# COMBATING PIRACY THROUGH OPTICAL DISC PLANT REGULATION IN NIGERIA: PROSPECTS AND CHALLENGES

*By*

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## Introduction

A contemporary challenge confronting copyright law and indeed copyright based industries globally is the emergence and application of digital technology in the late 20th century. Although digital technology has turned into reality the promise of innovative ways of distributing creative works on a global scale and the making of higher quality copies of works such as sound recordings, film products, and even books at lower unit cost, it also has a serious down side for content producers in the copyright based industries. Previous worries about widespread piracy[1] may have proven to be exaggerated, but with the advent of digital technology and its application in optical disc production and storage in the optical media, the magnitude of the threat has become unprecedented.

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1. Piracy in this context include sound recording and films that has been reproduced for commercial gain without the authorisation of the original rights owners.Pirate recordings include: bootleg (unauthorised recordings of live perfomances/ broadcasts; counterfeit recordings which are copied or distributed without authority, and which are packaged to resemble the original as closely as possible;and pirate which are copied or distributed without authority, and which are usually packaged differerently to the original. They are often compilations made up of recordings by several differnt artist.

In Nigeria, incidence of optical disc piracy and other intellectual property theft is no longer a new phenomenon. Indeed, it has been in the country for quite some time with a number of factors responsible for it. Prominent among was the absence of regulatory framework like the optical disc plant regulation that can provide the platform for an effective campaign against piracy before 2006.[2] Nigeria joined the league of countries making concerted effort to check the menace of optical disc piracy with the introduction of the Optical Disc Plants Regulation in 2007

2. Causes and motivations for piracy are myriad in Nigeria One of such reasons is the fact that long as the history of piracy appears to be in Nigeria, there has been no concerted effort until recent times to track and check it. Another factor is that the Nigerian Copyright Commission at inception was established basically as an administrative agency and not an enforcement agency. By the time the mandate of the Commission was expanded to enforcement in the mid-1990s, no institutional structure was put in place for enforcement. Others are scarcity and high cost of genuine products, abuse of digital technology, inadequate enforcement of intellectual property laws, poverty, laziness, inadequate awareness about copyright piracy and its ills, poor distribution networks of needed creative products, slow judicial system, poor funding of regulatory agencies and rancorous and uncooperative attitude of practitioners in the creative industries. See Adebambo A. Adewopo: "The Gain is More than the Pain: Cost Benefit Perspective of the Regulation and Control of Copyright Based Industries in Nigeria". Paper presented at the International symposium on economic crimes 31 August – 7 September 2008 at Jesus College University of Cambridge United Kingdom. p.6.

as part of the Strategic Action against Piracy (STRAP)[3] policy of the Nigerian Copyright Commission.[4] This paper aims to appraise the Regulation, highlighting its prospects as an antipiracy instrument, and the challenges that can hinder its effective implementation. To put this in proper perspective however, there is need to examine the nature of optical disc technology and the regulatory dynamics of its use.

## Optical Disc Digital Technology and the Imperative of Regulation and Control

Although there are varieties of optical disc technology media which includes format such as CD (compact disc), CD ROM (compact disc-read only memory), CD-R (compact disc- recordable), DVD (digital video disc), VCD (video compact disc), LD (laser disc) SCVD (super video compact disc) and other media or devices on which digital information may be stored using laser technology, the manufacturing process is basically a five-step process in which commercial CDs are replicated in mass quantities

3. The Strategic Action against Piracy (STRAP) intiative of the Nigerian Copyright Commission, was launched on 3rd May 2005, by former President Olusegun Obasanjo. It deploys three basic intervention components, namely: public enlightenment, proactive enforcement and the administration of rights. See Adewole A. Adedeji, "The Strategic Action Against Piracy (STRAP) Policy in Nigeria", *WIPO-WTO Colloquium Papers: Research Papers from the WIPO-WTO Colloquium for Teachers of Intellectual Property Law 2010.* (Geneva: WIPO-WTO, 2011), pp. 107-118. See also, *The Strategic Action Against Piracy Working Document and Action Plan,* (Abuja: Nigerian Copyright Commission, 2005).
4. Other countries where this type of regulation was introduced include; Malaysia, HongKong, the Phillipines, and Indonesia, among others.

using a master version created from a source recording.[5] This involved premastering, mastering, electroforming or preparing the stampers and injection moulding.[6]

The process starts with pre-mastering which involves the embodiment of data on a disc that at this stage is converted by the replicator from a non-image ready format to an image ready format on to a CD-R (one off, gold master) or 8mm tape. After the customer's approval, the CD-R goes on to mastering to be cut. Mastering entails the preparation of a glass substrate with dried photoresist called the glass master which is then placed into the laser beam recorder (LBR)[7] that is connected to a computer[8]. The data image source of CD-R or 8mm tape is then loaded into the computer from where it is read and

