UNDERSTANDING YOUR FUNDAMENTAL INTELLECTUAL PROPERTY RIGHTS

Intellectual property in context is being referred to creations of the mind; inventions, literary and artistic works.

This is divided into two:

- Industrial Property: this includes patents for inventions, trademark, industrial designs, geographical indications, trade secrets.
- Copyright: this covers literary works such as (novels, poems and plays), films, music, artistic works (drawings, paintings, photographs and sculptures) and architectural design.

COPYRIGHT

According to The Copyright Act Cap C28, Laws of the Federation of Nigeria 2004, s.51, states copyright means copyright. However s.6 under the copyright act provides that copyright in a work shall be the exclusive right to control the doing in Nigeria of certain acts in relation to the work; such acts include reproducing the work in any form or material, publishing or performance of the work in public, translating, adapting, distributing or communicating the work to the public.

Coppinger and Skone James describe copyright as one of the main branches of intellectual property which gives the owner exclusive right to authorize or prohibit certain uses of his work by others.

Copyright does not arise until a creative work has been fixed or embodied in a material or definite form. A mere intellectual conception of an idea is not protected by copyright until the idea has been expressed in a material form such as writing, printing, recording or any other definite form.

Copyright consists of a bundle of rights comprising both economic and moral rights. Economic rights aim at securing the financial interests of the author by allowing the author to exploit the work commercially, while moral rights protect the author's honour and reputation in regard to the work.

Also, a fixed work does not need to be registered to be covered by copyright. Copyright confers automatically in the creator of an eligible work upon fixation of the work in any definite medium of expression. One of the main objectives of

copyright is to safeguard private ownership rights of the author of the work and to promote public interest; the users of the work.

According to s1(1) of the Copyright Act, for a work to be protected it has to fall within the scope of works spelt out in this section. They include:

- Literary works
- Musical works
- Artistic works
- Cinematography
- Sound recordings
- Broadcast.

Once the work falls into any of this category, the next step is whether the work fulfills specific requirements which qualify it for protection under the act. Works that satisfy the requirements listed below will enjoy automatic copyright protection. The requirements include:

- Originality: originality here does not mean the newness of the idea. Copyright act is concerned with the expression of the idea. It means the form of work must have been the result of the author's intellectual creation, the outcome of his independent skill or judgment in the creation of the work.

- Fixation: s1(2)(b) of the act further requires that for copyright to subsist in any work, the work must have been fixed in a definite medium of expression known or later to be developed**.** Fixation is what distinguishes a work which is protectable from one that is not. In other words, what this means for a work to be protected under copyright act, is that it must have been in a fixed medium of expression.

The duration of copyright varies in different categories of work. Copyright in literary, musical, or artistic works other than photographs subsists for seventy years after the end of the year in which the author dies. Where there are joint authors, the seventy years commences at the end of the year when the surviving author dies.

Copyright for cinematograph films and photographs are protected for fifty years from the end of the year in which the work was first published, sound recordings and broadcasts subsists for fifty years after the end of the year in which the recording was first made or the broadcast first took place, as the case may be.

Furthermore, copyright is a branch of intellectual property that facilitates development because of its potential to encourage investment of time and effort in local creativity, inventive and entrepreneurial undertakings and also protect private ownership rights.

TRADE SECRETS

According to the World Intellectual Property Organization, "Trade secrets" are intellectual property rights on confidential information which may be sold or licensed. This seems to be the most basic definition for the term. In other words, trade secrets are information which give commercial advantage over competitors. This information has to be kept secret because if they are revealed to the public, they would lose their commercial value.

The massive rise in the number of Small and Medium businesses which offer similar goods and service creates a keen environment for fierce competition. Hence, business owners must devise strategies that put them ahead of the competition as trade secrets do not confer "proprietary right", meaning that the holder does not have exclusive right over the information. These strategies put in place to give commercial advantage should be protected by the businesses that come up with them as they in effect culminate into the success of the business.

Article 39 of the TRIPS Agreement spells out the requirements to be met before any piece of information can be regarded as Trade Secret. These requirements may vary from country to country but in their most basic form; they are;

- The information must be a secret.
- The information must have been subject to reasonable steps by the rightful holder to keep it a secret.
- It must have commercial value because it is a secret.

Trade secrets form part of the general concept of protection against unfair competition or are based on specific provisions or case law on the protection of confidential information.

In Nigeria, there are no legislations that protect trade secrets like patents. What is obtainable in practice is that creative measures are adopted in the protection of these secrets by businesses. Suggested ways for a comprehensive protection plan for trade secrets by the WIPO include:

- Creating agreements, policies, procedures and records to establish and document protection.

