TAXATION AND THE LEGAL PROTECTION OF INDUSTRIAL DESIGNS IN NIGERIA APPRAISED ....

Abstract

The importance of new ideas, researches, designs and innovations can never be over-emphasised. And, to allow new ideas and inventions to flourish, some level of protection is required. The focus of this paper therefore is on the legal protection of industrial designs as an aspect of intellectual property and the tax aspect of same in Nigeria. Using doctrinal research method, the paper examines the constituents of the law regulating industrial design, the effectiveness of same as well as the attendant clogs and barriers in the effectiveness of the regulatory regimes of industrial designs in Nigeria. Finally, in order to guarantee good returns, fair competition and honest/best trade practices in the realm of taxation and intellectual property law in Nigeria, this paper recommends for more protective measure for industrial designers in Nigeria.

Keyword: Industrial designs, Legal protection, Nigeria, Taxation

1.0 Introduction

Industrial design just like any other forms of arts, is an aspect of intellectual property and same is fundamentally an expression of style or form that is distinct from a known work or already existing works of art. The importance of new ideas, inventions, researches, designs and innovation can never be over-emphasised. Therefore, in any economy be it developing or developed, for new ideas to flourished and have a positive impact on the populace, it needs some *quantum* of protection. To ensure this protection under the law, the creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them.[1] In short,

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The idea of this joint paper came from Adebayo Mutiu and he actually wrote part of it before his untimely death. May his soul rest in peace.

[1] "Intellectual property: protection and enforcement" <http://www.wto.org/english/thewtoe/whatis_e/tif_e/agram7_e.htm>accessedon > accessed on 24th June, 2010.

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industrial design which is an aspect of Intellectual Property (IP) has been in the forefront of development in most developed and also developing countries.[2]

Industrial designs consist of shape, configuration, and pattern or ornament that give manufactured articles eye appeal. We must note however that while the subject matter of industrial designs is relatively straight forward, the legal issues that come into play in protecting new designs are among the most complex in the field of intellectual property in Nigeria.

Structured into six sections, the next section is on the legal requirements for the registration of industrial designs in Nigeria. In section three, focus is on the protective measures on the proprietor of industrial designs in Nigeria while four discusses the tax aspect of industrial designs. Section five is on the remedies for the infringement of industrial designs as well as clogs and barriers to its effectiveness. The paper ends in the sixth section with conclusion and recommendations.

1.1 The Reception of the Law of Industrial Designs in Nigeria.

Until 1970 when the Patents and Designs Act[3] was passed, the United Kingdom Designs (Protection) Act was the law regulating industrial design in Nigeria. However the coming of the 1970 Act repealed the United Kingdom Designs (Protection) Act and it also provided for the original registration of industrial designs in Nigeria. Therefore, just like the Copyright law, Trademark and Patents law, the root of industrial designs law in Nigeria was from the received English law and the major aim of the law is to protect a design that is new or essentially new inventions, therefore, when so many consumer products are technically very similar, designs becomes an important distinguishing factor…..[4]

Globally, industrial designs are part and parcel of intellectual property.[5] According to Babafemi,[6] the history of designs registration begins with a scheme which took shape in the

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[2] Bankole Sodipo, "Nigeria is in need of urgent IP Policy", <www. Thisdaylive.com/Nigeria-is-in-urgent-need-of-an-intellectual-property-policy>, accessed on 1st May, 2015.

[3] See particularly, See 3 (1) of the Patents and Designs Act, Cap P2 Laws of the Federation of Nigeria, 2004.

[4] See Babafemi F.O. *Intellectual Property: The Law and Practice of Copyrights, Trademarks, Patents and Industrial Designs in Nigeria* (Ibadan, Justician Books Limited, 2007) p 412.

[5] See Article 2 (viii) of the World Intellectual Property organization wherein industrial designs is categorized as a component of intellectual property.

[6] Ibid quoting Sharianan and Bently, *The making of intellectual property law*, 1999.

late eighteenth century. As the law developed, the right of the owner of the registered design was treated as good against the entire world. The design therefore had to be shown to be novel at the priority date of the application. The application is also subject to an examination before registration.

Under the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement,[7] Industrial designs must be protected for at least 10 years.[8] In other words, owners of protected designs must be able to prevent manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design.[9]

2.0 THE LEGAL REQUIREMENTS FOR THE REGISTRATION OF INDUSTRIAL DESIGNS

Under the Nigerian Law, not every industrial design is registrable. Going by section 13(1) (a-b) of the Act,[10] there are conditions which an industrial designs must fulfill before it become registrable. Amongst these conditions are:

a. The Industrial Design must be new

b. The industrial design must not be contrary to public order and morality.

