

**BANWO & IGHODALO**

## **STRENGTHENING INTELLECTUAL PROPERTY RIGHTS AND PROTECTION IN NIGERIA**

Sometime in April this year, the Intellectual Property Law Association of Nigeria (“IPLAN”) elected new executive officers to oversee its affairs. Notably, this came at a time when advocacy for the reform of the legal framework for protecting intellectual property (“IP”) rights in Nigeria is gaining momentum among stakeholders and attracting more attention from the government.

Significantly, IPLAN’s election has raised hope among stakeholders of an emerging new and re-energized regime of IP development, rights awareness and protection in the country. It is generally expected that proper coordination and synergy between the activities of this professional body and the other associations, regulators, IP owners and the entire IP community in Nigeria, will spur the advancement of property rights resulting in proper harnessing of talents and inventions and, by extension, economic growth in the near future.

This article reviews the IP regime in Nigeria and analyses some of the major challenges undermining IP rights in the country. In consonance with the aspirations of most of IP stakeholders, the article also discusses the prospects of IP policy reform and sets agenda for the development of an IP framework that will promote individual innovations, enhance foreign direct investments and international technology transfer and in effect, contribute substantially to national economic growth.

### **OVERVIEW**

Concerted efforts have been made over the years at promoting IP rights in Nigeria with some positive results being achieved. However, these efforts have been hampered by low public awareness about what IP rights are protected under the law; ineffective mechanisms for the protection and enforcement of such rights; inadequate penalties for infringements; official corruption and lack of coordination among the various agencies of government involved in the development and protection of IP rights.

Broadly speaking, there are two classes of IP namely Copyright and Industrial Property. While Copyright is concerned with literary, musical and artistic creations, Industrial Property covers rights in patents, trademarks, industrial designs, utility models, plants and animal varieties etc. The World Intellectual Property Organisation (“WIPO”) elucidates the concept of IP more succinctly by stating that:

*“IP refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce ... IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish”.*

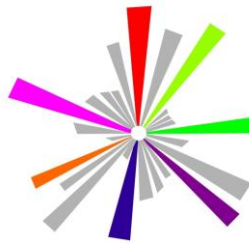
Essentially, IP rights are exclusive proprietary rights granted by law to the owners thereof, over intangible assets which are innovative products of the brain or the mind, as opposed to personal or real



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properties. IP Law therefore encompasses the body of rules and regulations governing the creation, acquisition and protection of the foregoing rights as well as adjudication over allegations of their infringements. Concrete efforts at developing the Nigeria's indigenous IP regime began to materialize shortly after the country attained independence in the early 1960s and have remained a work-in-progress till date.

### LEGAL AND INSTITUTIONAL FRAMEWORKS

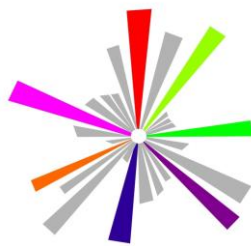
Some of the laws governing IP rights and protection in Nigeria include:

- Copyright Act (as amended), Cap. C28, Laws of the Federation of Nigeria 2004
- Patents and Designs Act, Cap. P2, Laws of the Federation of Nigeria 2004
- Trade Marks Act, Cap. T13, Laws of the Federation of Nigeria 2004
- Merchandise Marks Act, Cap. M10, Laws of the Federation of Nigeria 2004
- Trade Malpractices (Miscellaneous Offences) Act, Cap. T12, Laws of the Federation of Nigeria 2004

There are also certain international IP regimes in the form of treaties that have been ratified by Nigeria, such as the Paris Convention for the Protection of Industrial Property (ratified in September 1963); the Berne Convention (1986); the Rome Convention (Performers, Producers of Phonograms and Broadcasting Organisations – ratified in October 1993); the Patent Law Treaty (ratified in April 2005) and the Patent Cooperation Treaty (ratified in May 2005). However, not all existing and important IP related treaties have been ratified in accordance with the provisions of section 12(1) of the Constitution of the Federal Republic of Nigeria (1999) (as amended). This flies in the face of the substantial commitment demonstrated by the country over the years to multilateral efforts aimed at developing and protecting the rights of IP owners globally, exemplified in the country's membership of the WIPO (since 1993) and the World Trade Organization ("WTO") (since 1995).

