journals.unizik.edu.ng/index-php/jcpl ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW

An Appraisal of the Rights Conferred on a Patent Holder.

George R.C Ibekwe*

Abstract

In most developed economies, patent laws seek to provide a framework for the protection of inventions. A patent seeks to protect the technical solution offered by an invention. A technical solution is an idea for solving through technical, natural laws and industrial application, a specific technical problem encountered in our every day work life and existence. An invention generally consists of several technical features and relationship straddling through them. Engraving the invention with exclusivity entails an accelerated gravitation to the domain of patents depending of course, on some variables bordering on the patentability of the invention. It therefore follows that the assertion of any right of exclusivity by an inventor is a function of the grant of that right by government. The right when given bestows on the right owner the legal right to exclude or stop others from making, using and offering for sale, selling, or importing a product or process based on the patented invention. This work notes the strides made so far in invention protection through patent especially in advanced economies. This work also notes the challenges militating against the enthronement of a reliable data base for patent registration especially in this jurisdiction and suggested amendments to the existing laws. But all these will be interrogated after an exhaustive appraisal of the historical basis of patents, patentable inventions, the patent grant, rights of a patent holder and the procedure for application., It is therefore the view of this writer that it is not yet dawn in the exercise and appropriation of rights granted to a patentee in Nigeria.

1. Introduction / Historical Development of Patent

A patent is an exclusive right granted to an inventor of a product or process for his invention.

For a product or process to qualify to be patented, it must offer a new technical solution to a problem or provides a novel way of doing something. To get a product to be patented, the technical information about the invention must have been disclosed to the public in the application for the grant of the patent. [1]

A patent therefore is granted under the extant law of countries to protect the mercantile interest of an inventor from unjust and unfair predation by third parties. This branch of law is of tremendous importance to a diverse category of person.[2] Notably, Nigeria has not fared well in patent administration and regulation because of the paucity of patentable inventions.

---

* **George R.C Ibekwe.** A Senior Tutor at the Nigeria Law School. He can be reached at kamsibekwe@gmail.com 08033118097.

[1] This means that published patent documents become available as a potentially valuable source of technical and business information for inventors. See Page 28 of the "A guide to intellectual property issues in Access and Benefit – sharing Agreements. THE ABS CAPACITY DEVELOPMENT INITIATIVE, WORLD INTELLECTUAL PROPERTY ORGANIZATION

[2] These are technicians, technologists, researchers, space scientists, medical scientists, biologists, chemist, agriculturalist, pharmacists, mechanical engineers, computer engineers etc.

It should be noted that the idea of conferring a market monopoly as an incentive to innovate has old roots[3].

The history of patent and patent regulation is considered to have its roots with the Venetian Statute of 1474. In United States of America, Patent regulation started before the promulgation of the U.S constitution, although, there were some state specific Patent laws[4].

The seventeenth century provided no more than a germ of a functioning patent system[5].

"Specification" in patent application and consideration made its debut in the early eighteen century.

A half a century later, the courts were requiring the patentee to make a sufficient statement of his invention as "consideration" for the grant of exclusivity. There was a noticeable shift in concept of novelty which is one of the grounds for the grant of the monopoly.

The abiding question had been whether anyone was already practicing the invention in the country, now another issue was added, "Did the trade already" know of it through publication.

These changes of thresholds coincided with the initial steps towards mechanization and the concomitant increase in the number of invention nay patent. Part of the initial problem could be located in the inefficiencies and uncertainties that blighted the securing, registration and enforcement of Patents. The much-sought change came at the twilight of the nineteenth century. [6]

The new patents system though cheap and simple in concept, was designed to attract capital for the small ventures that were springing up[7]. Worthy of note also is the passage of various legislations regulating patent in England.[8]

Prior to 1970, there was no *de novo* legislation for registration of a patent in Nigeria. Registration and renewal in Nigeria were done under the registration of United Kingdom Patents Acts[9].

