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A COMPARATIVE APPRAISAL OF TRADEMARK INFRINGEMENT IN NIGERIA AND UNITED KINGDOM

BY

Dr. Ibijoke P. Byron¹

Abstract

A trademark performs certain functions such as identifying a seller's goods and distinguishing them from others, associates the goods with the provider, it serves as a representation of a certain level of quality. A trademark could be a mark, logo, letter, smell, sound, but it is anything that is able to distinguish and identify the goods of a trader from all other traders. The substantive law on trademark is the Trade Marks Act 1965 which regulates trademark in Nigeria today. The Nigerian Trade Marks Act (NTMA) 1965 is based substantially on the old United Kingdom Trade Mark Act (UKTMA) 1938, and replaced with the UKTMA 1994, but the NTMA has remained unreviewed till date. The NTMA excludes other types of infringement such as comparative advertising, dilution and parallel importation, get-up/trade dress, and this is contrary to what obtains in other jurisdictions such as the United Kingdom. Trademark law is an aspect of intellectual property which is in need of urgent reforms in Nigeria but it is nevertheless, deficient in areas as it has not given due recognition to other types of trademark infringement. Nigeria has, over the years, incorporated commerce into the Act but this is still premised on the UKTMA 1938 which does not reflect new trends on trademarks. A problem that could arise is where another person, not being the proprietor of the mark, uses the advertising techniques of the owner of the mark. Thus, when a trademark is being advertised, it could lead to infringement especially where the product is used adversely against the intention of the owner and the result is that it will harm the business of the proprietor irreparably. This paper will examine the ways in which an infringement of trademark can occur and also, other types of infringement which the NTMA has not provided legislative protection.

Keywords: Nigerian Trade Marks Act, United Kingdom Trade Mark Act, Comparative advertising, Dilution, Parallel Importation

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I. Introduction

An important aspect of trademark is that it is able to distinguish one person's goods from other persons and consumers are drawn to those goods because of the consistent quality and they also serve as a strong advertising instrument in which the consuming public depend on.² The different functions of a trademark is that it could enhance the economic efficiency of the marketplace by "lessening consumer search costs; by making products and producers easier to identify in the open market," and "encouraging producers to invest in quality by ensuring that the owners, and not their competitors, reap the rewards of that investment."³ A trademark is a mark which is regarded as an insignia of "dependable source and superiority" by consumers.⁴ The essence of a trademark system is therefore designed to protect the repute of a natural person or a legal entity by providing incentives for investments in the value of products sold to the public.⁵

For a trademark to be registered, it has to be situated in the country where it is found as the rationale behind every registration is that the owner of the trademark has the right to protect its property from persons who do not have the right to use that mark.⁶ It prevents the simultaneous existence of similar trademarks which are confusing and serves as proof of ownership, especially in cases of infringement. Registration of a trademark ensures the owners, the exclusive right to commercially use the protected names or symbols, including licensing them to third parties. These exclusive rights are enforced by a country's judicial system. For example, in order to immediately stop infringing activities, such as the sale of counterfeit products, trademark holders can request seizures or preliminary injunctions through the court system.⁷

Registers containing trademark registrations are found in virtually every country but national regimes often differ as to particular signs which qualify as trademark, the scope of protection, guidelines for avoiding confusing marks, registration costs, legal means available to fight infringement and other important details.⁸ Under the NTMA, to own a trademark, it must be for seven years which can be renewed in accordance with the provisions of this Act from time to time.⁹ When the right to use the trade mark has expired, an owner can renew for a further period of fourteen years.¹⁰ As such, where a trademark is registered, the owner is able to build goodwill and reputation in its enterprise and to prevent others from

² J Thomas McCarthy, 'McCarthy on Trademarks and Unfair Competition'. 4th Edition. Section 26: 1-4, 29: 1-7 (2004) <<https://www.carswell.com/product-detail/Mccarthy-on-Trademark-and-Unfair-Competition>> accessed 12 August 2013

³ Barton Beebe, 'The Semiotic Analysis of Trademark Law' [1995] 51 *UCLA L. REV.* 621, 623; *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64

⁴ Robert N Klieger, 'Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection', [1997] 58 *U. of PITT. L. REV.* 789, 790; cf. Mark A. Lemley, and Mark P. McKenna, 'Irrelevant Confusion' [2010] 62 *STAN. L. REV.* 413, 414

⁵ William M. Landes, and Richard A. Posner, Trademark Law: An Economic Perspective, [1987] 30 *Journal of Law and Economics*, 265, 271-73

⁶ William M. Landes and Richard A. Posner 'Trademark Law: An Economic Perspective' [1987] 30 *Journal of Law and Economics*, 265, 271-73

⁷ Eugenia Baroncelli and others. The Global Distribution of Trademarks: Some Stylized Facts. Blackwell Publishing Ltd. World Economy. (2005) Volume 28, Issue 6. Pages 765-782. <<http://dx.doi.org/10.1111/j.1467-9701.2005.00706.x>> accessed 20 August 2013

⁸ Eugenia Baroncelli, *ibid.*

⁹ Section 23(1), Nigerian Trade Marks Act, Laws of the Federation 2004

¹⁰ *Ibid.*

misleading consumers by false association with an enterprise, with which they are not connected.¹¹

Trademark rights are, like all other intellectual property rights, characteristically territorial.¹² The territorial nature of these rights means that each state or region determines, for its own territory and independently from any other state or country, what is to be protected as trademark; who should benefit from such protection and for how long the protection should be enforced.¹³ That is, each nation protects its intellectual property rights only insofar as these rights are exercised under domestic laws. Where a person seeks to register a trademark in another country apart from where the person is situated, the territorial nature of trademark is brought to the fore-front and such a person would have to pay the required procedural fees in each country where such protection is required and the probabilities of its success differs in each country.¹⁴

The current legislation on trademarks is the NTMA 1965 but it is in need of an over-haul because the Act is based and fashioned after the English Trade Marks Act of 1911 which later became the 1938 United Kingdom Trade Marks Act.¹⁵

II. Infringement of Trademarks in Nigeria

Trademark infringement occurs whereby a registered mark is used without the consent of the trademark owner and such use must be in connection with goods or services but its use must be in a manner which is likely to cause confusion, deception, or mistake about the originating source of the goods and/or services.¹⁶

