

# Enforcement of Intellectual Property Rights in Nigeria and South Africa: A Comparative Reappraisal

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## Abstract

Enforcement of intellectual property (IP) rights is key to achieving adequate protection, even though in Nigeria, enforcement is hampered by fragmented legislation, prolonged judicial processes, and limited public awareness of IP rights. Despite recent reforms of the Copyright Act in 2022, challenges persist, including rampant counterfeiting, digital piracy, and under-resourced enforcement agencies. South Africa, by contrast, boasts of a more robust IP regime anchored in its Companies and Intellectual Property Commission (CIPC), specialised Commercial Courts, and proactive anti-counterfeiting strategies. However, it faces its own hurdles, such as bureaucratic inefficiencies, high litigation costs, and uneven enforcement in rural areas. This study undertakes a comparative reappraisal of the enforcement of intellectual property (IP) rights in Nigeria and South Africa, with a view to identifying systemic challenges, institutional strengths, and opportunities for reform. While both nations are signatories to key international IP treaties, such as the TRIPS Agreement, their domestic enforcement frameworks and outcomes diverge significantly due to differences in legal infrastructure, institutional capacity, and socio-economic priorities. Adopting a doctrinal methodology, key findings reveal that South Africa is in alignment with global IP standards and investment in technological tools (e.g., AI-driven trademark databases) enhance enforcement efficiency, whereas Nigeria's reliance on outdated mechanisms and limited interagency coordination stifle progress. Both nations share challenges

in combating cross-border IP crimes and adapting to digital-era threats, such as AI-generated infringements and online piracy. The paper concludes with recommendations for Nigeria to adopt South Africa's model of institutional specialization, public-private partnerships, and technology integration while addressing systemic corruption and capacity gaps. Conversely, South Africa could benefit from Nigeria's nascent efforts to decentralize IP education and leverage informal sector collaborations.

**Keywords:** *Intellectual Property Enforcement, Nigeria, South Africa, TRIPS Agreement, Counterfeiting, Digital Piracy.*

## 1. Introduction

In an era where intellectual property (IP) has become a cornerstone of global economic competitiveness, the enforcement of IP rights remains a critical yet unevenly addressed challenge across Africa. Intellectual Property Rights (IPRs) serve as a fundamental pillar in the advancement of innovation and economic development in any nation. In Africa, the enforcement of these rights remains a pivotal concern, especially in burgeoning economies such as Nigeria and South Africa. As both countries continue to emerge as significant players on the global stage, understanding and evaluating their respective frameworks for IPR enforcement becomes essential.<sup>i</sup> We cannot imagine today's world without those countless inventions and innovations.<sup>ii</sup> The enforcement of intellectual property rights (IPR) is a crucial aspect of fostering innovation, creativity, and economic growth in any nation.<sup>iii</sup> In Africa, Nigeria and South Africa stand out as key players in this domain, each with distinct legal frameworks, enforcement mechanisms, and challenges. Nigeria, with its burgeoning creative industries, faces significant hurdles such as piracy and inadequate legal infrastructure.<sup>iv</sup> In contrast, South Africa boasts a more developed IPR regime, characterized by robust institutions and proactive enforcement strategies.

The importance of enforcement of IPRs is key to the protection of the rights and economic development as well. Strong IP enforcement encourages innovation because creators know their inventions or works are protected. If people can just copy someone's work without consequences, there will be less incentive to create something new. Hence, effective IP

enforcement encourages inventors, artists, and businesses to invest time and resources into developing new technologies, products, and creative works. Knowing their rights are protected reduces the risk of theft or unauthorized replication, enabling creators to reap financial rewards. Without enforcement, innovation will stagnate as creators lose motivation to create works.

By ensuring that creators can reap financial rewards from their inventions, IPRs contribute to economic growth. IP-intensive industries like technology and entertainment contribute significantly to GDP and job creation,<sup>v</sup> directly linking enforcement to economic prosperity. In 2023, the entertainment industry in Nigeria created jobs for over 4.2 million Nigerians with a capacity to generate an additional 2.7 million jobs within the next four to five years.<sup>vi</sup> IP enforcement prevents unfair practices such as trademark infringement or trade secret theft, ensuring businesses compete on merit rather than piracy and counterfeiting.<sup>vii</sup> Effective enforcement of IPRs helps maintain fair competition in the marketplace and protects consumers from counterfeit goods and ensures the quality and safety of products.

Nigeria, with its vibrant creative industries and growing technology sector, grapples with systemic challenges such as rampant counterfeiting, digital piracy, and prolonged judicial delays undermine investor confidence.<sup>viii</sup> In spite of progressive reforms in the Copyright Act 2022 enforcement agencies remain under-resourced, and public awareness of IP rights is still alarmingly low. Nigeria has been named as one of the transit points for fake electronics and electrical equipment produced in the People's Republic of China for re-export to other Western African economies and the EU.<sup>ix</sup> Counterfeit goods has become a menace, that the battle seems lost, due to lack of effective IPR enforcement policies and techniques coupled with corruption and poverty. Currently, Nigeria ranks among the top six countries in the world in terms of counterfeit goods seizures, ranks second of 54 African countries and 1st of 15 West African countries.<sup>x</sup>

In addition, counterfeiting in Nigeria poses widespread harm to the economy, going beyond mere financial losses to create significant socio-economic consequences.<sup>xi</sup> The methods used are varied and increasingly sophisticated, ranging from fraudulent branding and substandard materials to outright replication of popular products. This often tricks consumers into buying goods that fail to meet safety and quality standards. The rise of internet access and e-

commerce has exacerbated the problem, allowing counterfeit goods to reach even remote consumers who may be less familiar with genuine products.<sup>xiii</sup> In contrast, South Africa boasts a more sophisticated IP regime, anchored in the Companies and Intellectual Property Commission (CIPC), specialized Commercial Courts, and advanced anti-counterfeiting technologies. However, it faces its own hurdles, including bureaucratic inefficiencies, high litigation costs, and persistent rural-urban enforcement gaps.

This discrepancy provides a prism through which to examine how socioeconomic circumstances, institutional architecture, and political-will influence IP outcomes. Nigeria's dependence on antiquated procedures and disjointed coordination hinders development, whereas South Africa's adherence to international standards and investment in AI-driven trademark databases increase efficiency. However, all countries have similar challenges in preventing cross-border intellectual property crimes and adjusting to risks of the digital age, like online piracy and AI-generated counterfeits. In order to disentangle the contradiction between these two African countries, this essay examines legislative frameworks, enforcement data, and stakeholder views. It makes the case that South Africa's institutional rigor and Nigeria's vibrant informal sector offer complementing lessons for regional IP policy harmonization. Ultimately, the study underscores the urgency of bridging enforcement gaps to unlock Africa's innovation potential, ensuring that robust IP systems catalyze equitable growth rather than perpetuate dependency on foreign technologies.

This article aims to provide a comparative appraisal of the enforcement mechanisms and challenges faced by Nigeria and South Africa in safeguarding intellectual property. By examining the legal frameworks, institutional capacities, and practical realities in both countries, we aim to shed light on the strengths and shortcomings of their approaches. Additionally, this comparative analysis seeks to identify the best practices and potential areas for improvement, offering insights that could foster more robust intellectual property regimes in both nations. By understanding these dynamics, we can better appreciate the role of IPR in driving innovation and protecting the rights of creators in these two influential nations.

## 2. Overview of the Concept of Intellectual Property Rights

Intellectual Property is a branch of law that protects some of the beautiful manifestation of human imagination.<sup>xiii</sup> Intellectual Property Rights (IPR) are legal entitlements granted to creators, inventors, and owners of intangible assets, enabling them to control, protect, and benefit from their intellectual creations. Rooted in the principle that innovation and creativity drive societal progress, IPR balances the interests of creators, users, and the public by fostering a framework where ideas can be monetized, shared, and safeguarded.<sup>xiv</sup> It includes the rights relating to literary, artistic and scientific works, performances and performing artists, photographs and broadcasts, inventions in all fields of endeavour, scientific discoveries, industrial designs, trademarks, service marks and commercial names.<sup>xv</sup>

IPR encompasses a range of intangible assets derived from human intellect, patents protect inventions<sup>xvi</sup> for a limited period usually 20 years which grants an exclusive right to use, sell, or license the invention. Copyright is a bundle of rights that safeguard literary, artistic, and musical works by granting creators control over reproduction, distribution, and public performance. Trademarks are marks used to identify goods and services, they are used to prevent consumer confusion and ensure brand integrity. Industrial Designs cover the aesthetic aspects of products which do not have a functional purpose while trade secrets protect confidential business information that provide a competitive edge unlike other forms of intellectual property, trade secrets are protected as long as they remain undisclosed and provide economic value to the holder. The protection of trade secrets relies on maintaining their confidentiality through legal agreements and security measures.