---

[3] The growth of guilds and borough with exclusive trading privileges was to some extent connected with the desire to introduce and support new industries. See *e.g. Fox, Monopoles and Patents (194) chap 2. Daventport, the United Kingdom Patent System (1979. This was also cited with approval by F.O Babafemi in his work "Intellectual property. The law and practice of copyright. Trademarks, patents and Industrial Designs in Nigeria, 1st Edition Page 343.*

[4] In America in the early colonial period, there were no general laws providing for the issuing of patents. However, people who invented new products could appeal to the colonial governments, which could grant them the exclusive commercial right to the products. The constitution, of the United states, first adopted on September 17, 1787 had a provision for protecting intellectual properties (Article 1, Section 8).

[5] See *Mcleed, inventing the industrial Revolution (1988) cited with approval by F.O BABAFEMI, Intellectual Property Law; The law and practice of Copyright, Trademarks, Patents and Industrials Designs in Nigeria Pg 344*

[6] See *Boehm, The British Patent System I, Administration (1967) pp: 22-23*

[7] The initial cost of securing patent in the UK was reduced from £300 to £ 25.

[8] The legislations are as follows: *Patents and Designs Cap C29 1907 and the Patents Act 1977 (as amended) Chapter 37*

[9] Only Patent which have been registered in the UK were registerable or renewable in Nigeria under the Registration of the United Kingdom Patent Act Cap 182 of the laws of Nigeria 1958. It is instructive to note that the Patents and Designs Act 1970, embedded in Cap P2. Laws of the Federation, 2004, now provides for the de novo registration in Nigeria.

2. Patentable Inventions/Application and Procedure for Grant.

Patentable inventions are inventions protected and protectable by the law. The law has laid a down a threshold to be met before an invention can be patented.

An "invention" has been variously defined as stakeholders.[10]

A court in Canadian jurisdiction recognized the vanity in attempting a definition.[11] It is a given that principles and discoveries though of a scientific nature are not patentable inventions[12]. A discovery without more cannot by any stretch of imagination be regarded as an invention. For an invention to be clothed with the toga of patentability, there has to be some modicum of modification in the process leading up to the invention. The inventor must add value by doing something more. He must go beyond knowledge addition. He must therefore use his knowledge and creative ingenuity to create a new and useful thing. An invention is not the same thing as a discovery. Discovery adds to the amount of human knowledge in more profound way than by merely disclosing something.[13].

2.1 When will an invention be deemed patentable?

An invention will be deemed patentable;

a. If it is a new, results from 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.[14]

So for a work to be eligible for patent protection, it must be new (novelty requirement). It must also involve an inventive step (non-obviousness requirement). It must be capable of industrial application (to be useful), and lastly it must be disclosed in a clear and complete manner in the patent application (disclosure requirement).

Most often, patentable subject matters are defined in the default. This is common in most jurisdictions. It is usually done by providing a list of what cannot be subject to patent. While conceding that there may be differences in many jurisdictions, there are common denominators. [15]

---

[10] "The act of devising or contriving as a result of purpose or forethought", an original contrivance or the construction of that which has never existed before". A step forward in an art.

[11] In the case of *Crossley Radio corporation vs Canadian General Electric company ltd, (1936) D.L.R.508,* the court held thus "it would be idle to attempt a comprehensive definition. In certain cases, the decision must necessarily be the result of nicety. It is a question of fact and degree depending upon practical consideration to a large extent rather than upon legal interpretation.

[12] See *Section 1(5) Patents and Designs Acts, Cap P2, L.F.N 2004.*

[13] See the case of *FOX Vs Kensington and Knightbridge Electric Lighting Co. Ltd(1891) 8 R.P.C 277.*

[14] See *Section 1 (1) Patents and Designs Act, Cap P. 2 L.F.N 2004*

[15] Some of the areas excluded are

- Abstractions and scientific theories.
- Aesthetic creations.
- Scheme, rule and methods for performing mental acts.
- Substances as they naturally occur in the world.
- Inventions the exploitation of which may affect public order, good morals, or public health.
- Diagnostic, therapeutic and surgical methods of treatment for human or animals.