An infringement of trademark is when an identical or similar mark, which is known but used on a different package is put on display amongst people who are aware of the trade mark but may be confused, when the original and fake goods are put side by side. There is the mistaken belief on the part of the populace that the similarities between the marks are so alike, and that they belong to same trader.¹⁷ In *Oladipo & Tinuola v. Thawardas*,¹⁸ the Plaintiffs were the registered proprietors of a mosquito coil trade mark and an action was instituted against the Defendant for infringement of their mark. The Plaintiffs' contention centered on the fact that the Defendant imported and sold some quantities of mosquito coils in boxes which carried the device of an elephant's head, and which said symbol, is an essential feature of their trade mark as shown in boxes which carry the device of an elephant's head. This symbol was used in marketing their product and also advertised in the newspapers/posters. It was alleged that the defendant's mark was similar to that of the

¹¹ Eugenia Baroncelli and others, 'The Global Distribution of Trademarks: Some Stylized Facts'. Blackwell Publishing Ltd. World Economy, (2005) Volume 28, Issue 6: 765-782. <<http://dx.doi.org/10.1111/j.1467-9701.2005.00706.x>> accessed 20 August 2013

¹² Miles J Alexander and James H Coil, 'Geographical Rights in Trademark and Service Marks' [1978] 68 *Trademark Rep.* 101, 102

¹³ Z Slovakova, 'Protection of trademarks and the Internet with respect to the Czech Law'. (2006) <www.jiclt.com/index.php/jiclt/article/viewFile/9/8> accessed 29 March 2014

¹⁴ Stephen Pericles Landas. *Patents, Trademarks & Related Rights: National and International Protection*. (Harvard University Press, 1975) 3,4

¹⁵ John Asein, 'Consumer Literacy and Confusing Similarity of Pictorial Trademarks in Nigeria'. (1994) 84 *Trademark Rep.* 64. <<http://heinonline.org>> accessed 2 February 2015

¹⁶ United States Patent, Trademark Office (USPTO). Trademark Infringement. <www.uspto.gov/page/about-trademark-infringement> accessed 1 February 2016

¹⁷ Intellectual Property Office. Infringement: What is trade mark infringement? <www.wipo.int> accessed 1 January 2015

¹⁸ [1917-1976] 1, I.P.L.R. 196, 198

plaintiffs and it was apt to mislead consumers into thinking that the goods of the claimant look like that of the respondent. Hence, it could lead to a misconception of surrounding facts in relation to the goods of the plaintiff and the defendant. It was however held that it is the duty of the court to determine likelihood of deception based on any factual situations.¹⁹

In the United States, to establish a violation of the Lanham Act,²⁰ the Court considers the following before the case can be determined. It could therefore be premised for either a registered mark,²¹ or an unregistered mark,²² or where the plaintiff has to establish that it has a valid and legally protectable mark; or that the use of the mark by the defendant would likely amount to confusion in the identification between such goods or services.²³ A standard which the court uses in analysing infringement cases is viewed as the "linchpin" of trademark infringement tests. Hence, the test measures the "likelihood that a number of prudent purchasers are likely to be misled, or indeed simply confused, as to its origin or otherwise of the goods. In assessing the public's likelihood of confusion, the courts have developed a multi-factor test that considers: the strength of the mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, quality of the defendant's product, and the sophistication of the buyers.²⁴ The essence of this test is to ensure that both sides are treated fairly in the determination of each case. Therefore, the test focuses primarily on consumer confusion and a trademark owner who is unable to demonstrate such confusion may not prevent the unauthorised use and subsequent weakening of a mark through an infringement action.²⁵

In the landmark case of *Patkum Industries Ltd. v. Niger Shoes*,²⁶ the Plaintiff, a registered proprietor of trade mark described as "NISHMACO" and registered as No. 17229 in Nigeria in respect of shoes, slippers (Foot wears) and all goods included in the Class. The Plaintiff alleged that the Defendant sold, distributed, and imported goods in particular, Slippers, not of the Plaintiff's manufacture but for goods of the Plaintiff's manufacture and said acts constitute an infringement of their Trade Mark, namely "NISHMACO" and passing off same thereof. The Plaintiff prayed for an injunction restraining the Defendant and those claiming under him from passing off his goods as their own. It was held that the Federal High Court has jurisdiction to hear cases of alleged infringement of registered marks that are not immoral under the NTMA.²⁷

Similarly, in *Dyktrade Ltd. v. Omnia Nigeria Ltd.*,²⁸ the Court held that registration of a trademark will entitle the proprietor to sue or institute an action for any infringement of such mark. In *Bell Sons & Co. v. Godwin Aka & Anor.*,²⁹ the Appellant was the registered

¹⁹ *Oladipo & Tinuola v. Thawardas* [1917-1976] 1 I.P.L.R. 196, 198

²⁰ The Lanham Act is the Federal Law for all the states in the United States of America

²¹ This provision is contained under 15 U.S.C. Sections 1114, Lanham Act of 1946

²² This is under 15 U.S.C. Sections 1125(a) of the Lanham Act, 1946

²³ Legal Information Institute (LII). Trademark Infringement.

²⁴ https://www.law.cornell.edu/wex/trademark_infringement accessed 1 February 2016

²⁵ *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

²⁶ Katherine B McCabe, 'Dilution-by-Blurring: A Theory Caught in the Shadow of Trademark Infringement'

2000) 68 *Fordham L. Rev.* 1827. < <http://ir.lawnet.fordham.edu/flr/vol68/iss5/13> > accessed 4 October 2016

²⁷ [1977-1992] 2 I.P.L.R. 373

²⁸ Section 3, Nigerian Trade Marks Act, Laws of the Federation 2004

²⁹ [1997-2003] 4 I.P.L.R. 250

³⁰ *Bell Sons & Co v. Godwin Aka & Anor* [1917-1976] 1, I.P.L.R.,287

proprietor of a Trade Mark Exhibit AMF 1 registered in Class 3 of the Register in respect of castor oil and other pharmaceutical products on 19 April, 1958. The Respondent sought to register Exhibit AMF 2 in the same class and in respect of castor oil. The Appellant filed a Notice of Opposition before the Registrar of Trade Marks. The grounds for the objection/opposition is that the Mark sought to be registered by the Respondents is in all material respects identical to the Appellant's mark and clearly intended to or calculated to deceive and is not entitled to registration as a trade mark. The Respondents as Applicants applied to the High Court for an order that notwithstanding the opposition, the registration be proceeded with by the Registrar of Trade Marks. It was held that the ears as well as the eyes have to be employed with reference to the comparison between the two marks. Also, whether a Mark is potentially capable of being so mistaken for another one is a question of fact to be decided after a comparison of the two products. The law of Trade Marks is aimed at the subtle as well as to the obvious infraction of it and both the ears and eyes must be together in the exercise of comparison.³⁰