Whilst there is currently no special body with the mandate to generally oversee the various IP regimes in Nigeria, certain industry-specific institutions and regulations have over the years been established to govern IP in the country. These include the following:

- The Nigerian Copyright Commission ("**NCC**") – established under the Copyright Act to regulate creative activities such as music, publishing, artistic and literary works. Among the laudable achievement of the NCC in its bid to enhance copyright owner's rights is the issuance of the Copyright (Collective Management Organizations) Regulations 2007 and licensing of Collective Management Organisations to engage in collective management of copyright; issuance of the Copyright (Optical Discs Plants) Regulations 2006, which regulates all disc manufacturing companies in Nigeria by requiring them to compulsorily register with the NCC after meeting certain specified conditions for operation;
- The Nigerian Broadcasting Commission ("**NBC**") – established under the National Broadcasting Commission Act (Cap. NII, LFN 2004) and vested with the responsibilities of regulating and controlling broadcasting rights, licenses and assignments in Nigeria;



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- The Trademarks, Patents and Designs Registry – established pursuant to the Trade Marks Act and the Patents and Designs Act, under the Federal Ministry of Commerce to regulate the filing of trademarks, industrial designs as well as grant of patents in Nigeria;
- National Office for Technology Acquisition and Promotion (“**NOTAP**”) – established under the NOTAP Act (Cap. N62, LFN 2004) to register technical service agreements, technology transfers and know-how agreements between Nigerian and non-Nigerian parties.

Several other private (non-governmental) initiatives have also been formed to support the above government agencies in the facilitation and enhancement of IP rights, such as the following:

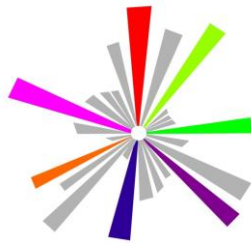
- Intellectual Property Lawyers Association of Nigeria (**IPLAN**);
- The Nigerian local Chapter of the International Association for the Protection of Intellectual Property (**AIPPI**);
- Anti-Counterfeiting Collaboration (ACC) of Nigeria;
- The Performing Musicians Association of Nigeria (PMAN);
- Copyrights’ Collecting Societies – associations of copyright owners established pursuant to and licensed under the Copyright (Collective Management Organizations) Regulations 2007 with the principal objectives of negotiation and granting of licenses, collecting and distributing of royalties in respect of copyright works; and the
- Federation of Intellectual Property Owners (FIPO).

## OBSERVATIONS

Despite the various efforts made at strengthening IP rights and protection in Nigeria, challenges remain. Common infringements take the form of piracy, counterfeiting, unauthorized/unlicensed use and unfair competition. These activities violate the proprietary rights of IP owners to reap the benefits of their inventions and hence, hamper the growth and development of intellectualism, innovation and the entire creative industry.

Infringement of IP rights also has negative implications on the overall economy as it obstructs genuine investments by both domestic and foreign investors, hinders job creation and causes loss of tax revenues to the government. Socially, widespread IP violations corrupt the cultural values and batter the national image of a country.

Copyright violation is one of the major challenges to IP rights and development in Nigeria. This cankerworm manifests more virulently in the following industries: book publishing (book piracy), information and communications technology – ICT – (internet & software piracy) and in film and entertainment (musical & cinematography disc piracy). A 2012 study undertaken by some industry



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analysts revealed that “Nigeria is ranked among countries where piracy is most prevalent with rates as high as 82%, 83%, 83%, 82% and 83% respectively in the years 2007, 2008, 2009, 2011 and 2012.

Recent data from the NCC shows that the situation hasn’t improved and is causing severe economic hemorrhage. The NCC has further stated that, not only is piracy threatening the survival of the local industries, which are discouraged from making the needed investments in the economy but also a disincentive to foreign direct investment (“**FDI**”) and its associated technical know-how and technology transfer.

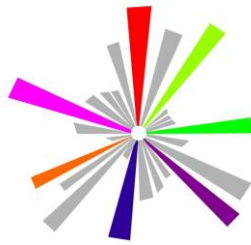
The effect of piracy on the entertainment industry in Nigeria further highlights the terrible cost Nigeria has had to pay for its weak IPR protection and enforcement framework. According to the National Bureau of Statistics (“**NBS**”), Nollywood – Nigeria’s film industry – currently accounts for 1.42% of Nigeria’s GDP (₦853.9 billion or \$7.2 billion); up from 1.4% as at 2014 when the country last rebased its GDP figures. Nollywood is said to be the country’s second largest job-creating sector after agriculture, providing employment to over 1 million directly and indirectly, mostly youths. In a report by the Nigerian Export-Import Bank, Nollywood is said to generate about \$590 million annually and considered a vital non-oil area that is crucial to Nigeria’s economic diversification. However, a World Bank report estimates that “for every legitimate copy (of a Nigerian film) sold, nine others are pirated”. As at 2014, an estimated figure of ₦82 billion was reported to have been lost by Nollywood alone to piracy.

