Overcoming Intellectual Property Created Barriers to Information: Perspective on Nigeria as a Developing Country

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Abstract

This study seeks ways to bridge the gap between the bipolar interests created by Intellectual Property (IP) law and policy, matched against "owners" on one hand and "users" on the other, and how to maintain the required balance in Nigeria. First, it highlights the ways IP creates barriers to information. Then, it suggests measures for overcoming the barriers, which include abridging the duration of IP protection, limiting the suit of IP rights and subject matter, making IP ease access to, rather than create artificial scarcity of, information, making freedom of thought sacrosanct using double or multiple patents and licences on simultaneous inventions, building traditional defences into the digital information environment, and harmonising the emerging information licensing environment with the public policy. Finally, Nigeria and other developing countries, especially in Africa, are urged to adopt and localise the Adelphi Charter on Creativity, Innovation and Intellectual Property 2005, which has been a catalyst for influencing the rethinking of IP law in Europe.

1. Introduction

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Intellectual Property (IP) law and policy polarise society into "owners" and "users" of creative works, and tend to stifle competition and create barriers to information. Owners of IP works claim exclusive right to control their use and reproduction, so as to gain reward for their creativity. Society, on the other hand, needs rich harvest of information in the public domain to stimulate user access, competition and innovation. The public interest requires a balance between the public domain and private rights. It also requires a balance between the free competition, which is essential for economic vitality, and the monopoly rights granted by IP laws. The overarching objective of this study is to seek ways of ensuring this balance from the Nigerian perspective. It gives an overview of the meaning, scope and origin of IP in Nigeria; examines ways in which IP creates barriers to information; and proffers ways of overcoming these barriers.

The approach is descriptive and analytical. Doctrinal and library research methodology is adopted. Statutes and case law form the primary research materials; whereas textbooks, journal articles, conference and workshop papers, and internet posts make up the secondary research materials. The study addresses perspectives on Nigeria as a developing country. Where reference is made to foreign, regional or international perspectives on IP, it is merely for illustration, emphasis or comparison.

The study is divided into five sections including the Introduction, section one. Section two briefly examines the meaning and scope of the suit and subject matter protected by IP law and policy. Section three shows the various ways in which IP creates barriers to information while section four suggests ways of overcoming these barriers. Section five embodies the concluding remarks.

2. What is IP?

IP has been defined as those property rights which protect the product of one person's work by hand or brain against

unauthorised use or exploitation by another.[1] These are known as intellectual property rights (IPRs). IP has also been defined as a category of intangible rights protecting commercially valuable products of the human intellect.[2] IP refers to the "products of the mind".[3] The term IP seems to cover that body of legal rights which arise from mental and artistic endeavour.[4] IP means the legal rights which may be asserted in respect of the product of the human intellect.[5] One string that runs through the various definitions of IP is that it is the product of the mind which the law protects as a legal right and the infringement of which is a legal wrong. Put succinctly, IP means the moral and economic value of the product of the human mental energy, the price of creative thinking, the reward for the labour of the mind. The essence of IP rights is to give the holder the exclusive right to use the IP and the power to prevent other people from exploiting it without permission.[6] IP is a category of properties comprising primarily copyright, neighbouring rights, patents, designs, trademark, trade secrets, right against unfair competition, *etc*.

Through the ages, the triple purposes of protecting IP have been financial incentive, economic growth and morality. The

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1 Leslie Rutherford and Sheila Bone, *Osborn's Concise Law Dictionary,* (8th edn.), (London: Sweet & Maxwell Limited, 1998), p. 181.

2 Bryan Garner, *Black's Law Dictionary,* (8th edn.), (St. Paul Minesota: Thomson West, 2004), p. 824.

3 Jennifer Davies, *Intellectual Property Law* (London: Butterworths, 2001), p. 1.

4 John F. Williams, *A Manager's Guide to Patents, Trade Mark and Copyright* (Cambridge: Cambridge University Press, 1981), p. 8.

5 Ugwu Sylvester and Shikyil Sylvester, *Intellectual Property Law and Practice in Nigeria: An Introduction* (Enugu: Zik-Chuks Nig., 2009), p. 4.

