

# Legal Regime of Trademark in the Nigeria Sports Industry

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## Abstract

A trademark is a distinctive sign that identifies certain goods or services produced or provided by an individual or a company and distinguishing same from others. Trade mark is a symbol or sign which differentiates the goods and services of one business from another one although they may operate in horizontal business within or without same community. Trademark is an indicative medium relied upon by consumers to create an imaginary link between a product on which such mark is used and its seller. Its major hallmark is its ability to differentiate the goods of one seller from those of others in the same line of business from one another. Trademark in Nigeria is governed by the Trade Marks Act, Cap T 13, Laws of the Federation of Nigeria 2004 (hereinafter referred to as Trademark Act) and the Trademark Regulations 1990. In contributing to existing literature, the paper examines the economic aspect of mark registration in the sports industry. It examines registrable marks and identifies the possibility of registration under existing treatise globally. The paper concludes with salient recommendations toward harnessing the economic aspect of trade mark registration in the Nigeria sports industry.

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## 1. Introduction

There are so many innovations in the sports industry today. Over the years, sporting activities in the society have grown into a multifaceted industry and ruthless business.<sup>1</sup> The investors in the sports industry generate money from broadcasting, live streaming of sporting events, advertisement, licensing, sponsorship, sale of souvenirs, crested jerseys, logo, marks, branding of slogan and songs to mention but few and hence the need to safeguard to avoid infringement. The registration of the marks brings the safeguard and the needed exclusivity.

Protecting intellectual property is crucial in the sports industry because of the recent development of commercialization of sports, media scrutiny and branding in the sports industry. Trade mark is one of the three ways to protect intellectual property especially in this borderless business world and the ever dynamic Sports industry. Trademark has also been defined as a registrable intellectual property right which is made up of symbol that is capable of being reproduced graphically and capable of differentiating good and services of one business from another such as the name, logo, slogan, domain name, shape, colour or sound used in business.<sup>2</sup>

In Nigeria, the principal legislation regulating the registration of trademarks is the Trade Marks Act. The Nigerian Trademark Act defines 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 a proprietor or as registered user to the mark.<sup>3</sup>

Trademark is defined by the United Kingdom as:<sup>4</sup>

Any sign capable of being represented graphically which is capable of distinguishing good and services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals, or the shape of goods or their packaging.

It is our contention that the above definition as provided for by the UK Trademark Act is not comprehensive as trademark may also be granted in respect of unique colours and/or colour combinations,

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<sup>1</sup> See E.O.Olowononi, 'Career Opportunities in the Global Sport Industry for Lawyers and the Challenges of Nigeria Legal Profession' [2013] *Institute of Human Capacity Development and Continuing Education*, 400.

<sup>2</sup> Nick De Marco QC, *Football and the Law* (UK: Bloomsbury Professional, 2018) 241.

<sup>3</sup> Nigerian Trademark Act Cap T13, LFN, 2004, s.67.

<sup>4</sup> United Kingdom Trademark Act (TMA), 1994, s.1(1).

sounds and smells.<sup>1</sup>

Historically, trademark came into existence when craftsmen reproduced their signatures, or “marks”, on their artistic works or products of a functional or practical nature. These marks have metamorphosed into today’s system of trademark registration and protection. Mark registration helps consumers to identify and purchase a product or service based on specific characteristics and qualities as indicated by its unique trademark.<sup>2</sup>

## 2. Economic Advantages of Registration of Marks

The benefits of trade mark in the sports industry cannot be overemphasised. Trademark registration ensures that the owners of marks have the exclusive right to use them to identify and authorize others to use them in return for payment. The period of protection varies, but a trademark can be renewed indefinitely upon payment of the corresponding fees.<sup>3</sup> Trademark registration is enforced by courts. The Federal High Court in Nigeria is the court of competent jurisdiction and has the authority to stop trademark infringement.<sup>4</sup>

The possibility of trademarks registration with the exclusivity rights promotes initiative, creativity and entrepreneurship. It helps to hinder the efforts of unfair competitors and counterfeiters in using similar distinctive signs to market inferior or different products or services within the industry.<sup>5</sup>

### 2.1 What Constitutes Registrable Marks?

Strictly speaking, trademarks may be one or a combination of words, letters and numerals and may consist of drawings, symbols or three-dimensional signs, such as the shape and packaging of goods. Some countries allow non-traditional marks to be registered for distinguishing features such as holograms, motion, colour and non-visible signs (sound, smell or taste).<sup>6</sup> It is observed that Nigeria presently does not provide for the registration of olfactory signs (smells), and audible signs otherwise known as non-traditional marks.