In 2005, while launching the Strategic Action Against Piracy (“**STRAP**”) initiative, the then President, Chief Olusegun Obasanjo, captured effectively the socio-economic effects of piracy thus:

*“The damaging effects of piracy are visible all around us; the waning zeal for creativity; the dearth of well researched textbooks and reading materials in the education sector; the diminishing of the artistic and literal quality of our stage performance and the increasing colourless and uninspiring products in the visual arts. Expectedly, investors are wary and the younger generation is not encouraged to pursue careers in the arts and entertainment industry. We are all confronted by an attack on our culture and future as a people. We are faced with the reality of a declining economic resource and a source of pride as a nation”.*

### SALVAGING THE SITUATION

Enhancing IPR protection and enforcement in Nigeria will have to begin, essentially, with the development of an IP policy that recognizes the importance of a robust and virile IPR legal framework to National developmental aspiration, particularly as regards science and technology and trade and industry. This step will then have to be followed by an inclusive reform, involving the identification of the critical problems bedeviling the administration of this creative sector of the economy as well as and the development of regulatory frameworks governing the sector which seek to address the identified critical problems as well as use IP as a vehicle of technical and industrial development and avenue for wealth and job creation.



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As Nigeria increasingly becomes an important economic hub both in the West African sub-region and in the African continent as a whole, protection of the rights subsisting in IPs created in the country is not only strategic to the nation's current drive to develop its non-oil sector but also central to its overall economic growth and development goals. Accordingly, there must be initiation of purposeful collaborations, going forward, between the government and the private sector organisations to identify, dialogue, and develop viable solution-frameworks to the problems of IPR infringements in Nigeria.

As with Copyright earlier discussed, the administration of Industrial Property (trademarks, patents and industrial designs) is marred with difficulties in the country in terms of registration, protection and enforcement.

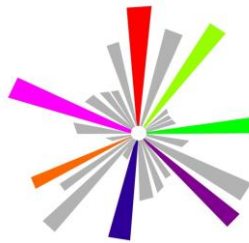
Intellectual Property laws protect the interests of creators by giving them proprietary rights (Intellectual Property Rights (IPRs)) over their creations. Infringement of IPRs undermines genuine investment in creativity, innovation and knowledge. Invariably, the granting of exclusive proprietary rights (usually in consideration of the disclosure of the creation), creates an incentive for creators to develop, produce, and distribute new and genuine goods and services for commercial purpose.

Notably, in countries where IPR holders are not protected under a clearly defined and efficiently administered intellectual property legal and policy framework, the economy bears the brunt of such inadequacies in terms of undeveloped potentials, hindered capacity for job creation (direct and indirect) and low international competitiveness. This, together with poor education system, comatose power system and unfavourable fiscal system accounts for stagnant growth of Nigeria's industrial development. Reform efforts that are needed to strengthen IPRs in Nigeria will therefore necessarily have to holistically address the challenges identified, in the areas of registration, protection, enhancement and enforcement.

Ordinarily, trademarks, patented inventions and registered designs are incorporeal hereditaments with beneficial ownership rights in the holders. The exclusive rights granted to the proprietors of these incorporeal hereditaments, enable them to control the use of the intellectual property in which the rights subsist. Statutorily, exploitation of all or any of their rights by third parties must be with the permission of the proprietors, by way of licenses or assignments, usually upon provision by the relevant third party, of valuable consideration. However, registration of these industrial property rights is necessary for the proprietors to enjoy exclusive rights over them.

