RIGHTS, REMEDIES AND EFFECTIVENESS OF REMEDIES UNDER THE NIGERIAN TRADEMARKS ACT: AN OVERVIEW

ABSTRACT

The registration and protection of trademarks in Nigeria are governed by the Trademarks Act. Statutorily, trademarks are valid for an initial period of seven years and then for further renewable fourteen-year periods. Universally, a trademark owner enjoys a bundle of exclusive rights upon registering his trademark. The basic rights include the rights to sue and be sued, assign, licence and the right to exclusive use of the mark about the products or services for which it is registered. Trademark infringements are a common form of trademark-related litigation. In the event of an infringement, its success in court depends on whether the defendant's use causes a likelihood of confusion and weakens the value of the proprietor's mark. In the end, a trademark proprietor is entitled to certain remedies, such as protecting the trademark proprietor from damage caused by infringers. This article discusses the rights accruable to trademark proprietors. It also highlights the remedies available to trademark proprietors in infringement cases and how effective these remedies are in compensating trademark proprietors on the one hand and deterring trademark infringers on the other hand.

1. INTRODUCTION

The primary objective of trademark law is to protect the rights of a proprietor who has undergone the strain of creating and registering a unique mark for his goods or services to, among other factors, distinguish such goods or services from that of others[1]. It also promotes the marketable qualities of goods against unscrupulous imitation or unauthorized use by others not having legal ownership over the mark[2].

By antecedent, trademarks were originally used to identify makers of jewelries in the middle ages, although, the original intent was to identify the makers to detect fraud regarding the composition of its alloy, trademarks were soon used to identify the quality standard of a particular producer.[3]

However, a trademark in modern times has assumed greater significance as a branch of intellectual property law. It guarantees rights over goods and services of a manufacturer as against unfair imitation by other persons. Put at its simplest, a trademark is a type of sign which distinguishes the product or service of one manufacturer or service provider from another.[4]

A cursory glance at the Nigerian economic landscape will reveal that it is growing at a rapid pace, harboring a wide range of business organizations or entities that are continually immersed in commercial activities which mostly involve the manufacturing and/or production of goods, services and other valuables that are made distinct with the aid of various kinds of trademarks. In an economy of such diversity therefore, cases of trademarks infringement are inevitably bound to occur whether by design or default. For instance, a novice in the production of a certain type of goods may be enticed by the need to expand his market, to pass it off to the public as that of a renowned or established producer of similar goods. It could also be that by sheer coincidence, a person designed a trademark for his goods or services which devoid of his knowledge, has already been registered as another's trademark for his own products.

---

[1] Mateo Aboy, *What is the Purpose of Trademark Law?*<https://mateoaboy.com/f6/blog_files/9975bff2077d8f58d340539a3c68b02b-23.html> accessed 23 February 2021

[2] Richard Stim, '*Patent, Copyright & Trademark', (*9th edn, Consolidated Printers, Inc. 2007) 344

[3] M.F. Olson, *An Introduction to Intellectual Property Law*<www.ipl.com> accessed 1 July 2018

[4] M.C. Anne-Marrie, *Intellectual Property Law: Professional Practice Guide* (Cavendish Publishing Ltd. 2003) 7

Similarly, Nigeria is still a major importer of technology and finished goods[5]. Given this circumstance, its citizens have of necessity become familiar with several international brand names, trademarks and industrial designs etc. which sometimes are unfortunately being imitated by crafty businessmen.

The law has therefore provided certain rights[6] that the proprietor enjoys and made available some effective remedies when these rights are infringed.

2. RIGHTS OF TRADEMARK PROPRIETORS

A trademark is a form of intellectual property right in favor of a person regarding any unique expression (word, symbol, brand, name, phrase, logo, slogan, sign, shape, picture, insignia, emblem etc.) relating to their goods and services[7]. The proprietor's rights include the right of registration under either part of the Act (Part A or B), the right to exclude others, the right to sue and be sued, right of assignment, right of transmission, and licensing. Some of these rights will be highlighted briefly;

The right of registration can be seen under Section 49 of the TMA[8], it provides that:

> …the fact that a person is registered as proprietor of the trademark shall be prima facie evidence of the validity of the original registration of the trademark and of all subsequent assignments and transmissions thereof

