NATIONAL OPEN UNIVERSITY OF NIGERIA

FACULTY OF LAW

COURSE CODE: PPL811

COURSE TITLE: INTERNATIONAL COPYRIGHT PATENT AND

COMPETITION LAW I

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NATIONAL OPEN UNIVERSITY OF NIGERIA

COURSE GUIDE

PPL811: INTERNATIONAL COPYRIGHT, PATENT AND COMPETITION LAW I

COURSE DEVELOPERS: DR. JUSTICE C. NWOBIKE
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1.0 Introduction

Competition law is an interesting subject which a student will find enlightening. This course is created to provide you with knowledge on the legal concept of competition law and the laws regulating competition in Nigeria and around the world. This course will prepare you to act and advise, where necessary on issues of competition in various sector both within and outside Nigeria. It will also arm the interested student with necessary tools to solve some basic problems encountered in undertaking on a daily basis.

This course material consists of six modules made up of twenty units of study in all. The course material is designed to give easy understanding of the course to the students. Each unit contains practical examples on competition among brands/products readily identifiable in Nigeria to which students can relate. At the end of the course material, a glossary of competition law terms is also provided. The glossary is based on the UNCTAD MEA competition glossary with amendments made in line with the objectives of this course.

There is also a list of materials for further reading, self-assessment questions, and tutor marked assignments at the end of every unit. These will help you to assess your understanding of the course. You are advised to take them seriously and try to answer them on your own using the course material and other references. You are further advised in your study of competition law, not to restrict your study to this course material. Ensure that you refer to the materials listed for reference and further reading. You may also source and read other relevant materials which will help to enrich your knowledge.

It is also advisable to apply what you have studied in this course materials to situations in day to day business activities or news reports that you may come across from time to time. That way you will deepen your practical understanding of the concepts taught in this course.

1.1 What You Will Learn in This Course:

This course is about the legal aspects of competition regulation. The course is meant to expose the law regulating competition both in Nigeria and other jurisdictions. A minimum study time of 4 hours per week is required for the duration of course i.e. one semester. To better understand this course, you will need to get acquainted with the various pieces of legislation and cases mentioned in the course. You must also note any new developments in the area of competition regulation in and outside Nigeria.

You should take note of the various terms/concepts introduced in this course as certain terms will inevitably impact on your proper analysis and discussion of the topics. As much as possible we have tried to simplify the concepts to aid

understanding. You can also refer to the glossary to refresh your memory on the meaning of any new concept. Get used to these terms and learn to use them in your personal study, group discussions or analyses of competition law issues.

It is essential to note that this course for this semester finds its basis from statutes, and case law. Some of the statutes include but are not limited to the Federal Competition and Consumer Protection Act 2019, Nigeria Communications Act 2004, Electric Power Sector Reform Act 2005, Companies and Allied Matters Act, Treaty on the Functioning of the European Union (TFEU or 'Treaty of Rome') and other international legislative instruments. Competition law being relatively new in Nigeria, a number of cases discussed in this course material are foreign cases. Nigerian case studies are also provided where possible.

Other sources include textbooks, journals and monographs on issues relating competition law. You will be referred to some of these texts and you are expected to make adequate use of them along with this course material. Relevant sections of statutes may be quoted or cited to give specific references during discussion of a topic. You are expected to get yourself familiar with these as much as they are relevant.

1.2 Course Aims

This course aims at providing learners with basic knowledge and clear understanding of the law with respect to competition in business. It is aimed at giving you the requisite knowledge of the facts, background, and development of competition law in Nigeria. You will learn about both statutes and case law regulating competition in Nigeria. You will also learn about the evolution of competition law in Nigeria and globally. Each of the topics in the course will be

discussed in sequence and relevant terms defined to enable a clear understanding of them.

1.3 Course Objectives:

At the completion of the course, you should be able to:

1. Define intellectual property
2. Identify the various forms of intellectual property
3. Trace the historical development of intellectual property protection
4. Define competition law
5. Trace the history of competition regulation
6. Discuss the rules applicable to competition law in Nigeria
7. Differentiate between competition law and competition policy
8. State the laws applicable to competition regulation in Nigeria
9. Understand the place of competition regulation in Nigerian business
10. Discuss the roles and qualities of the competition regulator as well as models of competition regulation.
11. Discuss the benefits and burdens of competition regulation

2.0 Working through This Course

The course should take you about 12 weeks (excluding Seminars and Examinations) to complete. You need to allocate your time to each unit in order to complete the course successfully and on time.

To complete this Course, you are advised to read the study units, recommended texts and other source materials provided in the course material. Each unit contains In-Text Questions (ITQs) and Self-Assessment Exercises (SAEs) together with suggested answers to the SAEs provided. This help to deepen your understanding of the course. Midway into your study you will be required to take your Tutor-Marked Assignments (TMAs) which form part of your continuous assessment. At the end of the course, there is a final examination.

You will find all the components of the course listed below.

3.0 Course Components

The major components of the course are:

1. Course guide
2. Study units
3. Recommended Textbooks and web-sources
4. Assignment file
5. Presentation Schedule

Each study unit consists of two weeks' work and includes specific learning outcomes; directions for study, reading materials, In-Text Questions (ITQs) and Self-Assessment Exercises (SAEs). Together with the Tutor Marked Assignments, these questions and exercises will assist you in achieving the stated learning outcomes of the individual units and of the Course.

This Course Material contains a total of 22 study units as listed below:

Module 1 - Intellectual Property: General Introduction

Unit 1 Overview of Intellectual Property

Unit 2 Historical Background to Intellectual Property Regulation

Unit 3 Historical Background to Intellectual Property Regulation in Nigeria

Unit 4 Justification and Critiques for Protection of Intellectual Property Rights (1)

Unit 5 Justification and Critiques for Protection of Intellectual Property Rights (2)

Module 2: Categories of Intellectual Property

Unit 1 Copyrights and Patents

Unit 2 Trademarks and Trade Secrets

Module 3 Legal and Institutional Regime for Protection of Intellectual Property

We have included a large number of examples and Self-Assessment Exercises (SAEs). These have been selected to bring out features of central importance. You will gain immeasurably by giving ample time to the Self-Assessment Exercises (SAEs), and by comparing your efforts with the relevant Answer Box and then drawing the lessons from the exercise. We do not expect you to come up with answers that are identical with the

answers provided. These exercises provide an opportunity to put in practice what has been described in the text and then *evaluate* your performance. This will not only tell you whether you have fully grasped the particular technique, but it will serve to confirm it. If you are not happy with your effort, ask yourself what was missing; then rework the passage in the text and revise your exercise to take account of the approach demonstrated in the answer.

You may find it helpful to read the text of a unit before working the examples and exercises. This will give you a general overview of the whole topic, which may make it easier to see how individual aspects relate to each other. If you break off study of a Unit before it is completed, in the next study session remind yourself of the matters you have already worked on before you start on anything new, to maintain continuity of learning.

4.0 Recommended Texts, References, and Web sources

Certain texts have been recommended in the course. Each study unit provides a list of references, relevant texts and web sources. You should try to obtain one or two texts and download the references and web-sources for your general reading.

5.0 Assessment

There are two aspects of the assessment of this course; the seminar and a written examination. In doing these assessments, you are expected to apply knowledge acquired during the Course. The assessments are submitted in accordance with the deadlines stated in the presentation schedule.

6.0 Final Examination and Grading

The duration of the final examination for Intellectual Property and Competition Law I will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self- assessment exercises you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your In-Text Questions, Self-Assessment Exercises and Tutor Marked Assignments before the examination.

Course Marking Scheme

The following table lays out how the actual marking is broken down

Seminar	30% of overall course score

Paper and Presentation	
Final Examination	70% of overall course score
Total	**100% Marks**

8.0 How to get the most from this Course

In the National Open University of Nigeria, you have the advantage of your course material and your online facilitation classes. The advantage is that you can read and work through the study materials at your pace and get explanations for knotty areas during your online facilitation classes.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning outcomes. These outcomes let you know what you should be able to do by the time you have completed the unit. You should use these learning outcomes to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self-Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you come to them.

9.0 Tutors and Tutorials

There are 8 contact hours of online facilitation classes in support of this course. You will be notified of the dates, times and links of these online facilitation classes, together with the name and contact details of your facilitator.
Do not hesitate to contact your facilitator if you need help. Contact your facilitator if:

1. You do not understand any part of the study units or the assigned readings;
2. You have difficulty with the self-assessment exercises;

You should try your best to attend the online facilitation classes. This is the only chance to have face-to-face contact with your facilitator and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course facilitation, prepare a question list before attending them. You will gain a lot from participating actively.

10. Summary

You have much to cover in this course. You may find that some of the units call for at least a full study session of their own. You may also find that the Self-Assessment Exercises require more time, as necessarily the text with which we are now dealing is longer. The course builds upon work you have already done; in a number of places you should be on reasonably familiar territory.

We hope you will find this course interesting. We wish you the best of luck!

Module 1 Intellectual Property - General Introduction

MODULE 1: INTELLECTUAL PROPERTY – GENERAL INTRODUCTION

UNIT 1 OVERVIEW OF INTELLECTUAL PROPERTY

1.1 INTRODUCTION

As the course title suggests, this course is dedicated to learning about international copyright, patent and competition law. As you will find out in this course material, copyright and patent are types of intellectual property. In effect, what you will be learning about the twin concepts of intellectual property and competition law. We begin with an overview of the concept of intellectual property. Some of the things you will learn will be the meaning, historical background to regulation, classifications and legal framework.

1.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Explain meaning of basic terms like 'intellectual property', 'intellectual property rights' and 'intellectual property law'.
- Discuss the nature of intellectual property as 'property'

1.3 MAIN CONTENT

1.3.1 What is Intellectual Property?

To better understand the term '**intellectual property**', let us break it down. The term 'intellectual property' is clearly a fusion of two words – 'intellectual' and 'property'. So what does each word mean?

The word '**intellectual'** is derived from the root word 'intellect' which the Cambridge English Dictionary defines as "a person's ability to think and understand especially ideas at a high level". The same dictionary defines 'intellectual' as "relating to the ability to think and understand ideas at a high level or involving ideas'. In its basic English meaning, '**property**' is defined by the same dictionary as 'a thing or things owned by someone. A possession or possessions'. A simple basic-English fusion of these definitions could therefore identify intellectual property as a thing or possession which is a product of a person's thought or high level ideas.

Bouchoux defines **intellectual property (IP)** as 'the fruits or product of human creativity ... the result of thought, namely intellectual activity...'. To Colston, intellectual property is 'all about the results of human creativity. Its subject matter is formed by new ideas generated by man'.

It is often said that 'necessity is the mother of invention'. Ideas are infinite. As long as the human mind exists, we can be certain that great minds will conceive high level ideas. Such high level ideas (where new) will constitute intellectual property. In that sense, it is safe to say that intellectual property is infinite. Intellectual property can arise out of the invention of new products or changes/improvements to existing products where something new is added to make create a separate product comprising of an earlier patented product as an additive or an earlier patented product which is improved upon.

Practical Example: From Nylon to Velcro

Nylon is a silk-like synthetic thermoplastic made from petroleum. The product was a result of several years of long research resulting in nylon which was developed in the DuPont research facility and patented in 1938 (US Patent 2130523 issued September 2nd 1938). Today the product is amenable to a variety of uses such as fabric, fibres, shapes, packaging, etc.

Subsequently, the well known 'Velcro' fastening (also known as 'hook –and-hoop' fastener) was invented by Engr. George De Mestral in 1941 out of two components one of which was made of nylon and polyester. This he named 'Velcro' and patented in 1955 (US Patent 2717437A issued September 13, 1955).

Case Example: Mazer v. Stein 347 US 201, 74 S. Ct. 460 (1954)

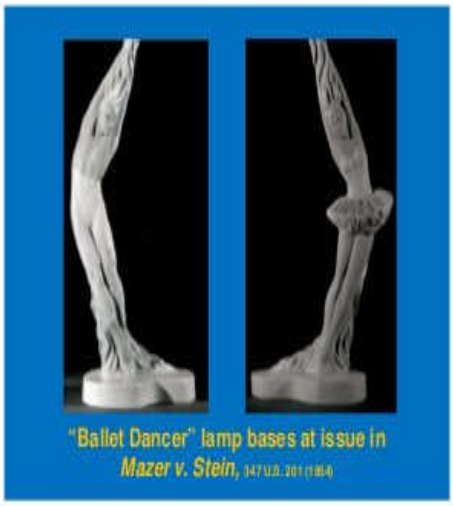


Fig. 1- Ballet Dancer Lamp in issue in *Mazer v. Stein*

Fig. 2- Coupon for sale of a similar table lamp

In *Mazer v. Stein* 347 US 201, 74 S. Ct. 460 (1954) the court was called upon to answer the question as to the validity of statuettes of male and female dancing figures made of semi vitreous china which were intended for use as basis for table lamps with wiring, sockets and lampshades attached to them (thereby constituting a separate product). The respondents claimed copyright in the statuettes alone as 'works of art' while the petitioners (their competitors in the lamp manufacture business), who had copied the statuettes without authorisation and made them into lamps for sale, opposed the respondents' claim contending that a work of art intended for reproduction as lamp bases could not be copyrighted because it had utility in addition to its ornamental value. To the petitioners, publication of the statuettes as a lamp base and registration as a statuette would help the respondents gain monopoly in the manufacture of same thereby constituting a misuse of copyright. While the court of first instance agreed with the petitioners, their contention was rejected on appeal. On further appeal to the Supreme Court, it was held that the intended use of an article cannot bar or invalidate its registration. Hence the copyright was valid and the respondents had a right to be protected against infringement of the work of art (the statuettes) as tangible expressions of an author's idea.

With reference to one practical example discuss how intellectual property can arise out of changes/improvements to existing products

Intellectual property rights consist of those exclusive rights attached to the possession of intellectual property and by extension to be enjoyed by owners of recognised intellectual property. In other words, owners or holders of intellectual property enjoy certain rights – chiefly the right to exclude others from profiting from their creations without consent. Also, note the use of the 'owners'. As we will see from various case examples ownership does not necessarily equate with primary discovery. Depending on the unique circumstances in each case, the inventor of a product which constitutes intellectual property may or may not be the owner of intellectual property rights in the said product. For instance, where a salaried employee invents a unique product in the laboratory of his employer and with the use of the employer's resources, ownership of intellectual property in that product resides with his employer.

Case Example: Wallace Carothers, DuPont and the invention of Nylon

Wallace Carothers, a Harvard academic was hired by DuPont Chemical Company to lead its polymer research group aimed at pioneering research into chemistry that would lead to practical applications. Nylon was first produced by Wallace and his team at DuPont's Experimental Station in 1935. Following this discovery, DuPont successfully obtained a patent for nylon in 1938. Ownership of the patent resided with DuPont.
(Source: Wikipedia)

Intellectual property law is the means of protecting intellectual property through various legal mechanisms whether statutory, tortious, equitable, economic etc. These mechanisms are applied in various ways to regulate the grant/designation of an idea as intellectual property and the protection of intellectual property rights.

Self - Assessment Exercise 1

Differentiate between 'intellectual property', 'intellectual property rights' and 'intellectual property law'

1.3.2 Intellectual 'Property' Rights as Possessions

Remember, we defined intellectual property as 'possession' or 'possessions'? In law, there are two broad categories of property - real property (land or real estate also called 'realty'), personal

property (tangible or intangible personal items not classifiable as real property also called 'personalty' e.g. cars, jewellery etc). Intellectual property falls within the category of personal property (though some authors classify it as a separate category of property). As with other forms of property, intellectual property is subject to other rights of ownership such as sale, license, inheritance etc. Intellectual property can also be bought, protected from infringement, taxed etc. However, unlike other forms of property, property rights attached to products subject of intellectual property may be subject to certain restrictions. So, for instance, though one can purchase an item of real or personal property and distribute it as desired, a book subject to intellectual property cannot be photocopied or distributed for sale in like manner. Similarly, authors' moral rights to attribution and prevention of distortion cannot be assigned, though it may pass on to the estate of the deceased upon his/her death.

Can you discuss some restrictions on intellectual property not obtainable for other forms of property?

You must bear in mind that, though classed as property, intellectual property by nature is usually intangible. Similarly, intellectual property rights are intangible rights attached to ownership of an intellectual property. This intangible thing or right is usually attached to a tangible object or invention which therefore substantiates it in practical terms. Hence, though intangible, there can be no intellectual property without some tangible invention. Note that a tangible object or invention as used in this section includes those things that can be perceived with the senses such as objects you can see, taste or touch as well as expressions of art or productions that you can hear or smell though not susceptible to sight, feeling or taste. Hence, while you may not be able to 'see' a song, it may be subject to copyright in its audible form.

Similarly, non-visual mark (e.g. a scent) may be accepted as constituting intellectual property if it has a distinctive character. This was the decision of the European Court of Justice in *Sieckmann v Deutsches Patent- und Markenamt* (Case C-273/00 of December 12, 2002) where it was held that an unconventional mark which cannot be visually perceived may, nevertheless be capable of registration as a trademark if it can be represented graphically and capable of being distinguished from those of other marks. It is interesting that the case is founded on an

application to register a scent which was rejected because the chemical formula depicting the scent was not deemed sufficiently intelligible or clear, and the physical deposit of its sample was not deemed sufficiently stable or durable. Though EU does not entertain the registration of scents as intellectual property, scents may be registered in the US if it can be established that the scent is distinctive i.e. that it is not a functional part of a product or service and is capable of indicating the source of the product or service. Some products that have passed this test include Hasbro Inc.'s PLAY-DOH scent described as "a scent of a sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of a salted, wheat-based dough."

Self-Assessment Exercise 2

With reference to relevant case law, state when a non-visual mark may be accepted as constituting intellectual property?

1.4 SUMMARY

Intellectual property is the product of human creativity following some form of intellectual activity. It is infinite and may arise out of invention of new products or something new added to an existing product to make it a separate product. Intellectual property has exclusive rights attached to them which are only enjoyed by their owners. This exclusivity allows them to exclude others from profiting from their creations without their consent. Intellectual property and intellectual property rights are protected through the mechanism of intellectual property law which regulate their grant and protections to attach to each intellectual property right. Intellectual Property Rights are classified as personal property with rights of ownership, sale inheritance etc, but subject to certain restrictions.

1.5 REFERENCES/FURTHER READING/WEB SOURCES

Waver, D., *'Intellectual Property Law'* Irwin Law (1997)

Schechter, R.E and Thomas, J. R., *'Intellectual Property The Law of Copyrights, Patents and Trademarks'* Thomson West (2003)

‘*Competition Policy & Law Made Easy’ (CUTS, 2001)*

Dreyfuss, R. And Pila, J. ‘*Oxford Handbook of Intellectual Property Law’* Oxford University Press (2018)

Nwabachili C.C. ‘*;Intellectual Property Law and Practice in Nigeria’* Malthouse Press (2016)

Lawal-Arowolo, A. And Ola, K. ‘ *Nigerian Intellectual Property Law’* Routledge (2022)

1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Intellectual property refers to the product of intellectual activity. Such products are subject of rights which grant exclusivity to the author of same – this exclusive right to deal with the product is what is referred to as **intellectual property rights.** To ensure that holders of intellectual property enjoy these rights, legal mechanisms are put in place to regulate how these products are protected, how the rights are exercised and third party relationships with the IP holder. These mechanisms are **intellectual property law.**

SAE 2

A non visual mark may be accepted as constituting intellectual property if it has a distinctive character. *Sieckmann v Deutsches Patent- und Markenamt* (Case C-273/00 of December 12, 2002

MODULE 1: INTELLECTUAL PROPERTY – GENERAL INTRODUCTION

UNIT 2 HISTORICAL BACKGROUND TO INTELLECTUAL PROPERTY REGULATION

2.1 INTRODUCTION

In unit 1 we examined the definition and relationship between intellectual property, intellectual property rights and intellectual property law. As we learnt, intellectual property are products of intellectual activity which ought to be protected by exclusive rights to deal with the product as desired. We make progress from that point examining the history of intellectual property regulation both from formal origins outside Nigeria and on record in Nigeria.

2.2 LEARNING OUTCOMES

By the end of this unit, you should be able to discuss,

- The historical background to the regulation of copyrights
- The historical background to the regulation of trademarks
- The historical background to the regulation of patents

2.3 Historical Development of Intellectual Property Law

The development of intellectual property law has its origins in antiquity. Though there are no records of specific laws protecting intellectual property, ownership of artists' work or product of skill appeared to have been recognised. For ease of understanding we will consider them under three broad categories.

A. Copyrights

As far back as 500 BC, records show that chefs in Sybaris in Ancient Greece were granted year long monopolies for creation of unique meals. As a matter of honour, moral rights of authors to their works of literature and arts was recognised and extended to require those who copied these authors' works to property credit the authors as owners of these works. Hence, Greek records (circa 257-180 BC) show false poets being exposed and convicted for stealing words and phrases

of other authors during poetry contests. Similarly, Roman records from the first century followed suit in exposing and punishing plagiarism by poets. Records from Ireland, also indicate the 6th century copyright battle between two authors – St. Columba and St. Finian which resulted in King MacCerbhaill of Ireland declaring that *'to every cow belongs her calf, therefore to every book belongs its copy'* effectively affirming Finian's right to his work which had been copied by Columba without his permission.

England laid the foundation for modern copyright law through the Statute of Anne 1710 which provided copyright protection to all authors of written works for a period of 14 years renewable for another 14 year term if the author is still alive, and 21 years for books already in print by the date of enactment of the statute. The main purpose of the Statute of Anne was to break the copyright monopoly of publishers under common law and to institute a regime of recognition of individual copyright attributable to the author as against printers and publishers who held sway before then.

The efficacy of the Act was tested in *Millar v. Taylor (1769) 4 Burr. 2303, 98 ER 201*. In that case, the plaintiff bookseller purchased publishing rights from a poet named James Thomson who held copyright for his poem 'The Seasons'. Upon the expiration of Thomson's copyright, the Defendant began to publish a competing publication in which he included Thomson's poem. Following Millar's claim against Taylor, it was held in his favour there is a (perpetual) common law right of an author to his copy and the said common law right has not been overturned by the Statute of Anne. The decision in *Millar v. Taylor* therefore affirmed the inherent right of authors (and by extension their licensees) to control copyright in their works. Giving the lead judgment, Lord Mansfield noted:

> 'It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work. ... It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest arid most equal way of doing it, is, by securing to them the property of their own works. ... He who engages in a laborious work, (such, for instance, as

> Johnson's Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family

The decision in *Millar v. Taylor* was subsequently overturned in *Donaldson v Becket* (1774) 2 Brown's Parl. Cases (2d ed.) 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257; 17 Cobbett's Parl. Hist. 953 where the court dismissed the notion of perpetual copy rights in favour of statutory limits on copyrights. The decision in *Donaldson v. Beckett* was followed by the US Supreme Court in *Wheaton v. Peters* 33 U.S. (8 Pet.) 591 (1834) and represents the law in many jurisdictions.

Can you Compare and contrast between the decisions in Millar v. Taylor and Donaldson v. Beckett?

Multilateral regulation of copyrights can be traced to the Berne Convention for the Protection of Literary and Artistic Works 1886 which is currently being administered by the World Intellectual Property Organisation (WIPO). The Convention has been revised several times, the most recent review being in 1979. Subsequently, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations came into force in 1961. In 1996, the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (together called the 'Internet Treaties') were adopted to address issues of Information technology and internet which technologies had not been addressed by any multilateral instruments. Subsequently various other treaties have been adopted in furtherance of copyright protection and regulation of public access to same. They include the Brussels Convention, the Geneva Convention and Marrakesh Treaty. To learn more about the copyright treaties in existence visit the WIPO Copyright pages at https://www.wipo.int/copyright/en/

B. Trademarks

Trademarks constitute the earliest recognised form of intellectual property. Though not specifically called 'intellectual property' or 'trademarks', the need to protect indigenous trade secrets, marks, brands and products have always been recognised in society. In societies which

communicated in writing, artisans distinguished their works through special marks. Ancient craftsmen were known to mark pottery and other craftwork with distinctive marks ostensibly to show ownership or quality. In Europe, the (approximately) 20,000 year old Lascaux cave paintings appear to show claims of ownership of livestock through personal marks the on bodies of such animals. Much later, early Roman craftsmen left distinctive marks in their products as stamps of quality. Same was the practice in other societies though the owners of theses marks had no legal recourse against those who infringed or sold sub-standard products with hijacked marks of well known craftsmen.

Legal protection of intellectual property has its roots in Europe. The first formal use of marks to claim ownership of intellectual property is traced to the Bread Marking Law of 1266 under which King Henry III required bakers to add distinctive marks to all bread produced them in order to prevent bread fraud. Similarly, the glass making guilds of Venice forbade the export of information of glass making craft and processes under pain of heavy fines.

Owing to the early recognition of trademarks as property, the French were also actively involved in the regulation of intellectual property. As early as the 13th century, trademark infringement was frowned upon and infringers were severely punished with fines, amputation or hanging depending on the severity of the offence. The first trademark statute is also credited to the French through the Manufacture and Goods Mark Act of 1857 which prohibited the sale of products with fake trademarks. This was closely followed by the US Federal Trademark Act of 1870 which was struck down by the Supreme Court with subsequent revisions and replacements resulting in the 1946 Lanham Act. The British legislature also closely marked their French counterparts with the enactment of the Trademarks Registration Act 1876 with its first trademark registration of the on January 1st of the same year resulting in the Bass beer logo becoming one of the oldest registered trademarks in the world.