The rights are preventive in nature in that they allow the owner to prevent others from carrying out acts in relation to the subject matter without his consent.<sup>xvii</sup> Intellectual property rights are those rights that are granted to protect human creation from indiscriminate or unfair use. Intellectual property gives rise to rights and duties. It establishes property rights, that gives the owner the right to do certain things in relation to the subject matter. Intellectual Property Law is that area of law concerning legal rights associated with creative effort or commercial reputation and goodwill. The subject matter of intellectual property is very wide and includes literary and artistic works, films, computer programmes, inventions, designs and marks used by traders for their goods or services.<sup>xviii</sup> IP rights are territorial in nature,

they are generally valid only within the jurisdiction where they are granted. It is on the basis of this IPRs are a dynamic and evolving pillar of modern economies, bridging creativity, commerce, and societal welfare. While they drive innovation and economic growth, their implementation must adapt to technological advancements and ethical imperatives. For nations like Nigeria and South Africa, robust yet flexible IP frameworks are critical to nurturing local innovation while participating meaningfully in the global knowledge economy.

### **3. Legal Framework for the Protection of Intellectual Property Rights in Nigeria and South Africa**

#### **3.1 *The Copyright Acts***

The Nigerian Copyright Act first came into existence in Nigeria on December 24<sup>th</sup>, 1970.<sup>xix</sup> The 1970 Act was found to be defective in many areas. The concerns about the defects in the 1970 Act led to agitations in the copyright-based industries which led to the promulgation of the 1988 Act. <sup>xx</sup>The 1988 Act was enacted under military administration and was, therefore, passed as a decree. The Act has been amended twice, firstly in 1992 and secondly in 1999.<sup>xxi</sup> In 2004 the laws were re-codified under the Laws of the Federation of Nigeria. On 17<sup>th</sup> March, 2023, Former President Muhammadu Buhari signed into law the Copyright Act of 2022 (the “New Act”) represents a landmark overhaul of the country’s intellectual property framework, replacing the outdated Copyright Act The New Act makes a number of changes to Nigeria’s copyright law, the most notable of its modification includes addressing the challenges of the digital era,<sup>xxii</sup> as well as expansion of protected works,<sup>xxiii</sup> moral rights,<sup>xxiv</sup> exceptions like fair dealing,<sup>xxv</sup> anti-piracy measures,<sup>xxvi</sup> protection of folklore,<sup>xxvii</sup> and provisions for disabled access.<sup>xxviii</sup> the Act aligns Nigeria with international copyright standards while fostering innovation and protecting creators. <sup>xxix</sup>

On the other hand, the South African Copyright Act of 1978 is the primary legislation governing copyright protection in South Africa. It was passed by parliament during the course of 1978 and came into force on 1 January 1979 and repealed all previous copyright legislation.<sup>xxx</sup> It has been amended several times, and align with international agreements such as the TRIPS Agreement to address technological advancements and international treaty

obligations. For example, amendments have been made to address the protection of computer programs, digital rights management, and internet-related copyright issues,<sup>xxxii</sup> this also includes the grants of copyright holders' exclusive rights to reproduce, distribute, perform, and display their works, as well as to create derivative works.<sup>xxxiii</sup> These rights enable creators to control the use and dissemination of their intellectual property and benefit financially from their creations.

### **3.2 The Trademark Acts**

In Nigeria, the legal regime of Trademarks is governed by the Trademarks Act of 1967 and Trademarks Regulation of 1967.<sup>xxxiii</sup> The principal aim of Nigeria's Trademark Act is to prevent unauthorized use of a trademark by anyone other than its registered owner or authorized user,<sup>xxxiv</sup> the Act provides a legal framework essential for the regulation, enforcement, and registration of trademarks, ensuring that businesses can protect their brands and consumers can distinguish between different products and services. This law establishes a dual system of trademark protection, covering both registered and unregistered marks.<sup>xxxv</sup> Unregistered trademarks are recognized under Section 3 of the Act,<sup>xxxvi</sup> gaining protection based on their use and market reputation. Unlike other intellectual property types, unregistered marks retain legal recognition, though proving goodwill can be challenging without registration.<sup>xxxvii</sup> Registered trademarks provide distinct advantages, as they offer prima facie evidence of ownership and eliminate the need to prove reputation in cases of infringement.<sup>xxxviii</sup> A trademark must be registered to benefit from legal protections; without registration, the owner cannot sue for infringement. Registration can occur under either Part A or Part B of the trademark register, under part A the trademarks must be inherently distinctive and part B, covers marks that acquire distinctiveness through use. Registered marks grant their owners exclusive rights to use and enforce the trademark, allowing for actions against unauthorized users, as well as the rights to assign, bequeath, and acquire incontestable status after seven years. Proper registration requires clear identification of the goods or classes associated with the trademark, and the Registrar's decision on classification is final. Marks that lack distinctiveness for Part A may still be registered under Part B.<sup>xxxix</sup> The Act adopts the Nice Classification system, which categorizes goods and services into various classes for the purpose of trademark registration. By embracing this internationally

recognized classification system, Nigeria aligns its trademark framework with global standards, although the law has not been amended.

The South African trademarks law is primarily governed by Trade Marks Act 194 of 1993, which aims to protect registered trademarks and prevent unauthorized use that could cause confusion in the marketplace.<sup>xi</sup> In a similar fashion, to be eligible for registration, a trademark must be able to differentiate the goods or services of one entity from those of another. This distinction can be inherent in the trademark itself, or it can be acquired through prior use and recognition in the marketplace. At the time of application, the trademark must either be inherently distinctive or have become distinctive as a result of its use. The registration process begins with an application submitted to the Companies and Intellectual Property Commission (CIPC), which involves examination for compliance with legal requirements.<sup>xli</sup> Registered trademarks enjoy significant advantages, including the presumption of ownership and the exclusive right to use the mark in relation to the specified goods or services.<sup>xlii</sup> Infringement actions can only be brought for registered marks, making registration essential for effective protection.<sup>xliii</sup> South Africa also recognizes common law rights through the doctrine of “passing off,” which can protect unregistered marks based on reputation and goodwill.<sup>xliv</sup> The law provides for various remedies, such as interdict, damages, to enforce trademark rights.<sup>xlv</sup> Additionally, the Act accommodates international treaties, enhancing protection for South African trademarks globally. Overall, the framework aims to promote fair competition while safeguarding the interests of businesses and consumers alike.

