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THE RISING THREAT OF TRADEMARK INFRINGEMENT IN NIGERIA: **ENSURING PROTECTION FOR EVERYONE**

Towards the end of 2016, beauty entrepreneur and Chief Executive Officer of the House of Tara; Tara Fela-Durotoye launched the “ISTANDWITHTARA” campaign against intellectual property theft and counterfeiting in Nigeria. Tara discovered that her trademark was being infringed by counterfeiting of her beauty products. She immediately began a campaign against counterfeiting; by encouraging people to buy original Tara products and stand up against counterfeiting. The tenacity of her outcry soon garnered overwhelming support and the campaign hashtag became a trending topic on various social media platforms. Subsequently, in February 2017, stakeholders in other industries joined forces with Tara to launch the “UNITEDWESTAND” campaign with the same objectives as the “ISTANDWITHTARA” campaign.

These campaigns became necessary in the wake of the prevalence of trademark infringement in Nigeria which is evident by the dominance of counterfeit goods in the Nigerian market. A random survey reveals that consumers in Nigeria suffer the consequences of these counterfeit goods through negative experience including rapidly deteriorating health conditions, difference in taste, colour, consistency and potency (as the case may be) of drugs, food, beauty/cosmetic and house hold products, in comparison to goods of the original producer which the consumers have become accustomed to over time. Generally, consumers are unable to deduce that such goods are counterfeit at the point of purchase because the goods bear the exact mark, name and packaging of the original producer.

Trademark infringement and counterfeiting are ills which are incidental to one another. These ills pose several dangers to both the consumers and the producer. Consumers are

exposed to loss of funds/value for money, and where the goods in question are drugs or food products; sickness and in extreme cases death. For the producers, the dangers include loss of revenue and reputational damage. Nonetheless, it appears that the disposition of the Nigerian populace towards these ills is at best mere lip service, as we are yet to explore every legitimate avenue to curb the menace of trademark infringement and counterfeiting. This may be borne out of insufficient awareness regarding the benefits of trademark protection and the inherent dangers of trademark infringement. Hence, this article seeks to sensitize stakeholders including; the government, original producers and the general populace of the need to safeguard trademarks by reiterating the benefits for trademark protection.

"...a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person..."

NIGERIAN LAW PERSPECTIVE OF A TRADEMARK

The Nigerian Trade Marks Act (TMA) which is the law governing the registration and protection of trademarks in Nigeria defines a trademark as:

"... a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person..."

In addition, the TMA defines a mark to include **"a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof"**.

THE REAL BENEFICIARIES OF TRADEMARK PROTECTION

Generally, it is near impossible to encourage people to take positive action towards redressing a wrong when there is nothing at stake for them. Consequently, certain questions arise; who are the real beneficiaries of trademark protection, is there anything in it for the consumer, and what's in it for the producer?

THE CONSUMER

Information of Product's Origin - The unauthorized use of another's mark generates confusion in the mind of the consumer as to the origin of the goods or service in question. There is also the possibility of confusion of affiliation. That is, the consumer may not misconstrue that the goods of the subsequent user of the mark emanates from the original user, but he could believe that the subsequent user is sponsored, endorsed or commercially affiliated with the original user.

Trademarks serve an origin identification function and consequently shields consumers from the possibility of confusion regarding the origin of the goods or services.

Information of Product's Quality - A reputable mark becomes a quality indicator to consumers. By virtue of the prestige and goodwill built in the mark through consistent quality, a consumer would expect a certain level of quality from goods bearing a particular mark. The quality assurance function of a trademark is a facet of the origin identification function. The knowledge of the origin invokes the quality recognition. Therefore, both functions work in tandem.

The use of another's mark on goods not originating from the original user of the mark would cause disappointment for the consumer, as the quality would not be the same with that anticipated by the consumer. Trademark protection would avoid consumer disappointment.

Product Identification and Market Information

- Trademarks help consumers to identify goods which have previously proven satisfactory, thereby distinguishing them from those which proved otherwise. Therefore, a trademark enhances market information; it allows consumers to relate information such as, personal experience, recommendations and commercial advertising with the goods bearing the mark.

Proponents of trademark protection have stated that the role trademarks play in easy identification of quality goods is an incentive for firms to invest in quality goods and services. Therefore, trademark enhances competition.

THE PRODUCER

Goodwill and Retention of Custom - Trademarks are protected to secure the reputation and goodwill producers have built for their mark in the market. Goodwill is developed in the mind of the consumer as a result of consistency in the quality of the goods originating from a particular producer.

Confusion in respect of origin would affect the goodwill of the original user of the mark, because dissatisfaction of the consumer will be at the original user's expense, as the original mark would lose its integrity for as long as the consumer remains confused.

Advocates of trademark protection maintain that goodwill is, "[T]he magnetism that leads customers to return to the same business or to buy the same brand".

The reputation the mark has acquired is the goodwill, and the return of customers to the same producer as a consequence is the retention of custom. Trademark protection sustains the goodwill and the custom.

Advertisement – Trademarks advertise the goods or services of the producer on which they are affixed. A reputable mark becomes a significant means of advertisement.

Without prior commercial advertisement, a new range of goods in the market bearing a reputable mark is capable of attracting consumer awareness. This stems from consumer consciousness regarding the quality of the goods that bear that mark. The trademark markets the goods; such is the advertising power of trademarks. This advertising power is safeguarded by trademark protection.

Investment – Producers expend substantial sums; invest time and effort in bringing a mark to the attention of the public. The wherewithal committed to consistent quality of goods, which attracts goodwill is usually a huge expenditure. Accordingly, a trademark is an investment deserving of protection.

ALL HANDS ON DECK

Trademarks are obviously protected for the benefit of both the producer and the consumer. However, the regulatory framework

for trademark protection across the globe including Nigeria is such that consumer protection is secondary to that of the producer because only producers can bring an action to safeguard a right in a mark under extant trademark legislations. An aggrieved consumer's redress if any, would very likely lie in tort.

Nonetheless, it is evident that trademarks serve multiple functions which ought to be safeguarded, and more than ever it has become imperative for the various stakeholders to work in tandem to curb trademark infringement and the incidental prevalence of counterfeit goods in the Nigerian market.

The primary responsibility of curbing trademark infringement should be undertaken by the producers/original user of marks. Although registration of a mark is not a prerequisite for use of the mark, registration of a trademark bestows an exclusive right to use the mark on the owner, as well as the right to sue for unauthorised use of the mark. Thus, producers/original users of marks should ensure that their marks are registered at the Nigerian Trademarks, Patents and Designs Registry (the "Trademarks Registry"). Also, producers/original users of marks should take a cue from Tara and put up a relentless fight against trademark infringement. For instance, producers/original users of marks should adopt a user friendly and straightforward mechanism for consumers to report suspected cases of trademark infringement (as a result of purchase of counterfeit goods) to enable producers investigate the alleged infringement and subsequently enforce their rights.

The consumers also have a corresponding responsibility to be vigilant and exercise a civic responsibility by notifying producers/original users of marks of suspected cases of trademark infringement.

Finally, the government as a stakeholder; through responsible regulatory agencies such as the Trademarks Registry and the National Agency for Food and Drug Administration and Control as well as the Courts should prioritise timeous investigations and enforcement of trademark infringement claims.

Progressively, concerted effort of stakeholders would curb trademark infringement and facilitate the advancement of trademark protection in Nigeria.