5. Anju Jain"Optical Disc Legislation: A New Tool to Combat Digital Piracy ? *(2002) 5 SCC (Jour) 26*. Available online at *http://www.ebc-india.com/lawyer/articles/2002v5a5.htm*,. Accessed 16/06/2011. p.2
6. "Compact Disc Manufacturing" – Wikipedia the free encylopedia. Available online at *http://en.wikipedia.org/wiki/Compact _Disc_ manufacturing* accessed 01/08/2011.p.1.
7. The Laser Beam Recorder (LBR) uses a laser to write the information with a wavelenght and final lens numerical aperture (NA) chosen to produce the required pit size on the master blank. LBR uses one of two recording techniques; photoresist and non-photoresist mastering. Photoresist also comes in two variations; positive photoresist and negative photoresist. See "Compact Disc Manufacturing" *op.cit.*,p.2.
8. Glass mastering is perfomed in a class 100 (ISO 5) or better room or a self-enclosed clean environment within the mastering system. Contaminants introduces during critical stages of manufacturing like dust, pollen, hair, or smoke, can cause sufficient errors to make a master unusable. But once successfully completed, a CD master will be less susceptible to the effects of these contaminants. "Compact Disc Manufacturing", *op.cit.,* p.2.

recorded to the photoresist[9] on the glass master using the laser. The metalised glass master is then sent unto electroforming or preparing the stamper. Electroforming[10] stage involves the placing of the metalised glass master into a tank of nickel sulphamate solution from which a layer of nickel that is grown onto the stamper is removed and called the "father". The "father" is a reverse image of the data and can be used to stamp discs. However, because any damage to the father would involve going through the whole process again, the "father" is put through the same process of electroforming and a new nickel layer is grown called the "mother". And from the mother again, through the process of electroforming, another nickel layer called the "stamper" is prepared. Like the "father", the stamper is a reverse image of the data and is used to create the discs. Injection moulding which is the final stage in the manufacturing process, involves placing the stamper after punching the centre and polishing into an injection moulding machine which is connected to a continuous

9. This is a light sensitive material used to create pits and lands on the CD master blank. When exposed to laser light, the photoresist undergoes a chemical reaction which hardens it. The xeposed area is then soaked in a developer solution which removes the exposed positive photoresist or the unexposed negative photoresist. "Compact Disc Manufacturing", *op.cit.*, p.2.
10. Electroforming occurs in "Matrix" which is the name used for the elcetroforming process in many plants. It is also a class (ISO 5) or better clean room. The data (music, computer data, etc) on the metalised glass master is extremely easy to damage and must be transferred to a tougher form for use in the injection moulding equipment which actually produces the end-product optical discs. "Compact Disc Manufacturing" *Op.cit.*, p.3.

supply of polycarbonate.[11] CD moulding machines are specifically designed high temperature polycarbonate injection moulders. Through a process of heating, compression and cooling the discs are prepared with the stamping of the data on it. After stamping, which takes about 5-10 seconds; the discs are metallised,[12]

11. This is the plastic materials from which compact discs are produced. Replication process involves the drying of clear polycarbonate pellets at around 130 degree Celcius for three hours depending on the optical grade resin that is in use and are the fed via vacuum transport into one end of the injection moulder's barrel and re moved into the injection chamber via a large screw inside the barrel. The barrel wrapped with heater bands ranging in temperature from ca 210 to 320 degrees Celcius melts the polycarbonate. When the mould is closed the screw moved forward to inject molten plastic into the mould cavity. When the mould is full, cool water running through mould halves, outside the cavity, cools the palstice so it somewhat solidifies. The entire process from the mould closing, injection and opening again takes approximately 3 to 5 seconds. The moulded disc is removed from the mould by vacuum handling unto the fininshing line infeed conveyor, or cooling station, in preparation for metallisation. At this point the discs are clear and contain all the digital information desired but cannot be played as they do not have reflective layer. "Compact Disc Manufacturing". *Op.cit.*, p.5.
12. The metaliser is a small chamber the disc pass into one at a time. It contains a metal target which is usually an alloy of mostly aluminium and small amounts of other metals. When the disc is rotated into the processing position by a swivel arm in the vacuum chamber, a small dose of argon gas is injected into the process chamber and a 700 volt DC electrical current at up to 20 kW is applied to the target. This produces a plasma from the target, and the plasma vapour is deposited onto the disc. The metal coats the data side of the disc (upper surface) covering the pit and lands. This metal layer is the reflective surface which acn be seen on the reverse (non-side label) of a CD. This thin layer of metal is subject to corrosion from various contaminants and so is protected by a thin layer of lacquer. "Optical Disc Manufacturing". *Op. cit.*, p. 5.

coated[13] and dried, after which they proceed for printing and distribution.

Although the process described above may appear technically complex, CDs are relatively inexpensive to produce and easy to distribute. It is these two features that makes them highly vulnerable to piracy. The content they carry is particularly vulnerable because an infinite number of perfect of copies in terms of quality can be made just from one original and unlike in the past when analogue recording technologies such as audio and video cassettes, had built in check on widespread piracy through the degeneration of recording quality with each new generation, the quality of a digital pirated disc is as high as the original, and the production facility can churn out a huge volume of illegal discs in a relatively short time at a relatively low cost.[14] An optical discs plant moulding line for instance, has an average output of 550 – 900 discs per hour.