### ***3.3 The Patent and Design Act of Nigeria and the Patent Act of South Africa.***

The Nigerian Patent and Designs Act enacted in 1970<sup>xlvi</sup> is an Act that provides for the registration and proprietorship of patents and designs in Nigeria. This Act came into existence as a result of the English laws that were received into Nigeria during the colonial era.<sup>xlvii</sup> The Nigerian Patent and Designs Act does not define patent. It only provides the type of invention that will be protected by patent. Thus, it provides that an invention will only be patentable if it is new or if it is an improvement on a patentable invention. It results from an inventive activity and is capable of industrial application.<sup>xlviii</sup> In Nigeria, the right to patent for an invention is granted to the first person that files an application for the patent and it does not matter if the applicant is not the true inventor.<sup>xlix</sup> Once granted, a patent confers upon the



inventor exclusive rights to exploit the invention. This includes the ability to prevent others from making, using, importing, or selling the patented invention without the inventor's permission. The duration of these rights is 20 years from the filing date of the patent application, provided that the necessary maintenance fees are paid.<sup>1</sup>

Designs law in Nigeria is governed by the Patents and Designs Act of 1971 as well. This legislation provides a framework for the protection of industrial designs, granting exclusive rights to creators for a limited period. The primary objective of designs law is to protect the aesthetic and ornamental aspects of products, thereby encouraging creativity and innovation in various industries. In Nigeria, a registrable design must be novel and not previously disclosed to the public.<sup>li</sup> It's defined as any combination of lines or colors, or a three-dimensional form (with or without colors), intended for industrial multiplication as a model or pattern. The design must be visually appealing and applicable to a manufactured article.<sup>lii</sup> Crucially, designs dictated solely by technical or functional considerations are ineligible for design protection. Once a design is registered, the owner is granted exclusive rights to use and exploit the design. This includes the right to prevent others from making, using, importing, or selling any product in which the design is incorporated or to which it is applied without the owner's permission. These exclusive rights are crucial for enabling designers to commercialize their creations and benefit from their investment in design development.<sup>liii</sup> The initial term of protection is five years from the filing date, with the possibility of renewal for two additional five-year periods, making the total duration of protection 15 years.<sup>liv</sup>

In Nigeria, the Federal High Court has jurisdiction over patent and design matters. This includes the power to resolve disputes relating to the infringement of patent rights and the validity of granted patents. Effective enforcement of patent rights is essential for maintaining the integrity of the patent system and ensuring that inventors receive the full benefits of their creations.<sup>lv</sup> The Nigerian PDA provides for international arrangements or agreements, to which Nigeria is a party.<sup>lvi</sup> However, the minister must declare by order in a federal gazette, that any country specified in the order is a convention country and may benefit from protection under the PDA.<sup>lvii</sup> The provision is to enable a convention country to benefit from earlier applications made within twelve months of registration in other convention countries.

Patent law in South Africa is governed by the Patents Act No. 57 of 1978. This legislation provides a comprehensive framework for the protection of inventions, the criteria for patentability, the rights of patent holders, and the procedures for filing and enforcing patents granting inventors exclusive rights for a limited period, typically 20 years from the filing date, provided that annual renewal fees are paid. This system encourages innovation and supports the commercialization of new technologies.<sup>lviii</sup> To qualify for patent protection in South Africa like Nigeria an invention must meet the three key criteria: novelty, inventive step, and industrial applicability.<sup>lix</sup> This means the invention must be new, involve an inventive step that is not obvious to someone skilled in the relevant field, and be capable of being used in some form of industry.<sup>lx</sup> Once a patent is granted it confers upon the inventor's exclusive rights to exploit their invention for a period of 20 years from the filing date of the application,<sup>lxi</sup> contingent on the payment of annual renewal fees.<sup>lxii</sup> This exclusivity empowers the inventor to prevent unauthorized making, using, importing, or selling of the patented invention.<sup>lxiii</sup> These rights are essential for inventors to commercially exploit their inventions and recoup research and development investments.

Designs law in South Africa is governed by the Designs Act No. 195 of 1993. The Designs Act of 1993 complements the Patents Act, providing protection for Industrial designs.<sup>lxiv</sup> This legislation provides for the protection of industrial designs. The primary objective of designs law is to protect the aesthetic and functional aspects of products. Aesthetic design means any design applied to any article, whether for the pattern or the shape or the configuration or ornamentation. Functional design means any design applied to any article, whether for the pattern or the shape or the configuration thereof, or for any two or more of those purposes, and by whatever means it is applied, having features which are necessitated by the function which the article to which the design is applied, is to perform, and includes an integrated circuit topography, a mask work and a series of mask works.<sup>lxv</sup> The legal structure balances the need to safeguard creative expression with practical industrial applications, though it presents unique challenges and distinctions compared to international regimes. Below is an analysis of its key features, case law interpretations, and comparative insights. Where design applications meet the requirements for registration the aesthetic designs will be recorded in Part A of the register, while functional designs will be recorded in Part F. The registration date will be the same as the application date. It's possible to register the same design in both Part

A and Part F, as well as in multiple classes. If there's uncertainty about the appropriate class, the registrar will make the determination.<sup>lxvi</sup> The duration of the registration of an aesthetic design shall be fifteen years while a functional design shall be ten years.<sup>lxvii</sup> Both Acts aim to encourage innovation by safeguarding the intellectual property rights of inventors and designers, ensuring they receive recognition and economic benefits from their creations. Amendments have been made to both Acts to align with international standards and improve the efficiency of the registration processes.

### ***3.4 The TRIPS Agreement***

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement came into effect on 1 January, 1995, it established a comprehensive framework for the protection and enforcement of various intellectual property rights, including copyrights, patents, trademarks, trade secrets, geographical indications, industrial designs, and layout designs of integrated circuits.<sup>lxviii</sup> The TRIPS offers World Trade Organization (WTO) members three essential components:

1. **Standards:** It sets minimum standards for the protection of intellectual property, ensuring that all member countries provide adequate legal safeguards for creators and innovators.
2. **Enforcement:** The agreement outlines procedures and remedies for enforcing these rights, emphasizing the importance of effective enforcement mechanisms to combat infringement.
3. **Dispute Settlement:** TRIPS includes provisions for resolving disputes between member nations regarding intellectual property rights, facilitating a structured process for addressing grievances.<sup>lxix</sup>

Additionally, TRIPS specifies transitional arrangements to allow all WTO members time to implement the agreement, acknowledging the varying capacities of nations to comply with these new standards.<sup>lxx</sup> This framework aims to enhance global cooperation in protecting intellectual property while promoting innovation and economic growth across member countries.<sup>lxxi</sup> Nigeria has been a member of the World Trade Organisation since 1 January 1995 and Nigeria ratified the TRIPS Agreement on 16<sup>th</sup> January 2017.<sup>lxxii</sup> Hence the provisions of

the Agreement have binding effect on Nigeria.<sup>lxxiii</sup> South Africa has also been a member of the World Trade Organisation since 1<sup>st</sup> January 1995.

#### **4. Institutions for the Enforcement of Intellectual Property Rights.**

##### ***4.1 The Nigerian Copyright Commission and the Companies and Intellectual Property Commission of South Africa.***

Until when the Copyright Act 1988 was passed into law, there was no effective administrative infrastructure for copyright practice in Nigeria. This trend was changed with the promulgation of the Copyright Act in section 34 of the Act which provides that ‘there is hereby established a body to be known as the Nigerian Copyright Commission (in this Act referred to as “the Commission”)’. One of the key roles of the NCC is to oversee all matters related to copyright in Nigeria. This involves the interpretation and application of copyright laws to ensure compliance and protection of creators’ rights. The Commission is also expected to monitor and supervise Nigeria’s position in relation to international conventions, providing valuable advice to the government on these matters. This includes advising on conditions for the conclusion of bilateral and multilateral agreements between Nigeria and other countries, thereby fostering international cooperation in the realm of copyright.<sup>lxxiv</sup> In addition to its regulatory and advisory roles, the NCC is tasked with enlightening and informing the public on copyright-related issues. Public awareness campaigns and educational programs are conducted to ensure that individuals and organizations are well-informed about their rights and responsibilities under copyright law.<sup>lxxv</sup>

Another crucial function of the NCC is to maintain an effective data bank on authors and their works. This database serves as a repository of information, facilitating the protection of authors’ rights and providing a reliable reference for copyright matters.<sup>lxxvi</sup> Moreover, the Commission is responsible for any additional tasks related to copyright as directed by the Minister from time to time. This ensures that the NCC remains adaptable and responsive to the evolving landscape of intellectual property rights.<sup>lxxvii</sup> Through these diverse functions, the Nigerian Copyright Commission plays an essential role in safeguarding the rights of creators, promoting innovation, and fostering a thriving intellectual property environment in Nigeria. In addition to the Copyright Act, several other regulations have been enacted to

address and mitigate the widespread issue of entertainment and software piracy. This include the Copyright (Video Rental) Regulations 1999 Copyright Act,<sup>lxxviii</sup> Copyright (Security Devices) Regulations 1999,<sup>lxxix</sup> Copyright (Optical Discs Plants) Regulations, 2006.<sup>lxxx</sup> The Optical Discs Plants) Regulations empowers the NCC to oversee and monitor the manufacturing of optical discs<sup>lxxxi</sup> or production parts, <sup>lxxxii</sup> raw materials and manufacturing equipment<sup>lxxxiii</sup> in Nigeria, as means of combating optical disc piracy by mandating manufacturers and importers to register with NCC.<sup>lxxxiv</sup>

In South Africa the Companies and Intellectual Property Commission (CIPC) is a regulatory body under Department of Trade, Industry and Competition (DTIC). The commission was established in 2011 under the Companies Act, 2008,<sup>lxxxv</sup> the CIPC emerged from the merger of the Companies and Intellectual Property Registration Office (CIPRO) and the Office of Company and Intellectual Property Enforcement (OCIPE). It serves as a centralized authority for corporate governance and intellectual property (IP) protection, aiming to foster economic participation and regulatory compliance and is responsible for a wide range of functions that support the business environment.