Registration of trademarks confers on the registered owner exclusive right to the use of a trademark concerning goods mentioned in the register.[9] The Supreme Court, in the case of *Dyktrade LTD. v. Omnia (Nig.) LTD*[10] held that unless a trademark has been registered, the proprietor cannot maintain an action for infringement of a trademark. Therefore, registration

[5]Nigeria – Country Commercial Guide <www.trade.gov/knowledge-product/nigeria> accessed 23 February 2021
[6] Right of registration, right to exclude others, right to sue and be sued, right of assignment, right of transmission and licensing.
[7] C. Tardi, *Business Essentials: Trademark Definition* <www.investopedia.com/terms/t/trademark.asp> accessed 23 February 2021
[8] Trademarks Act, CAP. T13, Laws of the Federation of Nigeria, 2004
[9] Ibid, Ss. 5 and 6
[10] (2000) 12 N.W.L.R part 680 p.1

confers a right of action on the registered owner. An application for trademark registration may be made by the proprietor himself or his agent.[11]

Another right enjoyed by the trademark owner is the right to exclude others from the use of the trademark**.** The registered owner has the exclusive right to use the trademark. Section 5(1) of the Act[12] provides:

> …registration of a person in part A of the register as proprietor of a trade mark in respect of any goods, shall, if valid, give or be deemed to have given to that person the exclusive right to the use of that trade mark in relation to those goods.

In *A.B Chami & Co. LTD. v. W.J Bush & Co. LTD*,[13]the court held that it is the registration of a trademark that confers on the proprietor both the exclusive right to use a mark in respect of the goods for which it is registered and the evidence of title.

The right of assignment and transmission of trademarks suggests that, like any other property, a trademark can be transferred from one owner to another[14]. Such transfers can occur in the form of an assignment in respect of the business in total or the particular goods and services covered by that trademark[15]. A registered trademark may be assigned in the same way as other personal property such as houses, vehicles, land, etc.[16]

Section 29 of the Trademarks Act provides:

> Subject to the provisions of this Act, the person for the time being entered in the register as proprietor of a trademark shall, subject to any rights appearing from the register to be vested in any other person, have

[11]*Ducross S.A v. Silas Industries & Trading Co. Ltd. (2003) F.H.C.L.R 215*
[12] Ibid (n 8)
[13] *(1996) F.H.C.L.R 115*
[14] See generally the provision of Section 26 TMA
[15] *Assignment and Recording of Trademark in Nigeria* < www.resolutionlawng.com/assignment-and-recording-of-trademark-in-nigeria/> accessed 24 February 2021
[16] A. Isaac, *Analysis of the Legal and Institutional Frameworks for the Protection of Intellectual Property Rights in Nigeria* (Ph.D. Dissertation, Ahmadu Bello University, Zaria 2014) 199

> power to assign the trademark and to give effectual receipts for any consideration for an assignment thereof.

In the event of the assignment of a registered trademark, there must be evidence of the fact of such an assignment.[17] The proprietor of a trademark also has a right of transmission. According to section 26(1) and (2) of the Trademarks Act, a registered trademark is transmissible either in connection with a business's goodwill or not. Subsection (2) further provides that from the commencement of this act such registered trademark is assignable and transmissible in respect of all the goods it is registered, or was registered or some (but not all) of those goods.

A trademark proprietor enjoys the right of licensing. Under this right, a proprietor may grant a license[18] because he cannot provide all the relevant goods and services from its own resources.[19] Once a licence is granted, the grant enables the licensee to use the trademark for specified goods or services without amounting to an infringement.[20] This means that when a trademark owner allows another to use the mark, a license is granted. The license granted may also be express or implied, general or limited, informal or in writing, exclusive, sole or non-exclusive.[21] Restrictions on the "sale of trademarks" have gradually been eased in *Scandecor Development AB v. Scandecor Marketing AB.*[22] Thus, a license to use a trademark does not confer any proprietary interest but amounts to permission to use, which prevents any allegation of infringement. However, concurrently with the registered proprietor's rights, an exclusive licensee has the same rights and remedies as though he were an assignee.[23]

3. INFRINGEMENT OF TRADEMARKS

[17] *A.B Chami & Co. Ltd. v. W.J Bush & Co. Ltd(1996) F.H.C.L.R 115*
[18] A trademark license is a permission to do an act that would otherwise be prohibited without the consent of an owner of a trademark (on mutually agreed terms and conditions).
[19] WIPO Trademark Licensing Module p.3 <www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_12_learning_points.pdf>accessed 24 February 2021
[20] Ibid.
[21] *Trademark Licensing: Everything You Need to Know* < www.upcounsel.com/trademark-licensing> accessed 24 February 2021
[22] (2001) F.S.R 122 HL at 130
[23] W.R Cornish and D. Llewellyn, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights* (6th edn, Sweet & Maxwell 2007) 686.