Newness and Originality:

On the definition of what is new and original, Duckley L.J. in the English case of *Dower Limited v Numberger*[11] held that:

> The word "original" contemplates that the person has originated something that by exercise of intellectual activity he has started an idea which has not occurred to anyone before that a particular pattern or shape or ornament may be rendered applicable to the particular articles to which he suggests that it shall be applied. If that state of things is satisfied, then the design will be original although the actual pattern or shape is or whatever it is which being considered is in the sense that it has existed with reference to another article before. The word 'new or original' involves the idea of novelty either in patter, shape or in the way in which an old pattern, shape or ornament is to be applied to some special subject matter.

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[7] Otherwise known as Uruguay Round Agreement, and for detail of this agreement especially on Intellectual property, visit <http://www.wto.wto.org/english.docs_e/legal_e/37-trips_04_ehtm#4>accessed on 27th July,2010.

[8] < http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm? Ehtm>. accessed on 27th July, 2010

[9] Ibid.

[10] Patent and Designs Act Cap P2 LFN 2004.

[11] (1910 Ch. D.2 at 29).

In other words, before something can be said to be new, it must have a distinctive feature that dichotomises it from the ones in vogue. Similarly, in the Nigeria case of *Sunday Uzokwe v Densy Industries (Nig) Ltd and Anor,*[12] the Court of Appeal amplified the two requirements that serve as condition precedent before industrial design can qualify for registration. In the words of the court

By virtue of section 13 (1) of the patents and Designs Act 1970, an industrial design is registrable if

1. It is new
2. It is not contrary to public order or morality.[13]

The section further provides that an industrial design is not new if before the date of application for registration, it has been made available to the public anywhere and it has at anytime by means of description, use or in any other way, unless it is shown to the satisfaction of the Registrar that the creator of the design could not have known that it had been made so available.[14]

A proviso in Section 13 (4) of the Act however provides that an industrial design shall not be deemed to have been made available to the public solely by reason of the fact that within the period of 6 months preceding the filling of the application for the registration, the creator has exhibited it in an official or officially recognized exhibition.[15]

Accordingly, apart from the singular exception of the design being exhibited in an official or officially recognized exhibition, within the period of six months, "publication" of the design will invalidate newness or originally and render the design unregistrable. According to Russell,[16] there is publication if the design has been disclosed to public as opposed to being kept secret. The question which has to be decided is, has the public been put in possession of the design? It is not, of course, necessary that every member of the public should possess the knowledge. It is sufficient and there will be publication if the knowledge was either

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[12] (2002) M J S C 37

[13] See also the case of *Controlled Plastic Limited v Black Horse Plastic Industries Limited* (1990) 1 HC 180

[14] Section 13 Patents and Designs Act, Cap P2 LFN 2004

[15] See also Russell Clarke *Copyright in Industrial Designs* (4th ed.) pp 41-42

[16] Ibid

1. available to members of the public, or
2. actually in fact shown and disclosed to the same individual member of the public who was under no obligation to keep it secret.[17]

Non Registrable Industrial Design

The Act does not state specifically which designs should be excluded from registration. The following should be excluded.

(a) Works of sculpture other than casts or models used or intended to be used as models or pattern to be multiplied by any industrial process.

(b) Wall plaques and medals

(c) Printed matter primarily of a literary or artistic character, including book jackets, calendars, certificates, coupons, dress making patterns, greeting cards, leaflets, maps, plans, postcards, stamps, trade advertisement, trade forms, and card transfer and the like.....[18]

2.1 Categories of Persons Who May Apply to Register an Industrial Design

(a) ***Statutory Creator*:** On this the Patents and Designs Act provides:

> ...the right to registration of an industrial design shall be vested in the statutory creator, that is to say the person, who whether or not he is the true creator, is first to file, or validly to claim a foreign priority for an application for the design.[19]

The Act however, goes on to provide that the true creator is entitled to be the named as such in the register and that this entitlement can be modified by contract.[20]

From the foregoing provision, it is quite clear that the first to file a registration obtains a right to register the design. One would have thought that this would leave a scope for fraud, but the Act adequately protects the true creator. It provides:

> If the essential elements of an application for the registration of an industrial design have been obtained by the purported applicant for the creation of another without the consent of the other person, both the obtaining of the essential elements of the filling of the application and in any consequent registration shall be deemed to be transferred to the person.[21]

b. ***Persons who Commission or employ others to create a Design:***

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[17] Ibid
[18] Babfemi, I O Op Cit , 428
[19] Section 14(1) of the Patents and Designs Act, Cap P2 LFN 2004
[20] Section 14(2) of the Patents and Designs Act, Cap P2 LFN 2004
[21] Section 14(3)of the Patents and Designs Act, Cap P2 LFN 2004

According to the Act,

> Where an industrial design is created in the course of employment or in the execution of a contact for the performance of a specified work, the ownership of the design shall be vested in the employer or, as the case may be, in the person who commissioned the work.[22]

Where the design has been commissioned or created in the course of a person's employment, that is, as part of the job of that person, his employer ought to have a right to register the design. It can be said in favour of the employer that he had engaged the employee to create that design.