6 Temitope Yerokun-Oloko, and Oluremi Savage Oyekunle, "Real and Intellectual Property Transactions: Reflections on Common Threads," *LASU Law Journal* vol. VI Issue 1 (2008), pp. 174-183 at 175.

exclusive rights to IP allow their owners to benefit from the property they have created, providing a financial incentive for the creation of and investment in IP and, in case of patent, pay associated research and development costs. There is a positive correlation between the strengthening of the IP system and subsequent economic growth.[7] The protection of IP is essentially a moral issue. The belief is that the human mind itself is the source of wealth and survival and that all property at its base is IP. Infringing IP rights is therefore no different morally from violating other property rights; it compromises the very process of survival and therefore constitutes an immoral act.[8]

3. How does IP Rights Create Barriers to Information?

There are always two sides of a coin. If authors or creators of IP are granted monopoly rights on one side of the coin, the populace on the other side is barred from having unrestricted access to the information contained in the IP. A thing is a barrier to another if the one prevents or hinders access to the other. So, IP rights actually create barrier to information. Information is knowledge about something, especially, facts and news.[9] In this particular context, information is the knowledge, facts, or research findings embedded in IP products. The general and specific, subtle and not so subtle ways in which IP rights create barrier to information are appraised in this section of the study.

Intellectual property rights (IPRs) are protected for an unduly long duration. In Nigeria, the duration of copyright for literary, musical or artistic works is the life span of the author plus

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7 R. Shapiro, and N. Pham, "Economic Effects of Intellectual Property-Intensive Manufacturing in the United States;" available at http://www.archives.org (Last visited on October 3, 2013).

8 A. Rand, "*Capitalism, the Unknown Ideal*;" available at http://www.archives.org (Last visited on October 3, 2013).

9 Paul Procter, *Cambridge International Dictionary of English* (Cambridge: Cambridge University Press, 1996), p. 729.

70 years. For cinematograph films, sound recordings and broadcasts, it is 50 years after the end of the year in which the work was first created.[10] For performer's right, the duration is also 50 years from the end of the year in which the performance first took place.[11] It should be noted that the maximum duration of copyright, when the very first Copyright Act was passed in England following the passage of the Statute of Anne in 1710, was 28 years. This has increased over the years till it now looks like "perpetual copyright on the instalment plan."

Patent is protected for 20 years.[12] The duration for industrial designs is 5 years renewable by two further terms of 5 years each; that is, a total of 15 years.[13] Registered trademarks remain valid for seven years under the Trade Marks Act, and are renewable.[14] These durations are so long that they create barriers to information. Until the duration lapses the protected work will not enter the public domain, and user access to it is severely restricted. The next section of the study will proffer solution to this duration and other issues that are raised herein.

By protecting a constantly expanding range of informational and knowledge-based materials, IP indeed creates barrier to those materials. IP originally protected only books. But through the years, the suit of protected works has expanded. The suit and subject matter of copyright alone now include all literary works, artistic works, cinematograph films, sound recordings, and

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10 The First Schedule to the Copyright Act. The position is the same in developed countries like Germany. Under the German Copyright Act (*Urheberrechtsgesetz, UrhG)* 1998, copyright in all protected works expire 70 years after the author's death, or in the case of government, anonymous and pseudonymous works, 70 years after publication. See Art. 64 of the German Copyright Law (*Urheberrechtsgesetz, UrgG)* 1998.

11 Section 27 of the Copyright Act.

12 Section 7 of the Patent and Designs Act.

13 Section 20, *ibid.*

14 Section 23 of the Trade Marks Act.

broadcast.[15] The protection for literary works covers almost all written compositions, compilation of table, irrespective of literary quality.[16] The same expansive array of materials is protected as musical works.[17] Under the rubrics of artistic works the law of intellectual property protects almost every conceivable means of communicating information, such that there is hardly any means left for members of society to have unfettered access to information. In addition to this, patents have been granted for living organisms for over a century.[18]

Even trademarks, which on the face of it will seem incapable of creating barrier to information, have taken a new turn. Today, trademarks have been used to bar the public from using commonplace things like colours and natural devices. In Nigeria today, a prospective mobile telecommunication company cannot adopt or utilise the colour yellow as its trademark background,

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15 Section 1 of the Copyright Act.