Furthermore, the success of the CD as a medium for carrying copyright content and subsequent DVD has resulted in an explosion of the global capacity to produce optical disc products. This explosion is not only driven by the ever growing worldwide demand for copyrighted high-tech entertainment and educational products, but also by

13. This is done through rapid spinining where UV curable lacquer is dispensed unto the newly metallised layer with a very thin layer (approx. 70 nm)coats. After the lacquer is applied, the discs pass under a high intensity UV lamp which cures the lacquer rapidly. The lacquer also provides a surface for a label, generally screen printed or offset printed. "Optical Disc Manufacturing". *Op.cit.*, p.5.
14. Laura Lee and J.K. Richardson: "New Tools for Fighting Optical Disc Piracy". Available online at: *http://www.america.gov/st/econ-english/2008/April/20080429225332mylee0.41005*.Accessed14/05/2010.

improvement in technology and the increased availability of relatively cheap second-hand machinery for production. Added to this, is the tighter profit margin facing the manufacturing sector which inevitably has raised the stakes of survival in the midst of tough global competition.[15] All these factors have combined to make optical disc piracy with its potential of generating billions of dollars, though frequently linked with organised crime, an attractive business.[16]

Moreover, increasingly, blank recordable optical media are also used for commercial optical CD duplication colloquially referred to as "burning". "Burning" is the process of assembling source material – video, audio, or other data- into the proper logical volume format to be recorded unto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants.[17] The process takes anywhere between a few minutes and half an hour, depending on the speed of the CD Burner which is the device used to write data to a recordable CD. Though initially sold for hundreds of dollars when introduced in the mid-90s, used models and

15. See, "Good Business Practices for Optical Disc Mastering and Manufacturing Plants". Available online at *www.ifpi.org/content/library/good_business_practices.pdf.Accessed* on 16/08/2011, p.1.
16. *Ibid* p.1.
17. Note that CD mastering is different from "burning", as the pits and lands of mastered CD are moulded into CD blank, rather than being "burn marks" in a dye layer (in CD-Rs) or areas with changed physical characteristics (in CD-RWs), In addition, CD burners write data sequentially, while a CD pressing plant "writes" the entire disc in one physical stamping operation. See "Optical Disc Authoring" – Wikipedia, the free encyclopaedia. Available online at *http://en.wikipedia.org/wiki/Optical_disc_authoring accessed 09/08 /2001* p.1.

even varieties of new ones can now be acquired cheaply and easily. CD burners arguably helped kick-start the era of music and gaming piracy, as one of the first applications was cheaply copying music and game.[18] Today the ubiquitous equipment has become an important tool in the hand of "small time" pirates. Although an average CD Burner does not have the huge capacity of an optical disc plant, but when the fact that an average CDs can hold slightly under 700MB (Megabytes) of data, which works out to about 11 hours of compressed music or a few hours of medium- quality video[19] is taken into consideration, the capacity of this source as a significant source of pirated CD in Nigeria would not be under estimated.

Gradually, pirated CDs, VCDs, CD-ROMs and DVDs, CD-Rs and DVD-Rs containing protected music, sound recordings, audiovisual works, business and entertainment software, books and journals are decimating the market for legitimate products.[20] And as all sectors of the copyright industry increasingly use a common set of optical disc media to distribute their products worldwide, piracy of optical disc product today continues to cause major loses

18. What is CD Burner available online at *http://www.wisegeek.com/what-is-a-cd-burner.htm. 09/08/2011* p.11.
19. *Ibid.*
20. It is instructive to note that the growth in the number and capacity of optical disc factories around the globe has been staggering. Based on a survey conducted by International Intellectual Property Alliance (IIPA) of optical disc production in 80 countries/ territories the following facts have emmerged: There were as many as 1,077 optical disc production plants in 2006 with a combine production lines of at least 8,928. While total production capacity worldwide was estimated at more than 31.8 billion discs per year in 2006. Also note that Nigeria alongside China, Russia, Thailand, Indonesia, were identified as key optical disc piracy production trouble spots. See *www.ifpi.org.*

to every industry that depends on copyright protection such as movie, music, and software industries, with an overall negative impact of loss in investment, innovations, income generation and employment opportunity.

It is instructive to note that until recently, piracy globally has been fought through the traditional protections offered under national copyright laws which are still available in today's digital environment. Copyright laws generally protects content and its unauthorised copying and distribution to ensure that there are proper incentives for companies to invest in producing and marketing of copyrighted works.[21] The Nigerian Copyright Act[22] for instance, grants producers of works protected by copyright[23] such as sound recordings various rights in their recordings.[24] These rights include the exclusive right to reproduce the recordings for commercial purpose[25] and also to distribute,[26] import and export[27] such copies. It is these rights that enable law enforcement agencies like the Nigerian Copyright Commission[28] to initiate criminal action against anyone who replicate or distribute music for

21. Other rationales include the natural law principle that every individual has a property right in his ideas just as the proprietorial rights to tangible goods and property are recognised.
22. Cap C28 Laws of the Federation 2004 hereinafter referred to as the Act.
23. The works protected by copyright are itemised in section 6 (1) (a)(b)(c) (2)(3),7, 8,&9 of the Act.
24. Section 7 of the Act.
25. Section 7 (1)(a) *ibid.*
26. Section 7 (1)(b) *ibid.*
27. Section 15 (1)(b) *ibid.*
28. The Nigerian Copyright Commission is the government agency in Nigeria statutorily mandated to criminally prosecutes copyright offenders in Nigeria. See Section 38 (1) (3) of the Act.

instance without the permission of the right owner.[29] They also allow right owners such as record producers to take civil actions[30] to recover compensation for damages[31] suffered as a result of music piracy.[32] An important implication of this is that an optical disc plant and its management can incur liability for substantial damages and or face criminal prosecution if it manufactures and delivers orders for music discs for instance without ensuring that it has a "mechanical licence" from a collecting society and that the customer has the right to reproduce the sound recordings concerned. This applies also to stampers.