The CIPC's primary objective is the efficient and effective registration of various entities, including companies (both domestic and foreign), other juristic persons as defined in Schedule 4,<sup>lxxxvi</sup> and intellectual property rights. This registration function is crucial for establishing a clear legal framework for businesses and intellectual property, facilitating transparency and promoting economic activity. The CIPC's role extends beyond mere registration to also include the maintenance of accurate, up-to-date, and relevant information concerning these registered entities and intellectual property rights. Education and awareness are also central to the CIPC's objective. It actively promotes education and awareness concerning company and intellectual property laws, ensuring that stakeholders are knowledgeable about the legal frameworks that govern their activities.

Some of its functions include registration and maintenance of companies, co-operatives, and intellectual property rights, including trademarks, patents, designs, and copyrights. The CIPC also promotes education and awareness of company and intellectual property law and ensures compliance with relevant legislation. It enforces legislation efficiently and effectively, monitors financial reporting standards, and makes recommendations to the Financial

Reporting Standards Council (FRSC). Additionally, the CIPC licenses business rescue practitioners and provides reports, research, and advice to the Minister on national policy matters related to company and intellectual property law.<sup>lxxxvii</sup> Generally copyright is an exclusive right granted by law for a limited period to an author and designer for original work which is protected automatically upon creation. But for cinematographic films, they are required to be registered with CIPC for copyright purposes.

#### **4.2 The Courts**

In Nigeria and South Africa, courts play a crucial role in enforcing Intellectual Property Rights by adjudicating disputes, interpreting IP laws, and issuing injunctions against infringements. They provide a legal framework for protecting creators' rights, ensuring compliance with IP regulations, and facilitating remedies for violations, thus promoting innovation and creativity. In Nigeria, the Federal High Court is vested with the exclusive jurisdiction to determine matters relating to the enforcement of Intellectual Property Rights and IPR infringement suits.<sup>lxxxviii</sup> In South Africa, the High Court is primarily vested with jurisdiction over intellectual property matters. Specific IP cases may also be handled by specialized courts or divisions, such as the Intellectual Property Tribunal, which was established to address certain IP disputes more efficiently.<sup>lxxxix</sup> The South Africa specialised courts include the Court of the Commissioner of Patents which deals with patents The Commissioner holds powers akin to those of a High Court judge, and the specialized court operates in a manner similar to a division of the South African High Court. The Commissioner is empowered to issue injunctions against infringers, as well as to mandate the delivery-up of infringing goods, the payment of damages, or the payment of a reasonable royalty.<sup>xc</sup>

#### **4.3 The Trademarks, Patents and Designs Registry of Nigeria.**

The Trademarks, Patents and Designs Registry under the Commercial Law Department of the Federal Ministry of Trade and Investment, created in pursuance of the Trademarks Act and the Patents and Designs Act, is the relevant patent and trademark authority in Nigeria. This system is quite different from South Africa's that is all house within the CIPC. Application for the registration of a patent or a trademark may be made by the proprietor or by an agent except in the case of a foreign proprietor where a local agent must be used. Where the owner of a foreign product intends to import it to the Nigerian market or a foreign business intends to carry on business in Nigeria, it is necessary for the invention or the trademark to be

registered in Nigeria to enable the owner benefit from the exclusive right over the patent or Trademark in Nigeria.<sup>xcii</sup> An action cannot be brought for patent or trademark infringement where the invention is not registered.<sup>xciii</sup>

## 5. The Enforcement Procedure of Intellectual Property Rights

Countries are obliged to establish laws that ensure enforcement procedures, which must include swift remedies to prevent and address infringements of intellectual property rights. This is essential to facilitate effective action against any acts of infringement.<sup>xciii</sup> Nigeria has a judicial system that addresses the enforcement of intellectual property rights within the same framework as its general laws. This issue is managed alongside other matters listed under the exclusive legislative jurisdiction, as outlined in the Constitution.<sup>xciv</sup> The recent crackdown on counterfeit and fake medicines has left most people wondering if there are original drugs in the market.

South Africa's Constitution safeguards intellectual property rights against arbitrary deprivation as property.<sup>xcv</sup> Furthermore, in recent decades, the country has made notable progress in the equitable protection, administration, management, and utilization of IP.<sup>xcvi</sup> Intellectual Property Policy of the Republic of South Africa discusses South Africa's commitment to leveraging flexibilities within the TRIPS Agreement to balance IPR protection with broader socio-economic development goals.

### 1. Nigeria

Countries must have robust laws and regulations in place to protect intellectual property rights. These laws should define the scope of protection, outline the rights of IP holders, and specify the remedies available for infringement. Typically, when an infringement occurs, it is the responsibility of the owner to initiate legal action. However, if the infringement becomes widespread, law enforcement agencies or customs authorities may intervene and take action.<sup>xcvii</sup> The Nigerian Copyright Act allows for both civil and criminal actions to be brought against an infringer. A civil action is initiated by the plaintiff, who is the person suffering loss or injury due to the infringer's actions.<sup>xcviii</sup>

Section 36 of the Copyright Act outlines specific circumstances under which an infringer's actions permit the rights owner to seek legal redress. When an individual's work is used without authorization, there are various causes of action available to the rights owner. Actions that constitute copyright infringement under the Act include inducing infringement, importing infringing copies into Nigeria, selling or offering infringing works, or hiring works that infringe copyright, producing tools for infringement like making possessing equipment specifically used to create infringing copies. In addition, permitting public performance infringement by allowing a public venue to be used for performances that infringe copyright, unless unaware and without reasonable suspicion of infringement and permitting reproduction of copyrighted works on premises. Also, commercially performing or causing the performance of copyrighted works for trade, business, or promotional purposes. These actions apply to the whole or a substantial part of the work, whether in its original form or a recognizably derived form.<sup>xcix</sup>

The Copyright Act provides a rights owner with three primary civil remedies for infringement: damages, injunctions, and an account of profits.<sup>c</sup> A copyright owner can pursue damages in the event of an infringement on their rights. When such an infringement impacts the proprietary rights of the copyright owner, resulting in a loss, damages are awarded to restore the owner to the position they would have been in if the infringement had not taken place.

Section 37 outlines the legal action<sup>ci</sup> for copyright infringement claims to give copyright owners, assignees, or exclusive licensees the right to sue, they can file infringement claims in the court where the infringement occurred. The remedies available to plaintiffs include damages, injunctions, accounting, or other relief similar to cases involving other proprietary rights. Copyright owner and exclusive licensee have rights to sue for infringement, have concurrent rights neither can proceed without court permission unless the other is included as a plaintiff or defendant. This section also provides for innocent infringement where the defendant was unaware of the copyright and had no reason to suspect its existence, the plaintiff cannot claim damages but rather may seek an account of profits. Additional damages may be awarded by the court as extra damages if effective relief is otherwise unavailable, considering the infringement's severity and any benefits gained by the defendant.