16 Section 51 *ibid.* See also *Ladbroke (Football) Ltd. v Williamhill (Football) Ltd.* [1964] 1 All ER 465.

17 Section 51 *ibid.* See *Austin v Columbia Gramophone Co* [1923] 156 LT Journal, where the court held that an arrangement of an old music, which amounts to a new work is protected as copyright. See also *Wood v Boosey* [1808] LR 3 QB 223, where it was held that copyright protects an adoption of an existing work for a different instrument.

18 Council for Responsible Genetics, "DNA Patent Create Monopolies on Living Organisms". Available with link at http://www.uspo.gov. p. 2. Retrieved on October 4, 2013. Human beings are now granted patents over natural creatures. Maybe in no distant time genetic scientists who clone human embryos will begin to claim patents over the life of fellow human beings! Contrast s. 1 (4) (a) of the Nigerian Patents and Designs Act, Cap. P2 *Laws of the Federation of Nigeria*, 2004, which provides that patents cannot be validly obtained in respect of plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products).

because yellow is now "MTN's" trademark.[19] The implication of a prospective telecommunication company adopting yellow as a business colour is that it shall thereby be infringing MTN's registered trademark. The trademark of MTN in its popular logo is not only the inscription "MTN", but also includes the yellow background of the inscription. In *Ferodo Ltd. v Ibeto Ind. Ltd*,[20] the Supreme Court held that any component of a trademark registered as part of its *basic idea* is protected from infringement. So the yellow background of MTN, a basic idea, is protected. Likewise, no telecommunication company except "Globacom" ("Glo" for short)[21] can use the colour green in Nigeria since that colour is a basic idea in the company's trade mark, going by the *Ferodo* principle. Similarly, no telecommunication company but "Airtel"[22] can use the colour red as a trademark in Nigeria since that colour is a basic idea in the trade mark of Airtel. Other instances of this monopoly of commonplace information and protection of same as IPR abound in the business and social milieus in Nigeria.

Even animal and other natural devices have been trademarked. A prospective bank cannot adopt a unicorn device because it is already a basic idea in the trademark of "Union Bank."[23] No bank but "First Bank"[24] can use an elephant device because that device forms the basic idea of the trademark of First

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19 MTN, in full, Mobile Telecommunication Nigeria, is a South African company registered to operate in Nigeria since 2001. The company adopted the colour yellow as a basic idea in its trademark.

20 [2004] 5 NWLR (Pt. 866) 317.

21 Glo is a mobile telecommunication company registered in 2001 in Nigeria to operate in the country.

22 Airtel is a mobile telecommunication company originally registered in 2001 as ECONET to operate in Nigeria. It has since changed its name to V-Mobile, then to Zain and now to Airtel.

23 Union Bank is one of the commercial banks registered to operate in Nigeria.

24 First Bank is a commercial bank registered to operate in Nigeria.

Bank. In the same vein, no paper company except the Star Paper Company[25] can use the star device as trademark since the star device is a trade mark of the Star Paper Company.

In these and a lot of other ways, the protection of IPRs inordinately expands the suit of rights and subject matter and creates ever-tightening barriers to the people's use of information.

IP creates artificial scarcity of information in a way that violates the right of the populace to own physical property. Some libertarian critics of IP have argued that allowing property right in ideas and information creates artificial scarcity and infringes on the right to own tangible property. Stephan Kinsella[26] uses the following scenario to argue this point:

> Imagine the time when men lived in caves. One bright guy–let's call him Galt-Magnon –decides to build a log cabin in an open field, near his crops. To be sure, this is a good idea, and others notice it. They naturally imitate Galt-Magnon and they start building their own cabins. But the first man who invents a house, according to IP advocates, would have a right to prevent others from building houses on their own land, with their own logs, or to charge them a fee if they do build houses. It is plain that the innovator in these examples becomes a partial owner of the tangible property (e.g., land and logs) of others, due not to first occupation and use of that property (for it is already owned), but due to his coming up with an idea. Clearly, this rule flies in the face of the first-user homesteading rule, arbitrarily and groundlessly overriding the very homesteading rule that is at the foundation of all property rights.

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25 The Star Paper Company is a paper company registered to carry on business in Nigeria.

26 Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies,* vol. 15.2 (2001) 1-53 at p. 49.