Optical disc piracy however comes with new challenges exposing the inadequacies of the protection offered content and its distribution by copyright law and international treaties.[33] One of such and by far the most prominent is their ineffectiveness in combating illegal reproduction of works at the manufacturing stage in the absence of a control or regulatory mechanism for the supervision of optical media production which is simpler and more efficient than civil or criminal measures for

29. Section 20 of the Act
30. Section 16 *ibid.*
31. Section 16 (1) *ibid.*
32. Note however that it is not just the rights of the producers of music that optical disc plants need to consider. Before music discs may be manufactured, it may be necessary to obtain the authorisation of the holder of the rights in the composition (often adminstered by an author's collecting society), as well as the holder of the rights in the sound recording (usually a record company).
33. Anju Jain. *Op.cit.*, p.1.

addressing copyright violations.[34] Therefore, in order to tackle this fast growing crisis effectively, the development of an innovative tool for controlling piracy at the source of production becomes imperative. This led to the adoption of specialised regulatory framework in the form of Optical Disc Plant Regulations in many countries.

Optical disc regulation is a preventive type of law aimed at encouraging owners of CD optical disc production business to produce legitimate licensed goods and not infringe other person's copyright. More importantly, it serves as a measure to effectively and efficiently combat copyright piracy through the controlling the manufacturing of optical disc products at the source.[35] In controlling manufacturing of unlicensed optical disc which is major source of piracy, the Regulation has not replaced alternative protection to that offered by Copyright or other forms of intellectual property. Optical disc law would regulate manufacturing of optical disc itself, while copyright laws would control reproduction, distribution and communication of the content or the intellectual property embodied in the optical discs.[36] The regulatory

34. "Effective Practices for Regulations Related to Optical Disc Production". Paper 2003/AMM/025, Agenda Item: V.2 submitted by the United States on behalf of the APEC/IPEG at the fiteenth Asia Pacific Economic Cooperation (APEC) Ministerial Meeting Bangkok, Thailand 17-18 October 2003, p.1 See Adebambo Adewopo, "Effectivemess of Remedies for Copyright Infringement in Nigeria" in *Landmark Cases and Essays in Honour of Kehinde Sofola SAN* (2007) Olusegun Yerokun, Fagbohun & Oyende (Ed.), Lagos, Chapter 12, page 137.
35. Say Sujintaya: "National Responses to Optical Media Piracy: ASEAN's Experiences". Paper presented at the ASEAN-USPTO Optical Media Regulation Workshop 21 October, 2004 at Arnoma Hotel Bangkok, Thailand.p.9.
36. Anju Jain, *op.cit.*, p.5.

control of replicating business evidenced in the Optical Disc Regulation therefore underscores an 'important feature(s) of modern system of governance' more particularly in the present context of copyright governance.[37]

## Overview of the Nigeria's Optical Disc Regulation 2006

The Copyright (Optical Discs Plants) Regulation 2006[38] generally empowers the Nigerian Copyright Commission to monitor the operations of all optical discs manufacturers and replicating plants, as well as the imports of such products with a view to checking the rising tide of piracy through optical medium in the country.[39] The Regulation is designed to enable the Commission to monitor and control the production, importation and export of optical discs, production parts, raw materials and manufacturing equipments in Nigeria, with a view to entrenching high standards of copyright practice in relevant industries.[40] The Regulation was introduced by the Nigerian Copyright Commission 2007 pursuant to section 46 (4) of the Copyright Act which empowers it "to make regulations specifying the conditions necessary for the operations of a business involving the production, public exhibition, hiring

37. See Adebambo Adewopo: 'Intellectual Property Regime and the Global Financial Crisis: Lessons from Nigeria *Journal of Money Laundering Control, Vol. 14, No. 2*, 2011, 83.
38. Hereinafter referred to as the Regulation. Its in Government Notice No. 47, Federal Republic of Nigeria Official Gazette No. 63, Vol. 93 of 20th December, 2006.
39. Guidelines for the Copyright (Optical Discs Plants) Regulation 2006 (Abuja: Nigerian Copyright Commission, 2006), p.1.
40. *Ibid.*

or rental of any work in which copyright subsists under the Act". It is instructive to note that the backbone of the regulation is the licensing regime it introduced which has the key features of registration and licensing, identification and coding, criminal remedies and enforcement which are hereafter considered.

