

PROTECTING COMMERCIAL INTELLECTUAL PROPERTY

What is Intellectual Property?

According to the World Intellectual Property Organization (WIPO), Intellectual Property (IP) refers to creations of the mind, including inventions, literary and artistic works; designs and symbols, names and images used in commerce, etcetera. IPs are protected by various laws, which allow the IP owners to exploit them commercially, reaping financial benefits, and prohibit third parties from using them without permission.

IPs that are protected in Nigeria comprise patents, trademarks, industrial designs, trade secrets and copyright. The nature of the IP sought to be protected, and the preference of its owner, to a large extent determines the most appropriate protection for it. This article examines patents and trade secrets protection in Nigeria.

Patent

Patent rights protect inventions. An invention is patentable, under the Nigerian Patent and Designs Act if it:

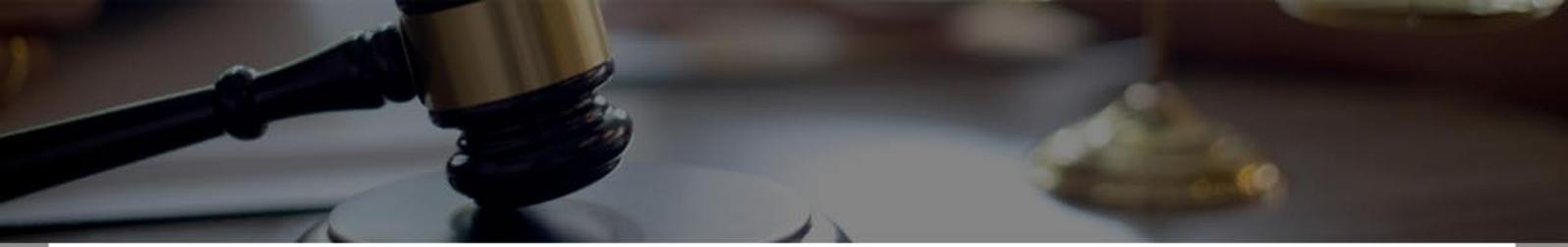
- is new; (Novelty test)
 - results from inventive activity; and
 - is capable of industrial application.
- The law states that an invention is capable of industrial application if it can be manufactured or used in any kind of industry, including agriculture.

A patent right grants its legal owner exclusive rights to commercially exploit an invention and exclude others from making, using, or selling products or processes based on the patented invention, without permission. Examples of patents include pen with scanner-a machine as small as a pen that can be used to transfer text from paper directly to a computer, steel kidneys, blood rocker, packaging success, life-saving invention, breastfeeding shirts.

An illustration of a patent that was commercially exploited, with a large degree of success, was Amazon's 1-Click buying patent, which was a process that enabled online shoppers to buy products, with just one click, without having to enter

and re-enter billing, payment, or shipping information. This process was quite revolutionary at the time it was launched in 1997, as it fostered hassle-free online shopping and allowed Amazon to create a very strong position in the market. Apple licensed the technology from Amazon in 2000 and incorporated it into its iTunes, iPhoto and Apple App store. Needless to say, the patent was worth billions of dollars to Amazon and was a valuable IP asset.

It should be noted that patents cannot be validly obtained in respect of plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products); or inventions the publication or exploitation of which would be contrary to public order or morality. Also, principles and discoveries of a scientific nature are not inventions.



Procedure for Patent Registration in Nigeria

A patent application is required to be filed with the Registrar of Patents and Designs, containing among other information: the applicant's full name and address; description of the relevant invention; and claim(s). The application is required to be supported by:

- Prescribed filing fees
- Where relevant, a declaration signed by the true inventor, requesting that he should be mentioned as such on the patent
- Where the application is made by an agent, a signed power of attorney

The Registrar is required to examine each patent application to ascertain that the information contained therein, as well as the accompany documentation, conforms to the requirements of the Act. If satisfied that the form of the application is compliant with the Act, the Registrar shall grant the patent registration without further examination. The implication of this shall be examined under limitations below.