The current system of IPRs tries to enforce artificial barriers upon the free flow and use of information and tangible property, thus creating scarcity where it is most damaging to all of humanity and where a rich bounty of wealth could exist instead. These barriers are upheld by a rigorous legal system, applying draconian enforcement measures. The difficulty experienced in enforcing these "rights" seems to show how unnatural and artificial the rights are. People violate IPRs as a natural reaction against the artificial barriers imposed by these rights.

Stephan Kinsella thus argues, supportably, that IPRs harm the public domain by shrinking it through high prices, artificial barriers to information and unfair restrictions on speech. Patents effectively allow the private sector to capture, for profit, ideas that should be in the public domain, and thus lock down public access to information. IPRs raise the cost of knowledge so much that they inhibit innovation and creativity. Copyright owners, in particular, wield the law to hinder competition and impede access to creative works. Patent rights block developing countries' access to high-tech medicines by making the drugs more costly; they stifle competition and prevent cheaper generics from entering the market.[27]

IPRs do contradict freedom of thought and render inventive power useless.[28] Patents can prevent anybody from using a manufacturing procedure, or invention, unless prior authorisation by the patent holder is obtained. Later independent re-invention or ignorance regarding the existence of patents is not excuse for "infringing" patents, as the patents can be enforced regardless. So, patents restrain supposedly free individuals precisely at their most important resource: the free use of their brain power to make inventions. People are not allowed to harvest the fruits of their

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27 *Id.,* at p. 52.

28 Freedom of thought is a fundamental right guaranteed by s. 38 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, as amended.

own creativity, intellectual efforts and inventions, if such intellectual products happen to have been patented previously by somebody else.

The foregoing create unnecessary barrier to information for, most people who try to solve problems, for instance, design and engineer a product, do not do so by consulting a patent database, to see if somebody else might already have found a solution to the same problem that they would only need to copy or adapt. Instead, most engineers will sit down, think about the problem, and develop a workable solution on their own. It is only later, when they are sued, that they may find out that somebody else perhaps had already come up with the same solution as well. Once this is so, they are denied patent on account of existing right. In this way, patents strangulate the right of people to use the very body and brain they own to solve problems, create products, and subsequently sell them.

A hypothetical example will illustrate how this works. A scientist (Wosu) lives in a community in Niger Delta, Nigeria where there is accidental oil spill, which is destroying farm lands and aquatic life. He is perturbed and moved to think of a solution to the spill. Now he invented a solution -a chemical reagent that reacts with hydrocarbons by neutralising them and cleansing the spilled oil. This is a great invention. But Wosu will be denied patent on his invention if it turns out to be that someone else somewhere had previously invented the same or similar chemical reagent. It is immaterial that Wosu did not know of the previous invention. This way, patent law has rendered Wosu's inventive power useless.

Many simultaneously thinking humans exist on this planet. It will come as no surprise that the same ideas will present themselves to different minds, possibly at the same time. That one of these persons can obtain a licence to block all other *simultaneous* or later inventors from using their own conclusions, just by virtue of having gone to the patent office one day earlier,

directly contradicts the principle of freedom of thought. This is outrageous and should be checked.

Again, IP protection of information in the digital environment overrides traditional defences to infringement. There are exceptions or defences traditionally built into copyright and other IP laws. Article 9(2) of the Berne Convention (Paris Act 1971) permits Member States to make exceptions to copyright provided the exceptions are a "special case," "do not conflict with a normal exploitation of the work," and do "not unreasonably prejudice the legitimate interest of the author..[29] For instance, "fair dealing"[30] is a defence to infringement of copyright, likewise use of copyrighted works for purposes of education, research, criticism or review, private use, illustration for teaching or scientific research, (transcription in tools) for the benefit of people with disability, *etc.*[31] But these and other commendable defences to copyright apply somewhat effectively only to information in the analogue environment. The defences do not apply to digital information because of available technological protection measures (TPMs).