- Establishing physical and electronic security and confidentiality measures.
- Assessing risks to identify and prioritize trade secret vulnerabilities.
- Establishing due diligence and ongoing third-party management procedures.
- Instituting an information protection team.
- Training and capacity building with employees and third parties.
- Monitoring and measuring corporate efforts.
- Taking corrective actions and continually improving policies and procedures.

Trade secrets require no formal registration to be protected. The protection of trade secrets ensures in perpetuity provided the information is not disclosed.

TRADEMARK

A registered trademark grants your brand with exclusive rights to use, license and sell a particular mark which is distinct to your brand. Pandora has acquired San Francisco-based music subscription service Rdio, the Oakland, California based company for 75 million.

Investors' purchasing decisions are influenced by the reputation and valuable trademark such brands represent.

Here is a fun fact; trademarks can appreciate in value over time. The value of your trademark increases with the success of your business. Registering a trademark is very similar to buying a real estate property.

Trademark as a Marketing and Communication Tool

Trademark is a valuable communication tool because it helps to distinguish your brand from your competitors. Simply put, the trademark is a brand identity; just like yourself who knows who you are and what you stand for, your brand has its own identity. For example, if you are a bottling company, you need to think twice about using the iconic slogan "Water would be Jealous" associated with H_2O in your marketing campaigns.

When the brand logo and slogan are used in a marketing campaign, the goodwill and trademark become more prominent to the public. Every campaign advertisement has two major goals: firstly, to portray the company to the public in

a positive light and create maximum brand awareness. Secondly, the brand offers and guarantees to meet clients' expectations for a certain quality of a product or service.

Where Can you Register a Trademark?

In Nigeria, the law which governs the registration of trademarks is the TradeMarks Act and the Trade Mark Regulations. The government agency that is in charge of the Registration of trademarks is the Trademarks, Patents And Designs Registry, Commercial Law Department, Federal Ministry Of Industry, Trade And Investment. Applications are made to the Registrar of TradeMarks.

Nigeria is a party to the Nice Agreement and under this agreement, trademarks are classified under 45 classes. Therefore, a trademark must be eligible for a trademark before it can be registered under the most relevant class.

What Mark is Eligible for Trademark Registration?

For a more concise list, let us list out the kind of marks that can be trademarked.

- Device and Word Marks
- Business names & Service Names
- Signatures and Symbols
- Products names
- Colours
- Sound
- Slogans
- Book Titles /Movie Titles
- Fictional Characters

For any of the aforementioned marks to be eligible for registration in Nigeria, it must contain one of the following highlighted below;

- The name of a company, individual, or firm, represented in a special or particular manner.
- The signature of the applicant for registration.
- An invented word or invented words.
- A word or words having no direct reference to the character or quality of the goods.

At this point, it is important to mention that it is possible to register more than two or three marks at the same time as a source identifier for your business name; as separate and distinct from your products.

A classic example of a product and business name that is registered with the Registry of Trademark is the Johnson & Johnson brand and the products they sell as a source identifier against all products, Johnson and Johnson produce the Band-Aid® bandages, what this means is that the Band-Aid bandage is a source identifier against every other bandage produced by other brands and the brand name Johnson & Johnson as a source identifier against their competitors in a competitive market.

To become a valuable brand, you will need to take active steps to protect the mark and ensure you enjoy all the economic and moral benefits of registering a trademark.

However, you can use a particular mark to promote your goods and services without registering it. You can even add a TM (for trademark) to your product labels, or symbol mark. This is a regular practice and it is not a criminal act but such trademarks do not enjoy intellectual property (IP) protection or the benefits accrued to registering your trademark.

PATENT

Patent as defined by the World Intellectual Property Organization is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem.

<u>What Makes an Invention Patentable?</u>

According to section 1(1) of the Patents and Designs Act of 1970, Cap 344 of Laws of the Federation of Nigeria, it provides:

1(1) Subject to this section an invention is patentable

(a) if it is new, results from an inventive activity and is capable of industrial application or.
(b) if it constitutes an improvement upon a patented invention, and also is new, results from inventive activity, and is capable of industrial application.

Examining the Conditions for Patentability

Simply for a patent to be granted:

- The invention is new
- The invention involves an inventive step
- The invention must be capable of industrial applicability
- If it is an improvement on an already patented invention

The Invention must be new

The requirement of newness is the main focus of the law of patents. An invention to be qualified as patentable, must be completely unknown everywhere around the world at the time the application for the patent is filed. If anybody had made the discovery before the applicant or even if the applicant himself had disclosed the discovery prior to the filing of the application; a valid patent cannot be granted to the applicant.