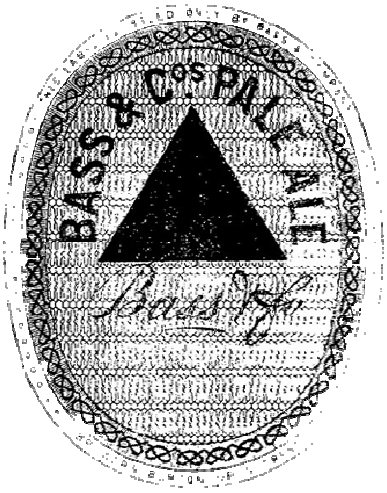


Fig. 3: Old Bass beer Logo (1876)

Fig. 4: Current Bass beer logo

Self-Assessment Exercise 1
Identify 3 distinctive elements of the current Bass beer trademark.

Over time, multilateral rules protecting trademarks have also be adopted – the earliest of which is the Paris Convention for the Protection of Industrial Property 1883 which protects all forms of industrial property including patents, trademarks, service marks etc. in 1891, the Madrid Agreement Concerning the International Registration of Marks was concluded and subsequently supplemented by the Protocol relating to the Madrid Agreement. Other multilateral legal instruments relating to the protection of trademarks include the Nice Agreement Concerning the International Classification of Goods and Services for Purposes of Registration of Marks 1957, the Vienna Agreement Establishing an International Classification of Figurative Elements of Marks 1973 and the Trademark Law Treaty 1994. Like the copyright instruments, the aforementioned multilateral legislative instruments and others too numerous to mention are administered by WIPO. To know more about the trademarks Treaties administered by WIPO see the WIPO trademarks page at https://www.wipo.int/trademarks/en/

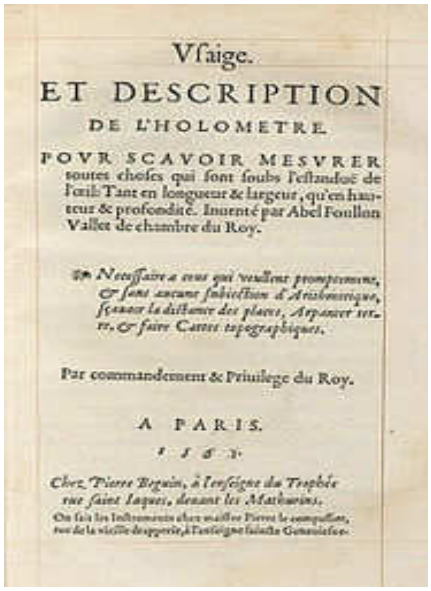
C. Patents

The protection of patents also received early recognition. In 1425, The Great Council of Venice ruled that Venetian glassworkers who exported their work outside Venice would be banished

from the guild and forbidden to work in Venice. Whilst the nature of such recognition tended to favour the guild system of ownership, individual ownership of intellectual property gradually developed largely through the efforts of Filippo Bunelleschi, a famous architect/engineer/inventor who refused recognition of his ground-breaking work under the guild system and pushed for individual recognition which was granted in 1421 vide a patent for his innovative *'il badona'* – a unique boat for cheap transportation of heavy building materials upriver. Two decades later (1449), the first recorded English patent was granted by King Henry IV to John Utynam, a Flemish stained glass producer with an attached monopoly on the production of stained glass in exchange for teaching the technique to apprentices in Eton and Kings College.

The subsequent Venetian Statute on Industrial Brevets 1474 codified prior customs and general principles guiding the grant of patents for innovations. The statute introduced certain criteria which out to be fulfilled before protection is extended to an inventor. They include protection to an inventor/originator of a patent, novelty and social utility which still constitute criteria for grant of intellectual property rights under modern statutes. The statute also pursued an individual (as against group/guild) focus to the protection and enjoyment of the fruits of inventions with specific incentives for inventors' compensation for infringement and term limits for enjoyment of intellectual property rights.

Though granting exclusivity as aforementioned, patents did not provide specific descriptions of inventions till 1561 when the description was published of a 1555 patent granted by King Henry II of France to French engineer, mathematician and inventor, Abel Foullon for his invention called *'L'Holmetre* – an optical dispositive equipment used for angular measurements in surveying (see Fig. 5 and 6 below. Source: Wikipedia).



Vſaige.

ET DESCRIPTION

DE L'HOLOMETRE.

POVR SCAVOIR MESVRER toutes choſes qui ſont ſoubs l'eſtendue de l'œil: Tant en longueur & largeur, qu'en hauteur & profondité. Inuenté par Abel Foullon Vallet de chambre du Roy.

Neceſſaire a tous qui veullent promptement, & ſans aucune ſubiection d'Arithmetique, ſçauoir la diſtance des places, Arpanter terres, & faire Cartes topographiques.

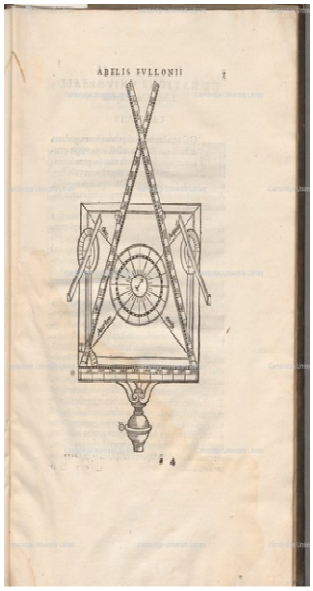
Par commandement & Priuilege du Roy.

A PARIS.

1 5 6 1.

Chez Pierre Breuin, à l'enſeigne du Trophée rue ſaint Iaques, deuant les Mathurins.

On fait les Inſtrumens chez meſſire Pierre le compaſſeur, rue de la vieille drapperie, à l'enſeigne ſainte Geneuiefue.



ABELIS FVLLONII

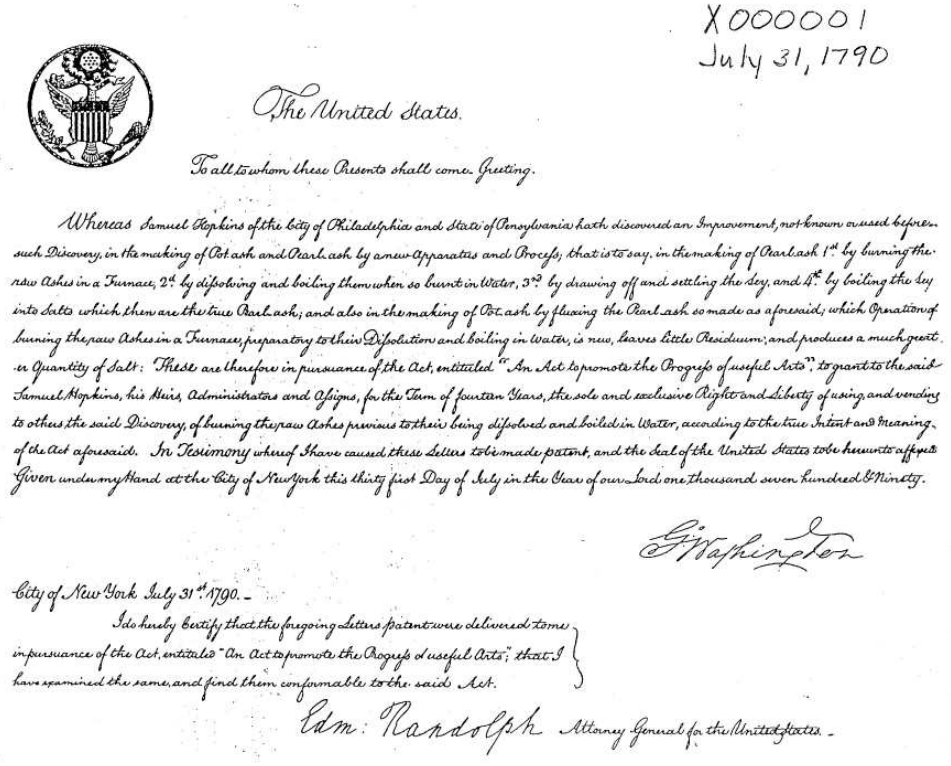
Fig 5: Description of Fullon's Holometer (1561)

Fig 6: Drawing of Fullon's Holometer (1561)

When was the first time that a patent provided specific descriptions of an invention?

The English Statute of Monopolies 1624 is generally regarded as the 'mother of modern patent law'. The statute which sought to prevent royal abuse of intellectual property rights through the arbitrary grants of monopolies in England, provided a 14 year limit for patents on inventions. This heralded a practice which remains valid till date – of specific time limits on inventors' exclusive rights of enjoyment of their intellectual property. It also stopped the granting of intellectual property rights to non-original works/works already in the public domain.

The American patent system followed the English model with the first patent granted in 1790 to inventor, Samuel Hopkins for his invention of a new method of making potash and pearl ash. The patent was for a term of 14 years and the patent instrument specifically described Hopkins' method (see Fig. 7 below. Source: Wikipedia)



X000001
July 31, 1790

The United States.

To all to whom these Presents shall come. Greeting.

Whereas Samuel Hopkins of the city of Philadelphia and State of Pensylvania hath discovered an Improvement, not known or used before such Discovery, in the making of Pot ash and Pearl ash by a new Apparatus and Process, that is to say, in the making of Pearl ash 1st by burning the raw Ashes in a Furnace, 2d by diffolving and boiling them when so burnt in Water, 3d by drawing off and settling the ley, and 4th by boiling the ley into Salts which then are the true Pearl ash; and also in the making of Pot ash by fluxing the Pearl ash so made as aforesaid; which Operation of burning the raw Ashes in a Furnace, preparatory to their Diffolution and boiling in Water, is new, leaves little Residuum, and produces a much greater Quantity of Salt: These are therefore in pursuance of the Act, entituled "An Act to promote the Progress of useful Arts", to grant to the said Samuel Hopkins, his Heirs, Administrators and Assigns, for the Term of fourteen Years, the sole and exclusive Right and Liberty of using, and vending to others the said Discovery, of burning the raw Ashes previous to their being diffolved and boiled in Water, according to the true Intent and Meaning of the Act aforesaid. In Testimony whereof I have caused these Letters to be made patent, and the Seal of the United States to be hereunto affixed. Given under my Hand at the City of New York this thirty first Day of July in the Year of our Lord one thousand seven hundred & Ninety.

G. Washington

City of New York July 31st 1790. –

I do hereby Certify that the foregoing Letters patent were delivered to me in pursuance of the Act, entituled "An Act to promote the Progress of useful Arts", that I have examined the same, and find them conformable to the said Act.

Edm: Randolph Attorney General for the United States –

Fig 7: First US Patent granted to Samuel Hopkins (1790)

If there were other statutes regulating patents before the 17th Century, why is the Statute of Monopolies 1624 referred to as the 'mother of modern patent law'?

Multilateral protection of patents was first achieved under the Paris Convention which, as earlier stated, offered protection for all forms of industrial property including patents. Other WIPO administered multilateral legal instruments relating to patents include the Patent Cooperation Treaty 1970, the Strasbourg Agreement Concerning the International Patent Classification 1971 and the Patent Law Treaty 2000.

2.4 SUMMARY

Intellectual property is the product of human creativity following some form of intellectual activity. It is infinite and may arise out of invention of new products or something new added to an existing product to make it a separate product. Intellectual property has exclusive rights attached to them which are only enjoyed by their owners. This exclusivity allows them to

exclude others from profiting from their creations without their consent. Intellectual property and intellectual property rights are protected through the mechanism of intellectual property law which regulate their grant and protections to attach to each intellectual property right. Intellectual Property Rights are classified as personal property with rights of ownership, sale inheritance etc, but subject to certain restrictions.

The regulation of intellectual property has its origins in antiquity with some copyrights dating as far back as 500 BC and pre-historic craftsmen and painters claiming ownership of their artistic works through personal inscriptions on the body of such works. Modern copyright law has its foundation in the English Statute of Anne 1710. For trademarks, the first statute is the French Manufacture and Goods Marks Act 1857 and the Venetian (Italy) Statute of Industrial Brevets 1474 representing the first codification of customs and principles guiding patents.

In pre-colonial Nigeria, intellectual property rights were initially guarded through colonial societies whilst indigenous knowhow on food, herbs and oral literature tended to be shared freely without individual restrictions. Following the advent of colonialism, treaty obligations and Statutes in force in Britain were transplanted and applied in Nigeria. After independence, Nigeria acceded to various multilateral treaties and agreements, joined WIPO and enacted various indigenous statutes to regulate intellectual property issues in Nigeria.

2.5 REFERENCES/FURTHER READING/WEB SOURCES

Waver, D., *'Intellectual Property Law'* Irwin Law (1997)

Schechter, R.E and Thomas, J. R., *'Intellectual Property The Law of Copyrights, Patents and Trademarks'* Thomson West (2003)

'*Competition Policy & Law Made Easy' (CUTS, 2001)*

Dreyfuss, R. And Pila, J. '*Oxford Handbook of Intellectual Property Law'* Oxford University Press (2018)

Nwabachili C.C. *';Intellectual Property Law and Practice in Nigeria'* Malthouse Press (2016)

Lawal-Arowolo, A. And Ola, K. ' *Nigerian Intellectual Property Law'* Routledge (2022)

WIPO ‘Berne Convention for the Protection of Literary and Artistic Works’ <https://www.wipo.int/treaties/en/ip/berne/#:~:text=WIPO%2DAdministered%20Treaties-,Berne%20Convention%20for%20the%20Protection%20of%20Literary%20and%20Artistic%20Works,musicians%2C%20poets%2C%20painters%20etc.>

2.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

i. Red colour
ii. Red triangle
iii. Font used for the word ‘Bass’
iv. Position of the word ‘Bass’ vis-à-vis the triangle (underneath, not beside or above)
v. The word ‘Bass’ with a unique shaped line under the middle alphabets ‘a’ and ‘s’

SAE 2

In precolonial Nigeria, trademarks, brands and secrets were guarded by creative societies who closely guarded unique information regarding their artistic works. Indigenous know-how for food and herbs, or oral literature did not enjoy such protect but was freely shared though their origins were acknowledged and respected.

MODULE 1: INTELLECTUAL PROPERTY – GENERAL INTRODUCTION

UNIT 3 HISTORICAL BACKGROUND TO INTELLECTUAL PROPERTY REGULATION IN NIGERIA

3.1 INTRODUCTION

In the previous unit, we traced the origins of intellectual property regulation in Europe and the USA. We shall localise our knowledge by learning about the regulation of intellectual property in Nigeria.

3.2 LEARNING OUTCOMES

By the end of this unit, you should be able to,

- Trace the historical background to the regulation of intellectual property in pre-colonial and colonial Nigeria
- Discuss the historical background to the regulation of intellectual property in post-colonial Nigeria

3.3. MAIN CONTENT

Historical Development of Intellectual Property Law in Pre-Colonial and Colonial Nigeria

As with other jurisdiction, trademarks, brands and secrets, were also guarded in pre-colonial creative societies of present day Nigeria through various means. For instance, the Benin lost-wax method of bronze casting which results in world-renowned bronze artworks of distinctive and unique quality comprised closely guarded secrets on steps for preparation, casting styles, metal composition etc. These secrets were persevered through the guild system under which bronze casting the sole preserve of the all-male Igun Eronmwon bronze casting guild in present day Igun Street, Benin City, Edo State. Communal living being the culture in various Nigerian societies, other forms of intellectual property (chiefly patents and copyright) such as indigenous know-how on herbs and food combinations, folklore, oral literature etc. were freely shared and not subject to individual ownership. However, their origins were usually acknowledged and respected.

Igun Street, Benin City. Home of Benin guild of bronze casters.

How correct is it that intellectual property was not protected in pre-colonial Nigeria?

Formal regulation of intellectual property in Nigeria took place in two stages: First by the British colonial government pre-independence (from 1900 – 1960) and second by indigenous post-colonial legislation post-independence (circa 1960 – date). During the pre-independence stage, the entity called Nigeria came into existence in 1914 following the amalgamation of the Northern and Southern Protectorates which had previously been under separate British rule.

One feature of protection of intellectual property during the colonial period was the transplantation of treaty obligations and/or extant statutes to colonies. Hence, whatever laws were in place in colonizers' jurisdictions were automatically applicable in the colonies without regard to local circumstances or differences in context. This approach was not to protect native colonies but for the benefit of the colonizers. Hence, patently Eurocentric treaties which completely ignored the interests of colonies or need for protection of native culture were automatically applicable in Nigeria with the advent of colonisation. Particularly, the Paris Convention for the Protection of Industrial Property 1883 and Berne Convention for the Protection of Literary and Artistic Works 1886 coming into effect in Nigeria after 1914 only served the interests of the British colonizers. As with spoils-of-war, fruits of native culture which constituted intellectual property were freely taken by the British colonizers with no recognition for the efforts of the native colonies in their production and no protection or reward for them.

Where such fruits of native culture were used as constituents of products sold by the colonizer, intellectual property was ascribed to the colonizers.

Whilst under colonial control, Nigeria and IP produced therein would have been subject to British obligations under various colonial treaties. However upon independence, Nigeria took steps to personally accede to some multilateral IP treaties/agreements with succeeding ratifications and domestications in some cases. Nigeria acceded to the Paris Convention and the Berne Convention in 1963 and 1993 respectively and joined WIPO in 1995. For further information on Nigeria's accession status for other WIP administered treaties visit https://www.wipo.int/wipolex/en/treaties/ShowResults?code=NG

In the following sections, you will find further details on domestic legislative steps aimed at protecting various forms of intellectual property in Nigeria.

Self-Assessment Exercise 1
How was intellectual property protected in pre-colonial Nigeria?

3.3.1 Trademarks

As with many other jurisdictions, trademarks constituted the first category of intellectual property regulated in Nigeria through the Trademark Proclamation 1900 already in force in Britain. First made applicable in the Southern protectorate upon its creation in 1900, the statute became applicable all over Nigeria after amalgamation in 1914. In 1915, the colonial government adopted the Merchandise Marks Act which was already in force in the UK seeking to prevent non-British merchants from distributing their goods in Britain and Europe with fake royal warrants and counterfeit trademarks designed to give the impression that the goods were manufactured in Britain.

The Trademark Proclamation 1900 was repealed by the Trademark Ordinance No. 13 1926 which remained in force in Nigeria till 1965 when the Trade Mark Act was passed heralding an era of indigenous regulation of intellectual property. The 1965 Act and Trademark Regulations 1967 remain the main statures regulating trademarks in Nigeria. Other statutes with specific

prescriptions on trademarks include the Trade Malpractices (Miscellaneous Offences) Act 1992 also prohibits labelling, packaging, sale or advertisement of a product with false or misleading information as to its brand name, and the Cybercrimes (Prohibition and Prevention) Act which prohibits cybersquatting to mention a few.

How soon after the Trademark Proclamation's applicability all over Nigeria was an indigenous trademark statute passed?

3.3.2 Patents

Before 1914, the British colonists had different laws in place for the regulation of patents in their different colonies. Hence while the Patent Proclamation Ordinance was in force in the Lagos Colony and the Southern Protectorate from 1900, the 1902 version was in force in the Northern Protectorate. Post-amalgamation, the 1916 Patent Ordinance repealed the aforementioned laws with universal application all over Nigeria. It was also repealed in 1925, by the UK Patent Ordinance which required prospective Nigerian applicants for a patent registration to first apply and obtain a UK patent. In effect, Nigeria was only treated as a patent registry without independent powers to grant patents. This was in force till 1968 when the Nigerian government enacted the Patent Rights (Limitation) Act 1970 to give Nigerian government and its agencies same powers as those enjoyed by the UK Government under its Patent Act of 1949. The Patent and Design Act which was passed in 1970 effectively eliminated the barrier occasioned by the 1925 ordinance and repealed all pre-existing local Ordinances and British laws which sought to regulate patents in Nigeria. The said Act remains in force in Nigeria till today. In 2021, the Nigerian House of Representatives introduced the Patents and Designs (Repeal and Re-Enactment) Bill 2021 intended to overhaul the 1971 Act, domesticate international treaty obligations and bring it up to speed with current developments. As of August 2022, the Bill was still going through the legislative process.

3.3.3 Copyrights

As with the aforementioned categories of IP, Nigeria also inherited the English Copyright Act 1911 which became applicable in Nigeria vide an Order in Council 912 dated 24th June 1912 and continued post-amalgamation. Following calls from various quarters particularly the publishing

and music sectors which recorded huge losses occasioned by the inadequacy of the 1912 Act to deal with piracy, the Copyright Act was passed in 1970. Apart from its status as an autochthonous copyright legislation which displaced the previous colonial import, the 1970 Act extended the nature and scope of copyright recognised thereunder and effectively abrogated the common law position on copyright – providing that no copyright may subsist if not provided under the 1970 Act.

By the 1980s, changes in copyright practice and pressure on the government to provide for an author-friendly law that effectively protected against copyright violations resulted in the enactment of the Copyright Act 1988 which repealed the 1971 Act. In addition to comprehensive protection of creative works and other provisions aimed at stimulating actors' creativity, the 1988 Act created the Nigerian Copyright Commission as the sector-specific regulator and enforcer of the Act. The 1988 Act which was further amended in 1992 and 1999 remained in force 2023 when it was repealed by the Copyrights Act 2022 signed into law on March 23rd 2023.

Self-Assessment Exercise 2

None of the indigenous statutes regulating intellectual property in Nigeria is less than 50 years. How correct is this statement?

3.4 SUMMARY

Intellectual property is the product of human creativity following some form of intellectual activity. It is infinite and may arise out of invention of new products or something new added to an existing product to make it a separate product. Intellectual property has exclusive rights attached to them which are only enjoyed by their owners. This exclusivity allows them to exclude others from profiting from their creations without their consent. Intellectual property and intellectual property rights are protected through the mechanism of intellectual property law which regulate their grant and protections to attach to each intellectual property right. Intellectual Property Rights are classified as personal property with rights of ownership, sale inheritance etc, but subject to certain restrictions.

The regulation of intellectual property has its origins in antiquity. In pre-colonial Nigeria, intellectual property rights were initially guarded through colonial societies whilst indigenous knowhow on food, herbs and oral literature tended to be shared freely without individual restrictions. Following the advent of colonialism, treaty obligations and Statutes in force in Britain were transplanted and applied in Nigeria. After independence, Nigeria acceded to various multilateral treaties and agreements, joined WIPO and enacted various indigenous statutes to regulate intellectual property issues in Nigeria. In Nigeria, trademarks are primarily regulated under the Trademarks Act 1965 Act and Trademark Regulations 1967 though some other statutes the Trade Malpractices (Miscellaneous Offences) Act 1992 and the Cybercrimes (Prohibition and Prevention) Act also offer specific protections for trademarks. For patents, the main statute is the Patent and Designs Act 1970. Prior to 2023, Copyrights were regulated under the Copyrights Act 1988 as amended. The 1988 Act has however been repealed by the Copyrights Act 2023 which was signed into law on March 23rd 2023.

3.5 REFERENCES/FURTHER READING/WEB SOURCES

Waver, D., *'Intellectual Property Law'* Irwin Law (1997)

Schechter, R.E and Thomas, J. R., *'Intellectual Property The Law of Copyrights, Patents and Trademarks'* Thomson West (2003)

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3.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

In precolonial Nigeria, trademarks, brands and secrets were guarded by creative societies who closely guarded unique information regarding their artistic works. Indigenous know-how for food and herbs, or oral literature did not enjoy such protect but was freely shared though their origins were acknowledged and respected.

SAE 2

The statement is correct for Trademarks and Patents which are regulated by statutes in force since 1965 and 1970 respectively. Same is not correct for copyrights which is now regulated by the recently passed Copyrights Act 2023.

MODULE 1: INTELLECTUAL PROPERTY – GENERAL INTRODUCTION

UNIT 4 JUSTIFICATION AND CRITQUES FOR PROTECTION OF INTELLECTUAL PROPERTY RIGHTS (1)

4.1 INTRODUCTION

In Units 1 to 3 we laid the foundation for this course with a definition and historical discourse on intellectual property. We are making progress from that point. As we noted in Unit 1, intellectual property rights afford their holders the exclusivity to enjoy their ownership of intellectual property and profit therefrom. This is only possible because of the protection offered such owners under intellectual property law.

Whilst owners of IPR may be happy to enjoy such exclusive rights, not everyone thinks such exclusivity is justified. Each have their reasons for taking the position they have taken. In this unit, we will discuss the moral rights theory and the reward theory as justifications for the protection of intellectual property and criticisms that have been expressed against these justifications.

4.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

a. Explain the justifications for protection of intellectual property rights under the moral rights theory

b. Explain the justifications for protection of intellectual property rights under the reward theory

c. Critique the justifications proffered for the protection of intellectual property rights

4.3 MAIN CONTENT

Justification for Intellectual Property Protection

Proponents of intellectual property protection have proffered various reasons for their support of exclusivity granted for the enjoyment of IPR owners. Some of the reasons are backed up or

distilled into with theories. Note that the fact that a justification does not have a specific theory attached to it does not in any way negate the validity of that justification. Some justifications have simply enjoyed more acceptance or been known for longer and so may theorised/classified. The natural/moral rights and the rewards theories are discussed below:

4.3.1 Natural/Moral Rights Theory

The natural rights theory is grounded in morality. Simply, it propounds that it is proper to recognise and protect the right of an author or inventor to enjoy the fruit of their intellectual activity. One of the earliest proverbs in support of this theory is King MacCerbill's famous ruling that 'to every cow belongs her calf, therefore to every book belongs its copy.' –essentially sanctioning the protection of copyright. The natural rights theory draws from John Locke's proposition that that a person has a natural right over the products of his labour. Early proponents of the theory include noted poet -William Wordsworth, writer - William Duff and legal luminaries William Blackstone and Francis Hargrave.