In addition to the civil remedies available to the copyright owner, the infringer may also face criminal sanctions, which are imposed based on both direct and indirect infringement. According to section 44 outlines criminal liabilities for certain offences and states penalties related to such copyright infringement, it consists of a comprehensive framework to deter unauthorized use of protected works and safeguard the rights of creators. This section is critical to enforcing copyright law in Nigeria, ensuring that intellectual property is respected and that violators face appropriate consequences. A person will be criminally liable for offenses such as manufacturing or importing infringing copies, making, importing, or possessing tools (e.g., plates, master tapes, machines) for creating unauthorized copies of copyrighted works for commercial purposes, selling or distributing infringing copies, selling, renting, distributing, or possessing infringing copies for trade or business purposes and copies for non-private use, even if not directly involved in their creation or distribution.

The Act provides for penalties such as imprisonment and/or monetary fines. These acts are punishable by fine of at least ₦1, 000 to ₦10, 000 per infringing copy depending on the type of infringement<sup>ci</sup> and imprisonment for a minimum of three to five years depending on the severity of the offence. Section 44(3) provides a defence for individuals who can prove they had no knowledge or reason to believe that the copies or equipment in their possession were used for infringement. This provision protects innocent parties from liability, emphasizing the need for intent or negligence in establishing guilt. Law enforcement officers can seize suspected infringing materials, and courts can order their destruction or delivery to the copyright owner, regardless of whether charges are filed. Infringing copies, plates, or equipment can be ordered to be surrendered to the copyright owner, or dealt with as the court deems appropriate, even if no conviction occurs.

Unlike years past where infringement was mainly reproduction or distribution of physical copies, the digital age has brought a new level of infringement which is addressed by section 44(7) and (8) which relates to modern forms of infringement such as unauthorized communication to the public, making copyrighted works available online or through wireless means for commercial purposes, digital and broadcast infringement is punishable by fines of at least ₦1,000,000 and/or imprisonment for a minimum of five years. These provisions reflect

the evolving nature of copyright infringement in the digital age, ensuring that the law remains relevant and effective.

Section 44(9) allows the NCC to settle offences out of court by accepting a sum of money from the offender, not exceeding 'double the minimum fine' prescribed for the offence. This provision provides a flexible enforcement mechanism, encouraging compliance while reducing the burden on the judicial system. This section is cornerstone of copyright enforcement, providing robust legal tools to combat infringement while balancing the rights of creators with the need for public access to knowledge and culture. By addressing traditional and modern forms of infringement, this section ensures that Nigeria's creative industries can thrive in a fair and dynamic intellectual property ecosystem.

Section 49 of the Copyright Act aims to combat piracy and protect the integrity of copyrighted materials by imposing strict penalties for violations related to anti-piracy measures. It grants the NCC with the consent of the Minister, the authority to prescribe anti-piracy devices such as designs, labels, marks, impressions, for use on or in connection with copyrighted works. These devices serve as safeguards against unauthorized reproduction, distribution, or counterfeiting of protected materials. Severe penalties deter violations, ensuring compliance with copyright laws. NCC's regulatory powers allow for the implementation of modern anti-piracy measures, addressing contemporary challenges in the digital age. By imposing strict penalties for violations and granting the NCC regulatory authority, this section ensures that Nigeria's creative industries can thrive in a fair and secure intellectual property environment.<sup>ciii</sup>

A trademark is considered infringed when an individual, without the owner's consent, uses it in the course of trade in a manner that suggests the mark is being used as a trademark. This includes using the mark on goods, in connection with goods, or in advertising materials distributed to the public, in a way that implies a reference to someone who holds the rights as either the proprietor or registered user. The mark used must be identical or so similar to the registered trademark that it is likely to deceive or cause confusion.<sup>civ</sup> For a trademark owner to initiate legal proceedings for infringement and seek damages, the trademark must be duly registered.<sup>cv</sup> Registration serves as prima facie evidence of the trademark's validity and of any subsequent assignments or transfers of ownership.<sup>cvi</sup>

However, the infringement of a proprietor's rights does not extend to any limitations recorded in the trademark register.<sup>cvii</sup> Additionally, if two or more registered trademarks are identical or nearly resemble each other and are used by their respective proprietors for the same or similar goods,<sup>cviii</sup> the use by one proprietor does not constitute infringement of the other's rights.<sup>cix</sup>

A trademark is infringed when a person uses in the course of trade without the owner's consent any goods in respect of which it is registered in such manner as to render the use of the mark likely to be taken to be used as a trade mark or used upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion.<sup>cx</sup> For a trade mark proprietor to institute any proceedings the trade mark must be duly registered to recover damages for infringement.<sup>cxii</sup> In effect, registration is prima facie evidence of the validity of the trade mark and of all subsequent assignments and transmissions thereof.<sup>cxiii</sup>

Nevertheless, the limitations recorded in the register do not constitute an infringement of a proprietor's rights.<sup>cxiiii</sup> Additionally, if one of two or more registered trademarks that are identical or closely similar for the same or similar goods<sup>cxv</sup> is used by one of the proprietors, it will not be considered an infringement.<sup>cxvi</sup>

The remedies available to a trademark owner include seeking damages as compensation for the wrongful act and obtaining injunctions to halt the infringing activity.<sup>cxvii</sup> Even though the Trade Marks Act does not explicitly provide for injunctions, section 6(2) suggests that a plaintiff may be entitled to injunctive relief if the use of a trademark is unlikely to deceive, cause confusion, or create a belief in a trade-related connection.<sup>cxviii</sup> Notwithstanding the courts have on several occasions issued injunctive relief to prevent further damages to the plaintiff in trade mark infringement cases.<sup>cxviii</sup> In *Solignum v. Ayinla*,<sup>cxix</sup> the plaintiff, a manufacturer of a wood preservative product named Solignum, found that numerous individuals were selling a large quantity of counterfeit products. These fake items, often lacking any preservative ingredients, were packaged in low-quality reused containers with basic paper labels falsely marked as Solignum and sold at a fraction of the price of the genuine

product. The court granted an Anton Piller order, allowing the plaintiff to search for and seize evidence of the counterfeit goods, as well as a class injunction to prevent all parties involved from dealing with the fraudulent Solignum products.<sup>cxix</sup>

Apart from civil liabilities a person may be criminally liable for making a false entry in the register, or a writing falsely purporting to be a copy of an entry in the register, or produces a document falsely claiming to be a copy of a register entry, or presents or causes to be presented in evidence any such fraudulent document, they shall be guilty of an offense. Upon conviction on indictment, they may face imprisonment for a term of up to seven years.<sup>cxxi</sup>

The enforcement of patent rights is covered under section 25 of the Patent and Design Act<sup>cxxii</sup> ensures that inventors can safeguard their innovations from unauthorized use. The Act defines infringement as the unauthorized use of a patented invention by a person without the licence or consent of the patentee or design owner. Specifically, infringement occurs when a person performs or causes to be performed any act that they are precluded from doing under Sections 6 or 9 of the Act.<sup>cxxiii</sup> This provision ensures that patentees have exclusive control over their intellectual property and can take legal action against unauthorized use. The Act provides that infringement is actionable at the suit of the patentee, and the court may grant a range of remedies to address the harm caused.<sup>cxxiv</sup> Damages for the losses suffered by the patentee as a result of the infringement is ward to ensure that the patentee or design owner is adequately compensated for any financial harm caused by the unauthorized use of their invention. Injunctions are a crucial remedy as they stop ongoing infringement and prevent future violations. These orders are to prevent the infringer from continuing the unauthorized use of the patent. Account of the profits awarded for the profit made during the infringement.<sup>cxxv</sup> In addition, the court can award any other relief that the court deems appropriate, similar to remedies available in cases involving the infringement of other proprietary rights.<sup>cxxvi</sup> A licensee, who has been granted the right to use the patent by the patentee, may take action if the licensor fails to address infringement.<sup>cxxvii</sup> This provision promotes the effective enforcement of intellectual property rights and ensures that all parties with an interest in the patent are protected. The Act also establishes a presumption of infringement in cases involving process patents, making it easier for patentees to prove their case by shifting the burden of proof to the alleged infringer.<sup>cxxviii</sup>