However, if it was part of the employee's job to create and he created one without using any data belonging to his employer, the employee should obviously be entitled to register the design. On the other hand, if he has used the data or materials belonging to his employer, the right to register the design should be vested in the employer. The employer has the right to register the design; the only question which can arise is in respect of the apportionment of the benefits which accrues from the use of the design. The statutory provision is as follows:

Where the creator is an employee, then if his contract of employment does not require him to exercise any creative activity, but he has, in creating used the data or means that his employment has put at his disposal-

(a) he shall be entitled to fair remuneration taking into account his salary and the importance of the design which he has created and

(b) the entitlement itself is not modifiable by contract.[23]

c. ***Persons to whom the design has been assigned:*** A person's right in an application for the registration of a design, and a person's right in a registered design may be assigned.[24] Apart from an assignment; such rights may also be transferred by succession or held in joint ownership. An assignment under this Act must be in writing and signed by the parties'.[25]

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[22] Section 14(4)of the Patents and Designs Act, Cap P2 LFN 2004.
[23] Ibid.
[24] Section 24(1)of the Patents and Designs Act, Cap P2 LFN 2004.
[25] Section 24(2)of the Patents and Designs Act, Cap P2 LFN 2004.
[25] Section 24(2)of the Patents and Designs Act, Cap P2 LFN 2004.

Such assignment shall have no effect unless it has been registered and the prescribed fee paid.[26]

d. ***Persons to whom a Contractual license has been granted:*** The Act makes provisions that a design owner may by written contract grant a license to any person to exploit the design.[27]However, in the absence of such provision in the contract, any act or exploit by an unauthorized person in Nigeria would amount to an infringement on the right of the person who owns the license.[28]Some of the acts that constituted infringement in this regard are spelt out in section 19 of the Patents and Designs Act, 2004.

From the above, it appears that "writing" is not obligatory in respect of a contractual license. Thus, it follows then that an effective license may arise by parole agreement if acted upon.

The Act further provides that where a license has been granted, then it must be registered and will be of no effect until registration has been effected.[29]Unless the intention is expressed or implied in the license, a licensee is not free to assign a sub-license.[30]

On the other hand, a design owner, unless otherwise prohibited by the contract from the license, may grant further license to the other persons.[31] A contractual license may be general or limited in scope. A general contractual license is one that grants to the license the power to use the design in any manner and to any extent throughout the whole territory for which the design was granted.

2.2 Duration and Renewal

The registration of an industrial design is effective in the first instance for five years from the date of the application for registration.[32] The registration may also be renewed on the payment of a prescribed fee for further consecutive periods of five years.[33]

Accordingly, the registration of an industrial design can last for a period of fifteen years. The renewal fee must be paid within 12 months immediately preceding the renewal period to which it relates.[34] However, a period of grace of six months after the beginning of the

[26] Section 24(3)of the Patents and Designs Act, Cap P2 LFN 2004
[27] Section 23(1)(a)of the Patents and Designs Act, Cap P2 LFN 2004
[28] Section 23(1)(b)of the Patents and Designs Act, Cap P2 LFN 2004
[29] Section 23(2)(a)of the Patents and Designs Act, Cap P2 LFN 2004
[30] Section 23(4)(b)of the Patents and Designs Act, Cap P2 LFN 2004
[31] Section 23(4)(a)(I)of the Patents and Designs Act, Cap P2 LFN 2004
[32] Section 20(1)(a)of the Patents and Designs Act, Cap P2 LFN 2004
[33] Section 20(1)(b)of the Patents and Designs Act, Cap P2 LFN 2004
[34] Section 20(2)of the Patents and Designs Act, Cap P2 LFN 2004

renewal period will be allowed for the payment of the fee. If the fee and any required surcharge are paid within the period, the above statutory provision or renewal will have been complied with [32]

3.0 THE PROTECTIVE MEASURES ON THE PROPRIETOR OF INDUSTRIAL DESIGNS IN NIGERIA

The registration of an industry design confers upon the proprietor, the right to preclude any other person from doing any of the following acts:

a. Reproducing the design in the manufacture of a product

b. Importing, selling or utilizing for commercial purposes, a product of utilizing the design, and

c. Holding such a product for the purpose of selling it or of utilizing it for commercial purpose[36].