Arguably the oldest theory on IP protection, the theory recognises that each original work is subject of intellectual labour which represents an extension of the maker's personality both of which should warrant IP protection. While this notion may not be entirely correct in modern times where research and knowledge has become incentivised, early artists' works tended to belie their personal sentiments. For instance, the poet William Wordsworth was a known naturalist and this was reflected in his poems. Furthermore, the quality of the poem demonstrates the depth of his knowledge both in terms of the rhyme scheme and classical allusions and the labour that went into authoring it.

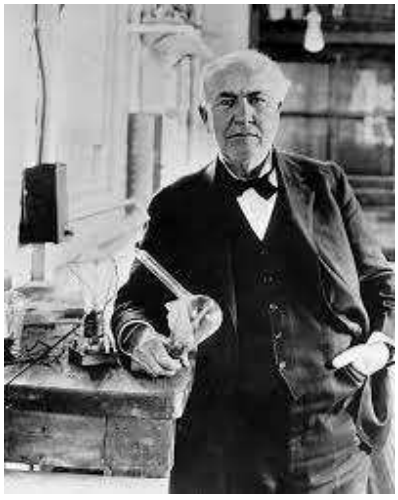
The moral right argument constituted one of the arguments successfully raised in favour of endless exclusive rights in *Millar v. Taylor*. Ascribing to IP protection afforded to Shakespeare and its effect on his artistic productions, they argued for such protection to exist in perpetuity. As the historical discourse on IP (especially copyright) indicates, the focus of IP protection in ancient times lay more in ownership/integrity than individual economic gain.

Can you mention the oldest proverb in support of the natural/moral rights justification for IP protection and two early proponents of the theory?

The idea of profiting economically came later after the 1710 Statute of Anne. Hence, whilst Wordsworth (born 1770 after the enactment of the Statute of Anne) profited from copyright in his works, Shakespeare did not having been born over 150 years earlier. While the natural right theory is well suited to the non-economic focus, the reality is that economics plays a significant role in the drive for IP protection. Wordsworth, though privileged to have enjoyed the benefit of the Statute of Anne, sought more IP protection for writers demanding eternal protection or at least, 40 years exclusivity for writers' works.

The natural rights theory has been criticised for some proponents' insistence on eternal intellectual property protection and its potential to hamper creativity. Furthermore, the theory loses sight of the fact that every creative outcome is more social/intertextual than individual. For instance, Wordsworth sonnet *'The World is too much with us'* makes reference to Greek mythology with a Petrarchan rhyme scheme – both products of others' intellect. Similarly, famous scientist and chemist - Thomas Edison, though most readily associated with the 'invention' of the lightbulb did not actually create same but improved what was already in existent to make it better and cheaper. Calling his activities 'perfecting' instead of a 'inventing' he noted "my so-called inventions already existed in the environment. I've created nothing. Nobody does."

Poet - William Wordsworth (Source: Britannica)



Inventor – Thomas Edison (Source: Britannica)

Self-Assessment Exercise 1

What are the arguments for and against the moral rights justification for IP protection?

4.3.2 Reward Theory

The reward theory seeks to reward the effort put in to create a work subject of intellectual property protection. Like natural rights, it recognises labour but not necessarily for economic gain because the creator is deemed to have gone beyond the extent to which society expects them to go in coming up with the product which is useful for society. The theory presupposes that a work of intellectual property has already been created, hence IP protection becomes a way of 'thanking' the creator.

The rewards theory is criticised for its lack of prescription of what kind of product is worthy of reward, what should constitute reward and for how long. Furthermore, how do you quantify intellectual activity not grounded in tangibility? For instance, Sir Isaac Newton's discovery of gravity was based on an off-chance idea following his observation of a falling apple. Ideas are generally not subject of intellectual property. In effect, despite a life-changing discovery which has constituted the basis of several other discoveries, Newton does not enjoy IP in the discovery of the law of gravity. Had he been born later, his writings may be have enjoyed copyright protection under the statute of Anne. In view of Newton's experience, several questions arise: should someone so intelligent as to invent gravity be rewarded? If yes, for how long? If no, why? So he is well known and credited with the invention of gravity with the story of the apple retold over and over – does that constitute reward or sufficient reward? ... So many questions. The same will arise for most other inventors and their inventions.

Self-Assessment Exercise 2
What are some of the questions that come to mind in critique of the reward theory?

4.4 SUMMARY

The desire for protection of intellectual property rights has been propounded for various reasons. One of the earliest justifications is the natural rights theory grounded on the moral argument that everyone ought to be able to enjoy the fruit of his invention. The theory however relies on the assumption that every invention is the original product of the inventor's intellectual effort – this is not always true. The reward theory justifies IP protection as reward for work already done but fails to address the basis for determining what will be sufficient as reward and for how long. The

incentive based theory is based on a similar premise of the need to reward the intellectual activity which results in intellectual property. However it further views IP protection as an incentive for further intellectual activity. Whilst IP may serve as incentive, a good number of inventions were not based on the desire for gain but on personal interest.

4.5 REFERENCES/FURTHER READING/WEB SOURCES

Waver, D., *'Intellectual Property Law'* Irwin Law (1997)

Schechter, R.E and Thomas, J. R., *'Intellectual Property The Law of Copyrights, Patents and Trademarks'* Thomson West (2003)

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4.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The natural/moral rights theory is justified on the basis that that a person has a natural right over the products of his labour and should profit from it. The theory is criticised for its proponents' insistence on perpetual intellectual property protection which may hamper creativity. Also, the theory loses sight of the fact that every creative outcome usually relies on previous creativity.

SAE 2

The incentive theory is meant to reward and encourage the intellectual effort that goes into inventions. It has been critiqued on the ground that some inventions are not based on the need for gain or based on the encouragement provided by prospect of benefitting from intellectual property protection, but on the personal interest of the inventor.

MODULE 1: INTELLECTUAL PROPERTY – GENERAL INTRODUCTION

UNIT 5. JUSTIFICATION AND CRITIQUES FOR PROTECTION OF INTELLECTUAL PROPERTY RIGHTS (2)

5.1 INTRODUCTION

In the previous unit, we commenced our discussion on the theories underpinning the protection of intellectual property rights. We explored the natural/moral rights and the reward theories. We will continue our discussion on the justifications for the protection of intellectual property under two more theories – the incentive-based theory and the neo-classical theory, as well as the and criticisms against them

5.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Explain the justifications for protection of intellectual property rights under the incentive-based theory
- Explain the justifications for protection of intellectual property rights under the neo-classical theory
- Critique the justifications proffered for the protection of intellectual property rights under the above theories.

5.3 MAIN CONTENT

5.3.1 Incentive-Based Theory

The incentive based theory has economic foundations based on a quantification of inventiveness as something worthy of economic value for the good of society. Accordingly, intellectual property protection becomes an incentive to encourage the production and dissemination of knowledge and invention. In practical terms, it seeks to encourage intellectual activity by offering IP protection as an incentive. The theory recognises that intellectual work, though rigorous and time consuming, is easy to reproduce. Without protection, inventors will be discouraged from engaging in such rigorous activity. Like the reward theory, the incentive-based theory recognises the need for some form of ‘reward’ for products created for the good of

society. However, unlike the reward theory which propounds that IP protection be extended as a 'thank you' for a product already created, the incentive-based theory propounds that IP be protection be extended to 'encourage' intellectual work towards the creation of the product. Hence reward comes before creation.

Bill Gates' billionaire status is attributable to intellectual property rights held by his company Microsoft for patents related to the Windows Operating System. If you were Gates, how would you justify your right to exclusive production and enjoyment of proceeds from the sale of the Windows operating system in poor African countries which are lagging behind in ICT but lack the funds to purchase all they require to gain competence?

The theory plays out in various sectors and is applicable to all forms of intellectual property. For instance, the production of textbooks, artwork or music (copyright), the discovery of new vaccines (patent) and goodwill in well-known logos (trademarks) depend on long periods of arduous work (sometimes abandoned where not expected to be viable or defective with no means of recouping the resources invested up till the period of abandonment). Without IP protection for viable works, inventors are unlikely to engage in research and development activities necessary for such arts or inventions.

Self-Assessment Exercise 1
Compare and contrast between the reward theory and the incentive-based theory?

Like the other theories, the incentive based theory has also been criticised. Some critics note that most 'inventions' created for the general good were prompted by individual interest of their creators and not the desire for economic enrichment. In other words, 'necessity is the mother of invention'. Such critics point out to great inventors like Alexander Fleming who created penicillin by mistake and renowned writers like Shakespeare wrote his plays and poems simply for literary appreciation. While this criticism has some merit, it loses sight of the commoditized nature of work in present times. Accidental discoveries or works created in service of humanity may still exist. However, major commercial enterprises engage in R&D strictly for commercial gain. This point is clear from activities of pharmaceutical giants who created COVID-19

vaccines and insisted on selling them at commercial rates without licensing their knowledge to countries who could not purchase them at such rates but also wished to save the lives of their citizens.

5.3.2 Neo-Classical Economics Theory

The neo-classical economics theory views intellectual property as a public good to which broad access is desirable for knowledge sharing and development. In this sense, a public good is a good which can be consumed by multiple consumers on a non-competitive basis. So, for instance, the fact that Mr. A is registered for this course and been issued a copy of this course material did not preclude you getting your copy of this course material upon registration. In fact, the more of you and your classmates who are able to benefit from the information contained in this course material, the better for dissemination of knowledge provided you or any of your classmates do not breach the terms of use for the same material (which begs the question – have you confirmed the terms of use for NOUN course materials? If you haven't you should!).

Self Assessment Exercise 2
What is the focus of the neo-classical economics theory?

Like the incentive based theory, the neo-classical economics theory agrees with the need for intellectual labour to be rewarded. Where both theories differ is the purpose of this reward i.e. whether to encourage further intellectual activity or to encourage the dispersal or dissemination of knowledge. Incentive based theory seeks to encourage further intellectual activity by guarantee of IP protection as a reward for any intellectual activity that results in a new product beneficial to the society. On the other hand, neo-classical economics theory is directed at the dispersal of knowledge with IP protection granted to the creator of the knowledge.

Having learnt about the major theories underpinning the protection of intellectual property. Which is most appealing to you and why?

5.4 SUMMARY

The focus of this unit has been on two more theories underpinning the protection of intellectual property rights i.e. We have learnt that the incentive based theory sees the protection of

intellectual property as an incentive to encourage the production and dissemination of knowledge and invention while the neo-classical theory views the protection of intellectual property as a public good to which broad access is desirable for knowledge sharing and development. Both theories are alike. However, their point of departure is on the reason for protection. Whilst the former encourages further intellectual activity, the latter encourages the production and dissemination of knowledge.

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5.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The neo-classical economics theory is based on the prospect of encouraging further invention with a view to dispersing knowledge. Hence, though reward for cost of invention may be sought the ultimate focus is to disperse the knowledge on which the invention is based for exploitation by others and advancement of knowledge.

SAE 2

The neo-classical economics theory is based on the prospect of encouraging further invention with a view to dispersing knowledge. Hence, though reward for cost of invention may be sought the ultimate focus is to disperse the knowledge on which the invention is based for exploitation by others and advancement of knowledge.

Module 2 Categories of Intellectual Property

Unit 1 Copyrights and Patents

Unit 2 Trademarks and Trade Secrets

MODULE 2: CATEGORIES OF INTELLECTUAL PROPERTY

UNIT 1: COPYRIGHTS AND PATENTS

1.1 INTRODUCTION

Having dealt with introductory issues related to IP, we will deal with specific matters relating to intellectual property. We will begin by examining specific categories of intellectual property and then we will consider the legal and institutional framework for the regulation intellectual property. In this unit, we will examine copyrights and patents.

1. 2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Properly categorise copyrights
- Properly categorise patents

1.3 MAIN CONTENT

Intellectual property whether products of scientific work, inventions or products of the arts fall into three broad categories – copyright, patents and trademarks. This unit will deal with copyrights and Patents.

1.3.1 Copyrights

A copyright is an intellectual property right granted by a government to the **author** of an **original** literary, dramatic, musical, **artistic**, or other eligible **creative** work (including databases, web pages and computer programs) that gives them the exclusive right to **control** how the work is published, reproduced, performed, or displayed as well as whether or not derivative works may be produced. Copyright protection is automatic though registration may provide added protection. Also it does not protect ideas. The right is granted for a specific **term of years** (See https://en.wikipedia.org/wiki/List_of_countries%27_copyright_lengths for terms of years for different countries).

It is necessary to bear the following in mind:

a ‘Author’

The use of the word ‘author’ is not limited to written work. For purposes of copyright, an artist can hold copyright in his painting, so can a musician or movie producer. What is important is that owners of ‘creative works’ which fall within the categories stated above, enjoy protection for their creative works. Because copyright does not protect ideas, authorship presupposes that the artistic or creative work has already been expressed or in existence.

b. Control

The degree of control exercisable by a copyright holder extends beyond reproduction of the work protected the right. It includes other forms of publication of the work or its derivative e.g. reproduction of an excerpt of a private letter in a newspaper, use of a song as a movie soundtrack or conversion of a novel into a movie or play.

Control is exercisable whether or not the product covered by copyright is in the possession of a third party. This is why your right to use a book which you have purchased with your own money does not extend to excessive photocopying of same. Similarly, in *HRH Duchess of Sussex v. Associated Newspapers Ltd.* Case No. A3/2021/0943 Case No: IL-2019-000110 where Duchess of Sussex, Meghan Markle successfully claimed damages against the Defendants’ (publishers of Mail On Sunday (MOS) newspapers) for the reproduction of extensive portions of her private letters to her father in MOS without her consent. It did not matter that the letter was her father’s property (having been addressed and sent to him), in her father’s possession and validly released to MOS by the said father.

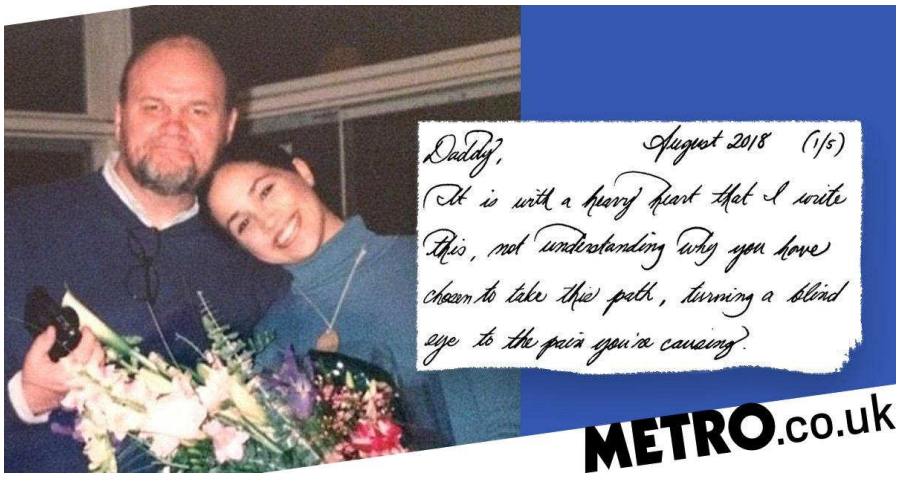

Photo of Meghan Markle and her father with portion of her handwritten letter inset.
Source: Metro.co.uk

Meghan Markle's letter to her father has been in his possession for years, who should hold copyright to the said letter and why?

You will find the animated video below (on copyrights) useful and interesting. Please click on the link to view it.

https://www.youtube.com/watch?v=eEB5MYcj-Ns

c. 'Artistic' or 'Creative'

The terms 'artistic' or 'creative' as used in the definition are highly subjective. As they say, one man's treasure may be another man's trash. The same is true of copyright. Regardless of how offensive or mindless a work may be to some persons, it will be entitled to copyright as long as it has been expressed or produced. Hence, even pornographic works enjoy copyright. You must also note that the level of creativity has nothing to do with rights enjoyed. Whether all that was required was minimal effort or extensive effort, both works will enjoy copyright.

Cobhams Asuquo speaks from the perspective of an artist. It will help you put the above into a practical perspective. Click on the YouTube link below:

https://www.youtube.com/watch?v=HIlZp0o8K5I

1.3.2 Patents

A **patent** is an intellectual property right granted by a government to an 'inventor' which gives the inventor the exclusive right to develop the **invention** and/or produce same for commercial purposes over a **specific term** of years. In legal parlance, the document or legal instrument issued to an inventor by the requisite issuing authority upon registration of a patent is also called a patent.

Utility models are also called 'short term patents', 'utility inventions' or 'innovation patents'. They provide short term protection for mechanical or technical innovations by granting the holders exclusivity for a limited period. This exclusivity prevents others from exploiting the inventions without the consent of the right holders. Products which usually enjoy utility model protection include those that make improvements to existing products, adapt same or have a short commercial life. Usually, these constitute the functional aspect of other inventions such as

toys, watches, machinery etc. In the famous *Chint v. Schneider Electric Case* (2009), Chint Group successfully claimed RMB 334 million damages against their competitor – Schnieder Electric Low Voltage Co. Ltd. for an infringement of Chint's utility model for the miniature low-voltage circuit breaker. For a discourse on Chint and Schneider's competition-based disputes see *Harry Yang, Chint v. Schneider* on Patent Infringement http://www.chinaipmagazine.com/en/journal-show.asp?id=258 .

In line with the incentive theory, utility models seek to encourage technical invention by giving exclusive rights to inventors in exchange for public disclosure on the workings of the invention. Utility models do not generally protect inventions relating to pharmaceutical, biotechnological chemical or biological substances/methods, like patents, utility models also require applicants to show the novelty of their products. However, the standard for novelty is less rigorous than patents and there is no requirement for inventive step. The process and for obtaining a utility model is faster and cheaper than that of the patent. Utility model protection is credited with advancing technological development especially in developing nations. However, they are not available in all countries – neither Canada, UK nor USA grant utility model protection. Utility models are not yet granted in Nigeria though applicable in several African countries like Egypt and Rwanda. It was proposed in the Patent and Designs (Repeal and Re-enactment) Bill 2020 (See Section 18 of the Bill). However, the bill is still going through the legislative process.

What is the difference between a patent and a utility model?

You must bear the following in mind concerning patents:

a. Invention

The word 'invention' as used above means something that is new. It need not be scientifically complex but must be patentable. Not all 'new' products are patentable they must meet other specific conditions. Whether or not a product is patentable depends on the provisions of statute in force in the jurisdiction where the application is sought.

In Nigeria, the Section 1(1) of the Patents and Designs Act provides

(1) Subject to this section, an invention is patentable—

(a) if it is new, results from inventive activity and is capable of industrial application; or
(b) if it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application.

In other words, an invention which is new but did not result from inventive activity or is not capable of industrial application is not patentable. Similarly, an improvement on an existing patented invention must also be new, result from inventive activity and be capable of industrial application.

Self-Assessment Exercise 1

Are the following patentable? Support your answer with reasons:

i. The discovery of the law of gravity by Isaac Newton based on dropping an apple from a rooftop.
ii. Method for roasting and cooling coffee which makes it frothier when mixed with cold water.
Iii Soaking of Garri with cold water to preserve its crunchiness
iv. A solar-powered microwave oven which worked well for laboratory demonstration but could not be manufactured for commercial purposes.

Under US Law, there is no requirement for industrial application. Section 101 of the UP Patents legislation (US Code Title 35) provides that "whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of [the law]". It goes on to specify the conditions in S102 – 103 as novelty, non-obviousness and utility.

b. Term of Years

Patent rules are subject to the legislative interests of each sovereign state. However, some rules have been harmonised in the interest of cross-border trade and development. The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) has facilitated the harmonisation of terms of patents. By virtue of Article 33 of the agreement, most nations including Nigeria fixed 20 years from date of filing of applications as the term of years of patents See Section 17 PDA. Note however, that utility models are usually granted for a shorter terms (usually between 6 and 10 years depending on the granting nation).

c. Applicability

Where granted under a specific national law, patent rights are usually applicable only within the nation where it is granted. For EU member states, patents may also be subject community-wide applicability. An EU patent affords an applicant the opportunity to obtain a single patent which will be applicable all over the EU subject to validation in the national patent office of each EU member state where protection is required. This does not preclude applicants from seeking national patents which will be applicable only in the EU country where it was registered. For WIPO member states, the Patent Cooperation Treaty also affords nationals of contracting state to apply for a patent which will be recognised across all Patent Cooperation Treaty contracting states subject to nationalisation of the successful application in each member state where applicability is sought. Nigeria is a signatory to the Patent and Cooperation Treaty. It is therefore obligated to nationalise and honour foreign patents registered under the Treaty.

An EU Patent or a PCT Patent is automatically applicable in all contracting states upon completion of registration. How correct is this statement?

1.4 SUMMARY

The focus of this unit has been on the categorisation of copyrights and patents as forms of intellectual property. We have learnt that copyrights are protections granted to authors of original artistic or creative works which are already in existence. Patents on the other hand are protections granted to inventors to enable them develop and commercialise their inventions for a specific term of years (usually 20 years). To be patentable, a product must be new, result from inventive activity and be capable of industrial application. Patents do not offer global protection. They are only applicable on a national or community wide (EU) basis. Some countries grant 'short term patents' called utility models short term (usually 6 to 10 years) protection for mechanical or technical innovations.

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1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Are the following patentable? Support your answer with reasons:

i. No. Dropping an apple from a height is not inventive activity. The law of gravity is also not Newton’s invention.

ii. Yes Product of inventive activity.

Iii No. Not a product of inventive activity. Simply commonsense.

iv. Yes. Product of inventive activity.

MODULE 2: CATEGORIES OF INTELLECTUAL PROPERTY

UNIT 2: TRADEMARKS AND TRADE SECRETS

2.1 INTRODUCTION

In the last unit, we started our discussion on categories of intellectual property – looking specifically at copyrights and patents. This unit will focus on the third major category of intellectual property – trademarks. We will examine some definitions of trademarks and why trademarks are granted. We will also discuss the meaning and nature of trade secrets.

2.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

1. Define trademarks
2. Explain the purpose of trademarks
3. Describe what is meant by 'trade secrets'

2.3 MAIN CONTENT

As we noted in the previous units, intellectual property whether products of scientific work, inventions or products of the arts fall into three broad categories – copyright, patents and trademarks. Let us now examine the meaning and nature of trademarks.

2.3.1 Trademarks

Kline and Kappos define a **trademark** as **"**an intellectual property right granted by a government to an individual, business, or legal entity that creates and uses a **distinctive** word, name, symbol, or device to distinguish its products or services from those from any other entity in the marketplace." Similarly, Bouchoux identifies it as word, name, symbol, or device, or a combination thereof, used by a person (including a business entity), or that a person has a bona fide intention to use in commerce, to identify and distinguish his or her goods from those manufactured or sold by others and to indicate the source of those goods. The Supreme Court similarly defined trademark in the same terms as a distinctive mark of authenticity through which the product of a particular manufacturer may be distinguished from those of others by word,

name, symbol or device. See *Society BIC S.A. and others v. Charzin Industries Limited* (2014) LPELR-22256 (SC). The Trademarks Act 1967 defines trademark "... a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of he identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under the Act". The above definition appears to limit trademarks to goods alone. However, definitions of trademarks ought to extend to service marks. The apparent lack of recognition of service marks under the Trademarks Act has been cured by the Business Facilitation Act 2023 which amends Section 67 of the Trademarks Act to include services in its definition of trademarks. In Section 67 of the Act, trademark is defined as "a mark used in relation to goods or **services** for the purpose of indicating a connection between the goods and **services** and a person having the right, either as a proprietor or as a registered user, to use the mark, whether with or without any indication of the identity of that person and may include shape of goods, their packaging and combination of colours"

How would you define trademarks?

Trademarks indicate origin, quality and ownership of a service. From a consumer protection standpoint, they serve two major functions, both of which are interconnected:

a. to provide assurance of quality and consistency, and
b. to assist consumers in deciding which brand of products to choose

Trademarks being distinctive, they become a brand associated with a producer or specific product over time with consumers associating that mark to the level of confidence they have in product quality. Hence, for instance, consumers of Coca Cola have come to associated the white ribbon device in a red box with that dark coloured gaseous soft drink with a distinctive taste unlike that of similar 'cola' soft drinks.

Coca Cola logo showing various Coca Cola trademarks

Self-Assessment Exercise 1

With reference to a vehicle of your choice discuss the following:

a. Your preferred brand of that vehicle
b. The description of your brand's logo
c. The function of your preferred brand's logo as a trademark

Like patents, trademarks are not universal. Hence registration of the trademark in a product in one country will not grant it automatic exclusivity in another. A case in point is the trademark registration of the popular Coca Cola 'contour bottle'. While it enjoyed trademark protection in the US since 1960 and subsequently in the UK, China and Russia, Japan refused to register it before 2008 and the EU Trademark Office rejected Coca Cola's application to register a variant of its' contour bottle on ground of lack of distinctive character.