A student for instance can make a photocopy of a book for private educational purpose and this is an exception to copyright infringement. But if there is only an electronic copy of that book the student can be barred by TPM from accessing the book. TPMs do not recognise students and their peculiar circumstance. Likewise, visually impaired persons can have a book transcribed

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29 The same principles are repeated in Art. 13 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

30 Item (a) on the First Schedule to the Copyright Act. See also *Hubbard v Vosper* [1972] 2 QB 84.

31 N. Itanyi, and S. N. Anya, "Mitigating the Copyright Law and Policy for Wider Access to Knowledge in the 21st Century", being a paper presented in a One-day National Workshop on Copyright Protection and Access to Knowledge, held in University of Nigeria, Enugu Campus on 24th June, 2010.

for them into Braille to facilitate learning. But if the book is in electronic format only, TMPs can be used to bar such transcription. So there appears to be stronger IP created barriers to information in the digital environment than in the analogue, due to the existence of tighter digital rights management technology.

In addition to the increasing use of digital rights management technology, the emerging licensing environment also shapes the digital environment and is being used to bar user access to information. Unlike paper materials, digital information generally is not purchased by consumers or the library; rather it is licensed from information providers. A licence usually takes the form of a written contract or agreement between the user and the owner of the right to distribute digital information. Licences frequently take one of the three forms: "standard form" paper licences, "shrink-wrap"[32] or "click-through"[33] licences.

In most cases, there is no opportunity to negotiate the terms of these licences. The user is simply bound by the terms of the provider. Even where there is opportunity for negotiation, the relative bargaining power between the user and the provider is grossly uneven. Before users can access any part of the IP, they must first signal their agreement with a licence clause (usually by clicking the "I agree" button). These so-called agreements are never negotiable.[34] Thus, there is a growing problem that such agreements are being used as "unilateral legislation". Licence agreements frequently override copyright exceptions and set a

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32 Shrink-wrap licences are so called because they are contained inside shrink-wrapped plastic around a physical article embodying IP (such as a CD-ROM or SIM card).

33 Click-through licences are typically used with respect to copyright material that is acquired online.

34 V. Siva, "The Anarchist in the Library: How the Clash between Freedom and Control is Hacking the Real World and Crashing the System" p. 2. Available at *www.intellectarchive.control/freedom. com.* (Last visited on December 4, 2013).

level of usage that is more restrictive than the law allows. Licensors seem not obliged to consider the public interest in accessing information when setting their terms and conditions. As most digital information is distributed by licence, public policy considerations such as fair use, fair dealing and other exceptions to the author's right are likely to become null and void. Some examples of the type of obnoxious restrictions that licence agreements often impose include:

(i) restriction on user printing or downloading or e-mailing copies or parts of the material;
(ii) restriction on the number, location, and organisational affiliation of users;
(iii) restriction on libraries performing inter-library loan/document supply;
(iv) restriction on libraries or archives copying the work for preservation purposes;
(v) restriction on the use of a work beyond a certain date;
(vi) restriction on libraries networking the work across the premises of the library;
(vii) restriction on lending or otherwise disposing of digital works;
(viii) restriction on the right to quote, analyse and even to index a work.

Indeed, the combination of TPMs and licences can lead to an absolutely unlimited protection of the interests of IP owners, who benefit from several cumulative layers of protection: copyright protection, technological protection, legal protection of the technological measures, and contract law. Digital technology enables publishers to track and charge for every instance of electronic access, even for browsing. The resulting market power allows the publisher to impose monopoly prices and potentially oppressive terms on users, including libraries, academics, institutes and research centres, and to ignore the social

consequences that ensue from the inability of users to pay for such access.

4. How to overcome the barriers

To overcome the identified IP created barriers to information, the law and policy on IP need to come to some compromise. In as much as creators of IP have the right to enjoy the fruit of their mental labour, the public have conflicting right to access to information. The owner/user dichotomy created by IP is a result of false analogy with physical property (like bread or apple). Any unauthorised taking of one's physical property by another is theft. The same is wrongly thought to be the case for IP. Physical property is generally *rivalrous* (that is, if Ada takes Obi's apple and eats it without Obi's consent, Ada's act does prevent Obi from enjoying his apple); while intellectual property is non-*rivalrous* (that is, if one makes a copy of a work, the enjoyment of the copy does not prevent the enjoyment of the original).[35] Removing IP from the pedestal of physical property using this distinction is apt, as it forms the stepping stone for taking measures to overcome IP created barriers to information. Owners of IPRs cannot, because they exacted their mind, bar society from access to information.