The Act further provides that the production will still be deemed to be unlawful even if it defers only in minor or in essential way from the design [37] The reproduction will also be deemed to be unlawful even if it concerns a type of product different from the type with which the design is concerned [38] The right conferred above extends only to acts for commercial or industrial purpose [39] This right shall however not extend to acts done in respect of a product incorporating a registered industrial design after the product has been lawfully sold in Nigeria.[40]

3.1 Statutory Exceptions to the Exclusive Rights to Use Industrial Design

(a) *Where the Product has been lawfully sold in Nigeria*

The combined effect of Section 13 (3), 19 (3) and 19 (2)(b) of the Patent and Designs Act, Cap, P2, LFN 2004, the right of exclusiveness conferred on the same Act, is taken away by Section 19(2) of the same Act, where the product has been lawfully sold in Nigeria before

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[32] Section 20(2)(b) & (b)of the Patents and Designs Act, Cap P2 LFN 2004 the Act also specifically stated in section 15(2)&(3) on detail procedure for registration

[36] See section 19(a)(c) of the Patents and Designs Act Cap P2 LFN 2004

[37] See section 19(2) of the Patents and Designs Act Cap P2 LFN 2004

[38] Ibid

[39] See section 19(2)(a)(b) of the Patents and Designs Act Cap P2 LFN 2004

[40] See section 19(2) of the Patents and Designs Act Cap P2 LFN 2004

the application for registration. See the case of *Peter E. Venture (Nig) Ltd v Gazasonner Ind. Ltd& Anor.*[41]

In this case, the appellant purchased from a company in Hong Kong, the Mould and Franchise for the manufacture and sale in Nigeria 275 lamp Burners. There upon it became the first manufacture thereof in Nigeria. After several years of test runs, the appellant took the requisite step to protect its industrial property in the manufacture by registering the trade mark and design, and was issued the Certificate of Registration of Design No. 5063 and 5064 in June 1994.

Based on an alleged infringement of the said design, the appellant sued the respondents to the Federal High Court, claiming among other relieves, an order of interlocutory injunction to restrain the respondents from infringing their registered designs pending the hearing determination of the suit. The trial judge dismissed the prayer for an interlocutory on the ground that the balance of convenience did not weigh in favour of the appellant. Dissatisfied, the appellant appealed to the Court of Appeal, which in determining the appeal construed Section (3) and 19(2)(a)(b) of the Patent and Design Act, 1970.

Unanimously, dismissing the appeal, Ubeazuonu JCA said inter alia:[42]

> It is clear from the averments in the aforementioned paragraphs of the reply that from 1987 the appellants had been importing and selling to the public, lamps with 275 lamp burner designs, which design it subsequently registered in 1994 under the Certificate of Registration of Design No.s 5603 &5604 dated 13th June 1994, in the light of its pleadings, the appellant is deprived of the legal right of exclusiveness to the 274 lamp burners design conferred on it by Section 19(1), as the result of the combined effect of Section 19(2) (b) and Section 13 (3) of the patents and Design Act 1971 as contained in Cap. 344 of the LFN 1990.

(b) ***Where the Design has been made available to the Public***

Where a design has been made available to the public, this will invalidate newness and render the design unregistrable.

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[41] (1998)6 N.W.L.R 619, see also *Oduntan v General Oil Ltd* (1995)4N.W.L.R(pt 60)
[42] Ibid at 633

3.2 Jurisdiction of the Courts and Infringement of Industrial Designs

3.2.1 *Court's jurisdiction*

The jurisdiction to hear and dispose of legal proceedings under the Patents and Designs Act is vested in the Federal High Court.[43] The Patents and Designs Act further provides that the provisions of the Trademarks Act which are applicable to legal proceedings shall also apply with the necessary modifications to the legal proceedings under the Patents and Designs Act.[44] Due to the technical and specialized nature of this area of the law, the Patents and Designs Act[45] provides that the Court which is hearing the proceedings under the Act may sit with and be advised by two assessors who have expert knowledge of a technological and economic nature of the issue in contention.

3.2.2 *Infringement of Industrial Design*

What constitutes an infringement of an Industrial Design?