The likelihood of confusion is the central focus of any trademark infringement claim in Nigeria and it exists when consumers view the mark as similar and that the product or service it represents is associated with the source of a different product or service. In determining this, the courts would apply two different standards to directly competing goods as opposed to non-competing goods. Where therefore, the alleged infringer and the trademark owner deal with such goods or services, which are deemed to be competitive and similar, they will be compared side by side to determine whether consumers would be confused when they come into contact with such goods. On the other hand, where the goods in question are completely unrelated, confusion is unlikely and infringement will generally not be found.³¹ In the popular case of *Nigeria Distillers Ltd. v. Gybo and Sons & Anor*,³² it was held that the question which is crucial in determining whether or not a name is so similar as to constitute an infringement of the plaintiff's trade mark, "Bacchus" is whether the person who sees the word, "Cacchus" in the absence of the Plaintiff's mark, "Bacchus" would be deceived as to conclude that the defendant's mark is similar to that of the plaintiff. The mark to be registered must not, when compared with what is already registered, deceive the public or cause confusion.³³ An infringement of a trade mark would thereby occur where a person, not being the owner uses a mark identical to an already existing trademark to cause confusion amongst consumers, who would have the belief that there is a connection between the two parties.³⁴

Trade mark's registration is meant to protect the proprietor or assignee in the exclusive use of the trade mark in connection with its goods. Therefore, infringement can occur, whereby an identical mark which closely resembles the original mark is used adversely to the interest of the owner and persons coming into contact with it, may be confused into thinking that it belongs to the infringer.³⁵ Any invasion of right is therefore actionable if this were to arise.

³⁰ Ibid., 289

³¹ Legal Information Institute (LII). Trademark Infringement. <https://www.law.cornell.edu/wex/trademark_infringement> accessed 1 February 2016

³² [1997-2003] 4, I.P.L.R. 464

³³ *Alban Pharmacy Ltd. v. Sterling Products International Ltd.* (1968) 1 All N.L.R. 300

³⁴ *British American Tobacco (Nig.) Ltd. & Anor v. International Tobacco Company Ltd* (2003-2007) 5, I.P.L.R. 272, 285, 280. Section 5(2) Nigerian Trade Marks Act, Cap. T13, Laws of the Federation 2004

³⁵ Section 5(2) *ibid.*

An infringement of an unregistered mark or trade name may be actionable as a passing off.³⁶ An action for infringement will therefore lie where a competitor uses registered Trade Mark in connection with the proprietor's goods for the purpose of comparing them with his own goods in the same class.³⁷ The classic case of *Rodgers and Sons v. Rodgers & Company*,³⁸ brought to light the need why a trade mark ought to be registered in the first instance. The learned judge, Romer J. stated thus, "[No] man is entitled to carry on his business in such a way as to represent that it is the business of another, or is in any way connected with the business of another." Thus, every person is entitled to have business relationships but it must be within lawful boundaries.

Depending on the circumstances of each matter, the Court has to determine if there is an infringement of a mark and whether it is calculated to deceive. In *P.Z. v. Chami*,³⁹ the two competing marks were an elephant pulling fruits from a palm tree with its trunk and a caparisoned elephant with two palm trees on each side of it with a rider in a howdah on its back. The appellants objected on the ground that the marks were identical and that the respondent's mark was likely to deceive or confuse. The objection was rejected in the High Court and the appellants later applied to the Supreme Court. The Supreme Court rejected the appeal stating that the said competing marks were not similar in that the two devices were dissimilar.⁴⁰

The Court therefore, in an action on a trade mark infringement, the question whether the defendant's trade mark is likely to deceive or confuse is a matter on which the judge alone must decide. The judge in deciding this issue must be guided by the evidence brought by the parties and he cannot abdicate his decision to witnesses.⁴¹ For every infringement of trade mark, evidence should be produced to show that consumers are or could be deceived.⁴² Where however, both marks are the subject of pending applications, there is no exclusive right to protect.⁴³

The owner of a trademark, otherwise referred to as a proprietor, has *locus standi* to sue. Likewise, proprietors, who are foreigners also have *locus standi* but may have to post a bank bond or security for costs.⁴⁴ The exclusivity right takes effect from the date of registration which is invariably, the date of filing.⁴⁵ The trade mark proprietor, is thereby entitled to the remedies and reliefs if any infringement were to occur.⁴⁶

The burden is on the Plaintiff to prove an infringement of a trade mark which is registered so as to have a cause of action. In *Gbadamosi & Anor. V. J.T. Chanrai & Anor*,⁴⁷ the Plaintiffs were the original registered proprietors of a Trade Mark known as "Cock Device Brand Mosquito Coil" 'Orire Goodluck'. The Plaintiffs alleged that the Defendants infringed

³⁶ Folarin Shyllon, *Intellectual Property Law in Nigeria*. (Max Planck Institute for Intellectual Property Competition and Tax Law, Munich 2003) 212

³⁷ See the case of *Bismag Ltd. v. Amblins (Chemists) Ltd.* (1940) Ch. 667. *Ferodo Ltd. & Anor. v. Ibeto Ind. Ltd.* [2003-2007] 5 I.P.L.R. 136

³⁸ [1914] 41 R.P.C. 277, 291

³⁹ (1971) 2 N.C.L.R. 376

⁴⁰ *Ibid.*

⁴¹ *Oladipupo v. Thwardas* (1970) 2 ALR. Comm. 179 at 184. Shyllon, F., *op.cit.* at p. 219

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Tawa Petroleum Products v. Owner of M.V. Sea Winner* (1980) F.H.C.R. 101

⁴⁵ C Colston, *Principles of Intellectual Property Law*. (Cavendish Publishing Ltd., London 1999)

⁴⁶ Section 14, United Kingdom Trade Marks Act 1994

⁴⁷ [1917-1976] 1 I.P.L.R. 428

their Trade Mark by selling Cock Brand Mosquito Coils with the Cock Device on the label between 1972 and 1074 June at Lagos. The Plaintiffs' contention is that the 1st Defendant Company is wrongfully selling the Mosquito coils under a name similar and in packets similar to that of the Plaintiffs and so closely resembling as to mislead the public into the belief that they are purchasing the Plaintiffs' goods. An action was thereby instituted against the Defendant claiming damages and injunction to restrain the Defendants by themselves or their Agents from selling or offering for sale 'Cock Brand Mosquito Coil' not belonging to the Plaintiffs. The onus to prove that there had been an infringement is on the plaintiff and he need not prove any other thing except that the trade mark complies with all the rules of its registration. On appeal to the court, the plaintiff sought an order to restrain the defendant from infringing its registered trade mark. However, the Plaintiff in any case, must ascertain that indeed, there is an infringement and the award of damages need not arise.⁴⁸