2.2 Newness / Novelty

An invention is new or novel if it does not form part of the prior art. This is a condition precedent to patentability. Prior arts refer to all the pertinent technical knowledge available to the public anywhere in the world prior to the first filing date of the relevant patent application. It includes patents, patents application and non-patent literature of all kinds. [16]

An invention therefore shall not be deemed to be available to the public merely by reasons of the fact that's within the period of six months preceding the filing of a patent application in respect of the invention, the inventor or his successor in title has exhibited it in an official or officially recognized international exhibition[17]

2.3 Inventive step/non-obviousness

The creation/invention must involve an inventive step or be non-obvious. This means that the invention could not be obviously deduced by a person having ordinary skill in the relevant technical field of endeavour[18]**.**

An invention will be deemed a product of inventive activity if it differs remarkably in methodology and applicability in the industrial result from previous efforts in the field.

2.4 Industrial application

The invention must be capable of industrial application. It must be capable of being used for an industrial or commercial purpose. It must go beyond a theoretical phenomenon.

It should be noted also that the subject matter of the invention must be patentable under the laws.

In some jurisdictions, plants are not regarded as patentable inventions, even when they have been newly developed, and have the attributes of novelty and useful applicability. An invention will be regarded as having crossed the watermark of novelty and inventive step if the inventor fails to disclose it before seeking patent protection.[19]

- Plants and animals other than microorganisms, and essentially biological processes of the production of plants or animals other than non-biological and microbiological processes; and
- Computer programs.

[16] See *"Inventing the Future". An introduction to patents for small and medium – sized enterprises (A publication of world intellectual property organization) Number 3, page 17. See also section N(2) (a) of the Act.*

[17] See *Section 1(3) of the Patents and Designs Act L.F.N 2004.*

[18] *Section 1(2) (B) of the Patents and Designs Act L.F.N 2004* provides thus *"An invention results from 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*". See also the English case of *Windsurfing Int. Vs Tabur Marine(1985) R.P.C 59,* where the Court made a bold pronouncement in the identification and determination of inventive step as follows,

(a) Identification by the court of the inventive concept embodies in the patent
(b) Assumption of the mantle of the normally skilled but unimaginative address in the art at the priority date and impute to him what was, at that date, common and general knowledge in the art in question
(c) Identification of differences, if any that exists between matters cited as being "known or used" and the alleged invention.
(d) It must also put a question to itself whether viewed without any knowledge of the alleged invention, those difference constituted steps which would have been obvious to the skilled man or whether they required any degree of inventions.

[19] Plant Varieties can be protected in the US under a system of plant patents or under a system of utility patents. But in Indian jurisdiction, plants in the whole or part are not patentable inventions. See *https//www.wipo.int.accessed on the 15th of January, 2022*

The invention must be disclosed in a patent application in a manner that is clear and complete to enable it to be replicated by a person with an ordinary skill set in the relevant technical field.

3.0 Application for Patent/Patent Grant and the Rights of a Patent Holder

Patent being a genre of intellectual property also has a central registry for its registration.

An application for the grant of a patent shall be signed by the applicant for registration or by his agent. An application for the grant of a patent shall be on FORM 1 and shall relate to only one invention, but may include in connection with that invention, claims for any number of products. It may also include claim(s) for any number of manufacturing processes for those products and for any number of applications of those products.

The application may also contain claims for any number of processes and also the means of working those processes, the resulting product or products and for the application of those products. [20]

Every applicant claiming priority under Section 27 of the Act by reason of an application for the grant of a patent made or deemed to have been made in a convention country as defined in section 27 (1) of the Act which country shall be named, shall append to his application, a written declaration showing the date and number of the earlier application, the country in which the application was made the name of the person who made the earlier application and shall furnish within three months thereafter a copy of the earlier application certified correct by the industrial property office in the country where the earlier application was made. Where an application is in a language other than English, a translation together with the name of the language shall be signed by the applicant or his agent and attached to the certified application.