From the beginning, information became available to all because society had invested in education. Society needs to recoup its investment in education, and this can be done only through allowing the populace wider access to information. Virtually all researchers and inventors rely somewhat on existing works; all stand on the shoulder of giants. By their nature, knowledge and information are inherently public assets. As such, the claim of society to wider access to information is decidedly superior to the assertion of private IPRs. In fact, the success of any intellectual

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35 Lawrence Lessig, *Free Culture: How Big Media Use Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004), p. 16.

work should be measured by how widely it is read or consulted, not by how tightly user access to it is barred. Thomas Jefferson once said in a letter to Isaac McPherson on 13 August 1813:[36]

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He, who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

With this compromise attitude in mind, this paper suggests the following practical ways of overcoming IP created barriers to information.

One specific measure to overcome barrier and enhance access to information is to reduce the duration of IPRs. The First Schedule to the Copyright Act should be amended for the duration of copyright works to be abridged to the life time of the author only. There is no use extending the duration to some further term after the author's death. A dead man is not a legal personality. Rights are the prerogatives of the living. Dead men are no longer persons in the eyes of the law. They have laid down their lives, and are as destitute of rights as of liabilities. What the extension of copyright term beyond the life time of the author essentially achieves is to benefit copyright owners and their future

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36 A. L. Comb, and A. Bergh, eds. *The Writings of Thomas Jefferson* 20 vols. (Washington: Thomas Jefferson Memorial Association, 1905), p. 25. Also available at http://press-pub.uchicago.edu/founders. Retrieved on February 4, 2014.

generations at the expense of users and potential creators of new information. Right to physical property can transmit from parent to child but there is so much wrong with transmitting IPR this way. Information belongs essentially to the public domain and should not be the subject of parent to child transmission. Physical and intellectual property should be further distinguished on this point.

Again, section 7 of the Patents and Designs Act should be amended to reduce the duration of patents to only ten years. Section 20 of the same Act should also be amended to reduce the duration of industrial designs to a five-year term renewable by only one further term; that is, a total of ten years only. The suggested shorter durations are long enough to provide authors or inventors opportunity to reap the benefit of their creativity. The effect of abridging the duration of IP as suggested is to hasten the reversion of IP works to the public domain and thereby lessen the length of time of barrier to information.

It is not easy to abridge the duration of trademarks protection to a number of years, since trademarks serve as a permanent industrial or commercial signature of producers or providers of goods and services. Abridging the duration of trademarks as a way of making other producers or providers use existing marks will create serious confusion and be counter-productive. All that can be said is that when a given business closes down, or leaves its registered trademark unused for a long time; such trademark should revert to the public domain for the free use of another. Furthermore, the registrar of trademark should stop trade marking animal and other natural or commonplace devices for monopoly use. The trend in Nigeria where many dairy companies are free to use cow devices as trademark is commendable and should be replicated in other sectors.

Another specific way of overcoming barriers to information is by excluding from the list of IP works some subject matters which are dear to common humanity. An instance is the expressions of folklore, which are not strictly speaking creations

of any single person, but which are nonetheless copyrightable.[37] Folklores are group-oriented and tradition-based creations of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means. These other means include folk poetry, and folk art in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, handicrafts, costumes and indigenous textile.

It is noteworthy that the community is one of the agents of socialisation. Folklores are culmination of community knowledge, which is handed down from generation to generation, and transmitted by expression. Thus, without freedom of expression of folklore, the rate and degree of spread of community knowledge are impaired. The community is weakened and made incapable of playing its role as an agent of socialisation. The result is the gainless locking-down of access to information to the detriment of present and future members of society and the wastage of the labour of our heroes past. It is therefore suggested that Part II of the Copyright Act should be amended to expunge expressions of folklore from the list of IP-protected works.

Other developing countries should emulate Nigerian law[38] and exclude from the suit of patents protection, all plant varieties, living organisms and genetic technology. The development of these and similar subject matter are crucial for human life, health and survival. Granting patents in this and similar fields is tantamount to overriding the public interest with private monopolies and privileges. It is a counter-productive and disastrous barrier to information and should be checked.

Concerted efforts are needed to ensure that protection of IPRs enhance access to, not create artificial scarcity of,

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37 See ss. 26-33 of the Copyright Act.