III. Infringement of Trademarks in the United Kingdom

In the United Kingdom, when a trademark has been infringed, proceedings are normally brought by the owner of the mark but it is also possible for an action to be brought by an exclusive licensee.⁴⁹ Where the licensees are however not entitled to bring proceedings in their own right, they can call on the proprietor to take proceedings on their behalf.⁵⁰ It is pertinent to note that before an action can be brought before the court, the trade mark must be registered. Therefore, the rights of the proprietor are enforceable against third parties with regard to acts done after the date of registration (which is the date of filing).⁵¹ The rights continue for ten (10) years from registration and may be renewed for further ten-year periods possibly indefinite.⁵²

There is no requirement for knowledge, intention, or derivation on the part of the defendant as regards infringement cases in the United Kingdom. The trade mark owner need not show damage and is able to commence an action for infringement even though the mark has not been used. However, it must be shown that the defendant used the mark in the course of trade.⁵³ In determining whether there is trade mark infringement, it is necessary to compare the registered mark with the alleged infringing sign with a degree of care. The circumstances in which a mark may be infringing are in terms of marks which are identical with goods and services or closely resembling such goods,⁵⁴ which includes the likelihood of association, with the earlier registered mark,⁵⁵ and such association could give rise to confusion with the marks and lead to the public being misled.⁵⁶

When a registered trade mark has been in use for a long time, in the United Kingdom for instance, it is said to have gained some form of popularity among its specified consumers who are used to the product. Where therefore, the plaintiff's known mark is used in a way by the infringer, which is the defendant in this case, it would destroy the essence or the uniqueness of the mark. Therefore, the United Kingdom looks at similar or closely

⁴⁸ *Gbadamosi & Anor v. J.T. Chanrai & Anor* [1917-1976] 1 I.P.L.R. 428

⁴⁹ This is under Sections 23(5) and 31, UKTMA 1994

⁵⁰ Section 30, United Kingdom Trade Marks Act 1994

⁵¹ Section 9(3), United Kingdom Trade Marks Act *ibid.*

⁵² Sections 42 and 43, United Kingdom Trade Marks Act *ibid.*

⁵³ Sections 42 and 43, United Kingdom Trade Marks Act *ibid.*

⁵⁴ Section 10(1) - (3) United Kingdom Trade Marks Act *ibid.*

⁵⁵ Section 10(2) (a), United Kingdom Trade Marks Act *ibid.*

⁵⁶ Section 10 (2) (b) *ibid.*

resembling products which could take undue advantage of the plaintiff's trademark and ensures that the proper penalties are laid down if an action for infringement arises.⁵⁷

The above has almost the same characteristics with the Nigerian counterpart but the difference is that trade mark is only in relation to goods. A registered trade mark can therefore be infringed if the goods or services are identical or closely resemble an earlier registered trade mark which could lead the consumers to confusion. Hence, where a person takes undue advantage of the status and reputation of a trade mark by selling products illegally bearing the name or logo of another person, and misleading consumers into thinking otherwise, such will be termed an infringement on the guilty persons.⁵⁸ However, it is pertinent to note that the concept of trademark is only in relation to goods in Nigeria.

The test to know whether there is an infringement, is to identify the scope of the proprietor's right in the trade mark and this can be done where there evidence of a Certificate of Registration issued by the Registrar. Thereafter, the court will ascertain the defendant's mark by assessing its liability to the specific use of the mark, that is, whether or not, it has used it in the course of trade and to what extent it has been used. To establish infringement, the mark must be used in the course of trade and the relevant territory in which the mark must be sold should not be ignored and finally, the importance of the function of the mark.⁵⁹

IV. Requirements in the determination of the scope of infringement

1. The Claimant's Trade Mark

The trade mark register is a way to assess whether or not a proposed mark is conflicting with an earlier registered trade mark.⁶⁰ Where registration is more than five (5) years, the specification of goods and services may need to be reformulated. Under the UK law, it is common for an alleged infringer to challenge the scope of the registration, especially if it is more than five years old, through a counter-claim for revocation for non-use.⁶¹ In evaluating infringement therefore, the court may be concerned with how the mark has been used. In *Specsavers International Healthcare Ltd. v. Asda Stores Ltd.*,⁶² the claimant's mark comprised two intersecting oval shapes and had been registered in black, which, under the prevailing conventions was assumed to confer rights irrespective of the colour in which the shape is used by the defendant. The mark, nevertheless, had been used primarily in a particular shade of green. The Court held the 'colour' was relevant and further held that the particular shade of green would likely create confusion.⁶³

2. The Defendant's Sign

When a person infringes a registered trade mark, it is necessary to compare the 'original' registered sign with the 'fake' sign used by the defendant. The question as to what constitutes the defendant's sign is of vital importance when considering whether or not the goods and services are identical or not. Furthermore, the UK provision states that if the marks and goods or services are identical, then a defendant will be considered to have infringed irrespective of any confusion.⁶⁴ In *LTJ Diffusion case*,⁶⁵ the owners of a figurative mark including the

⁵⁷ Section 10 (3) *ibid*.

⁵⁸ Lionel Bently and Brad Sherman. *Intellectual Property* (4th Edition, Oxford University Press) 1039

⁵⁹ Lionel Bently and Brad Sherman. *Intellectual Property* (4th Edition, Oxford University Press) 1039

⁶⁰ *Ibid.* at p. 1039

⁶¹ *Ibid.* at p. 1039

⁶² [2013] Case C-252/12

⁶³ *Ibid.*

⁶⁴ This is contained under Section 10(1) United Kingdom Trade Marks Act, Cap. 26, 1994

⁶⁵ Case C-291/100 [2003] ECR I-02799

word, "Arthur" in handwritten form for clothes brought infringement proceedings against a company selling children's clothing under the name, "Arthur Et Felicie."