## 2. South Africa

In South Africa the Copyright Act grants the owners of copyrighted works the right to take legal action against infringements. These remedies include damages, injunctions, accounts of profits, and the delivery of infringing copies or plates used for making those copies.<sup>cxxxix</sup> These remedies are similar to those available in cases of infringement of other proprietary rights. Where infringement occurs but the defendant was unaware and had no reasonable grounds to suspect that copyright subsisted in the work, the plaintiff will not be entitled to damages. However, the plaintiff can still seek an account of profits derived from the infringement.<sup>cxxx</sup> If copyright infringement is proven or admitted, the court may award additional damages, considering factors like the infringement's blatant disregard for the copyright and any resulting profits for the infringing party. This ensures the plaintiff receives effective redress. The Act also provides specific provisions to address cases where the infringement was unintentional and considers the severity and benefits gained from the infringement when assessing damages.<sup>cxxxi</sup>

By offering a range of remedies and considering the circumstances of each case, this section ensures that copyright owners can protect their rights while maintaining fairness and proportionality in the legal system. The Act grants the exclusive licensee the same rights of action and is entitled to the same remedies as if the licence had been an assignment.<sup>cxxxii</sup> The Act provides for specific penalties and proceedings for individuals who infringe on copyrighted works. These provisions are designed to protect the rights of copyright holders and deter unauthorized use of protected materials. The Copyright Act specifies actions that infringe copyright and outlines the corresponding penalties.<sup>cxxxiii</sup>

Section 27 of the South African Copyright Act covers penalties and proceedings for copyright infringement, the Act identifies several actions that, when performed with knowledge of copyright subsistence, are considered infringements. This section outlines the legal recourse available to copyright holders in South Africa in cases of infringement. The copyright owner, assignee, or exclusive licensee can take legal action in the court with jurisdiction over the location where the infringement occurred. This section is crucial in safeguarding the rights of copyright owners by criminalizing specific activities that undermine their intellectual property. The provisions outlined in this section aim to deter individuals and entities from

engaging in activities that exploit copyrighted works without authorization, ensuring that creators are protected from unfair use or distribution of their works.

When a person infringes a work while copyright subsists in it and engages in actions such as making, selling, hiring, distributing, or importing infringing copies knowing that they are infringing the work commits an offense. These actions include making copies for sale or hire, selling or offering them for hire, exhibiting them in public for trade purposes, importing them into South Africa and distributing them for trade or other purposes to the extent that the copyright owner is prejudiced, except where it is for private or domestic use. This subsection ensures that both commercial and non-commercial distribution of infringing copies is penalized, provided it harms the copyright owner.<sup>cxxxiv</sup>

The Act specifically, it criminalizes the possession of a plate such as a mold or master copy intended for making infringing copies, provided the person knows its purpose. This provision targets the supply chain of piracy by penalizing those who facilitate the production of unauthorized copies.<sup>cxxxv</sup> The Act also deals with the unauthorized public performance<sup>cxxxvi</sup> of literary or musical works and rebroadcasting or transmission of broadcasts.<sup>cxxxvii</sup> In addition the act focuses on the unauthorized distribution of programme-carrying signals. It makes it an offense to distribute such signals to a distributor for whom they were not intended, knowing that this constitutes copyright infringement. This provision is particularly relevant in the context of satellite and cable broadcasting, where signals are often transmitted across borders. It makes it an offense to distribute such signals to a distributor for whom they were not intended, knowing that this constitutes copyright infringement. This provision is particularly relevant in the context of satellite and cable broadcasting, where signals are often transmitted across borders.<sup>cxxxviii</sup>

The penalties accompanying the offenses are clearly defined. For actions under subsection (1), the penalties differ depending on whether it is a first or subsequent conviction. For a first conviction, offenders may face a fine of up to 500-rand, imprisonment for up to six months, or both, per infringing article. For repeat convictions, the fine increases to 1,000 rand, with imprisonment of up to one year, or both, per infringing article. Additionally, the total penalties for related offenses are capped at 10,000 rand or 10 years of imprisonment.<sup>cxxxix</sup> Offenses under other subsections, such as the possession of tools for infringement or

unauthorized public performance, carry slightly different penalties, including fines of up to 1,000 rand for a first conviction and the possibility of imprisonment for subsequent offenses.<sup>cxl</sup>

The South African Trademarks Act provides a robust legal framework for the protection of registered trademarks, ensuring that trademark owners can defend their rights against unauthorized use and can safeguard their brand identity and reputation. Section 34 of the Act outlines the circumstances under which a registered trademark is considered infringed, as well as the exceptions where the use of a mark does not constitute infringement. The key elements of infringement. The actions that constitute infringement of a registered trademark occur when there is unauthorized use of a mark in the course of trade that conflicts with the rights of the trademark owner.<sup>cxli</sup> The provision identifies three primary situations where infringement may arise, the first scenario involves the unauthorized use of a mark that is identical or nearly identical to the registered trademark in relation to goods or services for which the trademark is registered. Such use is considered infringing if it is likely to cause deception or confusion among consumers where the good or services are identical or similar.

<sup>cxlii</sup> Also this applies to the situation when a mark identical or similar to a registered trademark is used on goods or services that are dissimilar to those covered by the registration. However, this only constitutes infringement if the registered trademark is well-known in South Africa, and the use of the mark takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trademark.<sup>cxliii</sup> The Act clarifies that this provision does not apply to trademarks covered under Section 70(2), which deals with trademarks that have become customary in the current language or practices of the trade.<sup>cxliv</sup> The Act in subsection (2) also provides for a list of exceptions where the use of a mark does not constitute infringement. These exceptions ensure that trademark rights do not unfairly restrict legitimate business activities or freedom of expression.

Also section 34 (3) outlines the remedies available to trademark proprietors in cases of infringement. Additionally, it emphasizes the importance of fair practice and ensures that the rights of registered users are protected. This subsection focuses on the remedies for infringement, the requirement of fair practice, and the procedural safeguards for registered users. A key aspect of Section 34 is the requirement that any use of a mark falling under paragraphs (a), (b), or (c) of Section 34(1) must be consistent with fair practice. This means that

even if a use is technically permissible under the exceptions to infringement, it must still be conducted in a manner that is fair and equitable. When a registered trademark is infringed, the court has the authority to grant a range of remedies to the trademark proprietor. These remedies are designed to address the harm caused by the infringement and to prevent further unauthorized use of the mark.

The court may issue an interdict, which is a legal order to stop the infringing activities thereby protecting the trademark owner's rights.<sup>cxlv</sup> The court may order the removal of the infringing mark from all materials, such as packaging, advertisements, or products.<sup>cxlvi</sup> In cases where the infringing mark cannot be removed, the court may order that the materials be delivered to the trademark proprietor. The trademark proprietor may be awarded damages to compensate for the losses suffered as a result of the infringement.<sup>cxlvii</sup> The court may also award damages in lieu of, a reasonable royalty that would have been payable by a licensee for the use of the trademark.<sup>cxlviii</sup> To determine the appropriate amount of damages or a reasonable royalty, the court may direct a formal enquiry to assess the extent of the harm caused by the infringement and to calculate the compensation owed to the trademark proprietor.<sup>cxlix</sup> The trademark proprietor is required to provide a written notice to every registered user<sup>cl</sup> of the trademark whose name is recorded in the register. This notice ensures that registered users are aware of the proceedings and have the opportunity to protect their interests.<sup>cli</sup>

In essence Section 34 creates a careful balance between protecting the rights of trademark owners and allowing legitimate uses of marks by others, by delineating the circumstances under which infringement occurs and the exceptions that permit certain uses. The Act emphasizes the importance of fair practice and ensures that trademark owners have access to a range of remedies. This framework not only safeguards the interests of trademark owners but also fosters a competitive and innovative business environment in South Africa.