The rights of a design owner or patentee is infringed if another person, without the authority or license of the proprietor of the design, does or causes the doing of an act which the other person is precluded from doing under the Act.[46]

An infringement of the right of the proprietor of a design is actionable at the suit of the proprietor of the design and in any action for such infringement, all such reliefs by way of damages, injunction, accounts or otherwise will be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of their proprietary rights.[47]

4.0. Tax Aspect of Industrial Designs in Nigeria

The Nigerian tax laws can broadly be divided into four categories; these are laws that regulate personal taxation, corporate taxation, transactional taxation and service taxation. What determines each classification are the nature and the domain each tax belongs. An industrial design is an asset as well as property. Thus to tax it, both Companies as well as Personal Income tax provisions apply. Personal Taxation is regulated in Nigeria by the

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[43] See section 26(1)of the Patents and Designs Act Cap P2 LFN 2004

[44] Ibid

[45] In section See section 26(2)of the Patents and Designs Act Cap P2 LFN 2004

[46] section 25(1)of the Patents and Designs Act Cap P2 LFN 2004 which also referred to section 6 & 9 of the Act wherein acts that amounted to infringement were listed.

[47] Section 25(2)of the Patents and Designs Act Cap P2 LFN 2004

Personal Income Tax Act CAP P8 Laws of Federation of Nigeria 2004 (as amended in 2011). By section 1 of the Act, the income –

a. of individual,[48] communities[49] and families[50] and
b. arising or due to a trustee[51] or estate, shall be determined under and be subject to the provision of the Personal Income Tax Act.

The law that regulates Corporate taxation in Nigeria is the Companies Income Tax Act.[52] Traditionally the physical assets of a company which includes buildings, machinery, financial assets and infrastructure are what normally determine the value and performance of the company. But in the present world, these factors have taken the back seat, leaving the front row for the intangible assets. Industrial designs as an aspect of intellectual property has made its way from the corridors of the laboratories to the expanse of plush corporate offices with varieties of tax reliefs.[53] Many new reliefs such as reliefs for high end television drama, computer games and animation and theatrical production have been established on the tax simplification blog's spreadsheet.[54] The market value of a company at present is evaluated not only by physical assets but also by the statistics of the patents, trade secrets, trademarks, copyrights or the designs they possess and as such, the transfers of these intellectual properties have a growing significance at the time of the assessment of taxes.

Intellectual property allows people to own their creativity and innovations in the same way that they can own physical properties and that is indeed the most valuable assets owned by a company or individual. Designing a product is never a child's play. According to Benjamin, such venture is exactly as:[55]

> *if a man empties his purse into his head,(in that circumstances) no man can take it away from him. An investment in knowledge always pays the best profit.*

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[48] Imposition of tax on individual is in section 2 and 3 (a) (b) of PITA.
[49] Imposition of tax on communities is provided in section 4 (a) (b) (c) of PITA.
[50] Imposition of tax on families is in section 5 of PITA.
[51] Imposition of tax on trustee is enshrined in section 6 of PITA.
[52] CAP C21 Laws of the Federation of Nigeria, 2004 (As Amended).
[53] Updated List of All Tax Reliefs. Available at < http://taxsimplificationblog.wordpress.com/2014/08/06/updatedlist-of -all-tax-reliefs/> accessed on 7th July, 2017.
[54] Ibid.
[55] Benjamin Franklin, Famous Quote and Sayings: If A Man Empties.... < www.librarycompany. org/.../ benjamin-franklin-writer-and-printer.htm> accessed on 3rd May 2017.

Industrial design for the purpose of taxation is classified as an intangible fixed asset acquired or created for the use on a continuing basis in the course of business activities.[56] An industrial design is a pivotal component of intellectual property. Thus, amongst the various stages that underlie intellectual property cycle of industrial designs includes the creation, development, acquisition and the utilisation. The sale of registered designs attracts different forms of taxation at each stage and may fall under a number of headings like business profits, fees for services, rents and royalties, dividends, profits and capital gains etc. Tax system currently also includes certain provisions designed to include the Research and Development (R&D) activities such as deductions for many of the R&D expenditures and under certain circumstances, even tax credits targeted at environmentally related innovations. Tax law also contains rules for the depreciation or amortization of the acquired industrial designs.[57] Tax treatment and tax incentives vary according to the type of taxation which in turn is determined by the mode of transfers and transactions. The sale and licensing of industrial designs which often generate ordinary income can also produce capital gains.