If the applicant fails to supply the certified copy as required by this Rule, the Registrar shall disregard any claim of foreign priority.[21]

In the case of an application for the grant of a pattern in respect of more than one invention, the registrar shall invite the applicant to restrict the application so that it relates to one invention only and notify the applicant that he may within three months file in respect of the other invention dealt with in the original application subsidiary application. If the applicant fails to comply with the invitation mentioned above, the Registrar shall reject the application.[22]

The application for the grant of a patent shall be made to the Registrar and shall consist of the following;

(a) A petition or request for a patent with the applicant's full name and address.
(b) A specification, including a claim or claim in dispute.
(c) Plans and drawing, if any in dispute.
(d) A declaration as required by section 3 of the Act.
(e) A signed Power of Attorney or authorization of the agent if the application is made by an agent.
(f) An address for service in Nigeria if the applicant's address is outside Nigeria.

[20] *Rules 8 (1 &2) of Patents Rules (L.N. 96 of 1971)*
[21] See *Rule 8 (3) of the Rules*
[22] See *Rule 9 (1) of the Rules*

(g) The prescribed fees and
(h) Such other matter(s) as maybe prescribed from time to time by the Registrar.[23]

3.1 Consideration of Application for Patent

Upon the consideration of the application by the Registrar of patents and there is a photo compliance with the provisions of the Rules, the Registrar will grant the application. If for some reason the applicant failed to comply with the Rules, the Registrar will decline to approve the application[24].

Before the Registrar can give approval, he must satisfy himself that the complete specification includes a vivid description of the relevant invention with any appropriate plan(s) and also a claim(s)[25].

The description mentioned in the Rules must be such as to sufficiently describe the invention to be put into effect by a person skilled in the art or field of knowledge to which the invention relates[26].

The description must be correct, this means that it must be both clear and accurate. It must be free from avoidable obscurity or ambiguity and be as simple and distinct as the difficulty of description permits. It must not contain erroneous or misleading statements calculated to deceive or mislead the persons to whom the specification is addressed.[27]

It therefore follows that it is not necessarily enough to describe in detail one embodiment of the invention claimed, there must be sufficient information for the skilled addressee in essence to perform everything within a claim without himself having to invent anything[28]

The Registrar must also consider the claim. The inventor is by his claim putting fences around the field of his monopoly. His fences must also be clearly constructed in order to give sufficient notice to all and sundry. The term of the claim must be free from avoidable ambiguity or obscurity.[29]

It can be gleaned from available Legislation and Rules that the powers of the Registrar vis – a-viz the application for the approval of patent are severely circumscribed. Once an application has met the registration threshold, the Registrar must register. The Registrar cannot inquire into the patentability of the invention conveyed in the application. [30] Issues as regards the conformity with the requirements of the law are resolved by the courts on the prompting of a party aggrieved[31].

---

[23] See *Rule 11 of the Rules*
[24] See *the case of Scanveagi Vs Relcombine (1998) FSR 786 at 797. See Rules 11 and 13 of the Rules. See also section 4(1) (2) of the Patents and Designs Act*
[25] See *Rule 11, Ibid.*
[26] *See Rule 11, Ibid*
[27] *Minerals separation North America corp vs Noranda Mene Ltd (1947) EXR 306*
[28] See *Cornish and llewelyn: Intellectual Property law, 5th Edition at pages 289 -230*
[29] *See Minerals separation case Ibid.*
[30] He cannot enquire as to whether the description and claims satisfy the provisions of the law. The popular but flawed theory is that the Registrar does not have the requisite competence to enquire into the patentability of any invention.
[31] See *Section 26 of the Patents and Designs Act.*

Upon the grant of a patent over an invention, the Registrar will issue to the applicant; a document in Form 4 which bears the relevant number, the name and domicile of the patentee or his successor or assignee if any, the dates of the patent application and the grant, the title of the invention and the period of its validity. There has to be a reservation as to the right of third parties, the number and date of the application which a claim of foreign priority is based and where appropriate the name and address of the true inventor. A copy of the specification and a copy of the relevant drawings and plans if any, will be annexed to the approval[32].