As a general rule, trademark registration is not compulsory for trademark holders to be able to assert their right to protection of their brands (for instance they can do so under the tort of 'passing off'). However, registration of a trademark affords its owner more protection from counterfeiting and passing-off. Section 3 of the Trademarks Act provides –

> No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

Also, in Nigeria, the National Agency for Foods and Drugs Administration and Control (NAFDAC) requires that all food, water and pharmaceutical products produced in Nigeria must be registered as a trademark.

On a lighter note, you will find this animated video on creation and benefits of trademarks enlightening. Click on the link to view the video

https://www.youtube.com/watch?v=zs_6pikpaps

2.3.2 Trade Secrets

Trade secrets refer to confidential business information (whether favourable or negative) which provides and enterprise with a competitive edge. Every trade secret much have independent value (actual or potential) from being secret (i.e. not generally known or readily ascertainable by other persons) from persons who may be able to obtain economic value from its disclosure or use. Examples of trade secrets include formulas, patterns, compilations, program devices, methods, techniques, processes etc.

Self-Assessment Exercise 2

How may negative information constitute trade secrets?

Trade secrets may also be intangible things like ideas which are yet to be explored or expressed. Whilst the form is important, what makes a trade secret worthy of IP protection is the commercial value of such secret. Hence, unfavourable information may constitute a trade secret as long as it gives its holder a competitive edge.

Information that may qualify as patent or copyrights may also be deserving of protection as trade secrets. This may account for the relative obscurity of trade secrets as type of intellectual property. Some have even argued trade secrets should not be classified as intellectual property because, unlike patent or copyrights which become public information after expiration, they offer

no benefit for the common good. However, trade secrets are recognised as intellectual property by international bodies and legislative instruments such as the World Intellectual Property Organisation and TRIPS agreement respectively.

Practical Examples of Trade Secrets

- Coca Cola's 'Merchandise 7x' is the formula for its Coke drink. The formula which is stored in a secure vault in the Coca Cola Museum has never been patented in order to prevent disclosure required for patent approval and protect it for an unlimited period for time. It is said to be known only two senior executives of the company at any material time. The executives are bound by confidentiality agreements never to disclose same to anyone.

- Google search algorithm which makes it the best search engine was developed in 1997 and continually refine/updated. As with Coca Cola's formula, the secret is never disclosed directly or indirectly. In 2006, the Department of Justice requested all search engines to submit 2 months worth of search queries received from their users. Whilst Yahoo, MSN Search and Ask Jeeves complied, Google refused for fear that trade secret in its search technology may be compromised.

- The recipe for KFC's fried chicken giving it a unique taste and texture. Like the Coca Cola formula, it is known by only two senior executives of the company

- ***Dalmatia Import Group Inv. V. FoodMatch Inc. et al***. In that the secret recipe and process for gourmet fig spread was disclosed to vendors and distributors. Held: The Plaintiff's trade secret had been misappropriated. Damages awarded in favour of the Plaintiff.

Unlike copyright and patents, the fact that information is novel does not automatically qualify it for protection as a trade secret. Article 39(2) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement provides the conditions that must be satisfied for an information to be classed as of a trade secret – all present simultaneously:

- It must be secret i.e. not generally known or readily accessible to persons within the circles that normally deal with the kind of information
- It has commercial value because it is secret
- It has been subject to reasonable steps under the circumstances by the person lawfully in control of the information, to keep it secret.

It is noteworthy that whilst trade secrets may be awarded some measure of protection, it only protects the production process and does not preclude third parties from seeking to discover it by independent innovation or reverse engineering. This limits the protection afforded trade secrets in comparison with patents which prevent commercial use of any patented product. For instance, computer programmes rely on source-codes which when protected by patents cannot be freely accessed or used by competitors who may wish to enhance the program's function, develop the program or facilitate compatibility with other programs. If such source-codes are only protected as trade secrets, other programmers may seek to decipher them by reverse engineering or independent innovation without resource to the owner of the source-code.

Trade secrets are similar to patents and copyrights in that they offer monopoly (unlimited as against a specific term of years offered by copyrights and patents). Like copyrights, the need not go through a process of registration to enjoy protection. However, they differ from copyrights in that ideas or information may be protected as trade secrets before being expressed. There are also no specific categories or information that may enjoy protection as trade secrets.

There is no Nigerian statute directly prohibiting theft or unlawful acquisition of trade secrets by competitors in Nigeria. However, they may be protected by specific clauses in non-disclosure or confidentiality agreements coupled with the relief of breach of confidence, and contracts in restraint of trade under Labour law. In *Aero Contractors Co. of Nigeria v. Akingbehin* (Unreported Suit No: NICN/LA/123/2013) the courts held the disclosure of confidential information to counsel who sought to blackmail the plaintiff with same as a breach of his duty of confidentiality. See also *Akinsanya v. Coca-Cola* (Unreported Suit No.: NICN/LA/40/2012) where the Plaintiff's disclosure of a sensitive internal report to her husband was held to be a breach of the Defendant's Code of Business Conduct.

Note: Only contracts that are not unduly restrictive enjoy protection for trade secrets. See *Koumoulis v. Leventis Motors Ltd* (1973) LPELR-1710 (SC), *Samson Systems and Investment Ltd. v. Chmchoum* (Unreported Suit No.: NICN/LA/395/2015), *Infinity Tyres v. Kumar & Ors.* (Unreported Suit No: NICN/LA/170/2014).

Self-Assessment Exercise 3

How may trade secrets be protected in Nigeria?

In some jurisdictions, trade secrets also enjoy statutory protection. See EU Trade Secrets Directive 2016/943, UK Trade Secrets (Enforcement etc) Regulations 2018, Article 9 of China Anti-Unfair Competition Law 2019, US Defend Trade Secrets Act 2016 and Uganda's Trade Secret Protection Act 2009 to mention a few.

2.4 SUMMARY

The focus of this unit has been on trademarks as a form of intellectual property. We learnt that a trademark is a **distinctive** word, name, symbol, or device used to distinguish products or services from others in the market place as an indication of origin, quality and ownership. Registration of trademarks is not compulsory however trademark registration offers more protection against passing off and counterfeiting. Where registered, protection will be afforded a trademark within the region of registration and not globally.

We also learnt about trade secrets which are confidential favourable or negative business information which provide and enterprise with a competitive edge. To qualify as a trade secret, confidential business information must be secret, have commercial value and subject to reasonable steps taken to control such information. Though not globally categorised as intellectual property, trade secrets are recognised as intellectual property by the major IP institutions and in some countries. Where not statutorily protected, trade secrets can be protected under non-disclosure agreements.

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2.6 POSSIBLE ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

This question requires you to think about a car you like and take a closer look at its logo etc. A sample answer for someone who likes Mercedes Benz is provided below.

a. Preferred brand of luxurious vehicles is Mercedes Benz
b. The logo is a 3 pointed star in a circle (usually silver in colour)
c. The logo is fixed at the tip of the bonnet such that it stands out and is the first thing you see apart from the vehicle. The logo indicates the brand of the vehicle and what it is known for – an expensive/luxurious vehicle used for the most special of purposes.

SAE 2

Negative information can constitute trade secrets when they give a business a competitive edge. For instance, knowledge about what product combinations may not work may be classed as negative information. However, they constitute trade secrets if keeping them secret gives a business a competitive edge.

SAE 3

Trade secret may be protected by specific clauses in non-disclosure or confidentiality agreements coupled with the relief of breach of confidence, and contracts in restraint of trade under Labour law.

Aero Contractors Co. of Nigeria v. Akingbehin

Akinsanya v. Coca-Cola

Koumoulis v. Leventis Motors Ltd

Samson Systems and Investment Ltd. v. Chmchoum

Infinity Tyres v. Kumar & Ors.

Module 3 **Legal and Institutional Regime for Protection of Intellectual Property**

Unit 1 Domestic Legal and Institutional Regime for Protection of Copyrights, Patents and Industrial Designs in Nigeria

Unit 2 Domestic Legal and Institutional Regime for Protection of Trademarks in Nigeria

Unit 3 The Multilateral Regime for Protection of Trademarks in Nigeria

MODULE 3: LEGAL AND INSTITUTIONAL REGIME FOR PROTECTION OF INTELLECTUAL PROPERTY

UNIT 1 DOMESTIC LEGAL AND INSTITUTIONAL REGIME FOR PROTECTION OF COPYRIGHTS, PATENTS AND INDUSTRIAL DESIGNS IN NIGERIA

1.1 INTRODUCTION

From your reading of previous units in this module, you would have noticed that reference was made to various laws, treaties and legislative instruments (both domestic and international) which regulate various forms of intellectual property in Nigeria. In this unit, we shall specifically address the legal framework for the protection of copyrights, patents and industrial design – including the statutes and institutions created for that purpose.

1. 2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Identify the major laws that protect copyrights, patents and industrial designs in Nigeria
- Discuss how other laws and institutions also contribute to the regulation of copyrights, patents and industrial designs in Nigeria.

1.3 MAIN CONTENT

1.3.1 Copyrights

The main statute regulating copyrights in Nigeria is the Copyrights Act which just came into force having been signed into law on 23rd March 2023. The Act which repealed the Copyright Act 1988 as amended strengthens the existing legal regime for copyrights protection by enhancing the capacity of the Nigerian Copyright Commission to regulate copyrights, extending copyright protection to digital content and facilitating access to reading materials for blind, visually impaired and print disabled persons.

The Act establishes the Nigerian Copyright Commission as the main regulatory body responsible for all matters affecting copyright in Nigeria (See Section 52 Copyright Act 2022). It recognises six categories of works eligible for copyright protection in Nigeria – literary works, musical works, artistic works, audio-visual works, sound recordings and broadcasts. See Section 1 of the Copyright Act 2022.

Who is charged with regulatory powers over all matters that have to do with copyright in Nigeria? Support your answer with a relevant authority.

It is noteworthy that, the repeal of the 1988 Act notwithstanding, subsidiary legislation made thereunder remain in force. See Paragraph 3(1) of the 5th Schedule to the Copyright Act 2022. Some of the regulations made under the Act include the Copyright (Collective Management Organizations) Regulations 2007 (S.I. 37 of 2007), the Copyright (Optical Discs Plants) Regulations, 2006 (S.I No. 66 of 2006) and the Copyright (Security Devices) Regulations 1999 (Government Notice No. 145). For all subsidiary IP legislations in force in Nigeria, see WIPO's page on Nigerian IP Laws and Treaties at https://www.wipo.int/wipolex/en/members/profile/NG

Self-Assessment Exercise 1
Mention three subsidiary legislations which survived the repeal of the Copyright Act 1988.

1.3.2 Patents and Industrial Designs

In Nigeria, patents and industrial designs primarily enjoy protection under the Patents and Designs Act Cap P2 LFN 2004 while trademarks are regulated under the Trademarks Act 1967 CAP T13 LFN 2004. A Patents and Designs (Repeal and Re-enactment) Bill was passed by the House of Representatives in 2021. However, it is yet to be signed into law.

Patents and industrial designs on the one hand are registered by the 'Registrar' of Patents and Designs (see section 3(1) of the Patents and Designs Act). This function is exercised by the Trademarks, Patents and Designs Registry in the Commercial Law Department of the Federal

Ministry of Industry, Trade and Investments. All applications for registration of patents and industrial designs must be made to this department.

a. Patents

For an invention to be patentable, it must fulfil either of the following conditions (Section 1(1) PDA) –

a) It should be new, resulting from inventive activity and capable of industrial application **or;**
b) It should constitute an improvement upon a patented invention, also be new, result from an inventive activity, and be capable of industrial application.

Not every invention which meets these criteria are registrable as patents in Nigeria. Section 1(4) of the PDA restricts some 'inventions' which may otherwise meet the above criteria. Such restricted categories, though patentable in some other jurisdictions are not patentable in Nigeria. They include –

(a) Plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products); or

(b) Inventions the publication or exploitation of which would be contrary to public order or morality (it being understood for the purposes of this paragraph that the exploitation of an invention is not contrary to public order or morality merely because its exploitation is prohibited by law).

Whilst patents grant exclusivity to the patent holder, compulsory licences may be granted to third parties in certain circumstances. A compulsory licence will allow a third party or government agency use a patented product or one subject to a pending application without the consent of the patent holder or potential patent holder. See Section 11 and First Schedule to PDA. Such applications, where made by individuals (human or corporate) would be made to Court with

supporting facts. Where a compulsory licence is required by a government agency, the license is authorised by a Minister.

b. Industrial designs

An industrial design is registrable if new and not contrary to public order or morality (Section 13(1) PDA). Designs which may meet the aforementioned conditions may be denied registration if they are dictated by the technical function of a product, incorporate official symbols or emblems or cannot be classed as an 'article of manufacture' or one that can be 'replicated by industrial means'. A design may also not be considered new if it has already been disclosed to the public e.g. through advertisements or displays in catalogues/exhibitions. However, producers of such 'published' or 'disclosed' designs enjoy a six-month grace period during which it will not be deemed to have lost its novelty and may therefore be registrable.

On requirements for registration of industrial designs, see generally *Controlled Plastics v Black Horse Plastic Ltd* (1990-1991) FHCLR 180; *Densy (Nig.) Ltd. v Uzoke* (1999) 2 NWLR [pt 591] 392l; *Ajibowo & Co Ltd v Western Textile Mills Ltd* (1976) 7 SC 97 and *West African Cotton Company Limited v Hozelock Excel* (Unreported Suit No. FHC/L/CP/1240/2013).

Self-Assessment Exercise 2

Is it possible to patent a product which constitutes an improvement on a patented product and capable of industrial application?

1.3.3 Regulatory Authorities Influencing the Protection of Copyrights, Patents and Industrial Designs In Nigeria.

Some other regulatory bodies – by virtue of their functions contribute to protect copyrights, patents and industrial designs in Nigeria. Some of them are listed hereunder:

a. National Films and Video Censors Board

By virtue of Section 2 of the National Films and Video Censors Board Act 1993, the National Films and Video Censors Board (NFVCB) is responsible for the licensing of persons and

premises for exhibition of films and videos, censoring of films and videos and regulation /control of cinematographic exhibitions. In the exercise of these functions, the NFVCB usually ensures that all copyright protections due to works are in place and protected. See for instance, Paragraph 4(1) of the Preview of Films and Video Works Regulations 2000; Paragraph 1(1)(a), (2), (3) and (4) of the NFVCB Regulations 2008.

b. National Broadcasting Commission

No mention is made of 'copyright' in the National Broadcasting Commission Act. However, the National Broadcasting Commission (NBC) is charged with regulating and controlling the broadcasting industry, promoting Nigerian indigenous cultures, moral and community life through broadcasting, regulating ethical standards and technical excellence in public, private and commercial broadcast stations in Nigeria, monitoring broadcasting for harmful emission, interference and illegal broadcasting – among other functions (See Section 2(d) of the NBC Act). These activities are generally connected with or require the protection of copyright.

c. National Council for Arts and Culture

Like the NBC Act, the National Council for Arts and Culture (NCAC) Act makes no express mention of copyright. However, its functions include activities directly connected with or requiring copyright protection. They include promotion/development of Nigerian arts and culture, co-ordination of cultural activities, development of literary, visual and the performing arts, assistance of the National Commissions for Museums and Monuments with creation, acquisition and preservation of cultural or artistic works and the promotion/development of various forms of fine and performing arts, films, photography, literature, textile and decorative arts etc. These categories of arts and culture fall under the six categories of works entitled to copyright protection under Section 1 of the Copyright Act.

d. National Office for Technology Acquisition and Promotion

Established under military Decree No. 70 of 1979 (now National Office for Technology Acquisition and Promotion Act), the National Office for Technology Acquisition and Promotion (NOTAP) has the fundamental mandate of monitoring the transfer of foreign technology to Nigeria.

With particular reference to patents, NOTAP is charged with the registration all contracts or agreements in Nigeria for the transfer of foreign technology to Nigerian parties where the purpose or intent of same is for or in connection with the right to use patented inventions. (**See Section 4(d)(ii) NOTAP**). In furtherance of this mandate, NOTAP also protects and/or prevents against forced assignment of patents and infringement of patents. See Sections 6(2)(d) and 16 NOTAP. See also *StanbicIBTC Holdings PLC v. Financial Reporting Council of Nigeria & Anor* (2018) LPELR-46507(CA)

f. National Information Technology Development Agency (NITDA)

Established under the National Information Technology Development Agency Act 2007, NITDA is charged primarily with the responsibility for the development and growth of information technology in Nigeria through planning, research, development, standardization, application, coordination, monitoring, evaluation and regulation of IT practices, activities and systems in Nigeria. Some particular responsibilities of NITDA include

- management and supervision of the '.ng' country code top-level domain including domain registration of the '.gov.ng' and '.mil.ng' domain names.
- clearing all public IT and related projects in Nigeria embarked on by public institutions
- certification and licensing of all original equipment manufacturers
- Registration of all IT Service Providers, Contractors and Consultants in order to encourage the development of local ICT capacity in Nigeria
- e-government implementation, internet governance and IT development in Nigeria.

Whilst there is no specific mention of ' intellectual property' or its forms in the Act, it stands to reason that, with its focus as aforesaid, intellectual property issues will arise for consideration and/or regulation in consonance with other relevant regulatory bodies.

Self-Assessment Exercise 3

Mention 3 government agencies whose functions may extend to dealing with copyright and patent issues.

1.4 SUMMARY

In this unit, we have learnt about the legal and institutional framework for the regulation of copyrights, patents and industrial designs in Nigeria. We have learnt that the primary laws regulating trademarks is the Trademarks Act, while the Patents and Designs Act regulates patents and industrial design. We have also learnt about the primary regulatory institutions responsible for copyrights, patents and industrial designs in Nigeria. They include the Patents and Designs Registry which, under the Ministry of Trade, is responsible for the registration of patents/designs. As with the laws, several other regulatory agencies also impact on the regulation of intellectual property in Nigeria. They include the National Films and Video Censors Board, Nigerian Broadcasting Corporation and the National Office for Technology Acquisition and Promotion, to mention a few.

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1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Copyright (Collective Management Organizations) Regulations 2007 (S.I. 37 of 2007)

Copyright (Optical Discs Plants) Regulations, 2006 (S.I No. 66 of 2006)

Copyright (Security Devices) Regulations 1999 (Government Notice No. 145)

Others are listed in https://www.wipo.int/wipolex/en/members/profile/NG

SAE 2

Yes, provided the product is also new and results from inventive activity.

SAE 3

a. National Films and Video Censors Board
b. National Broadcasting Commission
c. National Council for Arts and Culture
d. National Films and Video Censors Board
e. National Office for Technology Acquisition and Promotion
f. National Information Technology Development Agency (NITDA)

MODULE 3: LEGAL AND INSTITUTIONAL REGIME FOR PROTECTION OF INTELLECTUAL PROPERTY

UNIT 2 DOMESTIC LEGAL AND INSTITUTIONAL REGIME FOR PROTECTION OF TRADEMARKS IN NIGERIA

2.1 INTRODUCTION

In the previous unit, we shall learnt about the legal framework for the protection of copyrights, patents and industrial design – including the statutes and institutions which may impact on their regulation. This unit will complete our lesson on the legal institutional regime for intellectual property protection in Nigeria. The focus will be on trademarks.

2. 2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Identify the major laws and institutions that protect trademarks in Nigeria

2.3 MAIN CONTENT

2.3.1 Trademarks Act

In Nigeria, trademarks are protected and regulated under the Trademarks Act and the Trademarks Regulations. Trademark registration under the Act gives the proprietor of a trademark exclusive right to use the registered trademark in relation to goods in respect of which it was registered. See Sections 5 and 6 Trademarks Act. However, trademark registration cannot defeat the right of a person to a *bona fide* use his name, name of his place of business or that of his predecessors in business, or the use of any *bona fide* description of the character of quality of his goods where such description is unlikely to deceive or cause confusion in respect of an existing trademark. See section 8 Trademarks Act.

As with patents and industrial designs, some trademarks – though distinctive or capable of distinguishing will not be registrable. They include deceptive, confusing, scandalous or trademarks contrary to law or morality, names of chemical substances and names which are identical or resembling an existing trademark . See sections 9 – 12 Trademarks Act.

The Trademarks, Patents and Designs Registry in the Commercial Law department of Ministry of Trade is also responsible for the registration of trademarks in Nigeria. The Trademarks Registry may also refuse registration, evaluate oppositions and preside over opposition proceedings. The may also take other administrative actions of a regulatory nature in the exercise of their functions.

To be registrable, the law requires a trademark to be distinctive or capable of distinguishing.
In line with the Nice Agreement 1957, trademarks are registrable under 45 classes. Categories 1 – 34 contains list of commodities while 35 – 45 contains a list of service under which applicants may register their trademarks Nigeria being a signatory to the agreement adheres with the classification system consisting of these categories. Applicants for trademarks registration may register their marks in one or more of these categories. For a full list of the products registerable under each class see ('How to Register Trademark in Nigeria' at https://www.hg.org/legal-articles/how-to-register-trademark-in-nigeria-56041)

With the aid of relevant authorities mention instances when distinctive marks may be distinctive but not registrable.

In the event of trademark infringement, the proprietor or registered user (as the case ma be) of a registered trademark may institute an action before the Federal High Court to challenge such infringement. See Section 5 Trademarks Act. See also *I.T. (Nig.) Ltd. v. B.A.T. (Nig.) Ltd* (2009) 6 NWLR (Pt. 1138) 477; *CPL Industries Limited v. Morrison Industries Plc* (2003-2007) 5, I.P.L.R page 350

2.3.2 Other Statutes providing Trademark Regulation and Protection

Apart from the Trade Marks Act, several other statutes provide protection and regulation for trademarks. Some of them are discussed below:

i. Merchandise Marks Act

A colonial creation which predates the Trademarks Act, the Merchandise Marks Act 1916 seeks to combat the menace of forgery and trademarks falsification in Nigeria. It defines 'trade mark' as "a trade mark registered in the register of trade marks kept under or preserved by any Act [including] any trade mark which, either with or without registration, is protected by law" and creates various offences related to trademarks including forgery of trademarks, application of trademarks or marks resembling trademarks in a way calculated to deceive, application of false description to goods and importation of offending goods bearing the name or trademark of manufacturers/dealers/traders in the UK. The act also holds third parties liable where they knowingly sell or expose for trade or manufacture, goods to which forged trademarks or false trademarks have been applied. The Act also provides a limitation date of three years or one year after discovery for commencement of prosecution for offences created under the Act.

ii. Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act

The Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act 1999 is primarily directed at combating the threat to health posed by sale of fake or counterfeit drugs and processed foods. However, its provisions also provide protection to trademarks because counterfeit or fake drugs are calculated to deceive consumers as to identity and source of drugs – thus infringing on registered trademarks. Accordingly measures taken to combat such criminal acts will have a positive effect for trademark protection.

Section 1 of the Act relates to trademarks. It prohibits the production, importation, manufacture, sale, distribution, display or possession of counterfeit, adulterated, fake or banned, substandard or expired drug or unwholesome processed food.

iii. Cybercrime (Prohibition and Prevention Etc.) Act

The Cybercrime (Prohibition and Prevention Etc.) Act is primarily directed at combating cybercrime. Cybercrimes include those crimes committed using a computer, computer networks

or other forms of ICT as well as crimes increased in their scale or reach by the use of computer, computer networks or other forms of ICT. The Act recognises that cybercrimes usually throw up various intellectual property issues. Hence one of its objects is the protection of intellectual property rights.

For the protection of trademarks, section 25 of the Act prohibits cybersquatting i.e. intentional taking or using of a name, business name, trademark, domain name or other word or phrase registered, owned or in use by another without authority or right for the purpose of interfering with their use by the owner, registrant or legitimate prior user.

iv. Trade Malpractices (Miscellaneous Offences) Act

Enacted in 1992, the Trade Malpractices (Miscellaneous Offences) Act combats various forms of trade malpractices. With particular reference to trademarks, section 1(a) of the Act prohibits the labelling, packaging, sale, offers for sale or advertisement of any product in a manner that is false or misleading or is likely to create a wrong impression as to its quality, character, brand name, value, composition, merit or safety. As we learnt, trademarks speak to quality, brand, character etc. an act which runs afoul of the above provision will amount to an infringement of trademarks.

v. Money Laundering (Prevention and Prohibition) Act 2022

The Money Laundering (Prevention and Prohibition) Act 2022 which repealed the Money Laundering (Prohibition) Act 2011 has as its main objective the provision of an effective and comprehensive legal and institutional framework for the prevention, prohibition, detection, prosecution and punishment of money laundering and other related offences in Nigeria. In Section 18 the Act prohibits the money laundering in furtherance of an unlawful act – particularly the offence of counterfeiting and piracy of products in Section 18 (6) (g).

vi. Business Facilitation Act 2023

The Business Facilitation Act 2023 was enacted to promote the ease of doing business in Nigeria, eliminate bottlenecks, amend relevant legislation to promote the ease of doing business and institutionalise all the reforms to ease implementation, facilitate the ease of doing and

maximise service delivery by government ministries, departments and agencies (MDAs). As an omnibus law, it amends various business related Nigerian statutes – reducing and/or eliminating bottlenecks and red-tape as a means of attracting investment in the Nigerian business sector.

The Trademarks Act is one of the statutes amended by the BFA. In Section 69, the BFA amended the definition of 'trademark' to include services. The BFA provides transparency obligations for all Federal Government ministries, departments and agencies (MDAs) requiring them to publish a complete list of requirements and timelines to obtain products and services offered by the MDAs. Also, by virtue of Section 4 of the Act, where an MDA fails to communicate approval or rejection of an application within the time stipulated in the published list, all applications for products and services not concluded within the stipulated timeline shall be deemed approved and granted. These requirements, if enforced, will deal with the uncertainties and extended timelines associated with trademark registration in Nigeria.