Limitations of Patent Registration in Nigeria

Business owners must, however, consider the following factors in deciding whether to obtain patent rights for their inventions:

- The Registrar is only required to confirm that the patent application contains the relevant information as prescribed by the Act, before

registering same. The Registrar is not required to examine the application to ascertain whether :

- o the invention passed the novelty test, results from inventive activity or is capable of industrial application
- o the information provided with respect to the invention is sufficiently detailed
- o there is a subsisting patent registration or application in respect of the same invention.

The Act placed a caveat that patent registrations were granted without guarantee of their validity, which begs the question of the relevance of patent registrations in Nigeria

- The patent on an invention has an expiry date of 20 years from the date of application for its registration . Amazon's 1-Click patent expired in 2017, allowing other retailers to commercially exploit the process, without the threat of lawsuits or having to license it from Amazon.
- The patent on an invention can lapse if the patent owner defaults in paying the prescribed annual fees.
- To be granted the patent right, the owner is expected to disclose to the public, a detailed, accurate and complete written description of the invention sought to be protected. By implication, competitors will have exact knowledge of the techniques used in the invention.
- The patent rights extend only to acts done for industrial and

commercial purposes. This implies that the owner may not be able to prevent the unauthorized use of the invention where it is not being used commercially.

- Moreover, the patent owner may be precluded from challenging the commercial use of the invention in some instances, such as when the third party uses the invention in good faith. This envisages where the third party, without prior knowledge of the patent owner's interest, independently discovered the invention and commenced the commercial use of same. By implication, the patent rights to the invention could be nullified as it had failed the Novelty test.

- Another exception arises where the patented product has been lawfully sold in Nigeria, and a third party buys it, makes improvements to it and thereafter exploits it commercially. However, the patent owner can still prevent this unauthorized use if they make provision for the special application of the invention at the point of registering it at the Patent and Designs Registry.

Trade Secrets

For strategic reasons, a Start-up may decide to protect its inventions and confidential information as trade secrets because if patented, the information will need to be disclosed to the public. A trade secret can be defined as information that is commercially valuable because it is not generally known, and it is the subject of efforts to maintain secrecy.

Examples of trade secrets include formulas, manufacturing process, market strategy, customer lists, etcetera.

A world-famous trade secret is the formula for the Coca-Cola drink, which was invented in 1886 and, till date, remains a closely guarded secret. According to the Coca-Cola company, only two of its senior executives are privy to the complete formula at any given time and they are not permitted to travel together. The written formula currently resides in a vault at the World of Coca-Cola in Atlanta, Georgia

Another famous trade secret is KFC's Original Recipe of "11 herbs and spices", which is currently stored inside a vault at the KFC's headquarters in Louisville, Kentucky, along with eleven vials of the herbs and spices.

Whilst trade secrets can represent a Start-up's most valuable IP asset, they are not registered with any government agency, unlike patents and other IP rights. In Nigeria, trade secrets are protected by laws of contract and torts.

One clear advantage that trade secrets have over patents is that the latter grants the holder monopoly for a maximum of 20 years, whilst trade secret protection (such as the Coca-Cola formula) continues indefinitely, unless disclosed by the owner or reverse-engineered by third parties.

Another advantage is that trade secret protection can cover information that are not patentable, such as customer lists.

However, protecting trade secrets require diligent administration and effective use of technology to protect them from disclosure and misappropriation. The following measures may be adopted to protect trade secrets:

- Limit access to information to those who "need to know"
- Control access to computers and servers, using password protection and firewalls
- Adopt non-disclosure agreements with employees, suppliers and partners

- Train employees in trade secret policies and implement practical measures to control the company's trade secrets

Patents and trade secrets are critical incentives for innovation and creativity and, consequently, the growth of businesses. To ensure adequate protection of these IPs, there is need for in-depth understanding of the applicable legal framework. It is recommended that individuals and businesses seek professional advice for robust protection.



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