4.0 Rights Conferred on a Patent Holder

A patent grants its owner the rights to exclude others from commercially using the invention. This includes the right to prevent or stop others from making, using, offering for sale, selling or importing a product or process based on the patented invention without the owner's consent. Patent rights are subject to the principle of territoriality. What this means is that patent protection has to be sought distinctly in each relevant country or region.[33]

The scope of the protection conferred by a patent will be determined by the terms of the claims, and the description included in the patent shall be used to interpret the claims[34]. Most importantly, a patent does not grant the owner the freedom to use or the right to exploit the technology covered by the patent only the right to exclude others. While this may seem a subtle distinction, it is essential in understanding the Patent system and how multiple patents interact. In fact, patent holder may therefore need to obtain a licence to use other people's inventions, in order to commercialize its own patented invention[35].

The person who conceived the invention is the inventor, whereas the person that files the patent application is the applicant, holder or owner of the patent.

It therefore follows, that the right under a patent will extend only to acts done for industrial or commercial purposes and will not extend to acts done in respect of a product covered by the patent after the product has been lawfully sold in Nigeria, except in so far as the patent makes provision for a special application of the product, in which case the special application will continue to be reserved to the patentee[36].

It should be noted that the right conferred by patent on an invention is a property right[37]. Interest in the invention protected by the patent can be granted as a licence or he can assign his interest in the patent. There are therefore statutory exceptions to the exclusive right to use of the patent by a patentee.

---

[32] See *Rule 15 of the Rules as well as section 5(1) of the Act*

[33] See, *A guide to Intellectual Property Issues in Access and Benefit-Sharing Agreement. The ABS Capacity Development Initiative World Intellectual Property Organization published in 2018 at https//www.wipo.int at Page 28 accessed on the 15th of January, 2022.*

[34] See *section 6(2) of the Act.*

[35] See *"Inventing the future" An introduction to patents for small and medium-sized enterprises, intellectual property for business service number 3.*

[36] See *Section 6(3a&b) of the Act.*

[37] The right to possess, use and enjoy a determinate thing (either a tract of land or a chattel), the right of ownership, the institution of private property is protected from undue governmental interference. The law of property is the law of proprietary rights in rem, the law of proprietary rights in personal being distinguished from it as the law of obligations. According to this usage, a freehold or leasehold estate in land or a patent or copyright is property but a benefit of a contract is not.

The exceptions are as follows:

4.1 Compulsory licence,

Since the overarching purpose of the grant of patent is to encourage the emergence of new industries, it will therefore pale into insignificance to allow a patentee who has been granted exclusivity not to do anything with the patent, thereby preventing anyone else from making the new invention available to the public. The Act provides that a person interested in the licence may apply to court for the grant of a compulsory licence at anytime after the expiration of four years after the filing of a patent application or three years after the grant of a patent which ever period last expired, on one or more of the following grounds,

(a) That the patented invention, being capable of being worked in Nigeria has not been so worked,

(b) That the existing degree of working of the patent invention in Nigeria does not meet on reasonable terms and demand for the product

(c) That the working of the patented invention in Nigeria is being hindered or prevented by the importation of the patented article and,

(d) That, by reason of the refusal of the patentee to grant licences of reasonable terms, the establishment or development of industrial activities in Nigeria is unfairly and substantially prejudiced[38] .