Self-Assessment Exercise 1
Apart from the Trademarks Act, mention four laws which may regulate trademarks or provide protection for trademark holders.

2.3.3 Regulatory Authorities Influencing the Protection of Trademarks in Nigeria

Various other regulatory authorities may, in the exercise of their statutory functions, also function as protective agencies for trademarks in Nigeria. They include:

a. Federal Competition and Consumer Protection Commission (FCCPC)

The Federal Competition and Consumer Protection Commission (FCCPC) was established under the Federal Competition and Consumer Protection Act (FCCPA) and is responsible for the promotion of competition and consumer welfare in Nigeria. In furtherance of this mandate, the FCCPA prohibits trademark infringements such as trading under false representations, unauthorised use of others' trademarks and passing off of the goods or services of others. See Section 125 FCCPA.

Some of the protective actions that the FCCPC may take include sealing up of premises suspected to contain, harbour or be used for production or dissemination of fake or substandard good, publication of lists of goods and services which are banned or restricted for being fake or substandard, search of suspicious premises and seizure of questionable goods. See sections 17, 18, 27 and 28 of the FCCPA.

b. Economic and Financial Crimes Commission

The Economic and Financial Crimes Commission (EFCC) is charged with combating various economic and financial crimes. In furtherance of its powers under the Economic and Financial Crimes Commission (Establishment) Act 2004, it is empowered to prevent, investigate, prosecute and penalise economic and financial crimes – especially where the execution of various related laws are concerned. One of these laws is the Money Laundering (Prevention and Prohibition) Act 2022 which the EFCC is empowered to enforce.

c. National Agency for Food and Drug Administration and Control Act

The National Agency for Food and Drug Administration and Control (NAFDAC) was established in 1993 to regulate and control the importation, exportation, manufacture, advertisement, distribution, sale and use of food, drugs, cosmetics, medical devices, bottled water and chemicals. In furtherance of its regulatory mandate, NAFDAC pays particular attention to the protection of trademarks. For instance, any enterprise to be registered by NAFDAC must provide proof of trademark registration or approval of same to protect the business name of the enterprise and/or brand of the product. Similarly, various regulations on the labelling of food products etc, it expressly requires manufacturers to display their trademark and ensure that such trademarks do not give wrong impressions as to nature, quality or substance. See Pre-packaged Food (Labelling) Regulations 1995. See also Sections 4 and 8 of the Drug and Related Product Labelling Regulations 2021. By virtue of Section 8(3) of the Regulations, the brand name of a drug product must not sound or look like an already registered product. Note that these regulations are directly enforceable by NAFDAC.

Can you Mention 3 regulatory agencies whose functions impact on trademark protection in Nigeria

2.4 SUMMARY

In this unit, we have learnt about the legal and institutional framework for the regulation of trademarks in Nigeria. As we have seen, the primary statute regulating trademarks is the Trademarks Act. Apart from these laws, other laws enacted for other purposes have an impact on the regulation of various intellectual properties. They include the Merchandise Marks Act, Cybercrime (Prohibition and Prevention) Act, Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act, Trade Malpractices (Miscellaneous Offences) Act, Money Laundering (Prevention and Prohibition) Act and Business Facilitation Act.

Like other forms of intellectual property, some regulatory institutions like the Federal Competition and Consumer Protection Commission, Economic and Financial Crimes Commission and the National Agency for Food and Drug Administration and Control also prevent trademark infringement. Agencies like.

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2.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

i. Merchandise Marks Act

ii. Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act

iii. Cybercrime (Prohibition and Prevention Etc.) Act

iv. Trade Malpractices (Miscellaneous Offences) Act

v. Money Laundering (Prevention and Prohibition) Act 2022

vi. Business Facilitation Act 2023

MODULE 3: LEGAL AND INSTITUTIONAL REGIME FOR PROTECTION OF INTELLECTUAL PROPERTY

UNIT 3 THE MULTILATERAL REGIME FOR PROTECTION OF INTELLECTUAL PROPERTY

3.1 INTRODUCTION

In previous units, we examined various domestic legal and institutional mechanisms for the protection of intellectual property in Nigeria. It is common knowledge that cross-border trade has taken over globally such that products made in one location are available in another location. To ensure the protection of intellectual property rights in such scenarios, various multilateral legislative instruments and institutions are in place. Nigeria as part of the world economy is party to a lot of these instruments and institutions. We shall examine some of them in this chapter.

3. 2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Identify the major multilateral institutions whose regulatory powers extend to intellectual property protection in Nigeria

- Examine the main multilateral legislative instruments dealing with intellectual property protection in Nigeria.

3.3 MAIN CONTENT

The different forms of intellectual property enjoy protection under various multilateral treaties and conventions as well as the institutions charged with administering the treaties. They are discussed hereunder.

3.3.1 World Intellectual Property Organisation (WIPO)

The World Intellectual Property Organisation (WIPO) is the specialised United Nations agency charged with leading the development of a balanced and effective international IP system with global reach. WIPO was established in 1967 under the WIPO Convention. Headquartered at

Geneva, Switzerland, WIPO's membership stretches to various countries (193 as of May 2023) - including Nigeria which also hosts one of WIPO's external offices in Abuja. Hundreds of Non-Governmental Organisations (NGOs) and International Governmental Organisations (IGOs) also enjoy observer status during WIPO Meetings. The WIPO Convention is binding on all member nations.

What do you know about the World Intellectual Property Organisation?

In pursuit of its mandate, WIPO enacts policy to shape and protect IP globally, resolves IP disputes, provides technical infrastructure to connect IP systems and share knowledge globally. It also develops cooperation and capacity building programs to facilitate development through the use of IP. WIPO also administers the WIPO Convention and 26 other IP treaties including the Berne Convention, the Paris Convention, the Nice Agreement, the WIP Internet Treaties WIPO Copyright Treaty, and the Rome Convention to mention a few. For a complete list of all 26 WIPO administered treaties, visit https://www.wipo.int/treaties/en/

Below is a link for a video (source:WIPO) on the WIPO patent protection system. You will find it enlightening. To view, click on the link below.
https://www.youtube.com/watch?v=0oq4tonI514

3.3.1.1 Paris Convention for the Protection of Industrial Property

The Paris Convention for the Protection of Industrial Property (popularly known as 'Paris Convention') is the first multilateral attempt at cross-border protection of intellectual property. Adopted in 1883, it applies to all forms of industrial property including patents, trademarks, industrial designs, utility models, trademarks, service marks and geographical indications. The Convention establishes three major protections for holders of intellectual property:

a. National Treatment

Every contracting state to the Paris Convention is required to grant the same level of protection to nationals of other contracting states as those it grants to its own nationals. This level of protection is also required to be extended to nationals of non-contracting states who are domiciled or have real and effective industrial or commercial establishment(s) in contracting states.

b. Right of Priority

This principle only applies to patents, utility models, marks and industrial designs. Under the principle an applicant who files a first application in one of the contracting states may, within 6 or 12 months (for industrial designs/marks and patents/utility models respectively) apply for protection in any other contracting state. The first application will guarantee the applicant the privilege for his subsequent applications filed in another contracting state to be regarded as if it was filed on the same date as the first application. The applicant will therefore enjoy priority over applications filed by others for the same invention.

c. Common Rules to be followed by Contracting States

The Convention requires contracting states to follow certain common rules including grants of patents for being independent in various contracting states. In effect a successful patent application in one contracting state does not oblige other contracting states to automatically grant patents for the same product. Also, an unsuccessful patent application in a contracting state does not automatically bind other contracting states to reject an application for the same product.

Every inventor has a right to be named as the inventor of his/her patented product.

Where a mark has been **duly registered in the country of origin**, it must, on request, be accepted for filing and protected in its original form in the other Contracting States. However, an application may be refused if the mark infringes third party rights, is devoid of distinctive character, is of a nature likely to deceive the public or contrary to morality or public order.

Self-Assessment Exercise 1

What are the three main protections afforded IP holders under the Paris Convention.

3.3.1.2 The Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention for the Protection of Literary and Artistic Works (popularly known as 'the Berne Convention') was adopted in 1886 and revised and/or amended several times as necessary. Its main goal is the protection of the works and rights of authors of literary and artistic works including musicians, poets, authors, painters etc. The Convention empowers such authors to control how their works are used, the terms of use and by whom. It operates under three basic principles:

a. National Treatment

This principle guarantees that works originating in one of the member states to the Convention is given the same protection which other member states grant to their own nationals.

b. Automatic Protection

Protection offered by all Convention member states must not be conditional or based on any formality but automatic.

c. Independence of Protection

IP protection is guaranteed and independent of the existence of protection in a work's country of origin though a Convention member state may deny protection for a work originating from another member state once the work ceases to enjoy protection in the country of origin.

The Convention provides minimum standards of protection and moral rights accruing to authors of protected works. It also prescribes the duration of protection for such works (up to 50 years after the author's death or 50 years after an anonymous or pseudonymous work has been made available to the public; minimum of 50 years after audio-visual (cinematographic) works are created or made available to the public; and 25 years after the creation of applied art or photographic works.

What forms of IP does the Berne Convention protect?

The above protections notwithstanding, the Berne Convention also allows free use of protected works in special cases such as quotations/use of works for illustration and teaching purposes, reproduction of newspapers and other works for reporting current events and ephemeral recordings for broadcasting purposes. With particular reference to developing countries, the Convention permits the implementation of non-voluntary licences for translation and reproduction of works for special purposes such as education, subject to remuneration fixed by law.

Self-Assessment Exercise 2
Discuss the principles underpinning the Berne Convention.

3.3.1.3 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (popularly known as the 'Rome Convention) seeks to secure IP protection in performances by performers, phonograms by phonogram producers and broadcasts by broadcasting organisations. The Convention is jointly administered by WIPO, United Nations Education Scientific and Cultural Organisation (UNESCO) and the International Labour Organisation (ILO)

Now, what can you say about Phonogram?

Phonograms are written characters (letters) representing a speech sound or a combination of speech sounds. For instance, the vowel sound in 'cat' is represented in English phonogram as 'a' or the /æ/ sound.

The Convention was adopted in 1961 guarantees protection for at list 20 years from the end of the date of fixation for phonograms or the date when a performance took place and the date on which the broadcast took place. This does not preclude member nations from granting longer terms of protection.

3.3.1.4 The WIPO Internet Treaties

The term 'WIPO Internet Treaties' refers to two WIPO Treaties which jointly protect intellectual property rights for those creative works accessible to or distributed on the internet or other digital networks.

The two treaties - the WIPO Copyright Treaty 1996 (WCT) and WIPO Performances and Phonograms Treaty (WPPT) prevent unauthorised access to or use of creative works distributed on the aforementioned media. While the WCT protects literary or artistic works, compute programs, databases, music works, audio-visual works, works of art, photographs and similar works in that category, the WPPT protects performers' performances and phonogram producers' phonograms especially where distributed through new technologies like the internet or other digital networks.

Contracting states are required to provide a framework of rights which enable creators of the aforementioned works to control and demand reward for the use and distribution of their works by third parties through new media/technologies. This does not preclude contracting state from granting exceptions which allow third party use of such works where done in the public interest, and non-profit educational or research purposes.

Self-Assessment Exercise 3
Mention the treaties referred to as the 'WIPO Internet Treaties' and the forms of IP protected under each of them?

3.3.2 The World Trade Organisation

The World Trade Organisation (WTO) is the international organisation charged with regulating global multilateral trade. Established in 1995, it makes rules guiding multilateral trade in order to open trade and ensure smooth trade flows worldwide. The WTO is headquartered in Geneva, Switzerland and is, instructively, headed by Dr. Ngozi Okonjo-Iweala – first female, first African and first Nigerian DG of the organisation. Nigeria is a WTO member nation.

The WTO cooperates with various multilateral institutions in furtherance of its mandate. For the purpose of this course, WTO's cooperation with WIPO is noteworthy. In recognition of the place of intellectual property and the need to protect same in multilateral trade, member nations of the WTO draw a complementary connection and recommend that the WTO and WIPO work together in furtherance of the IP protection mandate. This connection is encapsulated in the WIPO-WTO Cooperation Agreement 1995 under which both parties commit to transparency mechanisms, joint technical assistance and training as well as the requirement that WTO members abide by key conventions administered by WIPO.

In what ways have a connection been drawn between the WTO and WIPO?

3.3.2.1 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) was negotiated during the Uruguay Round (1986 – 1995) which birthed the WTO. It establishes minimum standards for the protection of intellectual property rights for nationals of WTO member nations; and access to WTO's dispute settlement system. Whilst the Agreement allows members to strike a balance between incentivising innovation and limiting access to intellectual property, its focus is to ensure that member nations do not subject intellectual property held by nationals of other member states to higher standards than those for their own nationals. An additional objective is to ensure that IP production contributes to technical innovation and transfer of technology to the benefit of both producers and users.

The TRIPS Agreement is founded on the basic principles of Most Favoured Nation and National Treatment.

a. Most Favoured Nation

The Most Favoured National (MFN) Principle essentially requires Member states to ensure that the same tariff and regulatory treatment is accorded to the products of other Member states as the most favourable tariff and regulatory treatment a Member state accords to its nationals.

b. National Treatment

As with the Berne Convention, the WTO prohibits discriminatory treatment of foreign trade nationals. Accordingly, every Member state is required to treat nationals of other Member states exactly the same way it treats its nationals with respect to trade rules, regulations and/or restrictions.

Self – Assessment Exercise 4
Discuss the principles underpinning the TRIPS Agreement.

The TRIPS agreement recognises and builds on the bedrock of existing IP treaties like the Bern Convention and the Paris Convention by strengthening inadequate protections and contributing to existing international standards. For instance,

For Copyrights, it provides for the protection of computer programs as literary works under the Berne Convention, as well as extends copyright protection to databases. It also expands copyright to rental of protected products and performers' right to prevent unauthorised recording, reproduction and broadcast of live performance for a minimum of 50 years.

Similarly with respect to marks, the TRIPS Agreement provides additional protection for service marks and geographical indications. In addition to the protections afforded trademarks under the Paris Convention, the TRIPS agreement introduces the opportunity for parties to oppose or petition for the cancellation of a trademark registration in member states. For industrial design, the TRIPS agreement provides for special protection for textile designs. Member nations are to ensure that requirements for securing protection for textile design do not impair opportunity to seek and obtain such protection.

For patents, the TRIPS agreement introduces a list allows member nations to exclude some inventions from patentability due to necessity for the protection of public order or morality, protection of human, animal or plant life or to avoid serious prejudice to the environment which may be excluded. The Agreement also requires member states to provide for the protection of plant varieties either by patents or an effective *sui generis* system. See Article 27 TRIPS Agreement.

The TRIPS Agreement introduces competition regulation to IP regulation through its Article 40 on Control of Anti-Competitive Practices in Contractual Licenses. Member state are authorised to legislate and take other measures against abuses of IP rights and provide for obligatory consultations between Member states upon request where a national of one member is accused of engaging in anti-competitive practices in another Member state's jurisdiction.

Mention some examples of ways in which the TRIPS Agreement has introduced additional commitments to commitments under the WIPO Treaties

To know more about the TRIPS agreement, click to view this video:
https://www.youtube.com/watch?v=FGwPiKxmpDI

3.4 SUMMARY

In this unit, we have learnt about the multilateral legal regime for the protection and regulation of intellectual property in Nigeria – particularly WIPO and WTO of which Nigeria is a member state.

As we have learnt, the WIPO is the specialised UN agency charged with global IP protection and regulatory activities. The WIPO administers many IP treaties for the protection of various form of IP. Some of the treaties examined in this unit is the Paris Convention, the Berne Convention, the Rome Convention and the WIPO Internet Treaties.

Whilst not a specialised IP regulatory body, the WTO being the sole multilateral regulator of international trade also oversees issues relating to IP and its protection in furtherance of its objective of ensuring global development through multilateral trade. The WTO regulates IP through its TRIPS Agreement which builds on the foundation of previous WIPO treaties and makes additional provisions for better IP Protection.

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WTO

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3.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Right of Priority

National treatment

Common Rules to be followed by Contracting States

SAE 2

National Treatment

Automatic Protection

Independence of Protection

SAE 3

WIPO Copyright Treaty 1996 (WCT)

WIPO Performances and Phonograms Treaty (WPPT)

Both protect copyrights

SAE 4

Most Favoured Nation

National Treatment

Module 4 Introduction to Competition Law

MODULE 4: INTRODUCTION TO COMPETITION LAW

UNIT 1: WHAT IS COMPETITION LAW?

1.1 INTRODUCTION

General reference to the word competition usually evokes pictures of sports or other forms of competitions between peers in a standardized setting. For a young law student for instance, thoughts of mooting and mock trials may come to mind. For the purpose of law however, competition relates to business activities and practices in the market for goods and services.

As a closer look at business behaviour will show that undertakings (in competition law, businesses are called undertakings) are in competition with other undertakings in the same sector both for profit and to remain relevant in the market by whatever means. This quest for profit and relevance is what makes competition regulation necessary. However, the objective of competition regulation is to protect the interests of the 'consumer'. Every regulatory action taken - whether to ensure that undertakings are not forced out of the market or that the market remains competitive is taken with the consumer in mind.

What are businesses called in competition law terms?

1.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Define competition law
- Differentiate between competition law and competition policy
- Identify the different terms for competition law in various jurisdictions

1.3 MAIN CONTENT

1.3.1 What is Competition Law?

Competition law is the law which regulates competition amongst undertakings in a market. In its ordinary English meaning, the Cambridge dictionary defines **competition** as 'a situation in which someone is trying win something or become more successful than someone else'. In business it is the effort of two or more undertakings acting independently to secure the patronage of customers/consumers by offering the most favourable terms.

The word 'competition' comes from the Latin root word ***'competere (com + petere)'*** which means to strive together. '*competere'* connotes the coming together of rivals/opponents ('*com'*) for the purpose of striving ('*petere'*) for a prize. In business that prize would be patronage from consumers and profit. Competition law is therefore concerned with the regulation of business practices to prevent market distortion or other effects which may be detrimental to the interests of the market or consumer. Competition law also seeks to promote competition within the market.

Can you attempt a definition of 'competition law' in your own words.

Competition law is relevant for every form of business activity regardless of whether such business is operated in a market where there are few or many undertakings; or whether the 'business' is being run for profit or not. As a competition law student, you must take care not to be swayed by the term 'profit'. Profit goes beyond pecuniary increase and could also include intangible items like the brand, reputation, customer loyalty, goodwill etc. Undertakings can leverage on such intangible items to advance their interests. Hence, they remain in competition. Furthermore, an undertaking may not be making a profit but may still need to remain relevant in the market for when it is able to break even and become profit making. This is particularly true of new entrants and seasonal businesses.

Competition regulation is also relevant for not-for-profit organisations. Whilst such organisations may be for social purposes, they still need to attract the funding they require to remain in

operation. Furthermore, they usually have a greater need to protect their name/brand and attract visibility. Their activities in furtherance of these goals may be subject to scrutiny by competition authorities.

Self-Assessment Exercise 1
State the Latin root word for 'competition' and its meaning

Click on the link below to view this short video on what competition law entails.
https://www.youtube.com/watch?v=pDoNWPhRlWY

1.3.2 Competition Law V. Competition Policy

In the course of your study, you will find several references to competition law and competition policy. This give the wrong impression that the phrases 'competition law' and 'competition policy' mean the same thing. They are two different terms.

Competition law refers to those rules designed to stop anti-competitive business practices and prevent unnecessary government intervention in the market. **Competition policy** on the other hand includes **rules**, **policies** and **measures** designed by the government to prevent anti-competitive behaviour and control the structure of the industry to encourage the opening up of such industries to private investment or participation. Some of these policies include deregulation, liberalisation and privatisation. In a nutshell, competition policy includes both competition law and other economic policies adopted by government in various markets. The relationship between competition law and competition policy is represented in Figure 1 below.

In simple terms:
Competition Law + Government's economic policies that affect competition = Competition Policy

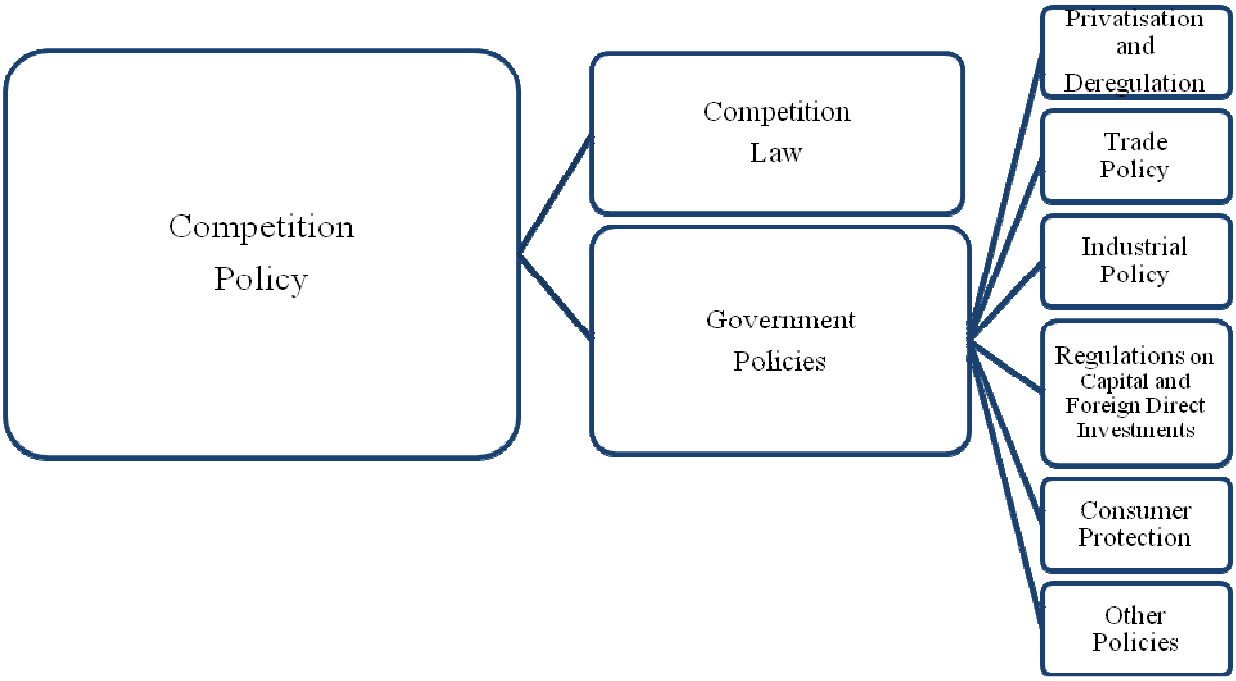

Figure 1: Relationship between competition law and competition Policy

To understand more about competition policy, view this video:

https://www.youtube.com/watch?v=KtV9MDN6_IE

1.3.3 Other Terms for Competition Law in Other Jurisdictions

The term, 'competition law' is not subject to global usage. In the UK, EU and Australia, the term is called 'competition law'. However, it was previously known as trade practices law in the UK and Australia. Most former colonies of the UK, who have competition law in some form, tend to follow the trend of naming the term 'competition law' as it is now named in the UK. In the United States, competition law is called 'antitrust law'. This is in consonance with the heritage of the competition regulation in the US which sought to prohibit anti-competitive practices (called 'trusts') engaged on by powerful market players. Hence, the term 'anti – trust'. In China and Russia, competition law is known as 'anti-monopoly law'. This name may be somewhat

restrictive as competition law extends beyond monopoly power and may also regulate other competitive and anticompetitive practices. Furthermore, as we will see later in this material, the object of competition is not necessarily to whittle down monopoly power since monopolies may legally exist in some sectors.

Self-Assessment Exercise 2

Give the name for 'competition law' in:

- Nigeria
- USA
- Russia
- Australia
- EU
- China

1.4. SUMMARY

In this unit, we have learnt about the definition of competition law. We have also considered the other terms for competition law in other jurisdictions and tried to differentiate between competition law and competition policy.

Competition law is the law which regulates competition amongst undertakings. It is also call 'antitrust law' in the US and 'anti-monopoly' law in Russia and China. In the past, it was called 'trade practices law' in the UK and Australia. Competition law is an aspect of competition policy. While the former is restricted to rules prohibiting anti-competitive practices, the latter includes rules, policies and measures designed to prevent anti-competitive behaviour and control industry structure.

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1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The word 'competition' comes from the Latin root word ***'competere (com + petere)'*** which means to strive together. '*Competere'* connotes the coming together of rivals/opponents ('*com'*) for the purpose of striving ('*petere'*) for a prize.

SAE 2

Nigeria – competition law

USA – antitrust law

Russia – anti-monopoly law

Australia – competition law

EU – competition law

China – anti-monopoly law

MODULE 4: INTRODUCTION TO COMPETITION LAW

UNIT 2: FORMS OF COMPETITIVE BEHAVIOUR

2.1 INTRODUCTION

In Unit 1 we commenced out introduction to competition law by defining what competition law means, its relationship with competition policy and how it is called in various jurisdictions. We continue our discourse in this unit by looking at some forms competitive behaviour. They include competition in the market, competition for the market, competition via financial markets and comparative competition. Of the four forms listed above, the first three relate to undertakings while the last one relates to both undertakings and regulators.