Registration of industrial property is hampered by an archaic and not very efficient administrative system in Nigeria, creating a disincentive to personal and corporate investment in creativity and invention, with the overall negative impact on human and economic development. Essentially, the most visible challenges are:

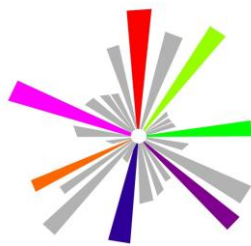
- **Outdated Laws:** Most of Nigeria's IP laws are old and out of sync with the trends in the 21st Century global market place. For instance, the Trade Marks Act was enacted in 1967 (and even then, was a re-enactment of the UK's 1938 Trade Marks Act) while the Patents and Designs Act was in 1971. Current laws fail to contemplate, and therefore do not provide means, for protecting



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new developments and innovations in industrial property. Stakeholders have repeatedly pointed out the fact that in other advanced climes (like in Britain from where most of Nigerian IP legislation took their roots), reforms of the laws have been carried out severally to enhance IPR protection, eliminate onerous statutory provisions and ensure conformity with new innovations.

- **Administrative Bottlenecks at the Trademarks, Patents and Designs Registry (“Registry”):** Since inception in 1967, the Registry has been riddled with several problems including but not limited to (i) lack of adequate funding; (ii) inadequate space for its operations; (iii) lack of well trained personnel; (iv) lack of an electronic database. All these have resulted in a disorganized filing system whereby IP files get mislaid or lost, an unduly protracted IP registration process (some trademark applications are known to have been registered well after the expiration of the seven (7) years initial validity period of their registration) and opposition process, lack of qualitative rulings issued by the Registry, and lack of funding to efficiently and effectively run the Registry.
- **Absence of a Ministerial Declaration on Convention Countries:** The Paris Convention for the Protection of Industrial Property (1883) permits a right owner that has filed an application in one of the contracting states, to take advantage of the filing date for the application where it applies for protection of the same rights in any of the other contracting states; provided that the application is made in those other contracting states within a certain period of time of the initial filing in the first contracting state. The subsequent application will be regarded as if it had been filed on the same day as the first application. In other words, it will have priority over applications filed by others during the said period of time, for the intervening period between the initial application and the subsequent application. The Patents and Designs Act as well as the Trade Marks Act requires the relevant Minister (in this case the Minister of Trade & Investment) to declare by order in the Federal Gazette, that any country specified in the order is a convention country for purposes of filing convention applications and claiming priority rights. However, Nigeria is yet to make this declaration in respect of Trade Marks in Nigeria. Notwithstanding, the Registry still accepts priority applications for registration despite there being no legal basis for doing so. Regarding Patents, the declaration was last made in 1971, recognizing all the Paris Union member-countries at that material time as “Convention Countries”. In effect, Nigerian IPR holders or foreign holders with interest in the Nigerian market are severely limited in the scope of the protection that is available to them, under the current legal framework in the country.
- **Nigeria is yet to take full benefits of multilateral efforts:** The country is not a member of some prominent multilateral organizations that provide for regional and international registration of IPRs, such as the Harare-based African Regional Intellectual Property Organisation (“ARIPO”); the Yaoundé-based Organisation *Africaine de la Propriété Intellectuelle* (“OAPI”); and the Geneva-based International Patent Cooperation Union (“IPCU”) formed based on the 1970 Washington Treaty – the Patent Cooperation Treaty (PCT). Neither has it ratified in accordance with Section 12 of the 1999 Constitution, recent intellectual property treaties and conventions to which it is signatory.