If an invention protected by a patent in Nigeria cannot be worked without infringing rights derived from a patent granted on an earlier application or benefitting from an earlier foreign priority, a compulsory licence maybe granted to the patentee of the latter patent to the extent necessary for the working of his invention if the invention,

(a) Serves industrial purposes different from those served by the invention which is the subject of the earlier patent; or

(b) Constitutes substantial technical progress, in relation to that last mentioned invention.[39]

It is worthy of note that if the two inventions mentioned above serve the same industrial purpose, the compulsory licence maybe granted in respect of the later patent to the patentee of the earlier patent, if he makes the request.[40]

Notwithstanding the provision of paragraph 3 of the schedule, a compulsory licence will not be granted in respect of a patent if the patentee satisfies the court that his refusal in relation to the patented invention is justifiable in the circumstance[41].

A compulsory licence will also not be granted unless the applicant satisfies the court that he had asked the patentee for a contractual licence but has been unable to obtain such a licence on reasonable terms and within a reasonable time, and offers guarantees satisfactory to the court to work the relevant invention sufficiently to remedy the deficiencies which gave rise to his

[38] See *the first schedule, part 1 paragraph 1(a-d). Patents and Designs Act. See the powers of the court to grant, refuse to grant or cancel a compulsory licence are provided for in paragraph 8 – 11 of the first schedule to the Patents and Designs Act.*

[39] See *paragraph 2 of the first schedule, part 1 patents and designs Act. L.F.N 2004*.

[40] See *Paragraph 3 of the first schedule to the patents and Designs Act*

[41] See *paragraph 4 of the schedule*

application.[42] It should be noted that the period of the use of the licence granted to the applicant by the court must be within the limited period of the life span of the patent which is twenty years subject to the payment of the maintenance fee and the patent not being revoked.

Instructively, a compulsory licence may be transferred only with the industrial undertaking in which the relevant invention is used, and no such transfer shall be valid until the consent of the court has been obtained.[43]

Also worthy of note are the other exceptions to exclusivity of the rights of the patentee. They are as follows:

If at the date of the filing of a patent application in respect of a product or process or at the date of a foreign priority validity claimed in respect of the application, a person other than the applicant,

(a) Was conducting an undertaking in Nigeria and

(b) In good faith and for the purposes of the undertaking was manufacturing the product or applying the process or had made serious preparation with a view of doing so.

Also notwithstanding the grant of a patent, there shall exist a right exercisable by the person for the time being conducting the undertaking to continue the manufacture or application, or to continue and complete the preparations and thereafter undertake the manufacture or application, as the case maybe and in respect of any resulting products to do any other act mentioned in the Act[44].

The minister can in the public interest authorize any person to purchase, make, exercise or vend any patented article or invention for the service of a government agency[45]

The Act also provides that during any period of emergency, the powers exercisable in relation to a patented article or invention on the authority of a minister will include the power to purchase, make, use, exercise and vend the article or invention for any purpose which appears to the minister necessary or expedient.[46]

---

[42] See *paragraph 5 of the schedule*

[43] See *Paragraph 7 of the schedule*

[44] See Section 6(4) of the Act.

[45] First schedule, part 2, paragraph 15 thereof. The authority of the minister maybe given (a) before or after the relevant patent has been given (b) before or after doing any of the acts in respect of which the authority is given and to any person whether or not be is authorized directly or indirectly by the patentee to make use exercise or vend the relevant article or invention.

[46] The expediency must be for the

(a) efficient prosecution of any war in which the federal republic of Nigeria maybe engaged
(b) for the maintenance of supplies and services essential to the life of the community
(c) for securing a sufficiently of supplies and services essential to the well being of the community
(d) for fostering and directing exports and reducing imports from all or any countries and for redressing the balance of trade.
(e) generally for ensuring that the whole resources of the community are available for use and are used in a manner best calculated to serve the interests of the community.