2.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Explain the meaning of 'competition in the market' and 'competition for the market'
- Differentiate between 'competition in the market' and 'competition for the market'
- Discuss the concept of 'competition via financial markets'
- Discuss how companies and regulators engage in benchmarking.

2.3 MAIN CONTENT

2.3.1 Competition in the market

This type of competition is also called direct competition. Direct competition is the most basic form of competition and occurs on an 'all things being equal' basis. It occurs in markets with undertakings are free to enter into and function within the market. Due to the existence of competition in the market, it may be sustained without much regulatory intervention. However, the regulator works behind the scenes to ensure that barriers to entry//exit are not unnecessarily high, undertakings are not squeezed out and that the market functions effectively. Furthermore,

where an undertaking in the market controls an essential facility, the regulator may step in and facilitate access to such facility for the market to continue to function.

Can you discuss the characteristics of 'competition <u>in</u> the market'?

b. Competition <u>for</u> the market

Competition <u>for</u> the market takes place in a market where the nature of products on offer lead undertakings to compete to control the entire market rather than gaining market share in same. Such market is usually a monopoly by nature or one suited to only a few players. The regulator plays an active role in such a market to stimulate competitive processes for the benefit of the consumer. In catalysing this form of competition, the regulator recognises that direct competition is impossible or inefficient in the market. However, the regulator seeks to ensure that consumers get the best deal from the single/few operators in the market. It therefore carefully monitors quality of service, and introduces measures that may result in cost reduction and innovation. Prospective undertakings may compete for access to the market. In the process of such competition, the regulator introduces measures to ensure that concession holders offer the best deal to consumers.

The process for such competition may be initiated by calls-for tenders for the provision of specific components of the monopoly service, auctions, management contracts to private operators etc. Competition for the market and its outcome is characterised by a measure of uncertainty. It is therefore subject to more regulatory attention both with respect to pricing/quality of service, and contract renegotiation. The level of effectiveness of this form of competition depends largely on regulatory expertise and may be subject to higher transaction costs than in competition in the market.

Self-Assessment Exercise 1
With the aid of a table, differentiate between competition in the market and competition for the market.

c. Competition via financial markets

This form of competition involves attempts by undertakings to take part in and/or control the running of a competing undertaking in the same sector as a means of increasing their market share. To achieve this, an undertaking may purchase shares in a competing undertaking through the securities markets or merge with the competitor. Such form of competition requires regulatory intervention both by the sector-specific regulator, the securities regulator and/or the industry-wide competition regulator. This is to ensure that competition via financial markets does not result in market restriction or undue market power. Where there is such a risk, then the combination may be disallowed by the relevant regulator or measures put in place to whittle down market power and prevent abusive behaviour.

Competition via financial markets may not always be encouraged because of its potential to restrict competition in the market. However, it could stimulate further competitive activity where a target undertaking knows of attempts by a competitor to acquire control over it, the target undertaking may pursue improvements in price and product quality to deter such control.

An example of competition via financial markets is Coca Cola's two-step acquisition of controlling interest in Chi Limited in 2019 (first was acquisition of 40% shares in 2016 before complete acquisition in 2019). Coca – Cola being the producer of the Five Alive range of fruit juices is a competitor to Chi Limited in the fruit juice market. Its acquisition of Chi Limited is therefore likely to increase its market power. However, whether Coca Cola's acquisition results in dominance will depend on the market shares of other fruit juice producers in the market.

Someone believes that competition via financial markets only takes place through mergers of banks in the financial sector. To what extent is this correct?

d. Comparative competition

This is also called benchmarking. It involves two or more undertakings (competitors included compare business practices for the purpose of enhancing efficiency and competitiveness). To achieve their goals, these undertakings may share private information such as information on

costs, pricing, overheads, processes, shipping, sales etc. The purpose of this exchange of knowledge is to improve processes and pursue efficiency/innovation in order for undertakings to maintain a competitive advantage. Whilst it may be viewed that such cooperation between competitors may be a mask to hide anti-competitive activities like price fixing or market allocation to the detriment of consumers or the market, comparative competition is not *per se* illegal but must be subject to a rule-of-reason exploration to decipher their pro-competitive effects. If the perceived anti-competitive effects outweigh the procompetitive effects, the cooperation will be disallowed. See *National Society of Professional Engineers v. United States* 435 US 679 (1977); *Maple Flooring Association v. United States 268 US 563 (1925).*

Benchmarking may also be done at the regulatory level in which case, it is not with a competitive intent but to benchmark against peer regulatory agencies in other jurisdictions in order to ascertain what the industry best practice is in order to improve in the fulfilment of regulatory functions.

Self-Assessment Exercise 2
'Comparative competition' is per se illegal. How correct is this statement?

2.4 SUMMARY

In this unit, we have learnt about four forms of competitive behaviour in the market. Competition in the market takes place in competitive markets with many players and free entry/exit and minimal regulatory intervention. The opposite of this is competition for the market which is characterised by concentrated markets tending towards monopolies with high barriers to entry necessitating significant regulatory oversight. Competition via financial markets takes place when an undertaking seeks to control its competitor through purchase of controlling shares, merger, takeover or other combination. For comparative competition, undertakings in competition with one another cooperate and share private information relating to their operations with one another with a view to benchmarking against peers and improving efficiency. Such benchmarking may also be done by regulators. Comparative competition is not per se illegal and may have pro-competitive effects.

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2.6 SUGGESTED ANSWERS TO SELF-ASSESEMENT EXERCISES

SAE 1

S/N	**Competition in the market**	**Competition for the market**
1	Competitive market	Concentrated market
2	Low barriers to entry/exit	High barriers to entry/exit
3	Minimal regulation	Heavy regulation
4	Focus is to gain or increase market share	Focus is to gain control
5	Market stimulates effectiveness	Regulator stimulate effectiveness
6	Little or no transaction costs	Higher transaction costs

SAE 2

Comparative competition is not *per se* illegal but must be subject to a rule-of-reason exploration to decipher their pro-competitive effects. If the perceived anti-competitive effects outweigh the procompetitive effects, it will be disallowed.

MODULE 4: INTRODUCTION TO COMPETITION LAW

UNIT 3: HISTORY OF COMPETITION LAW

3.1 INTRODUCTION

Competition is as old as business itself. Traders must compete to keep their businesses afloat by attracting customers to patronise them. However, the idea of regulating how businesses compete is another matter. In this unit, we will trace the origin of competition law and regulation. We will also explore various approaches employed by regulators in regulating competition.

3.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Discuss the history of competition law.
- Explain the different ways in which competition was regulated in Nigeria before 2019.
- State the foremost regulators of competition in Nigeria and their sectors of influence.

3.3 MAIN CONTENT

3.3.1 History of Competition Law

The regulation of trade competition can be traced back to antiquity. Though not directly called competition law, several rules were made in various eras to regulate business practices. Those rules had similar goals to the goals of present day competition law. Let us consider the idea of trade regulation in various eras:

a. Trade Regulation in Ancient Times

From early times, Roman law contained robust provisions which sought to regulate trade and pricing of essential or scarce products. Under the *Lex Julia de Annona* which was enacted around 50 BCE, stopping of grain supply ships was an offence punishable by fine. Price regulation was also achieved under the *Diocletian Edicat* of 301 AD which imposed the death penalty for

violation of the price control regime and attempts to push up prices of scarce commodities or stimulate scarcity by buying up large quantities of particular goods and concealing them.

During the reign of Roman Emperor Zeno about 483 AD, trade combinations or monopolies were prohibited together with exclusive rights previously granted to particular merchants. This was subsequently amended by a Justinian edict to provide for oversight of monopolies by salaried public officials. The old Roman rules on trade regulation were subsequently imported into some Italian municipal laws in the 14th century.

In ancient Greece, price regulation (especially for grains) was also practised. Hence Aristotle opined that *Sitophylakes* (Athenian grain inspectors) who were appointed to set the price of grain were to

> *'see to it first that the grain was sold in the market at a just price, that the millers sold meal in proportion to the price of barley, that the bakers sold bread in proportion to the price of wheat, that the bread had the weight they had fixed'.*

In Babylon, the Code of Hammurabi (1790 – 1750 BC) contained copious rules regulating trade and pricing. For instance, the Code introduced the sliding scale of fees for surgical services provided by physicians and veterinary surgeons depending on the status of the patient.

The focus of trade regulation in Egypt was the control of grains, ostensibly to prevent famine. In this regard, inspectors were appointed who took inventories of farmers and animals. These inspectors also made estimations of harvests. Other public officials were also empowered to control pricing and supply of grains.

In the ancient Chinese empire, pricing was controlled and competition reduced to the minimum. Under the Official System of Chou (about 1122 BC), regulators were appointed 'Master of Merchants' with the responsibility for price determination. Also, merchants were not allowed to raise prices of grains during calamities or benefit from seasonal economic booms. Like the

Egyptians, early Chinese rules also appointed a 'superintendent of grain' whose responsibility was to survey fields and determine the amount of grain to be realised.

In ancient India, pricing was also regulated by authorised officials who were to collect grains from merchants and fix profits and prices. Wages for services provided by artisans and other service providers were also regulated.

How correct will it be to say that survival of the fittest reigned supreme in business in ancient times?

b. Early Trade Regulation in Europe

In England, during the middle ages, monopolies and restrictive trade practices such as forced of scarcity of goods were controlled by laws which prescribed forfeiture as punishment for such anti-competitive practices. In 1226, King Henry III passed a law fixing prices of bread, ale and grains. In 1349, the Statute of Labourers fixed the wages to be charged by artisans and workmen. The also prohibited overcharging. For such acts, offenders were liable to pay a fine amounting to double the sum received from an injured party in the event of a breach.

The prohibition of restrictive contracts which ran counter to public policy was a precursor to modern competition law in Europe. Case law on restraint of trade formed a basis for subsequent statutes regulating competition. From the late 16th century, the introduction of 'industrial monopoly licenses' (IMLs) similar to modern patents to encourage innovation resulted in frequent abuses of the privileges without much innovation. This stimulated the development of case law frowning on restrictive practices such as those allowed under IMLs. A landmark case in this regard was the case of *Darcy V. Allein* (1602) where the sole right granted to the Plaintiff to import playing cards into England was declared void on grounds of monopolistic behaviour. The grant of monopoly licenses continued until 1835 when the Municipal Corporations Act 1835 abolished the privileges granted to guilds.

Elsewhere in Europe, the industrial revolution resulted in mechanized production with industrialised companies growing in size and market power. Hence it became necessary for such companies to be regulated to prevent market restriction. This led to the prohibition of price fixing in France under the Law of 14 – 17 June 1791 and in Austria under the Austrian Penal Code.

c. The Development of Modern Competition Law

The Canadian Act for the Prevention and Suppression of Combinations formed in Restraint of Trade 1889 was the first statute on competition law. The more popular Sherman Act was subsequently passed in the US in 1890. Though enacted after the Canadian competition statute, the Sherman Act is generally regarded as the first 'modern' statute on competition law. It prohibited the restriction of competition through price fixing, output control and market sharing, as practised by large companies through 'trusts. The Sherman Act was subsequently complemented by the Clayton Act 1914 which went on to outlaw other anti-competitive practices.

In Europe, the first statute on competition law as the German Anti-Cartel Law 1923. This was closely followed by similar laws in Norway and Sweden. After the Second World War, the UK enacted the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 - its first statute regulating competition.

On a regional level, the first multilateral law regulating competition developed from the *European Coal and Steel Community Agreement* 1951 which sought to limit Germany's dominance in the production of coal and steel. *The Treaty of Rome* 1957 in establishing the European Economic Community (precursor to the European Union) included competition regulation in the internal market as part of the foundational principles for the establishment of the Union.

Self-Assessment Exercise 1

Though ancient attempts at regulating 'competition' trace their origins to city states in modern day Europe, modern competition law has its foundations elsewhere. Discuss.

3.3.2 History of Competition Law in Nigeria

The first reference to regulation of competition in Nigeria was in the 1979 constitution which listed 'prohibition of trusts' as one of the objectives of government. However, no legislative step was taken to enact a law to regulate competition during that era.

a. Competition Regulation through Merger Control

The earliest attempt to regulate competition in Nigeria was through merger control under the Investment and Securities Act 1999. Though the ISA was principally enacted to regulate the Nigerian Capital Market, the Securities and Exchange Commission (the regulator created under the ISA) was mandated to review the effect of proposed combinations (mergers, takeovers and acquisition) on competition in Nigeria. S. 99 of the then ISA empowered the Securities and Exchange Commission (SEC) to withhold approval for combinations likely to cause a substantial restraint of competition or tend to create a monopoly. In pursuance of this mandate, SEC therefore assessed the fairness of proposed mergers on the shareholders of the merging parties and the general public. In effect, SEC's power of competition control only arose where mergers were proposed and/or submitted to it for approval. Beyond this, it had no pre-emptive regulatory powers over competition in any sector

Explore the legislative attempts to regulate competition during Nigeria's pre-liberalisation era.

b. Competition Regulation during Nigeria's Liberalisation Era

Owing to the previous status of public ownership of major commercial entities and utilities there was not much focus on regulating competition. Most public entities enjoyed exclusive or special rights as government-owned monopolies. Subsequent progress under the privatization and commercialization policy of the Nigerian government resulted in the divestiture of public entities into private control. This underscored the need for wider regulation of competition in all sectors.

With particular reference to the major Nigerian public monopolies, the divestiture of Nigeria's telecommunications (NITEL) and power (NEPA) monopolies into more competitive markets

necessitated the regulation of competition in these sectors. Two major several sector-specific laws were then enacted creating sector-specific regulators whose mandate included the regulation of competition in the sectors. The Nigerian Communications Act 2003 (NCA) empowered the Nigerian Communications Commission to regulate competition in the communications sector while the Electric Power Sector Reform Act 2005 (EPSRA) empowered the Nigerian Electricity Regulatory Commission to regulate competition in the power sector. **See Section 90 NCA** and **Section 82 EPRSA.**

The ISA was also amended to widen and clarify SEC's competition regulatory powers under the ISA 2007 which repealed the ISA 1999. Some of the competition related amendments under the ISA 2007 include the extension of ISA's powers to mergers of partnerships and mergers consummated pursuant to authorisation by sector-specific regulators, categorisation of mergers so as to reduce regulatory activity over small mergers which are unlikely to impact negatively on competition, third party input in mergers to enable industry stakeholders oppose mergers that may place them or the market at a disadvantage and time limits for SEC to make a decision on applications for mergers. Together with the NCA 2003 and the EPSRA 2005, the ISA 2007 constituted the legal regime for competition regulation until 2019.

Self-Assessment Exercise 2
With particular reference to relevant years, create a chronological list of attempts to regulate competition in Nigeria from independence till 2019.

c. Towards an Industry-wide Competition Regulation Regime

On 18th June 2001, the Competition and Anti-trust Reform Steering Committee was inaugurated to work with the Bureau of Public Enterprises (BPE) in formulating a competition policy for Nigeria. They came up with a draft competition law which was presented as an Executive Bill to the Senate. During the same period, the National Antitrust (Prohibition, Enforcement etc.) Bill sponsored by Hon. Halims Agoda and the Competition (Anti-trust) Bill sponsored by Hon. Chidi Duru were before the House of Representatives. Both bills were harmonized with the aforementioned executive bill and accepted for deliberation. Unfortunately, the process hit a brick wall when the Federal Competition Bill was thrown out at second reading in 2006.

Following a reintroduction during the first term of the Muhammadu Buhari government, the Federal Competition and Consumer Protection Act (FCCPA) was passed into law in 2018 with presidential assent granted in January 2019. The FCCPA created the Federal Competition and Consumer Protection Commission (FCCPC) as the industry wide regulator of competition and consumer protection in Nigeria. The FCCPA repealed the powers of the ISA to approve mergers – placing it under the exclusive authority of the FCCPC. Furthermore, where sector-specific competition issues are concerned, the FCCPC affirmed the powers of sector specific regulators to regulate competition in their sectors. However, the FCCPC has precedence over these regulators. **See Sections 17, 18, 93, 104, 105 and 165 of the FCCPA.**

Trace the journey towards industry-wide regulation of competition in Nigeria after 2001 - identifying the regulator and its relationship with sectoral regulators created under preceding statutes.

3.4` SUMMARY

In this unit, we have learnt about the history of competition regulation both internationally and in Nigeria. We have learnt that early trade regulation in ancient times gave way to modern competition regulation – first in Canada and thereafter in the USA. We have also learnt about early attempts to regulate competition in Nigeria from merger regulation under the ISA, sector specific regulation of competition and finally industry-wide regulation under the FCCPA.

The regulation of trade competition can be traced as far back to ancient times. Most of the early civilisations had rules in place to regulate trade and prevent market distortion. These constituted the foundation for modern competition law. In England, formal trade regulation was practised from the middle ages. With the industrial revolution trade regulation was also pursued in other parts of Europe. Though the first statute on competition law was enacted by Canada, the Sherman Act 1890 is generally regarded as the father of competition law. It was followed by the Clayton Act 1914 and other European statutes on competition law.

In Nigeria, regulation of competition was gradual – first via merger control under the ISA and thereafter through sector-specific regulation of competition in the communications and power

sectors. The first attempt to comprehensively regulate competition was made after 2001 when the Competition and Anti-trust committee was created under the BPE. Though the first legislative attempt failed in 2006, the enactment of the FCCPA has now introduced a regime of industry-wide regulation of competition.

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3.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The Roman and Greek city states can be said to have been at the forefront of regulating competition in ancient times with various laws and pronouncements prohibiting artificial scarcity and price hikes. However the first two formal

legislations for modern competition regulation were enacted by Canada and US in 1889 and 1890 respectively.

SAE 2

1979 – Constitution listed 'prohibition of trusts' as one of the objectives of government. 1999 – ISA given power to review effects of combinations on competition under Investment and Securities Act 1999. 2

2003 – NCC empowered to regulate competition in the communications sector under the Nigerian Communications Act 2003 (NCA)

2005 –NERC empowered to regulate competition in the power sector under the EPSRA 2005

2007 – ISA amended with competition regulation powers extended to partnerships and sector-specific members, industry stakeholders empowered to critique proposed mergers and time limits for decisions on mergers.

MODULE 4: INTRODUCTION TO COMPETITION LAW

UNIT 4: BASIC CONCEPTS OF COMPETITION LAW

4.1. INTRODUCTION

Competition law is a fusion of aspects of law and economics. Though not an area in business law, its object is the regulation of business. Competition law has some underlying concepts which tend to run through it. These concepts are relevant in the consideration of larger issues in the subject. To aid your understanding of the course, it will be important to grasp these concepts. We shall examine some of the concepts in this unit. Other useful words are captured in the glossary provided at the end of this course material. You may wish to refer to it at any time in your study of the course.

4.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Differentiate between fair and unfair competition
- Identify the different types of competition
- Discuss the different types of market structure

4.3 MAIN CONTENT

4.3.1 Ways in which Undertakings Compete in the Market

As we discussed in Unit 1, competition is about undertakings trying to secure patronage from customers or consumers by various means. Sometimes, some of these means may be illegal or uncompetitive. There are various ways in which undertakings compete in the market. They may engage in fair/unfair competitive practices or compete through pricing or other means to attract customer patronage.

It is pertinent to note that the use of the word **'market'** here does not necessarily refer to a place of business in layman terms, but to an exchange mechanism that brings buyers and sellers of a

particular commodity (goods or services) together. It is therefore more related the nature of the transaction than a geographical location. Also note that the use of the word '**undertaking**' is not in line with the common everyday reference to a pledge or promise. In competition law, the term '**undertaking**' refers to various types of businesses engaged in trade or competition within the market. Such trade may be in goods or services.

A. Fair and Unfair Competition

Fair competition takes place when undertakings use legal or fair means to attract patronage and build their market share without harming competition in the market. Such means may include efficiencies of production, cost or resources, quality control, wholesome advertising, investing in research and development etc.

In engaging in fair competition, the undertaking is aware of the presence of other competitors in the market. However, its focus is not to undercut competitors or drive them out of the market. The beneficiaries of fair competition are the consumers who will enjoy better quality products at better prices; the undertakings who engage in fair competition and their competitors who are not driven out of the market or forced to resort to other illegalities to remain in business. The market also benefits as it becomes more active and is better able to self-regulate.

Unfair competition is the opposite. Where undertakings compete unfairly their focus is to undercut competitors or drive them out of the market totally. To compete unfairly, the undertaking may engage in anti-competitive practices, unwholesome advertising or sponsorship of smear campaigns against their competitors, dropping of prices below the cost of production for a while to drive out competitors from the market, etc.

Where there is unfair competition, everyone except the unfair undertaking suffers. On the long run, even the market is distorted. Unfair competition harms the market and by extension, the consumer because the restriction of competition limit consumer freedom and consumer choice. Ultimately, the undertaking which engages in unfair competition may attain dominant or monopoly power such that it is no longer accountable in the market. It may alter prices and product quality at will to the detriment of consumer interests.

Differentiate between the objectives of fair competition from that of unfair competition.

B. Price and Non-price Competition

Price competition is the simplest and most common in the market. In engaging in price competition, the undertaking lowers prices with the intention of attracting customer patronage to the undertaking and increasing market share. Price competition relies on law of demand in economics that when the price of a product rises, demand falls and when the price falls, demand rises. Hence, many undertakings record massive sales when prices are dropped especially for promotional reasons. Where an undertaking drops the price of its product below the price of a substitute product sold by the competition, it may benefit from it on the short term. However, smaller undertakings are unable to engage in price competition as the losses from such pricing may not be sustainable.

Price competition may be fair or unfair. Where an undertaking only seeks to clear out old stock or gain market share by dropping prices for a while, its purpose may not be to harm the competition but to benefit from the increased patronage for the while and increase its market share without taking a loss. In such a scenario, price competition may be beneficial. However, where the purpose is to harm the competition or drive them out of the market on the long run, price competition would be unfair. Price competition does not always result in increased market share or customer base because there may be other factors informing customers' decision to purchase a product other than price. Such factors include customer loyalty, product quality etc. We shall look more at unfair price competition when we learn about **predatory pricing**.

In non-price competition, an undertaking tries to gain patronage and market share by other means. To achieve this, the supplier uses other means to win customers. Such means include improved quality, innovation, customer loyalty programmes, advertising, offering after sales service, free delivery, tying of other products to the product on sale, extended opening hours etc. By doing so the undertaking is focused on distinguishing its product such that the consumer is attracted to purchase it not withstanding that it may not necessarily be cheaper than the substitute produced by a competitor. Like price competition, non-price competition can be fair or unfair

depending on the intention of the supplier. We will see examples of unfair non-pricing practices when we look at abuse of dominance.

Self-Assessment Exercise 1

With particular reference to the Nigerian mobile telecommunications sector give one example each of price competition and non-price competition.

4.3.2 Market Structure

Market structure refers to the forms of competition in a market. There are 4 major forms of competition in the market. They are described below:

a. Perfect Competition

A market where perfect competition exists is characterised by the presence of large numbers of sellers and buyers with free market entry and exit. Other characteristics of such a market include:

i. The products sold in the market are identical

ii. Due to the nature of the market, no single seller can influence the market or price of products on his own

iii. The price of products is somewhat fixed as the market regulates the price

iv. There is little or no competition because of the presence of many sellers.

v. Profits are normal on the long run due to free entry and exit

vi. Buyers have clear information on the market

Consider the products you use daily in Nigeria. Considering the characteristics listed above, which of them can you say exists in the market with perfect competition?

b. Monopoly

A monopoly is a market where there is one seller with lots of buyers. In this kind of scenario, the market is entirely under the control of the monopolist who determines the price and output in the market. The monopolist can do this in 2 major ways. He can set the price and allow demand to determine the output, or he can set the output and allow demand to determine the price. Also, there is no adequate substitute for the product sold by the seller. An example of a monopoly is the utilities market in most developing countries.

Closely related to the monopoly is a **duopoly** or **oligopoly** which refer to the control of a market by two or a few undertakings respectively. These undertakings may act together to constitute a monopoly with controlling powers like single undertaking.

The flip side of a monopoly is a **monopsony**. A monopsony refers to a situation where there are several 'sellers' of a particular good/services but only one buyer. In this case, the 'buyer' is able to determine and control pricing which the multiple 'sellers' are constrained to adhere to since there is no alternative buyer.

Self-Assessment Exercise 2

If monopoly = one seller + many buyers
Duopoly = …… + ……
Oligopoly = …… + ……
Monopsony = …… + ……

You will find the following short videos enlightening. Click the link to view them and deepen your knowledge on various markets.

https://www.youtube.com/watch?v=0Gb4t1L2MH0

c. Monopolistic Competition

This kind of market is characterised by many sellers and buyers, with the existence of close substitutes and no entry barriers. The market is very similar to that of perfect competition. However, unlike perfect competition there are different prices for products which may be substitutable because of product differentiation. Though product prices may be different, sellers do not engage in price competition as demand is largely driven by other factors. Instead the market is characterised by product differentiation as employed by suppliers to attract customers and gain customer loyalty.

d. Oligopolistic Competition

This market operates like the monopolistic competition. It is characterised by large number of buyers, very few sellers, and large number of products which are not necessarily substitutable and high barriers to entry. In this market, both price and product competition are high as each seller is aware of the strategies employed by his competitor to gain customer patronage and strategies are crafted with this in mind. Branding and advertising is a major practice in this market as all are used to attract customers.

For ease of reference, Table 1 provides a snapshot of the four forms of competition discussed above and their characteristics.