V. Types of use

The UKTMA provides a non-exhaustive list of situations where a person uses a sign in the course of trade.⁶⁶ Instances where an infringer affixes the sign to the goods or to the packaging has been said to be the most common form of trademark infringement.⁶⁷ This would occur for example, when a counterfeiter were to place scented liquid in bottles to which have been attached the 'Chanel Label.' In *Frisdranken Industrie Winters BV v. Red Bull GmbH*⁶⁸ the defendant, a Dutch company, filled cans on behalf of Smart Drinks, a firm based in the British Virgin Islands. Smart Drinks supplied the drink extract, as well as the empty cans and lids (which bore marks that were said to infringe the claimant's trade marks). After filling the cans with the made-up drink, the defendant placed the filled cans at the disposal of Smart Drinks, which then exported them to countries outside the Benelux region. The Dutch appellate court had held that filling the cans was akin to affixing a mark to the goods, reasoning that in relation to a liquid, a sign cannot be affixed in any other way than by placing it in packaging that already bears the sign. The Dutch Supreme Court referred that issue to the Court of Justice. It was further held in this case that a party such as the defendant was not using the mark because it merely executes a technical part of the production process of the final product without having any interest in the external presentation of the cans and in particular, in the signs thereon.⁶⁹ It was held in the above case that there were no infringing acts on the plaintiff's goods. Therefore, in *Trebor v. Football Association*,⁷⁰ there was an infringement action involving the Football Association's "three lions' logo." The action arose when a sweet manufacturer, 'Trebor', included photographs of footballers in packets of sweets that it sold. The Football Association argued that, because some of the footballers were wearing the English team strip, which had the 'three lions' logo attached to it, this amounted to an infringement of its mark. Dismissing this action, it was held that Trebor was not really using the logo in any real sense of the word. Thus, Infringement could take place in different forms. A person could be liable for using a material which had initially gained recognition among consumers and the infringer now uses the same material by putting his own mark and consumers would believe that it is the product of the plaintiff. The plaintiff's trade mark will be harmed in so many ways and would invariably affect the business venture of the claimant. Hence, where a mark is deliberately used on material meant for labelling or packaging of goods, and the colour is the same, or it is exploited on business paper or when goods or services are advertised in a way to mislead consumers, such a person could be accused of infringement.⁷¹ A person can be said to use a sign where goods are offered for sale, or puts them on the market and stock them for these purposes under the sign, or offer or supply services under the sign. This simply suggests that although a sign may not be physically attached to the goods in question, a sign may nonetheless still be "used" where it is placed in proximity to, or is connected with the goods.⁷² A sign is also used when there are imports and exports of

⁶⁶ Section 10(4) United Kingdom Trade Marks Act, Cap. 26, 1994

⁶⁷ Ibid.

⁶⁸ Case C-119/10 [2011] ECR I-13179, [2012] ETMR (16) 340 (ECJ, First Chamber)

⁶⁹ Ibid.

⁷⁰ [1997] FSR 211

⁷¹ Lionel Bently and Brad Sherman, *ibid.* at 1044, 1045; Section 10(5), United Kingdom Trade Marks Act 1994

⁷² *Ibid.* at p.1044, 1045

goods under the sign. The importance of this provision is that a trade mark owner can prevent the importing of goods that bear the mark into the United Kingdom. This right can sometimes be used even where those goods have been marketed elsewhere with the trade mark owner's consent. Therefore, the end result is that a trade mark owner is empowered through this right to divide up markets on a territorial basis, and set prices differently for each territory.⁷³ On the other hand, while a person need not have title to the goods to be treated as an importer but merely transporting a product bearing a trade mark through a territory (especially where the destination is somewhere else) is said not to be an infringing act.⁷⁴

A sign can also be used on business papers⁷⁵ or in advertising.⁷⁶ In relation to business papers, the court has to determine whether such uses are in relation to goods or merely to the packaging.⁷⁷ Use in advertising includes a wide range of promotional activity, such as advertisement at the cinema, on television, on billboards, and in magazines; another respect is that advertising also consists of comparative advertising.⁷⁸ In *O2 Holdings Ltd. v. Hutchison 3G UK Ltd.*, the Hutchison 3G Ltd. (H3G), in 2004, ran a television advertisement comparing the cost of its pay-as-you-go service with that of O2. The advert featured moving images of bubbles, together with visual and spoken references to the O2 name. O2 thereafter sued H3G, alleging trade mark infringement. O2 alleged infringement under the Trade Marks Act where it was held by the court that it is an infringement to use an identical or similar service in such a way as to give rise to a likelihood of confusion.⁷⁹ Use therefore, of a third party's Trade Marks to generate advertising has been held to amount to use, even where the trade mark is typed into a search engine by a third party and the advertisement appears in a set of the search results designated 'sponsored links'.⁸⁰ It has been further held that use on publicly accessible websites counts as "use" under that Trade Marks Act.⁸¹ It should be noted that "use" simply implies that the third party uses the sign in its own commercial communication.⁸² It was held that the act of a search engine provider in suggesting the mark as a keyword and generating the adverts in response to the key words is not guilty of using the mark.⁸³ In other words, where an internet market service provider, such as eBay or Jumia, which provides a service that allows its customers to offer goods for sale under signs that may correspond to trade marks, does not itself 'use' those signs.⁸⁴

⁷³ Ibid. at pg.1045

⁷⁴ Section 10 (4) (c) United Kingdom Trade Marks Act 1994

⁷⁵ See the case of *Broad v. Graham* (No. 2) [1969] RPC 295, 298. Section 10(4), United Kingdom Trade Marks Act ibid.

⁷⁶ Section 10 (4) (d) United Kingdom Trade Marks Act ibid.

⁷⁷ Lionel Bently and Brad Sherman, ibid.

⁷⁸ David I. Bainbridge, ibid. at p. 777-778, 791-796

⁷⁹ *O2 Holdings Ltd. v. Hutchison 3G UK Ltd.*, Case C-533/06 [2008] ECR I-4231 (ECJ, First Chamber), [32]-[36]. See also P Miskolczi-Bodnar, 'Definition of Comparative Advertising'. *European Integration Studies*, Miskolc, (2004). Volume 3, No.1, pp.24-44. <www.uni-miskolc.hu/uni/res/kozlemanyek/2004/Definition.doc> accessed 12_May_2016

⁸⁰ *O2 Holdings Ltd. v. Hutchison 3G UK Ltd.*, Case C-533/06 [2008] ECR I-4231 (ECJ, First Chamber), [32]-[36].

⁸¹ Section 10(4) United Kingdom Trade Marks Act Cap. 26, 1994

⁸² *Louis Vuitton v. Google*, Case C-236/08 [2010] ECR I-2417, [56]

⁸³ Ibid.