Intellectual Property (IP) protection which includes industrial designs has in recent times received major attention in the technologically advanced contemporary world. Various Nations are budgeting more in the area of protection of IP rights due to compulsions of international agreements as well as the Trade-Related Aspects of the Intellectual Property Rights (TRIPS) within the system of the World Trade Organization (WTO).[58] IP is an important component or head under international taxation. The cross border movement of multinational companies with their intellectual property rights (IPRs) offers much scope for taxation of these rights and thus a considerable income for technology receiving countries. Nigeria at various times opened its economy with a bundle of tax reductions in Customs and Excise Duties, lowering corporate tax and widening the tax net.[59]

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[56] Christensen, J. P. Coleman and S. Kapoor, "Tax Competition And Globalization: Making Tax Justice A Focus For Global Activism", paper presented at the *Global Tax Workshop*, Finland, November 2004

[57] Section 32 of the Income Tax Act; See also Ravindran Raja Sudhir, *Intellectual Property and Taxation*, (Lexis Nexis Butterworths, New Delhi 2007), pp. 9,10.

[58] Ravindran Raja Sudhir, *Intellectual Property and Taxation*, (Lexis Nexis Butterworths, New Delhi 2007) at p. 21.

[59] Obatosin O., Contribution of Intellectual Property to Nigerian Economy – Policies for Future Growth on <http://www.oecd.org/science/inno/2498389.pdf> accessed on 12th May, 2015.

Taxes on pollution also provide clear incentives to polluters to reduce emission and seek out cleaner alternatives. By placing taxes as a direct cost on environmental damage, it increases the incentives for firms to reduce such damage in order to reduce their costs and increase their profits.[60]

Putting a tax on pollution by way of environmental tax can induce a wide range of innovations to check pollution. In Switzerland for example, the imposition of tax on volatile organic compounds (VOC) resulted in small firms and companies vaporizing substances that result in VOC. Paints makers, printers and metal cleaners therefore became more careful. The end of pipe innovation was discovered which required using a scrubber, a device put on the end of smokestack to partially remove or clean the emissions. Taxation is more likely to bring about an innovation that would reduce the creation of pollution, rather than one that would specialize in cleaning after pollution. Also, tax on 'no emission' in Sweden led to the adoption of abatement technology to minimize or remove emission.[61]Environmental related taxation is still a relatively new trend which should be considered in enhancing a cleaner environment, even though it may not always lead to innovation or the adoption of new technologies.

In Nigeria where flaring of gas has become the order of the day in the Niger Delta region or where companies allow petroleum spillages that can destroy land, fish, water and lives,[62] taxation on the estimated volume of such pollutants or damages caused can be a way forward towards the drastic reduction of unnecessary destruction. The experience of other countries shows that, a combination of incentives and policies are needed to facilitate and increase inventiveness. Nigeria has a well-developed tax system with a three-tier federal structure, comprising Federal, State and Local Government.[63] Income tax comes under the category of direct taxes and is collected by the various States Governments, as delegates of the Federal Government.[64]

Other duties collected by the Federal government are Customs duties, Value Added Tax-VAT, Petroleum Profit Tax, Companies Income Tax etc. The taxes levied by the State

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[60] Ibid.
[61] Ibid.
[62] Asume Osuoka and Peter Roderick. Gas Flaring in Nigeria: A Human Rights Environmental and Economic Monstrosity <www.foe.co.uk/.../gas-flaring-in-nigeria/a-human-rights-environmental ...> accessed on 12th May, 2015.
[63] Section 4 Constitution of the Federal Republic of Nigeria.
[64] Taxes and levies Approved List of collection, 1998.

Governments are internal revenue. The local government bodies are empowered to levy tax on market, kiosks user charges for utilities like water supply, drainage, etc. Today in Nigeria, multinational companies are investing more and more in high technology industries.[65]

In advanced countries, revenue generation from industrial designs is subjected to taxation. However in Nigeria, there is yet to be a clear tax provision for the taxation of industrial design. What we have as of now is basically tax holiday provision for the pioneer inventor. To decide same, different rules apply to different situations. Thus as earlier said, tax treatment and tax incentives vary according to the type of taxation, which in turn is determined by the mode of transfers and transactions. The sale and licensing of industrial designs which often generate ordinary income can also produce capital gains.

Similarly, even though there are some provisions in different pieces of legislation for industrial design component of IP taxation, government officials and industries are unaware of the application and implication of the provisions and are therefore taken by storm when confronted by relevant tax authorities to make tax payments. In most of the cases there are different approaches taken by the federal and state governments on taxability of industrial designs.

The federal government of Nigeria is making efforts to ensure that the tax environment is investment friendly and has provided incentives to specific sectors to stimulate growth and investment for local and foreign investors and designers. The following incentives exist in Nigeria under the Companies Income Tax Act, for designers, creators and pioneers of ideas:[66]

a) Creation of a Film Industry Development Fund to be listed in 5th Schedule to the Companies Income Tax Act 2004, as amended.
b) Investment Tax credit
c) Deduction of reserve made out of profit for research and development
d) Tax exemption for income earned abroad and brought into Nigeria
e) Low company tax of 20% for small companies in preferred sectors[67]
f) Designers and Pioneer statutes to be granted tax holidays
g) Low tax treaty concession rate of 7.5% for foreign investors.

