakeholders and custodians of our justice system in financing their trip to Manhattan.³⁷ This lack of support and encouragement is symptomatic of our self-inflicted challenges and is clearly detrimental to our developmental goals and antithetical to the promotion of innovation and creativity in the country.

4. Role of Universities and Institutions of Higher Learning as Incubators

A few weeks ago, I had the distinct privilege of speaking to a cross-section of law students at the University of Ibadan about the importance of teaching IP law as a subject in their faculty.³⁸ My lecture underscored the vital role that institutions of higher learning are required to play in nurturing the creative and innovative impulse of our youth. Tertiary institutions are distinctly equipped to subliminally programme into the subconscious minds of young members of our society the vital role that IPRs play in a country's development, of the need to respect the IPRs of others.³⁹ And as budding law students, to equip them with the skills and knowledge required to support our creators and innovators in actualizing their ideas and concepts into tangible and useful objects. This process should ideally not be limited to the law faculties but must extend to other departments and schools, to engineering, science and technology students in varied and appropriate formats.

Within the university environment, issues normally arise regarding the ownership of scholarly works, research projects, and inventions which typically involve multiple

³⁶ #GLH2018. Round One Winning Teams, <https://globallegalhackathon.com/round-one-winners/>.

³⁷ The Nigerian contingent to the finals in New York received no support from the NBA, the Section on Business Law (SBL), the Legal Aid Commission nor the Ministry of Justice to a promising digital application designed to facilitate criminal justice administration in the country.

³⁸ John Onyido, *Teaching Intellectual Property Law as a Pedagogical Imperative at the Faculty of Law of the University of Ibadan*, July 2018.

³⁹ This can take various forms like ensuring intellectual honesty, according proper attribution to borrowed data, and copyrighted material to shunning all forms of plagiarism. See **The Reference Shelf: Intellectual Property** (Jennifer Peloso ed.) H.W. Wilson Company 2003, pp. 45 85.

contributions, outside sponsorships and therefore ownership/inventorship disputes.⁴⁰ Most Universities make provisions for such issues as well as the distribution of income and royalties to all interested parties, inclusive of licensing and commercialization efforts. If properly managed, these institutions can serve as incubators and sources of new technologies and advancements in human learning.⁴¹ Our Universities should have a clear plan of action for these matters and collaborate with the law faculties (especially the IP departments) in maximizing the benefits of these opportunities both in the generation of much needed revenue and in supporting the countries innovation and development policies. Some other modalities that could be explored are forms of Open Source platforms and collaborative initiatives between various institutions that leverages on their respective strengths for enhanced turnaround and quickened actualizations of various creative ideations for the good of our society.

5. Licensing, Franchising and IP Monetization

These are the modalities through which the owners and users of IPRs leverage on the benefits of innovative and creative ideas.⁴² Oftentimes, the originators of such works are not in a position or financially and logistically capable of bringing their works to the market. Being able to identify how and when a limited or permanent transfer of ownership is indicated is essential in the IP monetization process. The state may intervene in this monetization process under unique and peculiar circumstances through compulsory licenses or through parallel imports where such measures become necessary in pursuit of the welfare and wellbeing of the citizens and government's economic and national interests.⁴³

6. You and IP Law

For our nation to achieve our economic and developmental aspirations, we all need to inculcate and imbibe an effective IP culture,⁴⁴ grounded not only in an above

⁴⁰ Gomulkiewicz, Nguyen and Conway-Jones, **Licensing Intellectual Property: Law and Application**, Walters Kluwer 2008, Ch. 12. See *Chou v. University of Chicago*, 254 F3d 1347 (Fed. Cir. 2001) and *Moore v. Board of Regent of California*, 51 Cal. 3d 120 (Cal. 1990).

⁴¹ Gomulkiewicz, *supra*, p. 465.

⁴² John Onyido, *Legal Trends in Intellectual Property Licensing*, The Gravitas Review of Business & Property Law Vol. 9 No. 1 2018, pp. 72-95.

⁴³ TRIPS Agreement Article 6, and Article 31(f) and (h), recognize the rights of member-states to adopt compulsory licensing initiatives and/or appropriate parallel importation strategies as deemed necessary. Council for TRIPS decision of 30th August 2003, WT/L/540.

⁴⁴ https://ipmall.law.unh.edu/sites/default/files/hosted_resources/Teaching_IP/Teaching_IP.pdf.

average understanding of the value and role of IPRs, but in collectively supporting the country's national innovation policies in our own minute ways, with each sector of the economy, the lawmakers, implementers and the private sectors contributing their quota in systematic and purposeful ways towards the ideal society of our dreams. We have ample examples from countries like Singapore, Korea, Hong Kong, Japan and China to emulate and you as the lawyers of the next generation can take up this vision, sustain it and bring this to fruition in a few short years of consistent efforts.

7. Conclusion

Nigeria is currently ranked as 118 on the Global Innovation Index (having moved up a notch from its position the previous year) when certain other African countries like South Africa, Mauritius and Kenya, who are not as endowed rank much higher.⁴⁵ Obviously, it is not that we do not have what it takes to achieve competitiveness on the global level in terms of technological innovation and scientific advancement; we just need to be deliberate and systematic in our efforts. Even though these preliminary exertions (much like Time Travel) may appear elusive in the immediate term, consistent and determined efforts can propel the country to great technological heights. This is how other leading nations have attained their current enviable status and there is nothing stopping us, except ourselves, from doing the same.

THANK YOU FOR LISTENING!

⁴⁵ The recently published Global Innovation Index (GII) for 2018 has Switzerland topping the charts for the second year in a row, with China moving up to number 17 spot from the 24th place in 2017. In sub-Saharan Africa, South Africa is listed at 58, Mauritius at 75 and Kenya 78. See http://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2018-intro5.pgf, accessed August 27th, 2018.