⁸⁴ *L'Oreal SA v. eBay International AG*, Case C-324/09 [2011], ECR I-6011, [102]

An infringement will only occur when the sign is used in the course of trade in a manner that is inconsistent with the owner of the mark.⁸⁵ To reiterate the fact that any sign that is infringed is in the course of trade, the Court of Justice in *Arsenal v. Reed*, stated that a sign is used in the course of trade where it is used 'in the context of commercial activity with a view to economic advantage and not as a private matter'.

To sustain an action of a British trade mark, the act must take place in the United Kingdom and it must be in respect of the goods for which there is an infringement in the course of trade.⁸⁶ Problems may arise however, where foreign sites are easily accessed by consumers from the United Kingdom; and the Court of Justice has indicated that mere accessibility is insufficient to constitute use of a mark in a particular territory and that the assessment of whether such use exists depends on whether consumers are targeted in that particular territory.⁸⁷ In an infringement, the defendant must have used a sign in relation to goods and services covered by the claimant's rights (that is, which is identical, similar to, or dissimilar to the claimant's goods).⁸⁸

The general consensus on the concept of 'use' is whether there is an infringement and whether the use affects or is liable to affect the functions of the trade mark particularly its essential function of guaranteeing to consumers the origin of the goods.⁸⁹ The 'origin' function has been described as the guaranteeing of goods or services bearing a registered mark having been placed on the market with the authority of the proprietor and thus, third parties' use affects the value of trademarks.⁹⁰

VI. Other types of Trademark Infringement in Nigeria

In Nigeria, infringement of trademark is only recognized when there are identical or similar products resembling each other. The non-recognition of current trends on trademarks could lead to unrecognized cases of infringement. Due to industrialization and globalization as a result of commerce and industry, there are in existence other categories of trademark infringement which Nigeria ought to make legislative provision for, under the Trade Marks Act. They include comparative advertising, get-up, dilution and parallel importation.

VII. Get-Up/Trade dress

Get-up seems to be recognized only under passing off in Nigeria and it is majorly found in the Law of Tort. This includes copying the packaging of the plaintiff to be similar to that of the defendant in a manner that is likely to confuse the public. Therefore, it includes the general appearance, package, label, or design of the product.⁹¹ Get-up is however not recognized under the NTMA and hence, there is no legislative protection for it. Thus, deceit would occur when a registered mark is imitated by an individual or company in relation to the goods or services which has acquired a distinctive reputation in the market and is known as belonging to a product by such individual or company only.⁹² In *U.K. Tobacco Co. v.*

⁸⁵ Under Section 103(1) United Kingdom Trade Marks Act, *ibid*.

⁸⁶ Section 9(1), United Kingdom Trade Marks Act *ibid*

⁸⁷ *L'Oreal SA v. eBay International AG*, Case C-324/09 [2011] ECR I-6011, [66]

⁸⁸ *Ibid*.

⁸⁹ *Arsenal v. Reed*, *op.cit*.

⁹⁰ *Hoffman-La Roche v. Centrafarm*, Case C_102/77 [1978] ECR I-1139

⁹¹ Ese Malemi, *Law of Tort*. (Revised Edition. Princeton Publishing, 2013) 638

⁹² Mondaq T & A Legal. Nigeria: An Appraisal of Passing off Actions under Nigerian Law. (2018) <www.mondaq.com/Nigeria/Trademark> accessed 16 October 2018

Carreras Ltd.,⁹³ the defendants were marketing cigarettes called "Barrister", and the packet showed a white man wearing a barrister's wig and gown. It was similar to that of the plaintiff's product which was called "Band Master" on which the packet of cigarettes also included a man in a band master's uniform.

The external packaging of a person's product in Nigeria is known as get-up and another name is for it is trade dress. Trade dress is what is used in the United States of America to describe product packaging. Trade dress refers to the visual appearance of a product that may include features such as size, shape, packaging, colour or combination of colours and this is considered the overall get-up of the product.⁹⁴ Trade dress is an important asset and it is generally described as the total overall impression which is created by a package design or label or the décor of a business.⁹⁵ It is the total image of a product or business which is reflected in features such as size, shape, colour or colour combinations, designs of a label, texture, graphics or sales techniques.⁹⁶ Thus, it can occur when one company uses a package similar to another person to cause a likelihood of confusion in a buyer's mind. This however is not recognized under the NTMA which could invariably lead to endless cases of unrecognized infringement.

Under the current Trade Mark Act, the shape or the form of presentation or packaging of a product is not recognized in Nigeria. A proprietor therefore, cannot prevent competitors from copying these elements through an infringement action.⁹⁷ This is in contrast with the United Kingdom Act where it protects product packaging, and other types of trade mark which are made use of in business practices.⁹⁸ Trade dress is an increasingly important asset as it is described as the total overall impression created by a package design or label or the décor of a business.⁹⁹ In addition, it could be referred to as the visual appearance of a product, which is used in most cases to signify the source of the product to consumers.¹⁰⁰ The non-recognition of packaging has been brought forth in different case laws. A classic case is that of *Ferodo Nigeria Ltd. v. Ibeto Industries Ltd.*,¹⁰¹ where packaging of a product was not recognized as an infringement of trademark. The development of commerce over the past decades accounts for the increased relevance and importance of trademarks; hence, the need for an updated Act. Law as an instrument of social engineering and economic development ought to suit the society in which it functions and hence, the urgent need for an updated Trade Mark Act.¹⁰²

The UKTMA on the other hand, recognises shapes and packaging as contained in the Act.¹⁰³ It provides that a trade mark may consist of any signs capable of being represented

⁹³ (1931) 16 NLR 1. See also *De Facto Works Ltd. v. Odumotun Trading Co. Ltd.* [1959] LLR 33

⁹⁴ Trade Dress Protection under Trademark Regime: An Analysis. <<http://www.ficpi.org/news/trade-dress-protetction-under/>> accessed 21 September 2017

⁹⁵ Folarin Shyllon, *ibid.* at 194

⁹⁶ JW Reese, Defining the Elements of Trade Dress Infringement under Section 43(A) of the Lanham Act. (1994) <<http://www.tplj.org/wp-content/uploads/Volumes/...>> accessed 10 February 2018

⁹⁷ Folarin Shyllon, *ibid.* 194

⁹⁸ Section 1, United Kingdom Trade Marks Act Cap. 26, 1994

⁹⁹ Folarin Shyllon, *ibid.* 194

¹⁰⁰ *Ibid.*

¹⁰¹ [2004] 5 NWLR, part 866 at p 317

¹⁰² Ayoyemi Lawal-Arowolo, 'Ferodo Limited and Ferodo Nigeria Limited v. Ibeto Industries Limited: Another Critical Review' (2012) NIALS Journal of Intellectual Property [NJIP] Vol. 1 No. 2