In defining new, the Act followed a two-step approach. Firstly, in section 1(2)(a); an invention is new, if it does not form part of the state of the art. Section 1(3) defines both **"the art"** and **"state of the art"** as follows: **"the art"** means the art or field of knowledge to which an invention relates and **"the state of the art"** means everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever (by means of a written or oral description, by use or in any other way) before the date of the filing of the patent application relating to the invention or the foreign priority date validly claimed in respect thereof, so however that an invention shall not be deemed to have been made available to the public merely by reason of the fact that, within the period of six months preceding the filing of a patent application in respect of the invention, the inventor or his predecessor in title has exhibited it in an official or officially recognized exhibition."

Ways of determining newness is fairly objective, so long as the invention has not been made available to the public.

The Invention involves an inventive step

This is defined in section 1(2)(b) as follows:

> "an invention results from an inventive activity if it does not obviously follow from the state of the art, either as to the method, the application, the

combination of methods, or the product which it concerns, or as to the industrial result it produces"

The main thing here is that, whether the discovery lies so much out of the track of what was known before as not naturally to suggest itself to a person that is thinking on the subject matter, it must not be obvious of what was previously known. An invention will not be patentable if given the state of art at the date the application therefore was filed regardless of the fact that the inventor undertook independent research and arrived at his invention without relying on available literature is one that could have been gotten to by a person skilled in the art, having access to all available information on the subject as the date of the filing of the application.

The invention must be capable of industrial applicability

It is not all inventions which are new or results from an inventive activity that can be patented, an invention will not be patentable if it is not industrially applicable. Section 1(2)(c) defines industrial applicability as:

"an invention is capable of industrial application if it can be manufactured or used in any kind of industry including agriculture".

This means that any invention that can be made with machineries and can be used in all industries to improve the industry.

If it is an improvement on an already patented invention

This happens when an invention is related to an existing patented invention but could not have been anticipated based on the information that is available on the existing patent; it could not have been foreseen by an ordinary person having possession of the knowledge of the invention.

EXCEPTIONS TO PATENTABILITY

The act made provisions for what cannot be patentable is sections 1(4)(5), it provides as follows:

(4) Patents cannot be validly obtained in respect of –

(a) Plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products); or
(b) Inventions the publication or exploitation of which would be contrary to public order or morality (it being understood for the purposes of this

paragraph that the exploitation of an invention is not contrary to public order or morality merely because its exploitation is prohibited by law)

(5) Principles and discoveries of a scientific nature are not inventions for the purposes of this Act.

Application for Patent

This is provided for in section 3 of the act, the application shall be made to the Registrar containing the following:

a. The applicant's full name and address, if the address is outside Nigeria there should be an address for service in Nigeria.
b. A description of the relevant invention with any appropriate plans and drawings.
c. A claim or claims (for any number of products, processes or applications), but an application shall relate to one invention only.
d. The application is to be accompanied by the prescribed fees as determined by the registry.
e. Where needed a declaration by the true inventor of the product supplying his name and address and requesting that he be mentioned as such in the patent.
f. In the case where the application is submitted by an agent, a power of attorney authorizing the donee of the power of attorney to that effect.

Who can register a patent?

Accredited individuals or companies can register patents on behalf of the inventors. Any person interested in registering a patent will therefore need to hire the services of accredited agents for this process. The Government agency that handles the grant of patents is the Trademarks, Patents and Designs Registry, Commercial Law Department, Federal Ministry of Industry, Trade and Investment. Applications are made to the Registrar.

Duration and Lapse of a Patent

Section 7 of the Act made provision for this, the life span of a patent is 20 years provided the annual renewal fees are paid for the duration of its potential life. In the case where the patentee defaults in the payment of the annual renewal fee, the patent lapses after a 6 months period of grace, if it is not renewed then it cannot be revived again.

Rights conferred by a Patent

Section 6 of the Act provides for this,

a. A patent gives the patentee the right to stop others from using the registered invention or to choose to permit the use of the invention by others under stipulated conditions.
b. A patent gives the patentee the right to bring legal action against anyone who infringes on the registered invention and entitled to the remedies of damages, injunction and accounts; section 25 of the act.

It must be noted that the granting of the Nigerian patent is made without a guarantee of validity, section 4(4) 0f the act provides:

"Patents are granted at the risk of the patentee and without guarantee of their validity"

Once a patent has been issued does not mean that it is valid, the validity is opened to be challenged in court and if challenged the primary onus of proving validity rests on the patentee, section 9 of the act.