Recently at the thick of the ravaging COVID-19, the world Health organization and its partner launched the COVID 19 technology Access Pool (C-TAP) to facilitate timely, equitable and affordable access of COVID-19 health products by boosting their supply. C-TAP provides a global one-stop shop for developers of covid-19

There are other sundry instances where patents are assignable. They are as follows.

4.2 Employee inventions

In many countries, inventions developed in the course of employment are automatically assigned to the employer. In some cases, where there is no contract of employment, the inventor may retain the right to exploit the invention but the employer is given a non-exclusive right to its internal purposes[47].

4.3 Independent contractors

In most jurisdictions, an independent contractor retained by a company to develop a new product or process owns all the rights to the invention, unless otherwise specified in writing in the contract of engagement. This applies even when the company has paid for the research and development.

4.4 Joint inventors

When more than one person contributes in significant ways to the conceptualization of an invention, they are in such cases regarded as joint inventors. They are mentioned as such in the patent application. If the joint inventors are the applicants the patent will be granted to them jointly.

Challenges

The right to a patent is not vested in the true inventor, this aphorism appears true in this jurisdiction. The right is vested in the first person to file an application for the grant of the patent on an invention. It is also worthy of note that persons to whom a contractual licence has been granted also have a right to apply to have their titles registered.

The Act provides that the right to a patent in respect of an invention is vested in the statutory inventor. The statutory inventor may or may not be the true inventor, but he is the first to file an application for the registration of the patent or the first to claim a foreign priority of the invention.[48]

In order to mitigate the obvious violence and injustice to the true inventor by the above mentioned section, the Act rather belatedly and curiously provides that the true inventor is entitled to be name as such in the patent application whether or not he is also the statutory inventor and the entitlement in question cannot be subjected to modification by contract[49]

In advanced jurisdiction, like the United States and Britain, the doctrine of first to bring in application for the purposes of registration of the patent is inapplicable. The extant legislations in those countries are tailored towards making the true inventor the beneficiary of the registration of the proprietary rights.

---

therapeutics, diagnostics, vaccines and other health products to share their intellectual property, knowledge, and data with quality assured manufacturers through public health driven voluntary, non exclusive and transparent licences

[47] See *Kacper Szkalej and Sanna wolk "Employee's intellectual rights: An Epilogue. https//uu.diva.portal.org accessed on the 15th of January, 2022.*

[48] See *Section 2(1) of the Patents and Designs Act.*

[49] See *Section 2(3) of the Act.*

It is immaterial whether or not he is the first to bring in application for the registration. It is respectfully submitted that our law ought to be amended to make it more equitable in outlook by only recognizing the true inventor as the person deserving to be registered as the patentee of the invention.

Also where the inventor is an employee, if his contract of employment does not require him to exercise any inventive activity but in making the invention, he used data and materials that his employer has put at his disposal or the invention is of exceptional importance, then he is entitled to a fair remuneration, taking into account his salary and the importance of the invention[50]. I.O Babafemi in his work argued that there are at least two objections to the above provision.

First, he contends that the provision appears to distinguish between inventions which are of exceptional importance and those that are not. He further submits that as long as the invention can be patented, the inventor and the employee should be rewarded. It was also his argument, that the provision in the Act dealing with fair remuneration based on the employee's salary and the importance of the invention will likely work injustice on the employee.[51]

We cannot agree more with the learned author. The reward regime should be such as to equitably reflect the creative ingenuity of the employee. It is also suggested that revenue flowing from the invention, even after the inventor has left the employment of his employer, should still inure to the employee in whatever proportion that was hitherto agreed. This contention is informed by the fact that the interest in an invention constitutes a property right, so the inventor /employee including his successors in title should be in a position to benefit from the product or process of his creative ingenuity. We hold the considered view that the law should be amended in that direction.

Conclusion

In appraising the rights of a patent owner, we have been able to embark on a tour d 'horizon of the entire gamut of patents and the grantable rights to an applicant seeking exclusivity of his invention, the mode of application, the licencing and assignment of the patentee's rights. We also examined the challenges and gaps in the extant legislation and the Rules.