It is suggested that to avoid the need to register separate applications with each national or regional office, World Intellectual Property Organization (WIPO) administers an international registration system for trademarks. The Madrid Agreement Concerning the International Registration of Marks and the Madrid Protocol are the two treaties governing the system. By reference to nationality, domicile or establishment to a country, a party to one or both of these treaties may, on the basis of a registration with the trademark office of that country obtain an international registration. This registration will take effect in some or all of the other countries of the Madrid Union. It is pertinent to note that Nigeria is not a signatory to any of these treaties.

For the purpose of registration of trademarks, Nigerian law classifies goods into the thirty-four International classes; and services into eleven International classes. It is important to note that unlike in other jurisdictions, use is not a prerequisite for registration of a trade mark in Nigeria.<sup>7</sup> Nigeria shared similar provisions with the British statutory provisions on nature of trademarks.<sup>8</sup>

### 2.2 Trade Marks in the Sports Industry

Trademark is one the most commonly created intellectual property rights associated with sports. The ability to protect and distinguish one sport team/club from another is crucial with respect to brand building and development. The names, titles, tagline, badge, jersey, slogans and logos of professional sports teams can be registered as trademarks.<sup>9</sup> It may be argued that since similar provisions exists with respect to trademark; Nigerian professional sports teams should be able to exploit intellectual property protection. Sports events organisers also protect their competitions via trademark.<sup>10</sup>

Sportsmen and women can apply to register trademarks comprising their names, slogan, signature etc. but such rights are only enforceable in the UK if the court is of the opinion that such signs are capable of distinguishing goods and services of one undertaking from those of another. Former football players like Alan Shearer and Ryan Giggs registered their names as trademark, Mark Hughes was unable to register. The reason

<sup>1</sup>Simon Gardener *et al*, Sport Law (2<sup>nd</sup> edn., Cavendish Publishing Limited, 2001), 442.

<sup>2</sup> World Intellectual Property Organization, ‘What is Intellectual Property?’ <[https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)> Accessed 25 November 2020

<sup>3</sup> F.O. Babafemi Intellectual Property: *The Law And Practice Of Copyright, Trademarks, Patents And Industrial Designs In Nigeria* (1<sup>st</sup> edition, Justinian Books Limited 2007), 189

<sup>4</sup> CFRN, 1999, s.25

<sup>5</sup> World intellectual Property Organization (n 6)

<sup>6</sup> Ibid.

<sup>7</sup>IfeyinwaUfondu, ‘A Guide to Trademark Registration in Nigeria’ 2018 <<http://www.mondaq.com/Nigeria/x/757232/Trademark/A+Guide+To+Trademark+Registration+In+Nigeria>>accessed 25 November 2020.

<sup>8</sup>*Alliance International Limited v SaamKolo International Enterprises Limited* (2010) 13 NWLR (Pt121), 270 (CA); see also Trademark Act (n 4), s.57.

<sup>9</sup>Ugochukwu Johnson Amadi, ‘Intellectual Property Rights in Sports: A Trick or Two Nigeria can Learn from the Global Game’ [2017] *African Sports Law and Business Bulletin* <<http://www.africansportslawjournal.com/Amadi.pdf>> accessed 25/11/2020 accessed 25 November 2020.