¹⁰³ Section 1, United Kingdom Trade Marks Act Cap. 26, 1994

graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or the packaging provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertaking.¹⁰⁴ Hence, packaging as recognised under the UKTMA indicates that it could lead to infringement if it is not adequately protected. To avoid infringement, a trader may need to design different packaging or shapes for goods.¹⁰⁵

VIII. Dilution

Dilution is an infringement under trademark law which can occur when a person uses a well-known name which would inadvertently destroy the uniqueness and originality of that particular mark. This would affect the value of the product in currency especially if the reputation of the mark was extended across a diverse range of products.¹⁰⁶ It is to be noted that under the Trademark Act in Nigeria, the term, 'infringement' is not defined unlike the Trademark law in the United Kingdom where infringement and infringement materials are well-defined.¹⁰⁷ Infringement by dilution is not recognized under the Trade Marks Act in Nigeria while it is recognized under the Trade Marks Act in the United Kingdom.¹⁰⁸

A trademark infringement occurs where a protected trademark is used in connection with entirely different products or services. For instance, if the trademark "Coca-Cola" is used by a manufacturer of blue jeans and such use gives the impression that this product draws on the reputation of "Coca-Cola" as a drink for dynamic young people, interests of the "Coca-Cola" company would be at stake.¹⁰⁹

Traditionally, under the doctrine of dilution, there are two types. The two types are dilution by blurring and dilution by tarnishment. The multiple uses of the same mark on different products is likely to dilute the distinctive quality of the mark which would make it difficult for consumers to recall the original product. To illustrate, suppose a firm names its soap "Tiffany Soap;" a car company names its new car "The Tiffany;" a restaurant opens under the name "Tiffany;" and so on. These uses of the TIFFANY mark may not confuse anyone about a possible connection with the jewellery company, but they could clutter the signal sent by the mark and make it more difficult for consumers to link it to Tiffany jewellery or so the blurring theory supposes.

That is, Dilution by blurring occurs when a mark is used by a different manufacturer in an unrelated line of business. For example, the trademark 'Xerox' (this is the known name of photocopier machines) would be diluted if it were by a manufacturer of chairs. This thereby prevents consumers from identifying a trademark with a particular good or collection of goods and the end result being that the effectiveness of a trademark is diminished.¹¹⁰ Dilution by tarnishment on the other hand, occurs where the trademark is used by a different seller in unrelated goods of lower quality than those of the trademark holder. Where a trader uses someone else's well-known trade mark for different goods or services, hoping to capture some of the goodwill attaching to the trademark, such person will be guilty of dilution.

¹⁰⁴ Section 1, United Kingdom Trade Marks Act *ibid.*

¹⁰⁵ Lionel Bently and Brad Sherman, *ibid.* 813

¹⁰⁶ Folarin Shyllon, *ibid.*, at 241-242. Though cases abound in Nigeria of dilution, there is the need to have a well-defined Federal Law for Trademark Dilution Act. See the case of *Nigeria Distillers Limited v. Gybo and Sons and Anor*, *ibid.*

¹⁰⁷ Sections 16-18, United Kingdom Trade Marks Act, Cap. 26, 1994

¹⁰⁸ Section 10(3) United Kingdom Trade Marks Act, *ibid.*

¹⁰⁹ Folarin Shyllon, *ibid.* 240, 241

¹¹⁰ Folarin Shyllon, *ibid.*, 241

Tarnishment covers cases where the defendant uses a similar mark in a way that severely clashes with the meanings that consumers associate with the plaintiff's mark.¹¹¹ This therefore does not allow the information about the level of quality for such trademarked good or collection of goods to be correctly inferred. In essence, dilution interferes with the proper economic function of trade marks.¹¹²

IX. Parallel Importation

Another form of trademark infringement is referred to as parallel importation. Parallel importation refers to a situation where the owner of the trademark has not given its consent to import its trademarked goods to a certain area.¹¹³ Currently, in Nigeria, no statutory prohibition on parallel importation exists. Parallel importers operate outside the distribution network set up by the manufacturer or his or her authorized distributor. Parallel imports are not fake or counterfeit goods¹¹⁴ but they occur when products are imported cheaply without the owner's consent having a trademark or other intellectual property in the goods, thereby aiming to compete with the owner's own products which had originally been marketed abroad at a lower price.¹¹⁵

The United Kingdom infringement categories is wider than what is found in Nigeria. A deficiency in the Trade Marks Act of Nigeria is that it does not define infringement or infringing materials in the statute. This is unlike the United Kingdom where infringement and infringing materials are defined. In addition, infringement in Nigeria is still related to closely resembling goods likely to cause confusion or deception.¹¹⁶

In order to ensure that Nigeria moves in modern times, the categories of trademark infringement which might occur other than identical or similar marks should be addressed.

X. Comparative Advertising

In Nigeria, the law on comparative advertising depends on whether the trademark concerned is registered under Part A or B of the trademark register. The Trade Marks Act lays emphasis that the mark must be registered which would give the owner the exclusive right to use the trademark in relation to the goods.¹¹⁷

Comparative advertising is used to describe advertisements in which the goods or services of one trader are compared with the products of another trader.¹¹⁸ Hence, it is defined as advertising that compares alternative brands on the price, value or quality and identifies the alternative brand by name, illustration or any other distinctive information that is attributable to the brand.¹¹⁹ It can be referred to as contrast ads, negative ads, attack ads, or knocking copy.¹²⁰

¹¹¹ Daniel M. Klerman, 'Trademark Dilution, Search Costs, and Naked Licensing', [2006]74 *FORDHAM L. REV.* 1759, 1762.