The rationale for the registration of a trademark is the prevention of the unauthorized use of the registered mark.[24] The right to a trademark is infringed if another person without the license of the proprietor does or uses any mark that other persons are precluded from registration under the Trademarks Act. The Merchandise Mark Act, section 4(a)-(b)[25] provides that:

> A person shall be deemed to forge a trademark who either-
>
> (a) without the assent of the proprietor of the trademark, makes that trademark or a mark so nearly resembling that trademark as to be calculated to deceive, or ;(b) falsifies any genuine trademark, whether be alteration, additional effacement, or otherwise, and any trademark or mark so made or falsified in this act referred to as a forged trademark;(c) provided that, in any prosecution for forging aB trademark, the burden of proving the assent of the proprietor shall be on the defendant.

In a similar vein, what constitutes the infringement of trademark had received judicial backing in *Smithkline Beecham Plc. v. Farmex LTD*.[26], where it was held that

> …the rights accruable under the act will be deemed infringed by any person who not being the proprietor or registered user, uses a mark or marks so nearly resembling as to be likely to deceive or cause confusion in the course of trade in relation to any goods to which it is registered.

Additionally, in *Alliance International LTD. v. S.K. International Enterprises LTD* [27]learned Justice Rhodes Vivour agreed with section 5(20) of the Trademarks Act, thus:

> …trademark is infringed by a person who, not being the proprietor of the trademark or a registered user thereof, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade…".

---

[24] Isaac (n 16) 201.
[25] Merchandise Mark Act, cap.M10 LFN 2004
[26] (2010) 1 N.W.L.R part 1175 at 285
[27] (2010) 13 N.W.L.R part 1211 at 270

4. ENFORCEMENT OF THE RIGHT OF A TRADEMARK PROPRIETOR

A civil action lies in practically all trademark infringement cases. The proprietor of a trademark can bring an action to prevent the registration of a mark similar to or resembling his own registered mark by another person.[28] He can also institute an action if the mark which infringes his own mark has already been registered. Indeed, where the two marks resemble or nearly resemble each other as to be likely to deceive or cause confusion, the proprietor of a trademark is likely to succeed in an action for infringement.[29]

In *Seven-Up and Anor. v. Warri Bottling Company Ltd*,[30] the plaintiffs claimed that they owned three registered trademarks, namely: "Seven-Up", "7-Up" and "Up", but that they saw an advertisement by the defendants in Daily Times for a product referred to as "thumbs-up", which is similar to their product and which might cause confusion in the market. The learned Judge, Belgore J. stated that in considering infringement the following ought to be considered:

> 1. take the two words and examine them both by their look and their sound;
> 2. the goods to which they are to be applied must be considered;
> 3. the nature and kind of customers who would be likely to buy those goods must be considered;
> 4. all the surrounding circumstances of the case ought to be considered;
> 5. what is likely to happen if each of those trademarks is used in a normal way as a trademark for the goods of the respective owners of the marks?

Applying the above tests to the case, the learned Judge upheld the plaintiff's claims and stated thus:

> Thumbs up can be confused with each of the plaintiff's three registered marks. It must be realized that the essence of infringement is possibility of the two names or designs causing confusion. Will the 'up' appearing in the two trademarks connote identity of origin of the two marks? Will the consumer of the earlier drink think the latter one is of the same family as

[28] F.O. Babafemi, *Intellectual Property* (2nd edn, Justinian Books 2006) 233.
[29] Ibid.
[30] (1984) F.H.C.L.R 183

> the earlier, or will a prospective consumer seeing for the first time the two marks together come to a reasonable conclusion that the goods come from the same source? If there is any of this possibility, then there is an infringement[31].