<sup>10</sup> Ibid.

adduced for the rejection was that his name was not distinctive enough.<sup>1</sup>

### 3. Registered and Unregistered Marks

Trademarks that meet the requirement for registration may be registered in a Public Registry/Trade Marks Registry. The registration of the trade mark enables the mark gains legal protection against similar or competing marks. Note that where a mark does not meet registration requirement but such mark has been in regular use over a period of time to distinguish the particular goods and services of an individual or company, it will enjoy some level of legal protection under the principal of unfair competition i.e. passing off under the English law. These kinds of unqualified marks that are given recognition due to long usage are known as common law marks.<sup>2</sup>

A trade mark though distinctive can still be rejected base on the following grounds:

- a) Misleading
- b) Descriptive
- c) Geographical
- d) Immoral
- e) Public policy
- f) Specially protected emblem

#### 3.1 Sporting Trademark

Where the basic condition of distinctiveness is satisfied, it is possible, in principle, to register sporting slogans and mottoes as trademarks. When a quote from a news conference or a postgame interview becomes popular among fans or when an athlete thinks it could be valuable in the future. It is registered as trademark. In jurisdiction like the United States, Patent and Trademark Office usually rules against others using terms that include person's name or image, even if another entity registered for a trademark before the athlete. Note that to trademark a name, a registrant must show that it can be used in commerce to identify his or her brand or team.

For example, Eric Cantona, the former Manchester United player trademarked the slogan 'Ooh aah Cantona'.<sup>3</sup> Tim Tebow trademarked 'Tebowing', Jeremy Lin trademarked 'Linsanity', Manny Ramirez trademarked 'Manny being Manny'. In 2012, a reporter asked Bryce Harper what kind of beer he usually celebrated with after a game. Bryce said, "That is a clown question, bro," and the simple phrase began trending on twitter and became so popular that Harper filed for trademark the next day.<sup>4</sup>

Trademark registration adds to the economic value of sports teams and sports events. It is submitted that Trademarks may be utilised by sports teams not only to protect the jerseys worn by their individual teams during competitions but also other items that may be associated with or bear the trademark or logos; for instance 'Champions Rise' was the tag line of FIFA 2019. These taglines, slogans etc. aids in establishing a worldwide brand value for the sports event. Once a brand is established, huge profits may be encored through live broadcasting and advertising.

In some cases, trademarks have been filed on the name of the players considering their popularity and brand image. One such example can be the name of the famous football player "David Beckham," who has filed for trademark on his own name and earned millions of dollars through innumerable sponsorship deals and endorsements. Trademarks are utilized by sports teams not only to protect the jerseys worn by their individual teams during competitions but also other items that may be associated with or bear the trademark or logos; for instance Kolkata Knight Riders in India apart from being a cricket team exploits their trademark as represented by its team badge is the sale of t-shirts, caps and so on.<sup>5</sup> It is argued that a professional sport team can register its trademark under multiple classes.<sup>6</sup> It is observed for instance that Real Madrid has registered its trademark under sixteen (16) classes as international trademark. This is possible because trademarks can also be registered in multiple jurisdictions and therefore can be enforced over different jurisdictions and this crucial as sports teams have fan bases that spread across the world.<sup>7</sup>

There are statutory remedies in cases of encroachment that exist within EU, United Kingdom, United States, India and Nigeria.<sup>8</sup> Trademark registration is important for sports teams but however, if a trademark is not registered a party can rely on the common Law principle of passing-off subject to proving the trinity or three basic requirements for establishing passing-off.<sup>9</sup> A claimant must prove the trinity with respect to establishing

<sup>1</sup>Ibid.

<sup>2</sup> Simon Gardener *et al* (n 5), 443.

<sup>3</sup>ibid, 445.

<sup>4</sup>Sport Trademarks: Everything You Need to Know', <<https://www.upcounsel.com/sport-trademarks>> accessed 4 January 2021.

<sup>5</sup>Paras Sharma, 'Intellectual Property Rights in Sports' [2020] vol.8 (3) | Volume 8, *IJCRT* 2582.

<sup>6</sup>Ugochukwu Johnson Amadi, (n.13).

<sup>7</sup>Ibid.

<sup>8</sup>Ibid.