¹¹² Folarin Shyllon, *ibid.*, 241

¹¹³ I Avgoutis, 'Parallel Imports and Exhaustion of Trademark Rights: Should steps be taken towards an International Exhaustion Regime?' [2012] *European Intellectual Property Review*, Vol. 34, No. 2, 108-121

¹¹⁴ O Agaba, 'The Parallel Importer and the Nigerian Trademark Jurisprudence: A Critical Analysis'. [2013] *IALS Journal of Intellectual Property*, Vol.2, No. 1

¹¹⁵ Folarin Shyllon, *ibid.*, 255

¹¹⁶ Section 13(1) Nigerian Trade Marks Act, Laws of the Federation 2004

¹¹⁷ Section 5(1), Nigerian Trade Marks Act, *ibid*

¹¹⁸ Lionel Bently and Brad Sherman, *ibid.*, 1072

¹¹⁹ *ibid.*, 1072

¹²⁰ MT Moore, 'Campaigns enter Phase I of ad war'. *USA Today*, October 27, 16 A. (1999). See also, K Williams, A Robert, 'Comparative advertising as a Competitive Tool'. (2013) *Journal of Marketing Development and Competitiveness*. Vol. 7(4), 47

Comparative advertisement through honest practices does not amount to trademark infringement but where a rival competitor intentionally harms the product of another through advertisement strategy, this can lead to an infringement of a trademark. Hence, comparative advertising can be an act of unfair competition where it is misleading, and unjustifiably discredits the competitor or his trademark. The objective is usually to gain an advantage over the goods of the competitor.¹²¹

In order to ensure that traders do not practice misleading advertisement, there are specific laws that guard against negative comparative advertisements. For instance, in the European Union, there is the Directive on Misleading and Comparative Advertising that deals with circumstances in which it is permissible and those in which it should be prevented. The essence of this directive is to ensure that in advertising goods, it does not take unfair advantage of another person's trade name.¹²²

In Nigeria, there is also no specific legislation that governs comparative advertising in Nigeria but some legislation over the years have been interpreted as indicating that the use of a company's registered trademark in comparative advertising could constitute trademark infringement in Nigeria.¹²³ For example, the Nigerian Communications Commission Guidelines on Advertisement and Promotions provides that advertisements must not unfairly discredit, disparage or attack other products, services, advertisements or companies.¹²⁴ In addition, it further states that no licensee shall imitate the slogans or illustrations of another advertiser in such a manner as to mislead the consumer.¹²⁵

Under the Nigerian Trade Marks Act (NTMA), the position of the law on comparative advertising depends on whether such mark is registered under Part A or B of the trademark register. In order for a trade mark to fall within the requirements of being registrable and having capacity, it must be in Parts A and B of the Register.¹²⁶ Therefore, for marks to be registered under Part A, the owner is given the exclusive right to use the trademark in relation to those goods.¹²⁷ The Act further states that the exclusive right granted shall be deemed to be infringed by any person who, not being the proprietor of the trademark or what is known as a registered user, uses a mark identical with it or resembles it nearly as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered and in such manner as to reduce the use of the mark likely to be taken either as being used as a trademark;¹²⁸ or in a case in which the use is upon the goods or in physical relation thereto or in an advertising circular or their advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trademark or to goods with which such a person as aforesaid is connected in the course of trade.¹²⁹

¹²¹ Adejoke Oyewunmi, *Nigerian Law of Intellectual Property*. (University of Lagos Press and Bookshop Ltd Nigeria, 2015) 267

¹²² Lionel Bentley and Brad Sherman, *ibid.* 1072-1073

¹²³ Comparative Advertising in Nigeria: Keep your improvements to Yourself. <<https://nlipw.com/comparative-advertising-in-nigeria.../>> a

¹²⁴ Article 3, The Nigerian Communications Commission Guidelines on Advertisements and Promotions 2003

¹²⁵ Article 3(d), Nigerian Communications Commissions Guidelines, *ibid.*

¹²⁶ Sections 9 and 10, Nigerian Trade Marks Act, Laws of the Federation 2004

¹²⁷ Section 5, Nigerian Trade Marks Act, *ibid.*

¹²⁸ Section 5(2)(a), Nigerian Trade Marks Act, *ibid.*

¹²⁹ Section 5(2)(b), Nigerian Trade Marks Act, *ibid.*

It can be seen therefore that the use of a trademark registered under Part A of the NTMA by another in its advertisements, constitutes trademark infringement regardless of the content of the advertisement.¹³⁰

Furthermore, the NTMA deals with rights conferred by, and infringement of trademarks registered under Part B of the trademark register.¹³¹ This section¹³² grants similar rights as those under Section 5¹³³ which states that in any action for infringement, there will be no relief for the plaintiff if the defendant is able to establish to the satisfaction of the court that the use of which the plaintiff complains is not likely to deceive or cause confusion or to lead to the belief in a connection in the course of trade between the goods and some person entitled either as proprietor or as a registered user to use the trademark.¹³⁴ In other words, the plaintiff must be able to prove that the defendant is advertising the goods of the plaintiff in a manner likely to cause confusion to the consuming public. It can also be noted from the above provisions under the NTMA, that when a mark has been duly registered and included in the Register, no-body else has the right to advertise in like manner as this could amount to an infringement.

The NTMA, has failed to recognise other categories of trademark infringement which is essential to the development of the international trademark system. Also, the Act also ignores the fact that the world has moved from where it is and in its place, some marks have acquired reputation over a long period of time. The United Kingdom's coverage of trademark infringement for instance, is wider and hence, it has been noted that as a result of globalization, other marks have been accorded the relevant recognition. The UKTMA, thereby makes provision for the different instances on how trademark infringement can occur.¹³⁵

XI. Conclusion

Trademark is important in any society and the knowledge to be able to distinguish the goods from other goods and undertakings is very crucial. In Nigeria, there is the need for trademarks to be registered so that infringement of trademarks are protected in order to deter infringement occurrences. For a trademark to be recognised, it must be affixed on products as it would be difficult for the product to be easily identified without the symbol representing such a product. Once a trademark has been identified, and in order for the owner to retain consistent quality, there will be the greater need to protect the trademark. This can only be done by registering the mark. Without legal protection, it would be difficult for the user of a mark to appropriate the full value that the mark represents. Thus, Nigeria can benefit from the United Kingdom by adopting a new trademark legislation that is up-to-date to suit new trends in the trademark law. As a result of globalization and fast growing technological economy, the United Kingdom updated its trademark laws to protect owners' goods from infringement. It has also made provisions for different types of trademark infringement under the UKTMA. The NTMA does not make any provision or special section of how trademark infringement could occur. The UKTMA however, provides extensively for how trademark infringement can occur. Nigeria therefore, in an extreme measure of urgency has to reform its trademark law as intellectual property continues to play prominent role in global policy and economic development.

¹³⁰ Section 5(1) (b), Nigerian Trade Marks Act, *ibid*.

¹³¹ Section 6, Nigerian Trade Marks Act *ibid*.

¹³² Section 6, *ibid*.

¹³³ Nigerian Trade Marks Act, *ibid*

¹³⁴ Section 6(2) *ibid*.

¹³⁵ Section 10, United Kingdom Trade Marks Act Cap. 26, 1994