Forms of competition in the market	**Number of sellers**	**Number of buyers**	**Barriers to entry/exit**	**Products**
Perfect competition	Large	Large	None	Many Identical
Monopoly	One	Large	Many	Single
Monopolistic competition	Large	Large	None	Many Different
Oligopolistic competition	Few	Large	Many	Large

Table 1: Forms and characteristics of competition

Differentiate between monopolistic competition and oligopolistic competition

4.4 SUMMARY

In this unit, we have learnt about the ways in which undertakings compete in the market. We have learnt that undertakings may either compete fairly or unfairly but with the same aim, to gain customer patronage and increase market share. We have also learnt that undertakings engage in price and non-price competition for the same purpose. We have also considered the major forms of competition in the market being perfect competition, monopoly, monopolistic competition and oligopoly.

In every transaction, the goal is to bring suppliers and buyers together for mutual benefit – profits for the supplier and service satisfaction for the buyer. Undertakings compete in the market in various ways. Sometimes they compete through the use of legal means to attract customer patronage. In other cases, they compete unfairly i.e. through illegal or negative means which seek to undercut their competitors. Undertakings also engage in price and non-price competition. In price competition, undertakings lower their prices to attract customer patronage and increase market share. For non-price competition, the supplier tries to gain customer patronage through other means such as quality, loyalty programmes, advertising etc.

There are 4 major forms of competition in the market. They are perfect competition (characterised by large number of sellers and buyers of the same goods with free entry and exit); monopoly (characterised by large number of buyers with one seller only) with duopoly and oligopoly as its hybrids and monopsony as its reverse; monopolistic competition characterised by large number of sellers and buyers with no entry barriers and various products; and oligopoly (characterised lots of buyers, few sellers and different products).

View the video below to refresh your memory on what have learnt in this unit.

https://www.youtube.com/watch?v=ohMYeUyW1wY

4.5 FURTHER READING/REFERENCES/WEB SOURCES

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4.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Examples of price competition in the Nigerian telecommunications sector

- Price reductions
- BOGOF
- Buy airtime and get associated product cheaper
- Call cheaper when calling within the same network
- Call cheaper at a particular time of day
- Charge first 3 calls at twice normal rates and all other calls at discounted rates
- *888*PIN# or *555*PIN#
- Call cheaper in home zone etc.

Examples of non-price competition in the Nigerian telecommunications sector

- Portability promos
- Welcome back promos
- Scholarships for subscribers
- Freebies
- Recharge and get free data
- Advertisements
- Sponsorship of shows and television programmes
- Sponsorship of charities and NGOs
- Training and business events etc.

SAE 2

Duopoly = **two sellers** + **many buyers**

Oligopoly = **few sellers + many buyers**

Monopsony = **one seller + many buyers**

Module 5 Benefits and Burdens of Competition Regulation

Unit 1 Goals of Competition Regulation

Unit 2 Burdens of Competition Regulation

MODULE 5 BENEFITS AND BURDENS OF COMPETITION REGULATION

UNIT 1: GOALS OF COMPETITION REGULATION

1.1 INTRODUCTION

Competition regulation is desirous to consumers but not necessarily by undertakings in the market place. In this unit, we will seek to answer the question: 'why have a legal regime in place for the regulation of competition in any jurisdiction?' Our answer to that question will highlight the purpose as well as advantages of competition regulation.

Let us begin with a taster of the benefits of competition policy. Please click the below to access a short video.

https://www.youtube.com/watch?v=KtV9MDN6_IE

1.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Explain why competition regulation is necessary.
- Give examples from different jurisdictions of how some purposes of competition regulation are advantageous.

1.3 MAIN CONTENT

Competition regulation has many goals/advantages. Some of them are as follows:

1.3.1 Consumer Protection / Welfare

The main focus and beneficiary of competition law is the consumer. Accordingly, competition law protects the interests of consumers and promotes their welfare in the market. Remember that no undertaking engages in business for charitable purposes. Since the main objective is to maximize profits, unregulated undertakings are likely to engage in practices detrimental to the

interests of consumers hence, the consumer-driven goal of competition law to ensure that the market is adequately competitive where possible, consumer freedom/choice is not stifled and innovation/efficiency is encouraged.

Who/what is the paramount focus of competition regulation?

Competition regulation is not only necessary in competitive markets. It is also necessary where monopolies exist. For such markets, competition regulation ensures that monopoly power is not exercised to the detriment of consumers. Note that dominant undertakings may also behave like monopolies and would therefore require regulation.

1.3.2 Promotion of Competition in the Market

The underlying goal of any business is to maximise profits. Every undertaking person knows that this is best achieved when there is no competition in the market – leaving them with power to fix prices at will. On the contrary, where there is competition in the market, demand and supply (price and output) will be controlled by the market itself. The latter is the goal of competition law – to promote competition in the market and ensure that the market is regulated by forces of demand and supply and not by monopolists/dominant undertakings within the market.

Note that, in regulating competition, the focus is to encourage the competitive process for the ultimate benefit of the consumer. An effectively competitive market regulates itself and may only need light touch regulation from time to time since over-regulation may harm competition and increase transaction costs.

1.3.3 Protection of Undertakings from More Powerful Competitors

Another goal of competition law is the protection of small undertakings from more powerful rivals which would ordinarily push such smaller undertakings out of the market through anti-competitive practices which will further strengthen their market power.

In protecting smaller undertakings from their more dominant rivals, the end is not to encourage weakness and inefficiency but to ensure that deserving undertakings who would ordinarily be

pushed out of the market on account of their relative weakness in comparison to more dominant competitors remain in competition for the ultimate benefit of the consumer.

Self-Assessment Exercise 1
The goal of protecting smaller undertakings from more dominant competitors is unfair. Discuss.

1.3.4 Promotion of Economic Equity

Closely related to the goal of protection of competitors is the role of competition law in promoting economic equity and redistribution of wealth - preventing the aggregation of resources in the hands of monopolist suppliers. This function of competition law has its root in American jurisprudence which sees such aggregation of resources in the hands of the few as a threat to democracy, economic opportunity and freedom of choice. In 1938, the President of the United States, Franklin Roosevelt opined that '*The liberty of democracy is not safe if the people tolerate the growth of a private power to a point where it becomes stronger than the democratic state itself....'*.This informed the break-up of the American telecommunications giant, AT&T to whittle down its monopoly. In the South African case of *Schumann Sasol (SA) (Pty) Ltd. V. Prices Daelite (Pty) Ltd.* 2001 – 2002 CPLR 281(CT), the South African Competition Tribunal disallowed the takeover of the largest manufacturer of candles by the largest supplier of candle wax because it would raise barriers to entry and lessen competition in the candle wax market.

1.3.5. Achievement of National Goals

Competition law and policy can be used as a tool for achieving specific national economic goals. For instance, the achievement of the single market imperative (i.e. the integration of the markets of EU member states into a single market) of the European Community (EC) has been driven largely by competition law and policy. Prohibition of anti-competitive practices and abuse of dominance was built into the grundnorm of the EC – the Treaty on the Functioning of the European Union (TFEU). In furtherance of this goal, Article 101 of the TFEU prohibits all agreements which affect trade between member states and have as their object or effect, the restriction or distortion of competition within the internal market. Article 4 of the Treaty provides that the activities of member states of the EU shall be conducted in accordance with the principle of '*an open market economy and free competition*'.

How does competition regulation promote economic equity?

1.3.6 Protection of Third-Party/Stakeholder Interests

Apart from the market or consumers, business practices may affect third parties/stakeholders. Competition law may be used as a tool to prevent such third-party interests from being adversely affected. For instance, the ISA 2007 empowered stakeholders to weigh-in on proposed mergers which may impact on their interests.

1.3.7 Competition Advocacy

Competition law can also be a means for competition advocacy. In this regard, competition authorities may scrutinise prospective legislation to point out their possible effect on competition in the market, if any. This is the case in the United Kingdom. Section 7 of the Enterprises Act 2002 empowers the Office of Fair Trading to draw Ministers' attention to laws which may be harmful to competition.

Self-Assessment Exercise 2

Discuss three goals of competition regulation that are not directly focused on the consumer.

1.4 SUMMARY

In this unit, we have learnt about the goals of competition regulation. We have learnt that competition law operates like an umpire to ensure that undertakings compete fairly in the market. We have also learnt that the main focus of competition law is the consumer. Where the goal of protecting consumer interests is achieved, the consumer enjoys lower prices, freedom of choice, innovation and improved quality of products. Furthermore, competition can be used to achieve other goals such as national policy goals, protection of weaker undertakings from their stronger competitors, economic equity and redistribution of wealth. Other functions of competition include the protection of competition in the market (and prevent monopoly control of the market), and advocacy.

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1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

In protecting smaller undertakings from their more dominant rivals, the end is not to encourage weakness and inefficiency but to ensure that deserving undertakings who would ordinarily be pushed out of the market on account of their relative weakness in comparison to more dominant competitors remain in competition for the ultimate benefit of the consumer.

SAE 2

Promotion of Economic Equity
Achievement of National Goals
Protection of Third-Party/Stakeholder Interests

MODULE 5 BENEFITS AND BURDENS OF COMPETITION REGULATION

UNIT 2: BURDENS OF COMPETITION REGULATION

2.1 INTRODUCTION

In the last unit, we learnt about some goals of competition regulation. You remember that we said that the goals of competition regulation also speak to the advantages of competition regulation. Having examined the advantages, do you think anyone would be opposed to competition being regulated? We will find answers to that question in this unit.

2.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Explain the burdens of competition regulation
- Identify who benefits from the burdens of competition.

2.3 MAIN CONTENT

The benefits of competition law notwithstanding, it has been opined that competition regulation can be burdensome and disadvantageous to undertakings. Note however that even though burdensome on undertakings, the focus of competition regulation is the consumer. Hence, consumers benefit though undertakings may be burdened. Some burdens of competition regulation are stated below:

a Competition Regulation may stifle efficiency

One of the goals of competition is to encourage efficiency. However, where an undertaking becomes dominant, attempts at maximising efficiency may be frowned upon as a restriction on competition. For instance, an exclusive distribution arrangement may be seen by undertakings as

a means of achieving efficiency in the organisation and distribution of their products. However, it hampers the customer's freedom of choice and may be prevented by competition authorities especially if one of the parties to the distribution agreement is dominant.

How may competition stifle efficiency?

b. Competition regulation may hamper producers' choice

The focus of competition law is to protect the consumer from exploitation by undertakings. Undertakings tend to look more towards a profit-oriented goal as against social service. This goal guides their choices – some of which may be contrary to consumer interests. The competition regulator monitor undertakings' business choices and activities so as to prevent those that may be exploitative on consumers.

c. Cost of Competition Regulation

One burden of competition law is the cost of regulation. Competition law is a specialised area where law intersects with economics. It therefore requires that regulatory authorities possess the necessary expertise to do justice. Also, since competition authorities mostly deal with multinational undertakings with deep pockets, they must be abreast of international best practices. A lot is also expended in investigations and training. The issue of funding and training of competition authority staff is more of a problem in developing countries where competition law is a relatively new concept and other agencies are competing for funding.

Self-Assessment Exercise 1
Competition law may sometimes be burdensome on the government. Discuss.

d. Competition Regulation may Stifle Competition

One cardinal principle of liberalisation is that when a market is sufficiently competitive it can regulate itself through demand and supply such that players and stakeholders in the market are constrained to compete fairly or risk losing patronage from consumers. However, in markets with few dominant players with market power to influence the market, the competition regulator may need to step in from time to time in the interest of consumers.

Who benefits where a non-competitive market with few dominant players is prevented from regulating itself

e. Competition regulation discourages Innovation

One major driver of innovation is the promise of profit beyond what is usual for a market. Innovation costs money and may result in huge costs sunk into research and development – some of which may prove unsuccessful. Hence, some argue that an innovator ought to be able to recoup the cost of innovation (including cost of R&D and all other unsuccessful attempts which may have been made in the process of finally coming up with a unique product). A counter-argument is that innovation may result in dominance which may be abused if not carefully controlled.

Self-Assessment Exercise 2
Discuss three situations where competition is a burden to undertakings

2.4 SUMMARY

In this unit we have learnt about the burdens of competition regulation. Competition regulation has advantages, but it also has its burdens such as problems with cost of regulation, discouragement of innovation, problems with inefficiency etc. However, these burdens do not outweigh the advantages as to make competition irrelevant. Furthermore, burdens notwithstanding, competition regulation is beneficial to the consumer.

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2.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Competition regulation can be burdensome to government. Competition law is a specialised area where law intersects with economics. It therefore requires that regulatory authorities possess the necessary expertise to do justice. Also, since competition authorities mostly deal with multinational undertakings with deep pockets, they must be abreast of international best practices and have access to necessary funding to deter corruption. A lot is also expended in investigations and training.

SAE 2

1. Where regulation stifles efficiency
2. Where it hamper producers' choice
3. Where it stifles competition
4. Where it discourages innovation

Module 6 The Competition Regulator

MODULE 6 THE COMPETITION REGULATOR

UNIT 1: THE ROLE OF THE COMPETITION REGULATOR

1.1 INTRODUCTION

Can you remember the basic English definition of competition in Module 1? If you can't, you may wish to refer to Module 1 to refresh your memory. Now cast your mind to competition in sports. Every sport involves some form of competition, rules guiding the sport and an umpire to interpret those rules. Without these components, competitors may cheat and over time, the sport may cease to be as interesting as it initially was. Transposing these principles to business, the sport is business, rules are competition law and policy and the umpire is the regulator. That 'umpire' is the focus of this unit. In this unit, we shall examine the status and broad functions of the competition regulator.

1.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Explain status of a competition regulator
- Differentiate between the head of a competition authority and the competition authority itself.
- Describe the broad functions of a competition regulator

1.3 MAIN CONTENT

1.3.1 The Status of the Competition Regulator

The regulator is not an individual, but an agency of government established under an enabling law. In order to perform its functions effectively, the regulatory agency is usually clothed with corporate personality such that it can sue/sue in its own name and hold property in its own name. It is therefore distinct from its staff or even the government.

The regulatory agency is usually headed by an individual. Though the head of such an agency is usually the regarded as the face of the agency, he/she is not the alter ego of the agency and

cannot be held personally responsible for the actions or liable for the acts or omission of the agency. In the event of personal liability or failure to carry out his/her duties, he/she may be subject to disciplinary proceedings in a personal capacity. The agency, being a legal person, with capacity to sue and be sued in its name is liable for its own acts and omissions.

Why is the regulator usually clothed with corporate legal personality?

Like an umpire in a sport competition, the regulator agency oversees competition in its legally assigned area of influence - sectoral or industry-wide. In the exercise of its functions, it acts when necessary to deal with an issue that may impact on competition when it is likely to arise or has already arisen. Regulatory action may be prescriptive (before the act) or proscriptive (after the act) depending on the model of competition regulation required for each particular situation and the sector in question.

Self-Assessment Exercise 1
Discuss the implications of a competition regulator's corporate personality for the acts or omissions of the head of such regulatory agency.

1.3.2 Broad functions of Competition Regulators

The overarching goal of competition regulation is to promote competition for the benefit and protection of consumers. It is important to differentiate this goal from consumer protection which may or may not be under the purview of the competition regulator. In some jurisdictions like Nigeria and the USA, the competition regulator has the added responsibility for consumer protection. This is not the case in all jurisdictions. In jurisdictions were sector-specific regulation of competition is the main regulatory model, consumer protection is usually the responsibility of an independent agency established strictly for that purpose. This was the case in Nigeria prior to the enactment of the FCCPA. Competition was regulated on a sector-specific basis while consumer protection was subject to the regulation of the Consumer Protection Council.

To achieve their overarching goal, competition regulators generally carry out three broad functions:

a. Control of market power and prevention of abuse of market power

The competition regulator ensures that market power of undertakings is controlled and abuse of market power prevented. It is important to note that what is required of the competition regulator in this case is **not to prohibit** market power but to **control** same. In essence, competition law recognises that market power is possible and not necessarily a bad thing. Market power becomes a problem when it is exercised in an abusive manner as to restrict competition and damage consumer/market interests.

Market control is an important function of competition regulators especially in oligopolistic markets where there are few service providers - all likely to possess market power. Examples of such markets are utility companies.

b. Prevention of Agreements which Restrict Competition

Agreements that may restrict competition are of two basic types:

a. horizontal agreements (i.e. between competitors in the same market e.g. between two power distribution companies, and
b. vertical agreements (between suppliers at different levels of the supply chain e.g. between transmission and distribution companies in the power sector.

Agreements which restrict competition may be horizontal or vertical. In both cases, these agreements may result in the consolidation of market power, cartels or collective dominance – all of which may become detrimental to competition and consumer interests. Therefore, the regulator may scrutinise behaviour indicative of such agreements and prevent those that may be restrictive to competition.

What are the basic types of agreements which restrict competition?

c. Merger Regulation

Mergers may or may not be beneficial for consumers depending on what the parties to the merger hope to achieve. For instance, bank mergers in Nigeria resulted in an increase in banks' asset bases and reduction in incidences of failed banks and loss of depositors' funds. That is clearly beneficial for consumers.

On the other hand, mergers may result in the creation of 'super- dominant companies' or lead to a high concentration of market power. Though they would be beneficial to the parties to the merger, they may be detrimental to consumers' interests. This may be prevented through effective merger regulation which will either prohibit such mergers or put conditions in place to ensure that the power of the surviving company is whittled down and competition in the market is not harmed.

Self-Assessment Exercise 2
Identify the broad functions of the competition regulator

1.4 SUMMARY

In this unit we have learnt about the status of the competition regulator as the umpire in the course of business activities in the economic sector. We have also learnt that the competition regulator is usually an agency of government created under an enabling law and vested with corporate legal personality. Also, we have learnt that the competition regulatory agency is different from its head and that it has three broad functions in the fulfilment of its mandate.

The competition authority is the agency responsible for the regulation of competition in any jurisdiction. The competition regulator is like the umpire who ensures that competitors abide by the rules of the game. The regulator is not an individual but an agent of government with corporate personality. The head of the competition regulator may be a well-known individual because of the agency's regulatory activities in various sectors. However, he/she is a distinct person from the regulator and cannot be regarded as its alter ego. Accordingly, each party (the competition regulator on one hand, and the head of the agency on the other) will bear its own liabilities.

A competition regulator has three broad functions all geared towards achieving the goals of competition regulation. They are control of market power which may extent to the prevention of abuse of such power, prevention of agreements which restrict competition and merger control.

1.5 SUGGESTED FURTHER READING /REFERENCES

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1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The competition regulator is not an individual but an agency of government. Accordingly, it is distinct from its officials, can sue and be sued in its own name and own property. By implication though the head of the regulatory agency may be well-known (like the face of the agency) it is not its alter-ego and cannot be held personally liable for the acts or omissions of the regulator. In the same vein, the regulator cannot be held liable for the acts or omissions of its head.

SAE 2

The broad functions of the competition regulator are:

1. Control of market power and prevention of abuses of market power
2. Regulation of agreements which restrict competition

3. Merger control.

MODULE 6 THE COMPETITION REGULATOR

UNIT 2: REGULATORY MODELS FOR COMPETITION

2.1. INTRODUCTION

As we have learnt from previous units, there are various objectives for regulating competition. Beyond the basic objectives of market protection and promotion of competition for the benefit of consumers, some jurisdictions regulate competition in line with specific objectives. The specific objectives of particular countries may influence the approach they take in regulating competition. Socialist economies may be more rigid in their regulation preferring a central regulatory authority while capitalist economies may prefer regulatory input from various agencies. In this unit, we shall learn about the main regulatory models for competition law.

2.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Explain the main regulatory models for competition law
- Discuss the advantages and disadvantages of the different regulatory models

2.3 MAIN CONTENT

There are three major models (approaches) for the regulation of competition. The sector specific approach, the sector neutral or industry-wide approach, and the concurrent approach.

2.3.1 Sector-Specific Regulation of Competition

Under this approach, competition is regulated on a sectoral basis such that the regulators of different sectors are empowered to regulate competition in their sectors. In jurisdictions where this approached is pursued strictly, there is usually no industry-wide regulator of competition. Under this approach, no sectoral regulator supersedes the other since each regulator has exclusive jurisdiction to regulate competition in its sector. The sector-specific approach to competition regulation is usually characterised by *ex-ante* regulation of competition i.e. by putting rules and regulations in place to promote competition and prevent abuses. The sector-specific regulator is more directly involved in dealing with competition issues.

Prior to the enactment of the during which time there was no industry-wide regulator of competition, Nigeria practised the sector-specific regulation of competition in the power and communications sectors though merger regulation was within the purview of the Securities and Exchange Commission. Ghana follows the sector specific approach to competition regulation. The country does not have a sector-neutral regulator of competition, so competition is regulated by sectoral regulators such as the Ghana Central Bank which regulates mergers in the banking sector and the Petroleum Ministry which regulates competition and prevents anti-competitive practices in the oil and gas sector.

Prior to the enactment of the FCCPA, who regulated competition in the Nigerian telecommunications and power sectors?

It is generally said that sector-specific regulation of competition may be more effective because of industry expertise which sectoral regulators will possess. Findings on issues like market definition, dominance or market power are likely to be more accurate since the regulator knows how the sector operates and may be adept at technical issues unique to the sector. However, the approach may be more expensive to manage because of the need for each sector to have staff with specific competition-regulation expertise. It may also lead to a multiplication of efforts. Furthermore, industry expertise may the not be such an advantage since consultants with requisite expertise can always be engaged on a one-off basis where required thereby disposing with the need to bear recurrent personnel costs.

Self-Assessment Exercise 1
Discuss the benefits and burdens of sector specific regulation of competition.

2.3.2 Sector-Neutral or Industry-Wide Regulation of Competition

Under the sector-neutral regulatory model, competition is regulated by a central regulatory agency regardless of the sector where it arises. Usually, the central regulatory agency will have different directorates/agencies with broad responsibilities for competition regulation. The sector neutral regulation of competition follows the *ex-post* approach i.e. acting after the fact to punish anti-competitive practices and enforce the provisions of the main competition legislation.

Can you mention another term for 'sector-neutral' regulation?

China operates the industry wide approach to competition regulation. Under its Anti-Monopoly Law 2008 (AML 2008), regulation and enforcement is placed under the exclusive purview of the Anti-Corruption Enforcement Authority (AEA) both at national and provincial (state) level. The AEA in exercise of its powers operates through three agencies responsible for the enforcement of specific areas of the AML 2008. They are the National Development & Reform Commission (NDRC) – responsible for price related offences; the State Administration for Industry & Commerce (SAIC) – responsible for enforcing monopoly agreements, abuses of dominant market position and abuses of administrative powers to eliminate and restrict competition (other than price related offences); and the Ministry of Commerce (MOFCOM) – responsible for merger control.

The presence of an industry-wide competition regulator does not preclude the existence of sectoral regulators. This is because beyond competition issues, other issues require regulatory control in specific sectors. While the sectoral regulator may get involved in competition issues in the sector, its regulatory control is minimal.

The industry-wide approach is believed to be more cost-effective since the competition expertise required will be domiciled with the sector-neutral competition regulator. However, such experts may not possess the know-how to deal with specific competition issues unique to particular sectors. For instance, issues relating to interconnection, number portability etc. are unique to the telecommunication sector. Specific knowledge on how these issues operate in reality may be useful in resolving competition issues that may arise in such sectors. Where this is the case, the industry-wide regulator may engage external consultants as aforesaid.

Self-Assessment Exercise 2

One of the disadvantages of sector-neutral competition regulation is said to be lack of expertise to deal with unique issues in particular sectors. How can the regulator go around this problem?

The table below provides extensive differences between sector specific and sector neutral competition regulation.

	Sector Specific	**Sector Neutral**
Primary Objective	Orderly growth of sector resulting in consumer welfare	Consumer welfare and curbing monopoly power
Focus	Specific sectors of economy	Entire market economy
Mode	*Ex ante*	*Ex post*
Method	Tells businesses 'what to do' and 'how to price products'	Tells businesses 'what not to do'
Issues handled	Regulating access, prices, reducing barriers to entry, changing market structure, facilitating competition	Affecting conduct of entities, maintaining competition
Expertise	Sector-specific expertise	Legal and economy-wide expertise
Involvement	Direct	Largely indirect
Timing	Ability to align incentives ex ante	Ex post enforcement
Penal Powers	Limited	More extensive
Transaction Costs	Relatively higher	Lower
Consumer Welfare	*Parens patriae* (acts on behalf of consumers)	Private enforcement provisions; ability to claim damages

Comparison between Sector-specific and Sector-neutral Regulation of Competition
Source: Dr. V. K. Gupta

2.3.3 Concurrent Regulation of Competition

The concurrent mode of regulation is a hybrid of both sector-specific and sector-neutral regulation such that both regulatory models are employed on a cooperative basis between the sectoral regulator and the competition authority. In jurisdictions where this model is practised, regulated or specific industries (usually utilities like telecommunications and electricity) are subject to regulation of competition by both the sector-specific regulator and the industry-wide regulator. The extent to which either regulator may exercise its regulatory authority differs per jurisdiction. Though regulatory powers are stated as concurrent, it is important to note that majority of jurisdictions recognise the overarching powers of the industry-wide regulator over competition even in such regulated sectors. Hence, the decisions of the sector-specific regulator may be subject to review by the industry-wide regulator in some cases.

In-Text Question

How does concurrent regulation of competition work?