38 Section 1(4)(a) of the Patents and Designs Act.

information. The law and policy on IP should drive the innovation and creativity that have served the world constructively for generations. They should provide the people with technologies and works of art that save lives, create jobs, advance economic growth and development, improve personal and professional livelihoods and help meet global challenges ranging from famine and disease, to climate change and energy security. Rather than create artificial scarcity, IP protections should expand the public domain by providing the incentive for as many authors and inventors as possible to innovate, even if by relying on works of one another. The lifecycle of innovation will improve general welfare by easing access to information, creating jobs, and fostering economic growth. Only works that are "useful," "novel" and "non-obvious," should be patented. This will ensure that patent is not used by the private sector to capture for profit and lock down ideas that should rather be in the public domain. The law and policy on IP should encourage, not prohibit, measures that make use of information cheaper; as only wide and extensive use can most readily enhance innovation and creativity. Copyright owners should be brave enough to allow people to access their works more widely, review, criticise or update them and write parody, pastiche or caricature of their works. These and similar kinds of use or exercise will engender fruitful competition and generate works of greater value for society.

Following the three step test defences in Article 9(2) of the Berne Convention, many countries have entrenched defences into their copyright law, which help to overcome barriers to analogue information.[39] But these exceptions are largely inapplicable in the digital environment–Internet. This warranted the World Intellectual Property Organisation (WIPO) to make the WIPO Copyright Treaty (WCT) and the WIPO Performers and

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[39] See Third Schedule to the Copyright Act for the Nigerian example. Compare ss. 107–108 of the US Copyright Act 1976.

Phonogrammes Treaty (WPPT) in 1996. The WCT and the WPPT are jointly referred to as the Internet Treaties. The Internet Treaties provide Berne-consistent defences and exceptions to copyright in digital/internet information.

Nigeria and indeed all developing countries need to ratify and domesticate the Internet Treaties. This will help overcome the TPMs used by information providers to unduly block access to information in the Internet. Article 10(1) and (2) of the WCT, on Limitations and Exceptions, provides that:

> (1) Contracting parties may, in their national legislation, provide for limitations of, or exceptions to, the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
> (2) Contracting parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The Agreed Statement to Article 10 clarifies that the provisions permit contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of the applicability of the limitations and exceptions permitted by the Berne Conventions.

Nigeria signed the WCT on 24 March 1997 but has not ratified it. She has to take a cue from some developed countries that have ratified, and updated or begun updating their copyright laws in accordance with the WCT. In this regard, the US has passed the Digital Millennium Copyright Act (DMCA) 1998 and updated her Copyright Act. The European Union has passed the European Union Copyright Directive (EUCD) 2001. Australia has passed the Australian Copyright Amendment (Digital Agenda) Act 2000. Other countries such as Canada, New Zealand and South Africa are in the process of updating their copyright legislation.[40] By ratifying and implementing the WCT, Nigeria will ensure that her copyright law removes the additional power of right holders to use TPMs to override exceptions and limitations to copyright. The needed amendment to the Copyright Act should legalise the application of reverse engineering by legitimate non-infringing users of information to circumvent TPMs, while protecting the interests of copyright owners. Without incurring additional cost or seeking licence, all legitimate users of digital information should be able to:

a. browse;
b. read, listen to, or view privately, on-site or off-site;
c. copy or have copied for them by information staff a reasonable proportion for personal, educational or research use; or
d. transcribe or have the information transcribed for them in appropriate tools of learning for persons with disability.

A situation where a teacher preparing lesson notes cannot look up Nigerian statutes or read e-books or journals in the

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40 International Federation of Library Associations and Institutions (IFLA), "Limitations and Exceptions to Copyright and Neighbouring Rights in the Digital Environment: An International Library Perspective." Available at www.aarchive.ifla.org p. 6. Retrieved on January 10, 2014.

Internet, because of some TPM, is appalling and should be checked.

Also to be checked is the use of licensing to bar access to digital information. The emerging digital licensing environment should be pruned to accommodate public policy concerns such as consensus in contract, access to knowledge, education, fair use, intellectual freedom, and consumer rights. Licence agreements should not exclude or negatively impact users of information; they should not override any statutory limitations or exception to copyright. Licensing agreements should fulfill public policy of IP law, not abrogate it.