The South African Patents Act<sup>clii</sup> provides for the protection of patent rights, ensuring that inventors and patentees can safeguard their innovations from unauthorized use. Section 65 of the Act is particularly significant as it outlines the procedures and remedies available in cases of patent infringement. The Act specifies parties that are entitled to institute patent infringement proceedings as the patentee and exclusive licensee.<sup>cliii</sup> The procedure for



infringement proceedings must follow what is prescribed by the law.<sup>cliv</sup> The plaintiff is entitled to certain remedies for patent infringement such as interdict which is a court order to stop the infringing activities.<sup>clv</sup> Compensation for the financial losses suffered by the plaintiff as a result of the infringement in the form of damages are awarded by the court. Damages are intended to restore the plaintiff to the position they would have been in had the infringement not occurred. The court may order the delivery-up of any products, materials, or tools involved in infringement. This ensures that infringing goods are completely removed from circulation. The defendant may counterclaim for the revocation of the patent, arguing that the patent is invalid and should be revoked relying on lack of novelty, obviousness, or insufficient disclosure allowing the defendant to challenge the validity of the patent in their defense.<sup>clvi</sup> Notice must be given to all licensees whose name is recorded in the register. This notice ensures that licensees are aware of the proceedings and have the opportunity to protect their interests.<sup>clvii</sup> These remedies provide comprehensive protection for patentees and exclusive licensees, ensuring that they can effectively enforce their rights and recover losses caused by infringement.

Section 65 of the South African Patents Act provides a comprehensive framework for addressing patent infringement. It grants the patentee and exclusive licensee the right to institute infringement proceedings and outlines the remedies available, including interdicts, delivery up of infringing goods, and damages. The Act also ensures that defendants have the right to counterclaim for revocation and challenge the validity of the patent. Additionally, it requires the plaintiff to notify licensees of the proceedings and allows licensees to intervene and recover damages. Together, these provisions ensure that patent rights are effectively enforced while providing a fair and balanced process for all parties involved. By protecting the rights of patentees, licensees, and defendants, the Act promotes innovation and fosters a robust intellectual property ecosystem in South Africa.

In summary, these penalties are intended to provide a strong deterrent against infringement, emphasizing the legal protections afforded to intellectual property. By imposing fines and imprisonment, the Act ensures that copyright holders can effectively enforce their rights and seek redress for unauthorized use of their works. Together, these provisions ensure that

inventors and creators are adequately protected and that infringers are held accountable for their actions, thereby promoting innovation and creativity in Nigeria and South Africa.

## **6. Enforcement required under the TRIPS Agreement**

The enforcement provisions of the TRIPS Agreement are particularly significant, as they ensure that IP rights are not merely theoretical but are actively safeguarded through fair, transparent, and efficient legal procedures. The foundation of IP enforcement under TRIPS is laid out in Article 41, which establishes the general obligations for member countries. It requires that member states ensure their legal systems provide for effective enforcement of IP rights to prevent infringement and offer remedies for violations. Enforcement procedures must be fair, equitable, and not unnecessarily complicated or costly. Additionally, decisions on the merits of a case must be in writing, reasoned, and subject to judicial review. These principles ensure that IP enforcement is accessible, transparent, and consistent with the rule of law.

The TRIPS Agreement emphasizes the importance of civil and administrative procedures for enforcing IP rights. The Agreement outlines the requirements for fair and equitable judicial processes. Right holders must have access to civil judicial procedures to enforce their IP rights, and defendants are entitled to written notice and the opportunity to defend themselves. Courts are granted the authority to require parties to produce relevant evidence, issue injunctions to stop infringing activities, and award damages adequate to compensate for the injury caused by infringement. Furthermore, courts can order the disposal or destruction of infringing goods and materials used to produce them, ensuring that infringing products are removed from the market.<sup>clviii</sup>

The TRIPS Agreement also addresses the enforcement of IP rights at national borders. The provisions of the Agreement require member countries to implement procedures for customs authorities to suspend the release of suspected counterfeit or pirated goods. Right holders can request customs authorities to take action against infringing goods being imported, and authorities may require right holders to provide evidence of infringement and post security or equivalent assurance to protect the importer and prevent abuse. These border measures are

critical in preventing the international trade of counterfeit and pirated goods, which can undermine legitimate markets and harm right holders.<sup>clix</sup>

## **7. Recommendations**

Both Nigeria and South Africa should consider updating their intellectual property laws to align with international best practices. This includes simplifying registration processes and enhancing clarity in regulations. Governments should invest in training programs for law enforcement and regulatory bodies to better understand and enforce intellectual property rights. This can improve the effectiveness of investigations and prosecutions. Initiatives to educate businesses and consumers about the importance of intellectual property rights can foster a culture of respect for these rights. Public awareness campaigns should target various sectors, particularly creative industries. Streamlining court procedures for intellectual property cases can lead to quicker resolutions. Specialized intellectual property courts or tribunals could be established to handle such disputes more efficiently. Nigeria and South Africa should engage in regional and international partnerships to share best practices and resources. Collaborative efforts can help combat piracy and counterfeiting more effectively. Governments should provide resources and assistance to SMEs in navigating the trademark registration process and understanding their rights, thus promoting innovation.

## **8. Conclusion**

IP enforcement is based in a holistic approach that includes civil procedure, available remedies through criminal action, structure and specialisation of courts and appellate bodies, cost of litigation and legal advice. The enforcement of IPR is a critical factor in promoting innovation, protecting creators, and fostering economic growth in Nigeria and South Africa. Both countries have made strides in establishing legal frameworks for IPR, but significant challenges remain. Nigeria's dual system of trademark protection allows for both registered and unregistered marks, yet enforcement is hampered by inadequate resources, rampant piracy, and a lack of public awareness. In contrast, South Africa's more developed trademark regime benefits from established enforcement mechanisms and a greater emphasis on public

education, but it still faces challenges, such as the need for quicker judicial processes and improved capacity for enforcement agencies. To bridge the gap in enforcement effectiveness, both countries can learn from each other's experiences. Nigeria can benefit from South Africa's comprehensive approach to public awareness and specialized judicial processes, while South Africa can draw from Nigeria's flexible protection of unregistered trademarks to enhance its framework. Collaboration at regional and international levels can facilitate the sharing of best practices and resources, creating a united front against piracy and counterfeiting. Ultimately, the effective enforcement of intellectual property rights in both nations requires a multi-faceted approach. Strengthening legal frameworks, enhancing the capacity of enforcement agencies, raising public awareness, and leveraging technology are essential steps towards a more robust IPR environment.