The learned Judge went further to say that apart from the actual use of the word ‘Up’ by the defendants in their proposed soft drink, one has to consider our society’s nature. Not every likely consumer is literate, and hence, sound plays a vital part. ‘7-Up” and “Thumbs-Up” stand the chance of misleading the ears of less particular people.[32]

However, the principles governing the comparison of two trademarks were expounded by the Supreme Court in the case *Alban Pharmacy Ltd. v. Sterling Productions International Incorporation.*[33] In that case, the appellants were the proprietors of the trademark “CASTORIA” registered in Nigeria. The product is a special laxative for children, and the mark on the bottle is a tiny picture of five children with the words “FLETCHER’S CASTORIA.”. The appellants based their objection to the respondents’ registration of a proposed trademark “CASORINA” on the ground that the trademark is so similar to their trademark “CASTORIA” as to be calculated to deceive. The respondents’ mark showed a baby’s device in a large picture on the bottle bearing the word “CASORINA.”. In upholding the objection, the Supreme Court referred with approval to the dictum of Sargent J. in an application for registration of a trademark[34] where the learned Judge said:

> The question is not whether, if a person is looking at two trademarks side by side there could be a possibility of confusion. The question is whether the person who sees the proposed trademark in the absence of the other trademark, and in view of only his general recollection of what the nature of the other trademark has been would be liable to be deceived and to think

[31] ibid [189]
[32] See also C.F.A.O v. Miller Brothers (1912) Unreported, where representation of a Guinea Fowl and a Turkey were also held capable of deceiving the illiterate native.
[33] (1968) All N.L.R 292
[34] (1914) 31 R.P.C 196

that the trademark before him is the same as the other, of which he has a general recollection.[35]

In *Bell Sons & Co. v. Godwin Aka & Anor*.[36] The Supreme Court held, inter alia, that a trademark is to be deemed calculated to deceive when by the representation it presents to the customer, whether illiterate or not, going only by his recollection of an already registered trademark, he is not unlikely to mistake one for the other and that whether or not a trademark is potentially capable of being so mistaken for another is a question of fact to be decided after comparison of one with the other. The Supreme Court also held that the onus is upon the party seeking to register a trademark to show that the mark proposed to be registered does not so nearly resemble another one already registered to be calculated to deceive and that the respondents had not discharged this onus in the instant case.

5. REMEDIES AVAILABLE FOR TRADEMARKS INFRINGEMENT

The most common remedies that the courts typically grant regarding an infringement of a trademark are Damages, Injunction, Anton Piller Order, Delivery-up and in some cases, Account for profits[37].

5.1 Damages

Damages are monetary compensation usually meant to compensate the plaintiff for losses he might have incurred due to the defendant's infringement of his trademark[38]. Damages generally are money claimed by or ordered to be paid to a person as compensation for loss or injury[39]. In other words, damages are the sum of money that a person wronged is entitled to receive from the wrongdoer as compensation for the wrong[40]. The court's grant of damages as a civil remedy generally and particularly in an action for trademarks infringement may take any of these forms; general and special damages, exemplary or punitive damages and nominal damages[41].

---

[35] Ibid [205]
[36] (1972) U.I.L.R. Vol. 3 pt.1, 42
[37] Babafemi (n 28) 286.
[38] Ibid
[39] Gari v. Seirafina (Nig.) Ltd. (2008) 2 NWLR (Pt. 1070) 1, 26 (Per Justice Ariwoola)
[40] Ibid [27]
[41] Babafemi (n 28) 108

General damages are losses that flow naturally from the defendant's conduct, and its quantum need not be pleaded or proved as it is generally presumed by law[42]. Accordingly, evidence that will assist the court must be given if the plaintiff obtains substantial damages under this head of claim.[43]

Conversely, special damages are damages which the law does not presume but must be specifically pleaded and proved. In *Dumes (Nig.) Ltd. v. Ogboli*[44] , the Supreme Court emphasized thus:

> It is axiomatic that special damages must be strictly proved and (unlike general damages, where, if the plaintiff establishes in principle his legal entitlement to them, a trial judge must make his own assessment of the quantum of such general damages)……….so far as special damages are concerned, a trial judge cannot make his own individual assessment but must strictly on the evidence before him which he accepts as establishing the amount to be awarded.

On another lane, exemplary or punitive damages are not intended to compensate the plaintiff but to punish the defendant and deter him from similar behavior in the future.[45]On a claim for exemplary or punitive damages, the trend of both judicial and juristic opinion is that the court may award additional damages for such matters as each case's circumstances may warrant, and the amount to be awarded must not be excessive[46].