Other specific measures to overcome barrier include encouraging information resource sharing, reviving the lending culture and preserving and conserving IP works. Information resource sharing plays a vital role in education, democracy, economic growth, health, welfare and personal development. It facilitates access to a wide range of information, which would not otherwise be available to the user, institution or country requesting it. Sharing will reduce cost, and expand availability to those who for economic, technical or social reasons are unable to have access to information directly. So, the IP law and policy of developing countries like Nigeria should encourage, in fact, entrench a culture of sharing.

IP Law should allow non-commercial, public lending of information. Public lending is essential to culture and education. It should be available to all. Information packaged in all forms should be part of the lending stock. By creating awareness, lending, in turn assists in the marketing of commercially packaged information and encourages sale. Libraries and other information lenders are, in this regard, catalysts for the sale of information in almost all of its formats. Thus, the lending of published works by libraries or private first purchasers should not be restricted by legislation.

To have access to information in the future, there is need to preserve and conserve IP works today. The responsibility for collection, preservation and conservation of information falls largely on the University, library, archives, institutes, academies and information and media professions. Laws of developing countries should prepare necessary and sufficient framework for these bodies to achieve this goal.

In addition to the specific measures and other considerations stated above, this study recommends that Nigeria and other developing countries adopt the Adelphi Charter on Creativity, Innovation and Intellectual Property (the Charter). The Charter aims at creating an international policy statement to frame how governments should make balanced IP law. The Charter is the result of a project commissioned by the Royal Society for the Encouragement of Arts, Manufactures and Commerce, London, UK. It is intended as a positive statement of what good IP policy is. The Charter, which was issued on 13 October 2005,[41] reads in part:[42]

> Humanity's capacity to generate new ideas and knowledge is its greatest asset. It is the source of art, science, innovation and economic development. Without it, individuals and societies stagnate. This creative imagination requires access to the ideas, learning and culture of others, past and present. And, in the future, others will use what we have done. Human rights call on us to ensure that everyone can create, access, use and share information and knowledge, enabling individuals, communities and societies to achieve their full potential.

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41 The Charter was prepared by an International Commission of experts from the arts, creative industries, human rights, law, economics, science, research and development, technology, the public sector and education.

42 Issued by Royal Society of Arts (Great Britain), ed. (2006).*Promoting Innovation and Rewarding Creativity,* RSA pp. 7-8.

> Creativity and innovation should be recognised and rewarded. The purpose of IP law (such as copyright and patents) should be, now as it was in the past, to ensure both the sharing of knowledge and the rewarding of innovation.

As is made clear in this quoted paragraph, the Charter calls for ways to overcome barriers to information created by IP. It has, since 2005, influenced thinking on IP law in Europe. In particular it has heavily influenced a subsequent copyright manifesto (Copyright for Creativity–A Declaration for Europe).[43] Nigeria and other developing countries, especially in Africa, have even greater need for rethinking IP law and policy than Europe, and should adopt and localise the principles of the Charter.

5. Conclusion

In conclusion, this paper finds that IP creates barrier to information. From the perspective on Nigeria as a developing country, the paper finds that the duration of IPRs is too long and this bars user access for a long period. IP grants monopoly to commonplace information and natural devices and bars user access thereto. It creates artificial scarcity and infringes on the right to own tangible property. It contradicts freedom of thought and kills incentive to invention and creativity. The digital information environment overrides traditional defences to IP, and the emerging licensing environment limits user access.

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43 Copyright for Creativity–A Declaration for Europe is intended as a positive statement on how good copyright policy needs to be constructed in the Internet Age, and comes against the background of increasing political debate within Europe as to the need to rethink copyright in the internet age. The Declaration was issued on 5 May 2010, signed by a broad coalition of consumers, creators, libraries, civil society and technology companies.

The paper recommends that Nigeria and other developing countries should change the lenses with which they view IP and take the measures suggested in section 4 of this paper to overcome the identified barriers. Access to information should be seen as a catalyst for innovation and creativity at the service of humanity, with IPRs being an exception. Governments should make laws that give priority to user access to information, and systematically restrict the duration and scope of IPRs. Information preservation, conservation and dissemination stakeholders like UNESCO, Universities, academics, libraries, archives, museums, publishers, bookshops, *etc*., should be more proactive in maintaining IP in the public domain, and providing easy user access to information. The current situation where IPRs are used as a sword and user right as a shield is pathetic and counterproductive, and should be reversed.