**Registration and Licensing**

The essence of the licensing measure is to enable the government to exercise control over the production of optical disc manufacturers. Since the manufacturing process entails mastering, preparation of the stampers and replication, installation of manufacturing equipments at the factory, importation and exportation of the mastering and replication equipments, polycarbonates and other materials used to manufacture optical disc, licensing arrangement could facilitate the checking of piracy at the manufacturing stage if well implemented.[41]

The licensing regime under the Regulation is in the form of registration of manufacturers of optical disc. Any person who desires to manufacture optical disc or production parts in Nigeria is duty bound to register with the Nigerian Copyright Commission.[42] Application for registration must be accompanied by payment of the prescribed fees and an undertaking by the applicant to comply with provision of the Regulation and not violate any copyright, neighbouring right or any other intellectual property right.[43]

41. Anju Jain, *op.cit.*, p.2.
42. Section 1(1) of the Regulation. Registration forms are available in the Commissions Head Office in Abuja and other designated Zonal offices.
43. See Section 1(1)(2)(3) of the Regulation.

As part of the pre-licensing exercise usually carried out by officials of the Commission, the premises of the plant would be visited to ensure that applicants are in genuine business of optical disc manufacturing or replication. During the exercise, information about the operations of the plant and its machineries would be cross-checked with those supplied by the applicant company in its application form.[44] If there is no objection to the application of the applicant after the pre-licensing check by officers of the Commission, the company would be registered by the Commission and a personal identification number and certificate would be given.[45] Registration under the Regulation is only valid for a year but it is renewable annually.[46]

44. See *Guidelines for the copyright (Optical Discs Plants) Regulation 2006, ibid*, p.2. Such information include the exact address and location of the plant, the number of lines of production installed capacity of the plant, the number been used for production, the average consumption of polycarbonate and where they are sourced, the place of manufacturing of the machines used in the production of CDs and DVDs, the place where the stampers are kept and the officer in charge, and samples of the CDs produced to have evidence of the fingerprints on the mould in the usptream section of the plant etc. These information are necessary and strategic for effective monitoring of compliance with the provisions of the Regulation.
45. Section 1 (4) of the Regulation. Information on the certificate are stated in the Third Schedule to the Regulation. It include name and address of the registered person, address of each premises used to manufacture optical disc orproduction as well as ancilliary facility, what the registration is granted for either production of optical disc or production parts or both,, any manufacturers code allocated or sissued to the applicant if prsecribed by the Commission, the duration of the registration and any other conditions that may be imposed by the Commission.
46. Section 1 (5) of the Regulation.

For importers and exporters of optical discs, production parts or equipment, each consignment of import or export must be approved by the Commission. The Commission is duty bound to maintain a register and record of operations registered under the regulations.[47] Ostensibly recognising importation from abroad as one the major source of optical disc in the Nigerian market, the Regulation makes provision for the control of imports and exports of any optical disc, production part or manufacturing equipment. Prior approval of the Commission must be obtained before this can be lawfully done.[48]

The Regulation also extend to all forms of commercial optical disc replication by making the recording of copyrighted materials owned by others on recordable optical discs for the purposes of sale, hire , lease or other commercial dealing without registering with the Commission prior to engaging in such business or activity unlawful.[49] By this provision the Commission aims at regulating commercial optical CD replication. Consequently, commercial duplication of optical discs by anyone without been duly registered with the Commission becomes a punishable offence.

47. Section 1(6) *ibid.*
48. Application for approval shall be accompanied by payment of prescribed fees stipulated in the Fourth Schedule and shall be in Form B of the First Schedule to the Regulation.Separate approval is reqiured for each exportations and or importations of optical discs, equipments or production parts. Section 2 (1) (3) of the Regulation.
49. Section 3 of the Regulation. Applicant is required prior to engaging in the duplication to give its names and addresses of person reponsible and also the address and premises at which the business of duplication will take place.

**Obligations of Registered Persons**

All registered person under the Regulation has obligation to do the following failure of which attracts dire consequences. These include the adaptation and use of manufacturer's code which is only permitted to be done as may be prescribed by the Commission. By virtue of this provision, all optical discs manufacturing equipment or moulds are required to adapt and apply the appropriate manufacturer's code as may be prescribed by the Commission. Each registered person is also duty bound to cause optical disc and each production part manufactured by it to be marked with the appropriate manufacturer's code.[50] The forgery of manufacturer's code or false application of same to an optical disc or the possession of equipment for the purpose of forging a manufacturer's code is prohibited, *afortiori*, the selling, offering for sale, or distribution of production part that is not marked with the appropriate manufacturer's code.[51]

Another important obligation of the registered person is the keeping of records and samples, display of certificate of registration, notification of change in particulars and filing of annual returns.[52] The records relating to every machinery and raw materials purchased, leased, sold, disposed of and raw materials the importation and exportation of which requires approval of the Commission under the Regulation with the date and nature of the transaction shall be kept. Also records with respect to orders for production and that of production are to be

50. Section 4 and 5 of the Regulation.
51. Section 5 (2)(3) *ibid.*
52. Section 6 and 8 *ibid.*

kept.[53] Records of and samples of works produced shall be made available for inspection by officers of the Commission and periodic returns shall be made as may be required in prescribed manner by the Commission.[54]