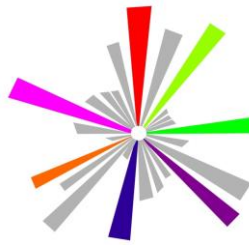


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- **Regulatory conflicts and lacunae:** There is a lack of coordination among various agencies whose regulatory functions impact IPRs in the country which largely make holders of registered IPRs or their licensees easily vulnerable to infringement. A ready example is the lack of common data bank or depository for regulatory alliance, among relevant government agencies and departments charged with the registration of business, commercial transactions and IPRs. For instance, while the Companies and Allied Matters Act (“CAMA”), (Cap. C20, LFN 2004), prohibits the registration of a company or business by a name which would violate, or is similar to, any existing trade mark registered in Nigeria without the consent of the owner of the trade mark; there are no mechanisms for data synergy between the Corporate Affairs Commission (“CAC”) and the Trade Marks Registry, to ensure efficient enforcement of the prohibition. Also, there is no similar provision in the Trade Marks Act. Another example is the Notice of Acceptance of trademark which is accepted by the National Agency for Food and Drug Administration and Control (“NAFDAC”) as one of the documents for registration of a regulated product. However, where such trademark has been successfully opposed pursuant to the Trade Marks Act, there is usually no communication to NAFDAC.
- **Challenge of IPR enforcement:** A very serious challenge facing IPR owners in Nigeria is the lack of an efficiently deterrent enforcement system. It appears that reforming our IP legislation alone may not achieve optimum results in protecting IPR holders, except the mechanism for enforcing the law is equally enhanced. Law enforcement agents, particularly the Nigerian Police Force and the Nigeria Customs Service, need to be more empowered to carry out their policing and prosecution functions. Experience shows that insufficient finance, inadequate or obsolete equipment and lack of up-to-date skills in the use of modern technologies among the rank and file of officers; prevent the various efforts being made in combating IPR infringement from achieving desired results.
- **Dearth of Judicial Precedent in IP:** There is also a dearth of IP cases in the country and this indicates that more effort needs to be made among the sector stakeholders (particularly IP lawyers, judges, judicial bodies, law teachers and law reform commissions, regulatory bodies and the general populace) towards developing Nigerian jurisprudence in this area. This problem is also exacerbated by the inadequate numbers of competent judges skilled in IP laws in the nation’s judiciary.

### LESSONS FROM OTHER DEVELOPING AND EMERGING ECONOMIES

In Nigeria, a two-pronged approach is required to address the problem with IPR protection and enforcement. Firstly, the whole framework of IPR administration requires overhauling. The current state where the Trademarks, Patents and Designs Registry still operates manual record system, and is managed as an underfunded appendage of the Ministry of Commerce and Investment must be addressed immediately. Leading Intellectual Property Offices (“IPOs”) are not organized the way the Nigerian IPO is currently organized and this may explain the poor state of things in Nigeria, compared to those other countries.



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For instance, in the United States of America (“US”), although the US Patents and Trademarks Office (“USPTO”) is an agency within the Department of Commerce, it is operationally independent and is only subject to the policy direction of the Secretary of Commerce in carrying out its functions. Section 1 of Title 35 U.S. Code stipulates that, it shall retain responsibility for decisions regarding the management and administration of its operations and shall exercise independent control of its budget allocations and expenditures, personnel decisions and processes, procurements, and other administrative and management functions in accordance with this title and applicable provisions of law. Its Headquarter comprises 18 buildings in Arlington, Virginia covering about two million square feet of office and related space and housing an estimated 7,100 employees.

Due to the peculiarities of the Nigerian socio-political system, a similar structure as that of the USPTO is advocated for the country. It is noted that this suggestion is not novel or recent as a bill for the establishment of an Industrial Property Commission, similar in function and power to the Nigerian Copyright Commission, has been developed as far back as 2006. A version of the bill is currently before the National Assembly and it is hoped that it will be treated with the requisite level of importance and urgency it deserves.

The second approach is the review of the legal framework and the legislation constituting the legal framework, not only to make substantive provisions for the rights of creators but also to provide an efficient enforcement and deterrent system for the protection of those rights.

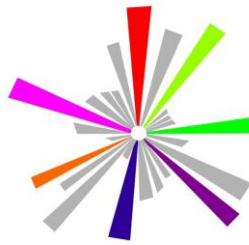
Such enforcement system will involve granting relevant law enforcement agencies, particularly the Nigerian Police Force and the Nigeria Customs Service, necessary powers to carry out their policing and prosecution functions. Instances where they may conduct a raid should be clearly delineated and the process for obtaining a search and seizure order should be significantly simplified.

The underlying problem that the foregoing, however, identifies is the dearth of an IP policy for the nation. Successive Governments have failed to understand the critical role that the protection and enhancement of IPR plays in the achievement of the industrial and commercial development of a country.

There are lessons to be learnt by Nigeria from emerging markets such as China and India, where IP has contributed immensely to the harnessing of talents; development of technical know-how; specialization in the production and exportation of modern technologies and overall growth and development of the economy.

In a 2015 Working Document by the European Commission (Brussels, 1.7.2015 SWD [2015] 132 final), studying the IP regimes in about 40 countries that have trade-relationships with European Union (EU) members; both China and India were rated high in Countries’ Ranking for the development of “solid and predictable IPR frameworks that create environments conducive to innovation and sustainable growth and offer effective enforcement”.