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[65] Obatosin, O. op.cit.
[66] CITA Cap C 21, Laws of the Federation of Nigeria, 2004 (as amended), Second Schedule to the Act, paragraphs 2-11.
[67] 1996 Fiscal Policy Analysis.

h) Accelerated capital allowance scheme.
i) Loss relief
j) Repatriation of net earnings outside Nigeria by foreign investors.
k) Allowance deduction of cost of film production

5.0 REMEDIES FOR THE INFRINGEMENT OF INDUSTRIAL DESIGNS AND CLOGS TO ITS EFFECTIVENESS IN NIGERIA

The legal implication of infringement upon the right of an industrial designer is as severe as infringement on the copyright of an author. In the realm of intellectual property, the infringement attracts severe punishment ranging from damages, injunctions, delivery up and account of profits which all serves as legal remedies available to the industrial designer whose work was copied.

5.1 Available Remedies

a) Damages

Damages in this circumstance may be special or general damages, exemplary or punitive damages, and normal damages. The issue of damages came up for discussion at the Supreme Court in the case of *Chanri & Co. (Nigeria) Ltd v Khawan.*[55]

In this case, the plaintiff sued in the High Court for the infringement of this registered design of certain cloth, claiming an injunction and damages. The judge granted the injunction and awarded £38, 323.10 as special damages and £3,000 as general damages. On appeal, the defendants admitted liability and did not complain of the injunction but complained of the amount of damages. The special damages awarded were made up of £38, 323.10 Loss on further consignment 12,000 pieces of cloths ordered. The £3,000 General damages were for loss over 1 5 years exclusive use of registered design and injury to goodwill and reputation due to the marketing of the inferior cloth by the defendant.

As to the award of £3,000 as general damages, the defendants submitted that it was inordinate having regard to the quantity of goods imported by them. The plaintiff however submitted that he was entitled to damages for the injury to the goodwill of his business and for the periods of renewal of his registration.

[55] (1965) ANLR.

The Supreme Court reviewed the award of damages in favour of the defendants stating inter alia:[69]

> 1. Damages must be rewarded upon consideration of all the facts of the case and the evidence led. Those or injury to goodwill should be fair and temperate, and those in respect for renewal periods for registration should have regard to the relative popularity of the line of goods and the probable duration if its popularity. In the Supreme Court's view, the trial judge erred by taking into account matters inordinately.
> 2. The plaintiff was entitled to €38, 323.10s for loss on 3,330 pieces and to damages for loss due to the defendant's selling 1,000 pieces, which he might have sold, and that he would be awarded €3,000 for profit on 12,000 pieces, ordered was improper and would be set aside
> 3. In regard to injury to goodwill, seeing that sale on that line of goods was not brisk, €500 will be adequate compensation and in regard to renewal periods of registration as the plaintiff had an injunction to protect him and the evidence on duration and popularity of that line of textile goods was not cogent, €200 will be enough.

b) Injunctions

The Court can also grant an order of injunction. In the case of *Black Horse Plastic Industry Ltd v Ceplas Industries (Nigeria) Ltd,*[70] the issue was whether the court should accede to the plaintiff/applicant's prayer by granting an order of interlocutory injunction. The Court agreed with the Plaintiffs contention that it has a legal right to protect and that the balance of convenience was in their favour.

c) Delivery Up

In appropriate circumstances the Court will grant this equitable relief. In the case of *Sumal Foods and Confectionary Ltd v Wholesale Processing Co. Ltd.*[71] and *Controlled Plastic Ltd v Black Horse Plastic Industries Ltd,*[72] the Court ordered the defendants to deliver up within seven days all the packets of chewing gum and large colanders in their possession which infringed on the design of the plaintiff.

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[69] Ibid at 166.
[70] (1998)FCHL 348 see also the case of *Peter E. Venture (Nig) Ltd v Gazasonner Ind. Ltd & Anor* (1998) 6 N.W.L.R 619 CA.
[71] (1990) FHCL 143 at 167.
[72] (1990) FHCL 180 at 199.

An account of profit is also available as an equitable remedy. It will be granted in appropriate circumstances. However, despite all these available remedies, the gravity with which industrial design is being infringed upon is still at an alarming rate in Nigeria. This is possible probably due to various clogs and barriers in the absolute protection of industrial design in Nigeria as well as limitation in the designer's knowledge on various legal protections/remedies available them.