<sup>9</sup>The three basic requirements are famously referred to as the classical 'trinity' and was first enunciated in the House of Lords decision

passing-off and these are namely: the claimant's goodwill, misrepresentation and damages. It is submitted that these three must be proved by the claimant conjunctively. This implies that these entire three elements must exist in the act that is alleged to be passing-off. The sport team, association and event organizer must establish certain level of goodwill or reputation and built up over a period of time.<sup>1</sup> It may seem that goodwill implies that the claimant which in this case would be a stakeholder in sport needs to establish that its reputation or goodwill has been built up for years or at least a long period of time. It is submitted that only well-established sporting associations and/or event organizers and professional sports teams could rely on passing off. However, in *Elida Gibbs Ltd v Colgate Palmolive Ltd*<sup>2</sup> and *Stannard v Reay*,<sup>3</sup> the courts held inter alia that even if an organisation has been in business for a relatively short period of time it could still rely on passing off. This therefore implies that relatively new sports associations and/or sports events organizers and professional sports teams in Nigeria can rely on the passing off. In order to rely on passing off a professional sports team, sports association and/or event organizer must establish that another sports team, event organizer or other party has misrepresented its product.<sup>4</sup> It has been argued that it is immaterial whether misrepresentation was done intentionally with respect to establishing a claim in passing off. It is also crucial that the misrepresentation in question has caused or has at least the likelihood of causing confusion in the minds of not just the consumer (fans) but in the in the minds of business associates like sponsors for example.<sup>5</sup>

The last limb in the proof of passing off is establishing that there has been some level of damage or at least there is the probability of damage.<sup>6</sup> It is mandatory that in the sports industry that sports teams and sports association and/or sports events organizers and sports professionals must prove that as a result of the unauthorized exploitation their goodwill has resulted in potential damage such as loss of profits, loss of goodwill or damage to public perception of the of the sports brand. A further protection of trademark resides in anti-dilution laws, which are limited to very popular and well-known trademarks. When a trademark is very popular and well-known it is given prime importance under the trademark laws due to ready association of the human mind with those products. It has been argued for instance that if an automobile industry manufactures a sport sedan and sells under the trademark Manchester United it would be in default of anti-dilution laws as it would amount to a dilution of the Manchester United trademark.<sup>7</sup> In Nigeria like in most Common Law jurisdictions statutory protection for regular trademark exists and the doctrine of passing off is also in force as well. However, the courts have not interpreted the provisions of the Nigerian Trademark Act to cover trademark within the context of the sporting industry though this may stem from the fact that sports jurisprudence in Nigeria is not as active as it is in other jurisdictions like the UK, US, Germany, etc.<sup>8</sup>

It is our contention therefore that sports stakeholders in the Nigerian sports industry must exploit the provisions of the Trademark Act<sup>9</sup> and the Common Law doctrine of passing off to maximise the benefits of Trade Mark.<sup>10</sup>

#### 4. Conclusion and Recommendation

In conclusion, in order to maximize economic returns, good management and practice of intellectual property is indispensable in the Sport industry. We agree with De Werra that intellectual property has much to learn from and with the sports industry. Conversely, the sports industry has much to gain from the key values of Intellectual Property Law.<sup>11</sup>

There is strong need for sports law experts in Intellectual Property in Nigeria so as to promote Intellectual Property practices in the sports industry. It is contended that clubs' proprietors, sport investors, players, media, sponsors and critical stakeholders commit resources into proper licencing, documentation, patenting and registration of marks. This will ensure security of marks, minimise infringement and enhance a claim of compensation in cases of violation. It will further protect sporting assets as well as keenly protecting intellectual property from abuse. Sports Law remains an amalgamation of various laws which may be argued as disjunctive. It is our contention that unity is achievable despite the diversity.<sup>12</sup>

It is pertinent to note that Nigeria is not a signatory to any of the treaties pertaining to international

in *Reckitt Products Ltd v Borden Inc.* [1990] 1 WLR 491.

<sup>1</sup>Ugochukwu Johnson Amadi, (n.13).

<sup>2</sup>[1983] FSR 94.

<sup>3</sup>[1967] RPC 589.

<sup>4</sup>*Coombe International v Scholl* [1977] RPC 1.

<sup>5</sup>Ugochukwu Johnson Amadi, (n 13).

<sup>6</sup>*Tattinger SA v Allbev Ltd* [1993] FSR 641,

<sup>7</sup>Ugochukwu Johnson Amadi, (n 13).

<sup>8</sup> Ibid.

<sup>9</sup> LFN Cap. T13 2004.

<sup>10</sup> Ibid.

<sup>11</sup>see De Werra Sports and Intellectual Property.