Furthermore, nominal damages are awarded in those cases where the plaintiff establishes a violation of his rights by the defendant, yet, he cannot show that he suffered any actual damage due to the defendant's wrongdoing or where damage has been proved, but no evidence has been given to its extent so that the award of compensatory damages is impossible[47].

A very instructive case wherein the civil remedy of damages for trademark infringement was made recourse to is *Beecham Group Ltd. v. Esdee Food Products (Nig.) Ltd.*[48] In this case, the plaintiffs,

---

[42] Ibid
[43] Ibid
[44] (1973) 3 U.I.L.R. 306 at p.311
[45]Babafemi (n 28) 109
[46] Masterpiece Investments Ltd. & Anor v. Worldwide Business Media Ltd. &Ors (1997) F.H.C.L.R 496 at p.511, (per Odunowo. J.)
[47]Ibid (n 45) 110
[48] (1980) F.H.C.L.R 177

who were the trademark 'LUCOZADE's registered proprietors, had brought an action for infringement of their trademark against the defendants who called their own product 'GLUCOS-AID'. The learned Judge upheld the plaintiffs' claims and considered the issue of damages. In their statement of claim, the plaintiffs had, inter alia, claimed an account of the profits made by the defendants or damages of ₦500,000.00(Five hundred thousand Naira). Anyaegbunam C.J. said:[49]

> I now come back to the issue of damages for the infringement……… the defendants have not given any evidence of their being unaware of the existence of the trademark now in question at the time of the infringement. They have neither given any evidence that they had no reasonable means of making themselves aware of the existence of the registration of the design nor anything tending to that. They gave no evidence at all.

Again, in the case of *Gbadamosi Tokunboh & Anor. V. J.T. Chanrai & Anor*,[50] the plaintiffs in 1968 registered a trademark known as "Cock Device Brand Mosquito Coil" "Orire Goodluck". The plaintiffs claimed that the defendants who are selling Cock Brand Mosquito Coils with the Cock Device on the label infringed their trademark. However, the defendants denied infringing the plaintiffs' trademark and claimed to have imported mosquito coils with similar trademark as early as 1963, five years before the plaintiffs' trademark was registered. The court awarded nominal damages against the defendants. It is doubtful whether nominal damages ought to have been awarded in this case since the plaintiffs did not prove that they suffered any damages. Moreover, the defendants were not found to have infringed the plaintiffs' trademarks.[51]

5.2 Injunction

One remedy that the courts usually grant to a plaintiff under the statutory provisions is an injunction. In its simplest meaning, an injunction mandates or forbids the doing of a specified act, and the whole essence of the remedy is to ensure that justice is done to parties in a lawsuit[52].

---

[49] Ibid [188]
[50] (1976) F.R.C.L. 55
[51] Ibid (n 47) 288
[52] Adedeji v. Eso (2011) LPELR-CA/1/110/2008 (Adumien J.)

Since damages may not always be adequate, an injunction is usually an added remedy. It is granted by the court to prevent a person from doing or continuing to do a wrong[53]. An injunction can be granted before trial upon affidavit evidence or even ex parte where there is a very urgent need to stop an infringement[54]. It is also possible to obtain an injunction to prevent a threat to infringe.[55]

In *Soul Publications Ltd. v. Sweet Hearts Publication Ltd. &Anor*.**[56]**One of the issues was whether the court should accede to the plaintiffs' prayers for an interlocutory injunction in the terms contained in the plaintiffs' motion papers. The court had earlier in the form of an "Anton Piller Order" restrained the defendants from publishing, selling, offering for sale or advertising any magazine or publication under or in the name of and or title of "HEARTS" or "SWEET HEARTS" or under or any other name and/or title of which the word HEARTS forms part…..pending the determination of the motion on notice filed herein. In its holding, the court stated that the following considerations apply in grant of an injunction:

1. whether the applicant has a legal right which he seeks to protect
2. real prospect of success at the trial notwithstanding the defendant's technical defence
3. balance of convenience and;
4. adequacy of damages

Sanyaolu J. delivering the lead judgment, further held[57];

> ….. all these issues, amongst others, are in my view sufficiently serious and fundamental to be resolved at the trial and in the view of this court, would warrant the grant of the interlocutory relief sought by the plaintiff pending the determination of the substantive suit.