Furthermore, the registered person is expected to keep for a period of not less than 12 months from the date of producing a sample of each optical disc title manufactured by it and one copy in a retrievable form of the content of each of the production part manufactured by it[55]. The registered person also has the duty to display the registration certificate in a conspicuous location in each registered premises and shall notify the Commission within 30 days of any change in the particulars set out in application for the registration or registration certificate granted under the Regulation.[56]

Moreover the registered person is duty bound to cooperate with Copyright Inspectors[57] carrying out inspection of any registered premises to monitor compliance by providing unrestricted access to the

53. See Guidelines for the Copyright (Optical Discs Plants) Regulation 2006, *op.cit*., pp. 3-6.
54. Section 6 (2) of the Regulation.
55. Section 6 (3)(a)(b) *ibid*.
56. The notification shall be delivered to the Director-General of the Commission at the Head Office in Abuja. See section 8 (1)(2)(3) of the Regulation.
57. Copyright Inspectors are appointed by the Commission under its general enforcement powers contained in the Copyright Act Cap C28 Laws of the Federation of Nigeria 2004. They have powers analogous to that of a police officer to handle copyright infringement cases. They can consequently investigate any allegation or complaint of piracy, arrest copyright offenders and carry out inspection of any place allegedly used for piracy activities or illegal production of copyright works. In addition, they can embark on raids and seizure of pirated materials and prosecute suspected pirates in court. See section 38 of the Act.

premises, plants and equipments, optical disc moulds, signal processor e.t.c, and provide and explain any records the Inspector wishes to check, in addition to supplying four samples each of the discs moulded by each mould that has been used or could be used for the manufacturing of optical discs.[58] It is important to note that the Regulation permits inspection of premises to be done by Copyright Inspectors with participation of experts, professional organisations and association of right owners or by the latter groups alone. This provision is important because effective antipiracy operation may not be feasible in some cases without the presence and active involvement of right owners and professionals. Requests in this respect must however be made to the Commission who can grant it without prior notice on such terms as it may deem fit.[59]

**Use of Source Identification Code**

A significant achievement in the implementation of the Regulation is the introduction of mandatory inscription of Source Identification (SID) Code on all optical discs produced in Nigeria in May 2010[60] pursuant to section 7 of the Regulation.[61] The Code is made up of characters which may be numeric or alphabets (or a combination of both),

58. Section 9(2) of the Regulation.
59. Section 9 (4)(5) *ibid.*
60. The SID code is a joint initiative between International Federation of Phonographic Industries (IFPI) and Phillips Consumers Electronics. IFPI represents the interest of producers of phonograms in the music and film industries globally. It collaborates with national associations in the two industries to articulate practical measures for control of piracy and other intellectual property abuses. See *www.ifpi.org.*
61. It empowers the Commission upon giving due notice to required the application of SID Codes or any other prescribed anti-piracy device on every optical disc produced.

identifying the registered number of the Laser Beam Recorder (LBR) used in making the stamper or a registered number of the mould used to press the disc. Since its global introduction in the 1994, it has proven to be a useful tool in tracking and tracing the source of optical discs mastering and replications thus becoming the industry standard for indicating the source of optical disc mastering and replication.[62] SID Code provides an optical disc production facility with the means to identify all discs mastered and or replicated in its plant, and the individual LBR signal processor or mould that produced a particular stamper or disc.[63] Each production facility in implementing the SID Code is issued with its own unique code(s). Although the code was developed for use on the CD format, it is now being used for both CDs and High Density disc formats, which include DVDs and Super Audio CDs.

The SID Code was developed jointly by rights owners and the optical disc industry, primarily as an anti-piracy tool.[64] Over the years, it has become popular with optical disc plants. This may not be unconnected with the fact that it enables companies to offer customers complete security for their products thus making it a vital ingredient in corporate growth strategy as more and more customers insist on having their discs produced exclusively in SID Code compliant plants.[65] In addition, the SID Code also fulfils the useful purpose of quality control through

62. See SID Code Implementation Guide. Available online at *http://www.ifpi.org/content/library/sid-code-implementation-guide. Accessed 16/08/2011.p.* 2.
63. *Ibid.*
64. *Ibid.*
65. *Ibid.*

allowing the immediate identification of mould or LBR that produced a particular disc. This has the advantage of facilitating tracing the source of discs. This no doubt is particularly useful in tackling cross-border or international optical disc piracy where an organisation based in one country may place orders for the replication of pirate discs in a second country and distribute them in several others.[66]

**Enforcement Powers**

Apart from the general enforcement powers conferred on the Commission by the Copyright Act,[67] the Regulation contain specific provisions empowering the Commission to refuse the registration of an applicant, and to suspend and revoke registration already done in section 10. The Commission may refuse to issue or renew a registration if the applicant or any of its principal officers[68] three years prior to the lodging of the application been convicted for an offence under the Regulation or relating to a copyright work.[69] Application may also be refused if the applicant has been involved in the production or manufacturing production parts of optical disc or engaged in the commercial optical disc duplication without registration or if for any reason, the applicant is not considered fit to be registered by the Commission.[70]