Proponents of the concurrent approach usually to point to its benefits for promoting regulatory consistency across regulated industries and shielding of sector-specific regulators from political intervention since both regulators (sector-specific and sector-neutral) are acting in consonance. However, the approach has been criticised on the basis of lack of clarity on who has primary objectives for regulation of competition. It is also believed that concurrent regulation may lead to suppression of viewpoints and prevent positive criticism in the event of regulatory failure. Though these latter points are possibilities, they are easily cured by express statutory/policy prescriptions on primacy and commitments to the fulfilment of regulatory obligations where there is a conflict between same and the obligation to cooperate.

Nigeria follows the concurrent regulatory approach. Following the enactment of the FCCPA, the Federal Competition and Consumer Protection Commission has the over-arching power to regulate competition on an industry-wide basis. However, The FCCPA recognises the existence of regulated industries and the competence of sectoral regulators to give directives or determinations that on competition issues in these sectors. It is also instructive to note that while sectoral regulators enjoy concurrent regulatory powers with the FCCPC, the latter's authority supercedes that of sector specific regulators. See Sections 104 – 106 FCCPA

Can you discuss the 3 approaches to regulating competition with examples of jurisdictions where each are practised?

2.4 SUMMARY

In this unit, we have learnt about the different approaches to regulating competition and some countries in which they operate. We have also learnt about the advantages and disadvantages of these approaches and ways in which major disadvantages of sector-specific and concurrent approaches can be minimised.

There are three major approaches to the regulation of competition – sector-specific; sector-neutral/industry-wide and concurrent approach. Under the sector-specific approach, various sectoral regulators exercise their regulatory authority over competition issues and no sectoral regulator supercedes the other. Benefits of this model is the ability for sectoral regulators to deploy their expertise in dealing with unique competition issues in their sector. However, this approach may be more expensive and result in duplication of efforts. The sector-neutral approach is the opposite of sector-specific approach. It entails the regulation of competition by a single competition regulatory authority in every sector of the economy. This approach may be less expensive, but the sector-neutral regulator may lack the expertise to deal with issues unique to specific sectors. As a hybrid of the sector-neutral and sector-specific approaches, the concurrent approach entails cooperation between sector-specific regulators and sector-neutral regulators. While the sector specific regulator is authorised to deal with competition issues that may arise in their particular sectors, the sector will also be subject to regulation by the industry-wide competition regulator who may exercise primacy where competition rules are concerned. One advantage of this approach is regulatory consistency. However, there may be issues with impartiality and lack of different viewpoints.

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2.5 POSSIBLE ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Benefits:

Industry expertise

Focus

Burdens:

More expensive to manage

Multiplication of efforts.

Higher recurrent personnel costs.

SAE 2

Where sector specific expertise is required, the industry-wide regulator may engage external consultants.

MODULE 6 THE COMPETITION REGULATOR

UNIT 3: THE EFFECTIVE COMPETITION REGULATOR (1)

3.1 INTRODUCTION

To a large extent, success in regulating competition and achieving the aims of such regulation depends on the competition regulator. An effective regulator is likely to achieve these aims whilst an ineffective one is unlikely to do so whilst constituting a drain on state resources. To be effective, a regulator must possess some qualities. That is the focus of this unit. As we go over these qualities, it is important to remember that the regulator is not an individual but an agency. Hence, qualities which appear personal must be attributed to the competition regulatory agency as a corporate person.

3.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Discuss some qualities of an effective competition regulator
- Discuss relevant mechanisms to ensure that the regulator is clothed with these qualities.

3.3 MAIN CONTENT

To be effective, a competition regulator must possess the following qualities:

3.3.1 Clear Understanding of Relevant Laws and Regulatory Instruments

The competition regulator is usually a creature of an enabling law with the mandate to enforce relevant statutes and legal instruments in competition. In order to be effective at such enforcement, the regulator must therefore clearly understand the requirements of the law, limits set by the law and how they operate in practice in the sector where they operate.

Market activity is usually very fluid and subject to change. Hence, knowledge of the legal framework for competition regulation is important to enable the regulator to react to such changes correctly. A competition regulator should also possess some understanding of how

economics works with law in shaping market behaviour and competition. The requirement for a clear understanding of relevant laws is important for all regulatory officers whether or not they have a legal background. Furthermore, all major regulatory staff must be exposed to relevant training from time to time to further equip them to carry out their functions effectively.

Why is it important for a regulator to understand relevant laws and regulatory instruments?

3.3.2 Industry Knowledge and Expertise

Competition law is a specialised area where law meets economics. In applying the basic rules of competition law in specific sectors, the regulator must know how those rules will operate in practice. For instance, different pricing rules will apply in different sectors. For interconnection cost pricing in the communications sector, an understanding of the Bottom-Up Long Run Incremental Cost model (BU LRIC) is the industry standard. A communications regulator must understand how it works and be able to provide useful guidelines where necessary.

While the competition regulator can engage the services of external consultants to advise on specialised sector-specific issues, some measure of expertise is required to comprehend consultants' findings. As with knowledge of legal and regulatory framework, the regulator must continuously invest in training to equip staff with knowledge in line with global best practice.

Self-Assessment Exercise 1
Is there a need for industry knowledge/expertise if a regulator can engage the services of external consultants?

3.3.3. Transparency

Regulation must be carried out in an open, honest and transparent manner such that all stakeholders are aware of regulatory decisions and the reasons guiding them. This will include publication of relevant rules/guidelines as well as reports and decisions on regulatory inquiries. The regulator may need to strike a balance between the need to be open and its duty to protect commercially sensitive information. However, the duty of confidentiality must not make the

regulator appear beholden to some undertakings interests. For instance, industry reports can be made available to the public with such sensitive information excluded or redacted.

How can a regulator be transparent and keep sensitive information confidential at the same time?

3.3.4. Consistency

The regulator must be consistent in its application of relevant laws, regulations and guidelines. Some benefits of this quality are the ability to catalyse fair competition in the market, provide certainty and reduce unnecessary regulatory interference. It also prevents confusion and builds business confidence thereby improving stakeholders' self-regulation, building trust in the regulator and resulting in stable regulatory environment.

3.3.5. Accountability

An effective competition regulator must hold itself accountable to the government, stakeholders, the media and the public. The regulator must hold itself accountable by carrying out periodic reviews and publishing the reports of such reviews, setting out clear steps, guidelines and/or mandates. The regulator must be ready to explain reasons for its regulatory decisions where required and be willing to offer redress where it is proven to have acted arbitrarily. It must also be subject to review by properly constituted judicial authority where necessary.

Self-Assessment Exercise 2
To whom does an effective regulator hold itself accountable and how may this quality be exhibited?

3.4 SUMMARY

The focus of this unit has been on some qualities of an effective competition regulator. We have learnt that a competition regulator must possess the necessary knowledge of the relevant laws and the knowledge/expertise required to enforce these laws. We have also learnt that an effective regulator must carry out its regulatory activities in a consistent and transparent manner - with the added quality of being accountable for the performance of its functions. We will consider other qualities in Unit 4.

3.5 REFERENCES/ FURTHER READING/ WEB SOURCES

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3.6 SUGGESTED ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

Though an effective regulator can engage the services of external consultants, it still requires industry expertise to be able to deal with the less complex issues that may arise and to comprehend and weigh whatever recommendations are made by external consultants.

SAE 2

An effective regulator is accountable to the government, the judiciary and stakeholders – including the media and the public. It carries out periodic reviews, publishes reports and explains reasons for regulatory action. Where it is found wanting, it also offers redress.

MODULE 6 THE COMPETITION REGULATOR

UNIT 4: THE EFFECTIVE COMPETITION REGULATOR (2)

4.1 INTRODUCTION

In the last unit, we started looking at the qualities that a competition regulator must possess in order to function effectively. We will continue with our discussion of the qualities of an effective competition regulator in this unit.

4.2 LEARNING OUTCOMES

By the end of this unit, you should be able to:

- Identify some other qualities an effective competition regulator should possess
- Discuss the importance of these qualities for the regulatory function.

4.3 MAIN CONTENT

4.3.1 Flexibility

The competition regulator operates in a rapidly changing environment. If it is to be effective in fulfilling its mandate of promoting competition, then it should anticipate such changes as undertakings innovate and new technologies are deployed in the provision of good and services. An effective regulator must therefore be flexible enough to adapt its rules to deal with whatever issues may arise without leaving any gaps that will damage competition. The regulator cannot be static but must be seen to be changing with the times and not merely playing catch-up. Whilst this may be easier for a sector-specific regulator to achieve, it is also an important quality for a sector-neutral regulator.

Why do you think it may be easier for a sector-specific regulator to adapt its rules to deal with competition issues as they arise in the sector?

4.3.2 Independence

An effective regulator must be independent and free from political or government control. This is particularly important in the regulator's activities in concentrated industries some of which may still be subject to government interference or control. Where such entities run afoul of the law, the regulator must be willing and able to rule against them as it would against a purely commercial entity. Two main issues may impact on a regulator's independence:

a. its mode of constitution or appointment of senior members and
b. source of funding.

To foster independence, the regulatory agency should be constituted as a Board with membership representing both public and industry interests with. The Board must be subject to clear rules for appointment, removal etc – such rules provided by its enabling statute. Appointment of senior members of the board should also be subject to anti-corruption background checks and legislative approval.

Adequate funding arrangements must be made to enable the regulator discharge its duties without undue interference. Some avenues to enable the authority to preserve its independence while remaining properly funded include the right to levy fees for specific services or to draw from an independent government funding subject to legislative oversight.

Self-Assessment Exercise 1 Discuss the factors that may interfere with a regulator's independence and how to ensure that they do not.

4.3.3 Consumer-Focused

As stated earlier, the main purpose of competition regulation is to protect consumer interests. Accordingly, an effective regulator must have the interests of the consumer at heart in the pursuit of its mandate. This quality is particularly important for sector-specific regulation of competition where consumers lack avenues to personally seek redress. An effective competition regulator must therefore speak both for the market and the consumer.

Why must an effective regulator be consumer-focused?

9. Coercive Powers

A regulator that has coercive powers is one who is able to enforce relevant rules and statutes in the sector. Such a regulator is said to have 'teeth'. An effective competition regulator must have the power to constrain fair competitive conduct by undertakings and stakeholders within their purview. It is the norm for competition legislation to contain penalties for various breaches. For these provisions to have the desired effect of constraining specific behaviour, it behoves on the regulator to exercise its enforcement powers. An effective regulator cannot be lacking in political will to enforce the law. For maximum effect, enforcement must be swift, consistent and proportionate.

Self-Assessment Exercise 2
How would you identify a regulator that has 'teeth'?

The qualities discussed earlier in this unit and the previous unit may impact on a regulator's enforcement capability. For instance, a regulator which lacks independence may be less able to enforce the law without fear of political interference. It is therefore important that the competition authorities and relevant stakeholders possess the necessary political will to ensure that the goals of competition regulation are achieved.

4.4 SUMMARY

This unit concludes our discussion on the qualities of an effective competition regulator. In addition to the qualities we learnt about in Unit 3, we have learnt that an effective competition regulator must flexible, free from interference both in the appointment of its senior officers and funding, and must act in the interest of the consumer. Above all, an effective regulator must have teeth. It must possess the necessary powers and political will to independently enforce the regulatory laws and rules in a timely, consistent and proportionate manner.

The above qualities of an effective regulator will impact on the quality of competition in the market, build trust in the regulator, result in competitive certainty and ultimately enable market players to self-regulate thereby reducing the need for heavy regulation – all of these in the ultimate interest of the consumer.

4.5 REFERENCES/FURTHER READING/WEB SOURCES

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4.6 SUGGESTED ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

The two main issues may impact on a regulator's independence are mode of appointment of its governing body and funding. To prevent undue interference, membership of the board must be balanced with membership representing government, public and industry interests. Rules for appointment and removal should be clear and supported by enabling statutes. Also appointment of senior members of the board should be subject to legislative approval and anti-corruption checks. The regulator should have access to adequate funds sourced from independent sources with legislative oversight.

SAE 2

A regulator who has ‘teeth’ enforces the law swiftly, consistently and proportionately.

COMPETITION LAW GLOSSARY

Source: UNCTAD/DITC/CLP/2016/4 Available at

<https://unctad.org/en/PublicationsLibrary/ditcclp2016d4_en.pdf>)

Barriers to Entry
Barriers to entry may involve regulatory barriers, such as tariffs or quotas and strict licensing procedures or buy-local regulations. They may also be the result of market structures, like heavy sunk investment costs that cannot be recuperated, rigid consumer habits giving high preference for existing firms, or intellectual property rights foreclosing the market or making it difficult for new entrants.

Bid Rigging (Collusive Tendering)
Bid-Rigging or Collusive Tendering relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions.

Bid Rotation
A form of bid rigging or collusive tendering whereby competitors agree to take turns on who will be the winning bidder.

Cartel
An arrangement between competitors to limit the terms on which they compete with one another. The arrangement can be in the form of an explicit or tacit agreement or otherwise, in which competitors may collude to engage in anticompetitive practices.

Collusion
Collusion is the coordination of competitive behaviour among competitors such as raising prices, limiting production, and/or allocating markets with a view to increasing their profits. Such collusion does not need to be specified in a written agreement, as tacit collusion may often be the result of parallel action by enterprises who do not actually talk to each-other, but who will implicitly follow the other firm's behaviour (i.e. If you do not enter my market, I will not enter yours…).

Concerted Practices
Enterprises act in concert with or without a formal agreement to coordinate their activities. One example of concerted practice is parallel pricing, i.e. when the one increases its prices, the other follows…

Concerted Refusal to deal (Group Boycott)
Group boycotts may be used to implement an illegal anti-competitive behaviour. For instance, in order to enforce price fixing agreements, competing firms may agree not to do business with others except upon agreed terms. In other instances, group boycotts can be employed to prevent a firm from entering a market or to disadvantage an existing competitor. Or they may target price discounters in order to enforce resale price maintenance arrangements. Sometimes, the boycott may not actually be put into effect, but the threat to do so may induce the "potential victim(s)" to take the proper course of action prescribed.

Conscious Parallelism
Refers to a market situation where competitors offer closely comparable prices and terms. Conscious parallelism concerns similar products priced very closely, although not identically. Although not automatically illegal, conscious parallelism may be regarded as highly suspicious by competition authorities, especially when price variations, in particular price increases, are automatically matched by competitors. The existence of such parallelism, like parallel pricing, may be considered as a strong indicator of the existence of a cartel.

Cover-up Bids
Some competitors may agree to submit unacceptable bids to cover up a bid-rigging scheme. These are called "cover-up bids or tenders".

Damages
Many competition laws provide for claims regarding damages by those who have suffered injury from an infringement to the competition law. For example, those who have had to pay higher prices as a result of cartel violations, have the possibility to claim for damages, as restitution of the amounts for which they have been spoliated. In the United States, for example, once the public case has resulted in a condemnation of members of a cartel, antitrust laws allow for civil courts to claim for treble damages (three times the amount effectively lost to a cartel) for those who have suffered damages. The treble-damages are in the way of an incentive for private individuals to denounce cartels and to gain from prosecution.

Dawn Raid
Dawn raids are surprise inspections of company sites aiming at finding evidence of breach of competition rules, often done simultaneously in different premises belonging to a company under investigation. Dawn raids are usually conducted in the early morning, at the opening of working hours.

Discriminatory Pricing
Price discrimination arises when a supplier or distributor applies different prices or sales conditions to his customers, under similar circumstances. In other terms, prices may differ if justified by different local taxes, transportation costs or sales quantities. Usually such a prohibition will apply to dominant firms, where applying discriminatory pricing may be considered as an abuse of dominant position.

Dominant Position
This refers to enterprises whose market position is such that they can essentially dictate the terms of competition to other customers and market participants. Under EU law (Article 102 TFEU), a firm is in a dominant position if it has the ability to behave independently of its competitors, customers, and/or suppliers.

Effects Doctrine
Under the "Effects Doctrine" or "Effects Principle", when an anticompetitive practice taking place abroad has an effect inside a jurisdiction, the competition authority of the affected jurisdiction can take action against extra-territorial offenders.

Essential Facilities
Under competition law, a so-called Essential Facility is an infrastructure or a key asset required for any firm to be able to compete in a given market. A facility is considered essential when it is very difficult or impossible for an outsider, deprived from this facility to enter or to stay in the market because of physical, geographical, economic or juridical reasons.

***Ex-ante* Regulation**
The term ‘ex-ante’ is a Latin term meaning ‘before the fact’. Ex ante regulation seeks to identify problems beforehand and shape stakeholder behaviour and responses through regulatory intervention to prevent these problems from arising. Sector-specific regulators usually regulate competition in their sectors through ex-ante regulation.

***Ex – post* Regulation**
The term ‘ex-post’ is a Latin term meaning ‘after the fact’. Ex-post regulation pertains to competition issues in the context of a specific market economy. More generalized competition or antitrust regulatory authority are tasked with resolving market behaviour related problems after they arise.

Exclusive Dealing
Exclusive dealing arrangements may be found in an agreement where a restriction is placed on the firm’s choice of buyers or suppliers, such that a buyer is required to purchase all his requirements from only one seller, or a seller is required to sell its products to only one firm. The competition concern with exclusive dealing is that it may foreclose a market. Exclusive dealing is usually forbidden only if it substantially lessens competition in a market. This is often the case where there is an abuse of dominant position on the relevant market.

Free-Riding
Free-riding refers to the case of individuals or firms taking advantage of existing facilities without paying for them.

Hard-Core Cartel
It is widely accepted that hard-core cartels are always anticompetitive and that they could be reasonably presumed to be illegal without further inquiry. For this reason, majority of competition law regimes prohibit them outright, as per se violations of the law or anti-competitive by object.

Four types of agreements generally fall within the definition of hard-core cartels: *price-fixing, output restraints, market allocation and bid-rigging*.

Hoarding
Hoarding is a practice of retaining goods from sale during periods of scarcity in order to contribute to, and gain from, rising prices. Some competition laws explicitly prohibit such practices.

Horizontal Agreement
Horizontal agreements, as opposed to vertical agreements are those which bind competitors at the same level of the production-distribution chain.

Joint marketing
Joint marketing may involve agreements to jointly sell, distribute, or promote goods or services. Such agreements can be pro-competitive when a combination of complementary assets can generate cost savings and other efficiencies. However, they may also involve agreements on price, output, or other competitively significant variables, resulting in competitive harm.

Joint purchasing
A joint purchasing agreement is an agreement between firms to jointly purchase necessary inputs. Often joint purchasing agreements are considered pro-competitive, since joint purchasing can allow participants to achieve greater discounts from suppliers reflecting, for example, lower supply costs or to save delivery and distribution costs. However, such agreements can lessen competition where they facilitate collusion through standardizing participants' costs.

Joint Ventures
Joint Ventures are often mentioned in competition laws, either with respect to concentrations, where creation of a joint venture may be considered as a merger, or under the bidding process, where two or more competitors may wish to bid jointly. In such a case they might create a temporary joint venture, also called a "consortium" in order to submit a joint bid or tender.

Leniency Programme
Hard-core cartels constitute very serious violations of competition rules. They are often very difficult to detect and investigate without the cooperation of an insider. Given the serious harmful effects of cartels, many jurisdictions now offer the possibility to members of a cartel to benefit from a total or partial reduction of fines in exchange for cooperating with the competition authority in disclosing and eliminating a cartel agreement.

Market Allocation
In a typical hard-core cartel arrangement, markets can be allocated geographically among competitors, they can be partitioned accordingly to types of customers, or members of the cartel can take turns in the bidding process.

Market Concentration
Market concentration occurs when two or more firms merge or create a joint venture. In markets where competitors are few, concentration may lead to the creation of dominant firms, and this may lead to a duopoly and ultimately to a monopoly. Competition authorities usually control mergers and acquisitions reaching a certain threshold in terms of market share or turnover volume and require pre-merger notification.

Market Power
Market power is dependent upon market structure (if the market is concentrated or not), on the degree of openness of the market to new or potential competitors (if there are barriers to entry or to expansion), it also depends on other criteria, including sunk-costs needed to enter the market, vertical integration and degree of control over infrastructures by the existing firms.

Market Share Threshold
Market share thresholds are often used in competition laws, in particular for determining the existence or possible existence of a dominant position of market power, and for setting a limit over which merger control takes place. In merger control, also called control of concentrations, a threshold is often used to mark the limit above which pre-merger notification will be mandatory. The fact remains that firms will often exaggerate their market share when they advertise to shareholders, for example in their annual report, and on the contrary, minimize their market share when they wish to escape a notification obligation or being considered as dominant.

Monopoly/Monopsony
A monopoly is a single supplier/Monopsony is a single buyer of a good or service in a relevant market. Being a monopoly/monopsony brings advantages to the firm enjoying such a position, because it does not have any competitors. This means it can fix the price and sales conditions (or purchase conditions) which allow it to reap maximum returns from the market in which it has a monopoly or monopsony.

Natural Monopoly
Historically, *public utilities*, such as water, gas and sewage, electricity and gas, public transport and railways, as well as telecommunications were usually shielded from competition because of their classification as *natural monopolies*. Today, technological breakthroughs in particular, as well as the drive towards more competition in markets, have considerably reduced the extent of so-called natural monopolies.

Notification
Notification for Authorization is often required for mergers and concentrations, as well as for obtaining exemptions from competition law.

Parallel Pricing
Coordinated action by competitors who, with or without agreement, increase prices in tandem, or at very short intervals.

Potential Competition
In a given market, potential competitors are firms which are not supplying the market at present, but which, if the conditions are favourable (or if the prices rise in the local market) might easily decide to enter the market and compete with the local suppliers or producers.

Predatory Pricing, Loss-selling
Predatory pricing takes place when a firm, individually or collectively, with competitors, sell at a loss or below cost for a time, with a view to eliminate competitors from the market, or to repel them from entering the market. Such predatory-pricing or selling at a loss practices can be found in various instances.

The first would be when members of a cartel are threatened by one or more outsiders whom they want to exclude from the market. With this objective, they may strongly reduce their prices, even below cost. The second is the practice of a dominant firm, which has much “deeper pockets” (monetary reserves) than its competitors and is willing to sell at very low prices to harm and hopefully exclude its weaker competitors. A third, less important case, is that of any retailer trying to attract customers by making special offers at very low prices (until extinguishment of stocks…) and customers are soon faced with “no more stocks” and are invited to buy other, more expensive items.

Price-Fixing
Price fixing involves any agreement among competitors to raise, fix or otherwise maintain the price of a product or service. Price fixing can include agreements to establish a minimum price, to eliminate discounts, or to adopt a standard formula for calculating prices, etc.

Price Regulation
Price regulation or regulated prices by the State have been in existence in most countries, for goods and services considered sensitive or of prime necessity for low-income populations, or for enterprises the State wishes to protect or subsidize as part of its industrial policy. Subsidies and price controls exist in numerous sectors, especially for agriculture.

Reciprocal Exclusivity
Reciprocal exclusivity refers to a supplier conditioning his exclusive supply of goods to a retailer on the condition that the latter does not carry any goods of competitors. Such exclusivity conditions are contained in *Exclusive Dealing* contracts.

Refusal to Deal
A *refusal to deal* is a practice which can seriously harm competition if it is part of a collective scheme or hard-core cartel, aimed at eliminating an outsider from entering a market. It is also considered as a serious infringement to competition law for a dominant firm to abuse its dominant position by unjustifiably refusing to deal with competitors.

Relevant Market
Refers to the specific market where an enterprise might have a dominant position of market power, or where merging companies would together have a dominant position after the concentration takes place. Once the relevant market has been determined, the competition authority will be able to identify all the firms which are active in that market and estimate their market shares. After evaluating further considerations as to the degree of openness of that market, and the existence or not of *potential competition*, the competition authority will be in a position to decide whether a given enterprise, or the enterprises after a merger or concentration takes place, gives rise to a dominant position of market power.

Resale (or Retail) Price Maintenance (RPM),
A resale price maintenance arrangement may be found in an agreement among a supplier and their distributors where the supplier requests the retailers to sell their products at certain prices. Generally, resale (or retail) price maintenance refers to the setting of retail prices by the supplier.

Selective Distribution
This is a distribution system whereby a manufacturer or supplier selects a limited number of distributors or retailers in a given geographic market, who are required to meet certain criteria, of quality, staff, premises, etc.

Tying, Tied-Selling, Bundling
A tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product or products and/or services. This may also involve the obligation to buy such products in large quantities at a discount, while single units are sold at a higher price.

Unfair Trading/Unfair Competition Law
Also known as Fair Trade Law, Unfair Competition is a body of law which should not be confused with competition law. While in the modern understanding, competition law (antitrust law in the United States) deals with cartels, abuse of dominant positions and concentrations of market power, Unfair Competition or Unfair Trade deals with a wide list of issues, including metrology (false weights and measures), counterfeiting or violating intellectual property rules, trademarks and patents, misleading/false advertising, sometimes also trade defence laws such as antidumping and countervailing subsidies, and safeguards, etc., including certain marketing practices affecting consumers, such as bait and switch selling, premium selling, etc.

Vertical Agreement

Vertical agreements are agreements between firms at different levels of the production or distribution chain, e.g. agreements between a producer and a distributor or between a wholesaler and a retailer. Since the firms are often not in direct competition with one another, the balance of the effects of these agreements is more towards greater efficiency than substantially lessen competition. From a systematic perspective, it appears, however, more appropriate to deal with vertical agreements under the prohibition of anti-competitive agreements.