On the other hand, in the case of *Primrose Nigeria Limited v. Mr. Atul Singh &Anor*.**[58]**, the plaintiff had claimed against the defendants an injunction to restrain the defendants from disturbing

---

[53] Ibid [114]
[54] Ibid
[55] Ibid
[56] (1997) F.H.C.L 369
[57] Ibid [388] (Sanyoalu J.)
[58] (1998) F.H.C.L 116. See also Saraki v. Kotoye (1992) 9 N.W.L.R

and hindering the plaintiff in the course of its business and also a total sum of 41.5 million Naira (forty-one million, five hundred thousand naira) as general and special damages. However, the defendants objected to the court assuming jurisdiction over the matter because the particulars of claim did not disclose any cause of action against the defendants. Therefore, an injunction could not be made in vacuo.

Upholding the defendants' objection, Odunowo J. said[59];

> The first requirement to be satisfied in case of injunction is the existence of a legal right which is crying for protection. Hence, an injunction cannot be granted in vacuo, as in the instant case.

Indeed, there must be the existence of a legal right to protect. If there is no legal right to protect, then an injunction will not be granted[60].

5.3 Anton Piller Order

An Anton Piller Order is an order which can be given ex parte for inspection, photographing and delivery up of infringing materials in the possession or control of an infringer. In normal ex parte application, the plea is based on urgency and secrecy[61]. In the locus classicus case wherein the order was first issued, i.e. the notorious case of *Anton Piller KG v. Manufacturing Process Ltd*.[62]The plaintiff manufactured and supplied its English agents and computer components through the defendants. It had reason to suspect that the defendant disclosed its trade secrets to competitors. The court considered the effect of a civil search order (as opposed to a criminal search warrant). In effect, the court ordered ex parte the defendant to allow the plaintiff entry to his premises to inspect documents. The plaintiff appealed against the refusal of such an order. The appeal succeeded, and the order made. The court went further to adumbrate thus;

This type of order requires an applicant to satisfy four essential pre-conditions:

1. that there is an extremely strong prima facie case;
2. that the damage which they will suffer will be serious;

[59] Ibid [122]
[60]Babafemi (n 28) 291
[61] Ibid 115
[62] (1976) Ch 55

a. that there is clear evidence that the respondents have in their possession some damaging documents or other material; and
b. that there is a real possibility that the material might be destroyed before any application inter parties could be brought.

Lord Denning MR said:

> Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say 'Get out

Similarly, in *Ferodo Limited v. Unibros Stores*,**[63]** an Anton Piller Order was granted. In this case, the plaintiffs who were the sole distributors in Nigeria of Ferodo Linings claimed that their products were being sold by the defendants who were not their customers. The court granted the following orders:

(a) the defendants are to permit up to six persons, including a police officer, to enter upon the premises of the defendants for the detention, preservation, and inspection of any movable property or thing that would constitute a breach of injunction prayed for in the suit.
(b) the defendants are to allow the plaintiff's solicitor to inspect all or any documents in custody or under the control of the defendants relating to the matters in question in this suit and finally;
(c) The defendants, by themselves, their servants, or agents, are restrained from repeating any infringement of the plaintiff's registered trademarks.

5.4 Delivery Up

This is a remedy usually granted by the courts. When granted, infringing goods will be delivered up to the plaintiff to be destroyed.[64] This relief was granted in *Beecham Group Ltd. v. Esdee Food*

[63] (1999) 2 N.W.L.R. 509
[64] Ibid (n 61) 295

Products (Nig.) Ltd. [65] The court, having found that the defendant's product marked "GLUCOS-AID" drink infringed upon the plaintiffs drink marked "LUCOZADE", held, inter alia, that the defendants should deliver upon oath for destruction all the goods, cartons, wrappers, blocks, discs or stamps bearing any mark or get up that would be in breach of the injunction which had been granted.[66]

6. THE EFFECTIVENESS OF THESE REMEDIES

From the preceding expositions, it is abundantly clear that the set of remedies which the law has availed the proprietor of a registered trademark upon the infringement of his legally conferred rights cannot be overemphasized. This is because all of the remedies discussed have their roots in judicial pronouncements. The remedies of damages, injunction, Anton Piller Order, and the relief of delivery up are all very effective in and by their very nature.