66. Although the SID Code was introduced on a purely voluntary basis, it has now been implemented in over 80 percent of the world's optical disc plants, representing over 90 percent of worldwide optical disc manufacturing capacity. The Codes are issued by Philips Electronics. See SID Code Implementation Guide, *op. cit*., p.3.
67. See section 38 of the Act.
68. Principal officers in this regard include directors, manager and, secretary.Section 10 (1) of the Regulation.
69. Section 10 (1) (a) *ibid*
70. Section 10 (b) (c) *ibid.*

The power to suspend registration can be exercised by the Commission on three grounds. These are: if the register person has been charged with an offence under the Regulation or involved in an infringement of copyright, trademark and neighbouring right or an offence in these regards has been committed in the registered premises and the offender has not been identified or another person has been charged with an offence committed in the registered premises.[71] The third power of the Commission is revocation of registration. It can be exercised if the registered person has been convicted of an offence under the Regulation or offences bordering on copyright, neighbouring right and trademark or any other person has been convicted of offences under the Regulation or bordering on copyright and neighbouring rights and trademarks violation.[72] The Commission also has the power to terminate registration if the registered person ceases permanently to manufacture optical discs or production parts in the registered premises.[73] The Commission under the Regulation also have the power to close down plants. This power is exercisable whenever there has been refusal to issue or renew registration, or if the registration has been revoked and the plant continues operation without registration,[74] and also if any person manufacturing optical discs or production parts has been convicted of an offence under the Regulations or of an offence bordering on copyright or neighbouring right infringement.[75]

71. Section 10 (2) (a) (b) (c) *ibid.*
72. Section 10 (3) (a) (b) *ibid.*
73. Section 10 (4) *ibid.*
74. Section 10 (6) *ibid.*
75. Section 10 (5) *ibid.*

The Regulation prescribes penalties for the contravention of any of its provisions. Where no penalty for an infraction is stated, it stipulates a penalty of a term of imprisonment not exceeding three years or a fine of N1, 000,000.00 or both.[76]This subsection more or less appears like an omnibus penalty provision. Section 11 (2) (a) (b) however create specific offences. These are refusal on the part of the registered person to cause each optical disc and each production part it manufactured in Nigeria to be marked with the appropriate manufacturer's code as may be prescribed by the Commission,[77] produce any book documents, records and file returns as required, and the giving of any information or explanation as may be stipulated by the Regulation.[78] The second offence is given if false or misleading information or explanation in the making of returns with respect to the conduct of the business under the Regulation.[79] Penalty for these offences on conviction is a term of imprisonment not less than two years and a fine of not less than N500, 000.00 for refusal. For every false information given, it is N10, 000.00. And in cases where the offence continues, the fine would not be more than N10, 000. 00 for every day until it abates.[80]

## The Prospects and Challenges of the Regulation

After series of constructive interactions with stakeholders in the optical disc manufacturing industry, implementation of the Regulation commenced almost immediately with its

76. Section 11 (1) *ibid.*
77. This is pursuant to section 5 (1) *ibid.*
78. Section 11 (2)(a) (i-iii) *ibid.*
79. Section 11 (2)(b) (i-ii) *ibid.*
80. Section 11 (2) *ibid.*

introduction in May 2007, eliciting great hope for curtailing piracy of optical disc products in Nigeria. Existing optical disc plants were asked to register and regularise their operations. So far 13 of such plants have been registered by the Commission.[81] Obviously impressed with this development, the United States removed Nigeria from its Special 301 List in 2007 and 2008.[82] In the course of conducting post registration unscheduled inspection exercise of the plants, two of the plants suspected of violating provisions of the Regulation were shut down by the Commission.[83]

It instructive to note that the inspection exercise that led to the shutting down of these two plants were conducted during the night hours.[84] Prior to this development, all inspections conducted on these plants during day time by Copyright Inspectors from the Commission, always revealed full compliance with the Regulations. This implies that some of the optical disc plants have been producing both legitimate and illegitimate

81. This information was obtained in an interview with a senior official the Regulatory Department of the Commission in Abuja.
82. See "Yar'Adua Commends NCC over US Delisting of Nigeria", *Saturday Champion* Septenber 24, 2007 p.9 and Oscarline Onwuemenyi, "Nigeria gets Reprieve from Piracy List," *The Punch* Monday, September 24, 2007, p.9 The Special 301 List is part of the yearly report prepared by the office of the US trade representatives. It contains the names of countries where the pirating of United States products are endemic. It identifies countries alleged to provide inadequate protection of US intellectual property rights. A listing can ultimately lead to trade snactions against alledged offenders. See Wikipedia, "Office of the US Trade Representative". Available online at *http://en.wikipedia.org/wiki/ Office _of _ the_Unted_States_ Trade_ Representative* accessed 17/09/2010;
83. This information was given during an interview with a senior official of the Enforcement Department of the Commission in Abuja.
84. *Ibid.*

products particularly at night. The illegal products are usually evacuated from the factory and delivered to customers before day break when the factory would then commence the production of legitimate products. Illegal stampers and other related materials are kept outside the factory and since the plants are usually on 24 hours of the day, their night operations could not arouse any reasonable suspicion more so when daylight official inspection that were conducted normally yielded negative finding of illegal activities.[85]