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In China, a political declaration was made at the 18th Chinese Communist Party Convention in 2013 which reinforces trade and IP in general and incorporates them into the Chinese national development plan. Prior to this, the nation adopted in June 2008 a National IP Strategy (“**NIPS**”) which was later, in March 2011, complemented by the 12th Five Year Plan with the objective of developing China into an innovative country. In pursuance of these objectives, major reforms of the legal and adjudicatory frameworks for IP in China have recently taken place and are still on-going. To this end, three specialized IP courts were created in 2014 in Beijing, Shanghai and Guangzhou.

The progress achieved so far through China’s policy measures has enhanced significantly, the country’s clear national goal of becoming an innovation economy by 2020.

Also as reported of India in the referred European Commission’s paper, landmark improvements have been noticed in India’s IPR regime; particularly since the country joined, in 2013, the international trade mark system’s Madrid Protocol. There have been major reforms recently in the administration of IPR in India such as the introduction of a “comprehensive e-filing services, customs services’ enforcement, co-operation between various enforcement departments, improved IPR awareness amongst officials, digitalization of the operations of the Indian Patent Office, and hiring of additional patent examiners.”

These efforts have strengthened IPR protection and enforcement in India such that today, Indian police will often take enforcement action on their own initiative where there are perceived or reported cases of IPR infringement while the courts are more efficient and effective in dealing with rights-enforcement suits.

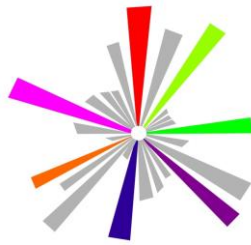
### ADVOCACY FOR A NATIONAL POLICY ON INTELLECTUAL PROPERTY

Obviously, Nigeria needs to develop a national policy on IP as a matter of urgency. From the experiences of China, India and the advanced countries of the world such as the US, no nation can consciously and seamlessly develop its IP without first setting up, and vigorously propagating, a National Policy Framework that will spell out in clear terms the overall IP goal of the nation and launch time-based policy thrusts with short, medium and long term development goals.

Effectively, when put in place, the proposed Nigerian **National IP Policy** (“**NIPP**”) will define what we want to achieve with our collective national talents, cultures and technologies and will be a mirror that reflects for other countries in the international community what direction our industrial and creative industries are headed and hence, the kind of international Conventions or Treaties that Nigeria would naturally be ready to ratify.

### CONCLUDING REMARKS

At a time when Oil, the nation’s principal source of foreign exchange earnings, is facing a precarious future (dwindling volume of production resulting from decaying and vandalized infrastructure; plummeting international prices and; competing, more efficient, alternative energy sources), the time to transform the nation from a traditional commodities-based and import-driven economy, to a knowledge-



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economy exporting expertise, talents, value-added products and tech-savvy inventions is ripe. This accounts for the current national agitation for a developed and self-reliant economy, buoyed by diversification.

We observe that a concurrent NIPP that will drive our collective industrial, technological and economic advancement goals must be developed and integrated into the diversification efforts. Additionally, we recommend that a holistic reform of the country's IP sector be immediately commenced with focus on attaining the following:

1. Clearly defined policy direction to be published in the national official gazette.
2. Integration of the developed NIPP into national consciousness through vigorous public awareness campaigns to be championed by the National Orientation Agency.
3. Inculcation of the NIPP into school curricula from the Senior Secondary School level to higher institutions of learning.
4. Automation of the systems in all IP registration offices and their harmonization with the platforms of all regulatory bodies for trade, business and investments in Nigeria; including but not limited to the CAC, Copyright Commission, Patents and Designs Registry, Trade Mark Registry, SON, NOTAP, CBN, NCS, FIRS, and NAFDAC. This will have the effect of creating a common database for these bodies. In like manner, it is also suggested that NOTAP and NITDA should be merged while the various laws constituting the IP framework should be revised to ensure that areas of overlap are addressed and that they complement one another rather than contradict or intrude into the purview of one another.
5. Financial autonomy for law enforcement agencies and the judiciary with adequate staff training in latest technology for both. Reforms of old IP laws and enactment of new ones in line with modern bilateral and multilateral treaties such as the TRIPS Agreement.
6. Finally, further amendment of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to create constitutionally recognized, specialized IP courts to handle IP-related matters. Competent legal practitioners skilled and experienced in IP law should be appointed both from the bar, the bench and the academia to sit at the specialized IP courts.

***The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo***

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