5.2. Clogs and Barrier in the Absolute Protection of Industrial Designers in Nigeria

Lack of adequate regulatory agency to check the menace of copyright infringement in Nigeria is a clog in the protection of industrial design in Nigeria. Although the establishment of the Nigerian Copyright Commission is a good step aimed at reducing the illegal copying of person's work, however, the commission is not completely successful because of series of new methods devised by criminal to escape the long arm of the law.

Similarly, the absence of a distinct commission or agency that will be saddled with the responsibility of ensuring the protection of industrial designs materials in Nigeria is also a clog in the absolute protection of industrial designers in Nigeria. At present, the Nigerian Copyright Commission seems to be the sole agent in charge of both copyright and industrial designs matters, this a huge responsibility for the commission to effectively handle.

Not only that, the criminal tendency among some Nigerians is also a clog in the protection of industrial designers and their works in Nigeria. Many strategies and modes were being employed by the industrial designer's copier in a bid to duplicate or produce another person's work illegally. This act is greatly affecting the availability of original design work in Nigeria and its greatly affecting the economy negatively.[73]

The ambiguity in the wordings of section 14(1) which gives ownership of industrial design on any person... "who, whether or not he is the true creator, is first to file, or validly to claim a foreign priority for an application for the design" is also a clog in the absolute protection of industrial designer in Nigeria. The wordings of this section seems to be too open ended and a copier who is smart or fast can capitalized on this provision by being the first to file.

[73] For details of some of these effect see the Nigerian Tribune 3rd November, 2009.

6.0 CONCLUSION AND RECOMMENDATIONS

From the foregoing, it is clear that the legal scheme to protect industrial designs under the Nigerian law is typically premised on copyright and patent concepts. The basic foundation of the industrial design law is to provide two levels of protection for registered designs as well as its designers. However, despite the availability of legal protection for industrial designs in Nigeria, it is glaring from the above discussion that lots of infringements are still been committed in the industry due to lack of adequate enforcement mechanism on the part of the government as well as lack of knowledge on the part of the designer on the provision of the Industrial design Acts which they can rely on to fight their case. Due to these and other factors already discussed, the state of legal protection of industrial designs is highly ineffective and this is affecting the revenue generation from the supposed derivative income of industrial designers negatively. To check these shortcomings, the following are recommended:

Stiffer punishment for a breach of industrial design: More protective measures in form of stiffer punishment for a breach of industrial design are recommended. The essence of this is to deter any would be perpetrator from engaging in an act that may retard the progress of innovative ideas. There is need to impose punitive penalties on offenders so as to make it unattractive to violators. The owner of an infringed intellectual property does not feel fulfilled when the penalty for the infringement is too meagre to deter any would be offender. Apart from copyright which can seek criminal sanctions through NCC, Patent and Trademark Acts do not give criminal jurisdiction.

Amendment of the ambiguous words in section 14 (1) of the Industrial Designs Act: Amendment in form of removal of some ambiguous words in section 14 (1) of the Patent and Designs Act which vested the status of creator on the person ... "who, whether or not he is the true creator, is first to file, or validly to claim a foreign priority for an application for the design". The word, "whether or not he is the true creator" to these writers is ambiguous and such, should be removed or amended and the section to read as follow: "...Who, if certain is the true creator, and first to file..."

This amendment will adequately compliment the explanation on who a statutory creator is in the section 14 (3) of the Act.

Review of section 20 (1) (a) &(b) : Just like the industrial design agreement under the *TRIPS* which is protected for the minimum of 10 years, the benefit under the Nigerian industrial design as contained in section 20 (1) (a) &(b) is also recommended. Instead of 5 years as stated in the Act, the writer humbly recommend 10 years in the first instance from the date of application for registration and to be renewed on the payment of a prescribed fee for further consecutive periods of 10 years. This is to enable the designer to enjoy the full benefit of the fruit of his labour.

Quicker dispensation of cases relating to industrial designs: In order to facilitate a quicker dispensation of cases relating to infringement of industrial designs, this paper recommends for a concurrent jurisdiction of both Federal as well as state High Court on the issue of industrial designs.

Liaison effort with industrial design owners: Instead of copying another person's work, an industrial designer who is interested in another designers work should embark on a conscious effort at liaising with the designer whose design they are interested in either by contacting such designer personally, or his legal representative rather than copying the design without authority which will amount to infringement.

The need for overhauling of the Nigerian Tax Statute: To ensure adequate revenue generation from industrial designs income, there is the need for comprehensive overhauling of the Nigerian Tax statute to adequately reflect and provide for the taxability of the derivative income from industrial designs in Nigeria. Doing this will increase the revenue generation sources of the federation of Nigeria.