A point in fact worth noting from this is that constant and persistent monitoring of compliance with the provision of the Regulation through unscheduled inspection by the Commission any hour of the day is critical to the success of the Regulation in facilitating the realisation of its main objective of curbing optical disc piracy at the manufacturing stage. Considering the large number of registered optical disc plant in Nigeria, this not only requires huge financial resources but also, the deployment of large number of highly skilled officers trained in every aspect of enforcement of the Regulation both of which are in limited supply at the Commission.[86] This situation no doubt has serious limiting impact on the capacity of the Commission to effectively enforce the Regulation thus hindering the realisation of its full

85. *Ibid.*

86. Underfunding and inadequate manpower in terms of quality and numbers has been two main challenges confronting the Nigerian Commission in the fulfillment of its statutory mandate. See Adebambo Adewopo, "Intellectual Property Rights Protection and Legal Practice in Nigeria: Challenges and Propsects". Paper presented at the August 2008 Nigerian Bar Association Annual Conference held at the International Conference Centre Abuja.

potentials as an effective anti- piracy tool. Furthermore, the difficulty in conducting investigation as a result of the location of the factory is another challenge the Commission is grappling with in its enforcement. Some of the optical disc manufacturing plants are sited in remote areas where surveillance is difficult. The premises of these plants are usually fenced with high walls and huge gates constantly locked, with close circuit television cameras installed at strategic locations to monitor any movement around the premises. In addition, high level security guards are usually employed and instructed to be on alert for strangers. Moreover, the low numbers of employees of these factories which more often than not are of Asian nationalities many of whom would claim inability to communicate in English on been arrested and interrogated thus making information gathering more difficult.[87]

It is instructive to note that the implementation of the Regulation so far has focused mainly on the big optical disc plants. The Commission has not commenced the implementation of the Regulation's provisions on commercial CD duplicators or "burning". The machinery for implementing the provision of the Regulation with respect to this source has not been put into place by the Commission.[88] Consequently, so far no one has been registered and none has been prosecuted for operating without registration in contravention of the Regulation since May 2007 when it came into force, despite the ubiquitous presence of the operators of commercial CD duplicators. While the focus and attention given the optical disc plants due to their huge capacity is

87. Information to this effect was given in an interview with a senior official of the Regulatory Department of the Commission in Abuja.
88. *Ibid.*

commendable, there is no doubt that CD Burning has become an important and significant source of pirated CDs, VCDs, DVDs, CD-ROMs, CD-Rs, and DVD-Rs thus constituting a serious threat to the copyright based industries.

Increasingly, blank recordable optical media are being used to "burn" unauthorised copies of protected music, sound recordings, audiovisual works, business and entertainment software, books and journals on commercial basis with serious decimating effect on the market for legitimate products. With increase and more effective regulation of factory production, CD "burning" may soon become the biggest piracy threat to copyright based industries in the country. Although the handy nature of CD Burner which can be operated anywhere with little or no difficulty can be a serious challenge in identifying its location for enforcement activities. This challenge however is not insurmountable if the Commission can devise appropriate and adequate proactive strategies to address the situation. Otherwise, checking the menace of optical disc piracy through Regulation in Nigeria may turn out to be a mirage.

Another challenge militating against the effectiveness of the Regulation as an antipiracy tool is the rampant smuggling of optical disc products though the country's porous and unmanned borders with neighbouring countries and ports. One factor responsible for this is the absence of the Commission's officials at the border and ports.[89] Although interagency cooperation exists between the Commission and other enforcement agencies that are

*89. Ibid.*

permitted to be at the border,[90] it has yielded limited result in terms of checking the influx of illegal optical disc products into the country. Most of the other agencies are busy with their statutory mandate which expectedly is on their priority list than aiding another agency in discharging its mandate.[91] Unfortunately, as long as this state of affairs persist, the smuggled optical disc products which are usually cheaper than even the locally produced ones would not only pose a threat to the survival of local plants, but also make the impact of the Regulation unfelt with dire consequences for the nation's economy and indeed, the survival of Nigeria's copyright based industries. Efforts towards checking the smuggling of optical disc products through the nation's borders and ports therefore need to be stepped up.

## Conclusion

There is no doubt that the Regulation is an innovation that if incrementally implemented can facilitate the checking of the menace of piracy of optical disc products in Nigeria. One fact that is glaring from the introduction of the Regulation is that it has increased the responsibility and burden on the part of the manufacturer and copyright owner and also on the burden of enforcement of copyright matters placed on the Commission.[92] When however viewed against the background of what the industry stands to lose in the absence of the regulation, the inconvenience

90. See "Piracy: A Dangerous Game", interview granted by Adebambo Adewopo, former Director-General of the Nigerian Copyright Commission in *The Classifier* Vol.2 No.6 November Edition 2009, p.11 (Copy in author's file).
91. Information to this effect was given in an interview with a senior official of the Regulatory Department of the Commission in Abuja.
92. Say Sujintaya, *op.cit.*, p.18.

can be said to be necessary. It is hoped that if all the above mentioned challenges are effectively addressed, the objective of the Regulation as an anti-piracy tool would be realised.