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- xlii Section 62 (1) (d) Trademarks Act 194 of 1993.
- xliii Section 34 Trade Marks Act 194 of 1993; Yeukai Mupangavanhu and Kawake Sipelo Vuke, 'The Risk of Confusion in Trademark Infringement in South Africa and Kenya: Lessons from Singapore?' (2023) 10(2) *Journal of Comparative Law in Africa* 174-203.
- xliv Section 33 Trademarks Act 194 of 1993.
- xlv Section 34 (3) Trademarks Act 194 of 1993.
- xlvi Cap. P2, LFN 2004.
- xlvii FO Babafemi, *Intellectual Property, The Law and Practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria* (1st ed, Justinian Books 2006) 344.
- xlviii Section 1(1) of the Patents and Designs Act Cap.P2, LFN 2004.
- xlix Section 2(1) PDA.
- l Section 7 PDA.
- li Section 13 PDA.
- lii Section 12 PDA.
- liii Section 19 PDA.
- liv Section 20 PDA.
- lv Section 26 PDA.
- lvi Section 27(1) PDA.
- lvii Section 27(2) PDA.
- lviii Roshana Kelbrick, *Intellectual property law* (2012) (1) *Annual Survey of South African Law* 525-534
- lix Section 37 Patents Act No. 57 of 1978.
- lx Section 25 (10) Patents Act No. 57 of 1978.
- lxi Section 46 PA.
- lxii Section 40 (4) (b) PA.
- lxiii Section 45 (1) PA.
- lxiv Kelbrick (n. 72).
- lxv Section 1 Design Act.
- lxvi Section 15 Design Act.
- lxvii Section 22 Design Act.
- lxviii Corbett (n 22).
- lxix Corbett (n 22).
- lxx Oloko (n 34).
- lxxi Oloko (n 34).
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- <sup>lxxii</sup> International Trade Organisation, 'Nigeria - Country Commercial Guide' <https://www.trade.gov/country-commercial-guides/nigeria-trade-agreements> Accessed 2 February 2025.
- <sup>lxxiii</sup> ITO guideline (n 86).
- <sup>lxxiv</sup> Section 34(3) C28 LFN 2004.
- <sup>lxxv</sup> Section 34(3) (d) C28 LFN 2004.
- <sup>lxxvi</sup> Section 34(3) (e) C28 LFN 2004.
- <sup>lxxvii</sup> Section 34(3) (f) C28 LFN 2004.
- <sup>lxxviii</sup> Copyright (Video Rental) Regulations 1999 Copyright Act (As amended by the Copyright (Amendment) Decree 1999) *Commencement: 7th September 1999.*
- <sup>lxxix</sup> Copyright (Security Devices) Regulations 1999<sup>lxxix</sup> Copyright Act (As amended by the Copyright (Amendment) Decree 1999) *Commencement: 7th September 1999.*
- <sup>lxxx</sup> Copyright (Optical Discs Plants) Regulations, 2006 *Commencement: 15th September 2006.* Federal Republic of Nigeria Official Gazette No. 63, Vol. 93 of 20th December 2006. Government Notice No. 47.
- <sup>lxxxi</sup> "optical disc" means any medium or device, other than a production part, on which data in digital form, readable by means of an optical scanning mechanism employing a high-density light source such as a laser, has been stored or is capable of being stored, and includes but is not limited to: CD (compact disc); CD-ROM (compact disc read-only memory); CD-R (compact disc recordable); CD-RW (compact disc rewritable); DVD (digital versatile disc); DVD-RAM (digital versatile disc random access memory); LD (laserdisc); MD (minidisc); VCD (video compact disc); CVD (China video disc); SVCD (super video compact disc); SACD (Super audio compact disc). See generally section 13 Copyright Act Copyright (Optical Discs Plants) Regulations, 2006.
- <sup>lxxxii</sup> "production part" includes: (a) Any other device, usually referred to as a "master", "father" or "mother", embodying data from which a stamper may be produced by means of an electroplating process. (b) The component of a mould usually referred to as a "stamper" that embodies data in a digital form and is capable of being used to mould optical discs, "Professional organization" means an organisation whose membership consists wholly or substantially of intellectual property right holders, and which is mandated by those members to enforce their rights against counterfeiting and/or piracy.
- <sup>lxxxiii</sup> Section 4 Copyright Act Copyright (Optical Discs Plants) Regulations, 2006.
- <sup>lxxxiv</sup> Oloko (n 34).
- <sup>lxxxv</sup> Companies Act, 2008 No 71 of 2008.
- <sup>lxxxvi</sup> Companies Act, 2008 No 71 of 2008.
- <sup>lxxxvii</sup> Section 187 Companies Act, 2008 No 71 of 2008.
- <sup>lxxxviii</sup> Section 251 1 (f) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that the Federal High Court shall have exclusive jurisdiction over any Federal enactment relating to copyright, patent, designs, trade marks and passing-off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards;
- <sup>lxxxix</sup> Talkmore Chidede, The role of intellectual property rights' protection in advancing development in South Africa (2022) 26(1) *Law, Democracy & Development*.
- <sup>xc</sup> Patent Litigation in South Africa | What You Need to Know - Adams & Adams <https://www.adams.africa/russell-bagnall/patent-litigation-south-africa-need-know/>
- <sup>xc</sup> Ifeyinwa Ufondu, 'Nigeria: A Guide to Trademark Registration in Nigeria' <https://www.mondaq.com/nigeria/trademark/757232/a-guide-to-trademark-registration-in-nigeria> accessed 2 February 2025.
- <sup>xcii</sup> Section 3 TMA.
- <sup>xciii</sup> Article 22 TRIPS Agreement.
- <sup>xciv</sup> Second Schedule Part II of the Constitution of the Federal Republic of Nigeria.
- <sup>xcv</sup> Section 25 Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights.
- <sup>xcvi</sup> Intellectual Property Policy of the Republic Of South Africa Phase I 2018 International Trade and Economic Development [https://www.gov.za/sites/default/files/gcis\\_document/201808/ippolicy2018-phasei.pdf#:~:text=The%20South%20African%20Constitution%20already%20protects%20intellectual%20property,just%20protection%2C%20administration%2C%20management%2C%20and%20development%20of%20IP.](https://www.gov.za/sites/default/files/gcis_document/201808/ippolicy2018-phasei.pdf#:~:text=The%20South%20African%20Constitution%20already%20protects%20intellectual%20property,just%20protection%2C%20administration%2C%20management%2C%20and%20development%20of%20IP.)
- <sup>xcvii</sup> Oloko (n 34), Article 42 and 60 of the TRIPS Agreement.
- <sup>xcviii</sup> Section 36 and 44 CA 2022.
- <sup>xcix</sup> Section 36 (2) CA 2022.
- <sup>c</sup> Section 37 CA 2022.
- <sup>ci</sup> 'Action' includes counterclaims, and references to plaintiffs or defendants are interpreted accordingly.
- <sup>cii</sup> Section 44 1 (c) 2(d), 4, 7 and 8.
- <sup>ciii</sup> Section 49 (3) CA 2022.
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- civ Section 5(2) TMA.  
cv Section 3 TMA.  
cvi Section 49 TMA.  
cvii Section 5(3) TMA.  
cviii Section 13(2) TMA.  
cix Section 5(4) of the Trade mark Act.  
cx Section 5(2) of the Trade Marks Act.  
cxi Section 3 of the Trade Marks Act.  
cxii Section 49 of the Trade Marks Act.  
cxiii Section 5(3) TMA.  
cxiv Section 13(2) TMA.  
cxv Section 5(4) TMA.  
cxvi Section 6(2) TMA.  
cxvii *Ayman Enterprises Ltd v Akuma Ind Ltd & Ors (2003) LPELR-683 (SC)*.  
cxviii *Ibid* (n. OLOKO). See *Ferodo Limited v. Unibros Stores*(1980) F.S.R. 489.  
cxix (1993 FHCLR 233.  
cxx Folarin Shyllon p.223; see also Ogunkeye and Adams , Trade World July-August 1994 19.  
cxi Section 60 of the Trade Marks Act.  
cxii CAP. P2 LFN 2004.
- cxiii Section 25 (1) Patent and Design Act, CAP. P2 LFN 2004.  
cxiv Section 25 (2) PDA.  
cxv Section 25 (2) PDA.  
cxvi Section 25 (2) PDA.  
cxvii Section 25 (1) PDA.  
cxviii Section 25 (4) PDA.  
cxix Section 24(1) South Africa CA; See also *Moneyweb (Pty) Ltd v Media 24 (Pty) Ltd (2016)*.  
cxx Section 24(2) South Africa CA.  
cxxi Section 24(3) (b) South Africa CA.  
cxxii Section 25 South Africa CA.  
cxxiii Section 27 South Africa CA.  
cxxiv Section 27(1)  
cxxv Section 27(2)  
cxxvi This provision is particularly relevant in contexts such as live performances, concerts, or public events where copyrighted material is used without permission.  
cxxvii Section 27( 3 &4).  
cxxviii Section 27(5).  
cxxix Section 27(6).  
cxl Section 27(7).  
cxli Section 34(1) South African Trade Marks Act 194 of 1993.  
cxlii Section 34(1) (a) SATMA.  
cxliii Section 34(1) (b) SATMA.  
cxliv Section 34(1) (c) SATMA.  
cxlv Section 34(3) (a) SATMA.  
cxlvi Section 34(3) (b) SATMA.  
cxlvii Section 34(3) (c) SATMA.  
cxlviii Section 34(3) (d) SATMA.  
cxlix Section 34(4) SATMA.  
cl Registered users are individuals or entities authorized to use the trademark under a licensing agreement.  
cli Section 34(5) SATMA.  
clii Patents Act, 1978 Act No 57 of 197.  
cliii Section 65(1) PA.  
cliv Section 65(2) PA.  
clv Section 65(3) PA.  
clvi Section 65(4) PA.  
clvii Section 65(5) PA.  
clviii Articles 42-49 TRIPS Agreement.
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cix Articles 51-60 TRIPS Agreement.