It is our fervent hope that some of the suggestions made will find expression in the subsequent amendments of the extant Act.

Recommendations

1. It is suggested that the Act be amended to cloth the Registrar with more executive and discretional powers in the consideration of application for exclusivity of an invention[52]. We cannot validity appraise the rights of a patentee if those rights are unavailable because the underwhelming disposition of the Registrar of patents and designs.

[50] See *Section 2(4) (a) of the Act*

[51] See *Section 2(4) of the Patents and Designs Act, Ibid.*

[52] In United States and some other advanced jurisdictions, the examination any the patent office covers all possible aspects of the patents law which may affect the validity of the patent when it is granted. In contra distinction to what obtains in Nigeria, the Registrar cannot inquire as to whether the subject matter of the application is patentable.

2. It is also suggested that a *patent of addition* be included in our legislation whenever opportunity presents for an amendment of the Act. This patent of addition enables the applicant to apply for an improvement or modifications made on the invention disclosed in the complete specification. This can only be granted after the date of grant of a patent for the main invention[53].

3. In other to ensure the vitality and engender improvement in the functioning of the patent system in Nigeria, a consideration should be given to the following recommendation made to the United States patent and trade mark office. [54] They are as follows;

(i) The enthronement of an open-ended, unitary and flexible patent system. The system should remain open to new technologies with features that allow flexibility in protecting the ever emerging new technology. [55]

4. Non obviousness standard.

The requirement that to qualify for a patent registration and licence, an invention cannot be obvious to a person of limited skill in the art should be shrewdly observed and construed.[56]

5. Open Review Procedure.

There is the urgency of now for the amendment of the extant legislation in order to create a procedure for third parties to challenge patents for a limited period before an administrative proceeding committee. The inherent benefits of speed and cost embedded in this procedure cannot be over emphasized.[57]. This administrative proceeding will serve as the first line of adjudication and resolution.

6. Liability for patent infringement emanating from research activities.

There should an amendment of the Act to protect and promote the activities of academic researchers and shield them from the vagaries of non protection from patent infringement, in view of the fact that their activities are non-commercial in nature.

7. Litigation

The triple element of "willful infringement "best mode" and inequitable conduct in determining a party's state of mind in an infringement of patent litigation should be emphasized. These elements invariably up the likely cost component and damages to be awarded at the end of the litigation. So judges of our domestic courts saddled with the determination of infringement of patent disputes should respectfully be guided accordingly.

---

[53]*Priyanka Rastogi and Vijaya Singh: Patent of Addition: An Indian Perspective. http://www.mondaq.com. India accessed on the 14th of August, 2021.*

[54] Also see *generally chapter 4 of 2004.*

[55] The committee (The natural association of sciences, engineering and medicine) recommended that the (USPTO) should seek advice from a wide range of sources and also maintain a public record of the submission in developing such guidelines and that also the results gathered should be given appropriate deference by the courts.

[56]See also the committees recommendation (he the Natural association of sciences, engineering and medicine)

[57]There is a similar provision in the investment and securities Act 2007 and the consolidated Rules made there under. Same also goes for the companies and Allied Matters Act 2020, which also created administrative proceedings committee as a first line adjudicatory measure in cases of disputes arising from the operation of the Act.

8. Creation of a special division in the federal High Court, Nigeria.

It is also suggested that a special division be created in the federal high court and the division will be populated by Judges who are quite familiar with patent technologies from a variety of perspectives as well as areas of law affecting innovations as opposed to patents. As occasions demand, expert opinion could be sought and deployed towards the resolution of patent disputes.

It is our sincere hope that if some of these recommendations are infused into the extant patent legislation in Nigeria, then we will be seen to have commenced the much needed match to legislation sufficiency and patent development in Nigeria.