<sup>12</sup>See E.O.Olowononi, 'Expanding the Frontier of Legal Training for Budding Lawyers: A Case for Sport Law' (2011) (2) *LPR*, 126.

registration system for trademark. It is therefore submitted that the policy makers must fashion in place treaties and protocols for international system for registration of trademarks.

It is recommended that the legal contractual agreements must be in place guarding all forms of intellectual property created in sporting events, teams, individual players etc., so as to safeguard all the stakeholders and their financial interests.<sup>1</sup>

It is also recommended that there should be legal framework for total registrations of sporting events, emblems, songs and so on in Nigeria for protecting sporting events.

It is recommended that Nigeria Football Federation should come up with a sports business model which could help in building an effective Intellectual property rights strategy that could address the use of patents, trademarks, designs and other forms of IP in football industry in particular. The Football industry is a highly sophisticated subset of the sport industry with diverse registrable marks.<sup>2</sup>The game of football has been transformed to commercialized activity in which financial investors support teams with the aim of making financial profit and operate a ruthless business operation.<sup>3</sup>

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## Notes

Note 1. See E.O.Olowononi, 'Career Opportunities in the Global Sport Industry for Lawyers and the Challenges of Nigeria Legal Profession' [2013]Institute of Human Capacity Development and Continuing Education, 400.

Note 2. Nick De Marco QC, *Football and the Law* (UK: Bloomsbury Professional, 2018), 241

Note 3. Nigerian Trademark Act Cap T13, LFN, 2004, s.67

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Note 5. Simon Gardener et al, *Sport Law* (2nd edn., Cavendish Publishing Limited, 2001), 442

Note 6. World intellectual Property Organization, 'What is Intellectual Property'?

<sup>1</sup> See E. O. Olowononi, 'Legal Analysis of Rules of Football Transfer Market and Lessons for Africa' (2021) *African Sports Law and Business Bulletin* <http://www.africansportslawjournal.com/Amadi.pdf> accessed 6 July 2020.

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<sup>3</sup> See J. Walvin, "The Only Game: Football in Our Times" (Pearson Education, 2001). While the idea of saying "a ruthless business" may be a bit exaggerated; this writer does agree with the author because of the billions of dollars involved, the various sponsorship deals and merchandising, television rights, endorsement, advertisement, licensing, subversions and other numerous commercial activities. Player transfers, sales of gadgets, souvenirs and tickets, matches, sales of broadcasting rights, player salaries and member fees are all examples of economic activities within the football sphere which all carry economic implications. Hence, it leaves no doubt that sports and economics overlap.

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Note 9. World intellectual Property Organization (n 6)

Note 10. Ibid.

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Note 18. 'Sport Trademarks: Everything You Need to Know', <<https://www.upcounsel.com/sport-trademarks>> accessed 4 January 2021

Note 19. Paras Sharma, 'Intellectual Property Rights in Sports' [2020] vol.8 (3) | Volume 8, IJCRT2582

Note 20. Ugochukwu Johnson Amadi, (n.13)

Note 21. ibid

Note 22. ibid

Note 23. The three basic requirements are famously referred to as the classical 'trinity' and was first enunciated in the House of Lords decision in *Reckitt Products Ltd v Borden Inc.* [1990] 1 WLR 491

Note 24. Ugochukwu Johnson Amadi, (n.13)

Note 25. [1983] FSR 94

Note 26. [1967] RPC 589

Note 27. *Coombe International v Scholl* [1977] RPC 1

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Note 32. LFN Cap. T13 2004

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Note 34. See De Werra Sports and Intellectual Property

Note 35. E.O.Olowononi, 'Expanding the Frontier of Legal Training for Budding Lawyers: A Case for Sport Law' (2011) (2) LPR, 126

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Note 38. See J. Walvin, "The Only Game: Football in Our Times" (Pearson Education, 2001). While the idea of saying "a ruthless business" may be a bit exaggerated; this writer does agree with the author because of the billions of dollars involved, the various sponsorship deals and merchandising, television rights, endorsement, advertisement, licensing, subversions and other numerous commercial activities. Player transfers, sales of gadgets, souvenirs and tickets, matches, sales of broadcasting rights, player salaries and member fees are all examples of economic activities within the football sphere which all carry economic implications. Hence, it leaves no doubt that sports and economics overlap.