Damages have a common-law origin[67]. The effect of damages involves the award of pecuniary and adequate compensation to the trademark proprietor who wields sufficient evidence before the court to show that, indeed, a deliberate and mischievous infringement of his registered trademark has been perpetrated by the defendant, borne by an attempt to delude the unsuspecting members of the public into the assumption that there exists some sort of business connection between them or to merely cause confusion so as to gain undue economic advantage[68]. The consequence of this, is inarguably, injurious to the quantum of profit that would have or could have accrued to the plaintiff, i.e. the proprietor had his trademark not been infringed. A satisfactory justification for judicial grant of damages is exemplified in the cases already relied on in the previous discussions.[69]

A close alternative to damages is the equitable remedy of injunction. An injunction or injunctive order, so properly called, possesses both prohibitory and mandatory effects when issued by the court in all other cases depending on their merits and accompanying circumstances[70]. However,

[65] (1981) F.H.C/L. 177
[66] Ibid [188]
[67] *Legal Remedies: Damages* <https://courses.lumenlearning.com/masterybusinesslaw/chapter/legal-remedies-damages/ accessed on 25 February 2021
[68] Isaac Ogbah, *Understanding Trademark Law in Nigeria* (Legal Jurisprudence Limited 2019) 207
[69] See for example the cases of *Dumes(Nig.) Ltd. v. Ogboli (supra) and Beecham Group Ltd. v. Esdee Food Products (Nig.) Ltd. (supra)*
[70] J. J. Kur, *Intellectual Property Law and Entrepreneurship in Nigeria: Principles and Practice,* (Aboki Publishers 2015) 127

regarding trademark infringement, an injunction more often than not bears a prohibitory effect by restraining the defendant from further carrying out the infringing act or acts for the time being, pending the determination of the substantive suit[71]. The court's issuance of such an order comes after the registered proprietor's application, who must have furnished the court with irrefutable, credible, cogent and exigent grounds for the grant of same. The judicial authorities[72] relating to injunction have emphatically portrayed its effect, which is simply the forestalling of the act of infringement by the defendant and giving the plaintiff some sort of respite until such a time when the principal matter shall be decided upon.

Anton Piller Order, as granted in the case of *Ferodo Limited v. Unibros Stores,*[73] has succinctly revealed its effect by not only withholding the wheel of infringement from making a further motion but equally seeing to it that all the materials, tools, equipment, items etc. used in performing the act which threatens the prosperity of the trademark proprietor's business have been confiscated. This is followed by an ex parte order for inspection, photographing and subsequent delivery up of infringing materials in the possession or control of the defendant/respondent. The remedy as first established in the celebrated case[74] named it has the singular overriding effect of putting the plaintiff/applicant back in the position he would have been had the infringer not possessed the materials or partaken in the illegal act.

By and large, the remedy of delivery up is more or a less a supplementary one but the effect of which can be dispensable. Its effect lies in placing the infringing goods in the proprietor's custody for destruction[75]. This implies that the order ensures that the in-road to recurring infringement has been blocked. It is also an order as it is a form of deterrence serving to assure the plaintiff of an infringement-free business mark[76].

7. CONCLUSION

The law governing trademarks in Nigeria operates to accord business owners and firms (proprietors) the legal window to exercise certain statutory rights emanating from the use of the

[71] Ogbah (n 68) 203
[72]*Saraki v. Kotoye (supra). See also C.B.N v. Kotoye (1989) 1 N.W.L.R (Pt.98) 415*
[73] supra
[74] *Anton Piller KG v. Manufacturing Process Ltd. (supra)*
[75] Babafemi (n 28) 295
[76] See the case of *Beecham Group Ltd. v. Esdee Food Products Nigeria Ltd. (supra)*

unique features they have devised in promoting and distinguishing their products and/or services _ their trademarks.

The enjoyment of this set of rights is however, not devoid of a propensity to be infringed upon by other players in the commercial landscape in a move to promote their own businesses. Taking into consideration this invaluable worth of registered trademarks to enterprises, business individuals and the consuming public, as well as the risk of infringement that hovers over it, the law has put in place certain mechanisms for their protection vis-à-vis measures meant to prevent the use or imitation of trademarks or trade names in ways that are likely to confuse the public. Such occurrence occasions a civil wrong committed against the legally recognized owner of the mark in question, hence, demanding of effective channels through which to obtain appropriate legal redress.

Regardless, there is more to be done in ensuring the provision of full protection to this bundle of rights vested in the proprietors. As technology is rapidly redefining the whole of life as we know it, more and more products and their unique marks are being developed and they inadvertently attract acts of infringement, the law needs to be made elastic enough to contemplate and address these novelties.