American Journal of
Law
(AJL)

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Mary Imelda Obianuju Nwogu, Phd Law

AJP

American Journal of Law
ISSN 2709-6521 (Online)
Vol.5, Issue 1 pp 63 - 72, 2023

www.ajpojournals.org

The Jurisprudence of Patentable and Non-patentable Inventions: Nigerian in Perspective

Mary Imelda Obianuju Nwogu, Phd Law

Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria

Email: ujn3333@yahoo.com

Article History

Date Received: 8th Feb 2023

Date Received in Revised Form: 27th Feb 2023

Date Accepted: 10th Mar 2023

Abstract

Patent is an industrial property right granted by the government of a state to a patentee. It is an intangible, incorporeal and exclusive right granted under the Law to an invention. While an invention is something that has never been made or existed before. Patents are granted to inventions, but not every invention qualify for grant of patent, hence there are patentable and non-patentable inventions. An invention is patentable if it is new, results from an inventive activity and is capable of industrial application (s.1(1) of the Patent and Designs Act 2004). Several textbooks, case laws, statutes(local and International), internet sources reveal that Nigerian legislation inadequately granted patent to inventions, wherein it did not grant patent to some inventions which International intellectual property regime stated patent should be granted. The Laws of developed countries like USA have wider protection of inventions than Laws of developing countries like Nigeria. Hence the Nigerian Law is narrow in the inventions that should be patentable as against the International Intellectual Property Regime.

Keywords: *Jurisprudence, patentable, non-patentable, inventions, novelty, industrial application.*

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INTRODUCTION

The grant of patent right by the government of a state to an invention is for the encouragement of industry, employment and growth to catch up with the advancement of technology. The development of patent system has been traced to the 1879 patent conference held in Paris, where it was decided that the patent Laws and systems of colonial masters in Nigeria be extended to the colonies[1]. Thereafter came the Patent and Designs Act of 1970, which is the first indigenous patent Law in Nigeria, supported by rules made pursuant to the Act. All patents are made up of inventions consisting of products or processes, but not all inventions are subject to valid patent. Hence the existence of patentable and non-patentable inventions. Consequently this paper seeks to review the Nigerian law on inventions that can be granted Patent and inventions that cannot benefit from the grant of patent.

Meaning of Patent

In the words of B.A. Garner[2] patent is the governmental grant of a right, privilege or authority; the official document so granting. According to the Oxford Advanced Learner's Dictionary, patent is an official right to be the only person to make, use or sell a product or an invention, a document that proves this[3]. To the Google's English Dictionary[4], patent is a government authority or licence conferring a right or title for a set period, especially the sole right to exclude others from making, using or selling an invention. The World Intellectual Property Organisation (WIPO) states that a patent is an exclusive right granted for an invention, which is a product or process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application[5].

Inherent in the above definitions of patent is that patent rights are dependent upon an issue or grant by an appropriate authority. It also prevents unauthorized third party from exploitation of the rights. The Patent and Designs Act[6], which is the governing legislation in Nigeria did not provide for the meaning of patent. It merely provided in its interpretation section, that is section 32 for patent application and patentee. To the Act[7], patent application means an application for the grant of patents while patentee means a person to whom a patent has been granted. Patent in the words of Kenton[8] is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design or invention for a designated period in exchange for a comprehensive disclosure of invention. They are a form of incorporeal right.[9] He went further to state that US Patent and Trademark Office (USPTO), which is part of department of commerce, handles applications for patenting and grants approvals. Also that, the utility patents are the most

[1] E. Penrose (1951). *The Economies of International Patent System,* Baltimore, John Hopkins Press, p. 53
[2] B.A. Garner (1999). *Black's Law Dictionary*, 9th edition, St. Paul Minn, West Publishing Company, p. 1234.
[3] A.S. Hornby (2015). *Oxford Advanced Learner's Dictionary,* 9th edition, Oxford, Oxford University Press, p. 1127.
[4]Oxford Languages, *Google's English Dictionary*, languages.oup.com, accessed 5/12/2022.
[5] WIPO, Meaning of Patent; http://www.wipo.int>patents, accessed 5/12/2022.
[6] Patents and Designs Act, Cap P2, Laws of the Federation of Nigeria (LFN), 2004.
[7] S. 32, *Ibid*.
[8] W. Kenton "What is a patent in simple terms? with examples," http://www.investopedia.com-updated October 29, 2022, accessed 11/12/2022.
[9] W. Kenton "What is a patent in simple terms? with examples," http://www.investopedia.com-updated October 29, 2022, accessed 11/12/2022.

common patent issued in the United States, accounting for 90 per cent of all issued patents[10]. Hence, there are different types of patent, which will be enumerated hereinunder.

Types of Patents

There are four different types of patent grants to inventors to protect different kinds of inventions. They are;

1. Utility Patents

A utility patents is a patent that covers the creation of a new or improved and useful product, process or machine.[11] They are very valuable assets because they give inventors exclusive commercial rights to producing and utilizing the latest technology. Utility patents are difficult to obtain, hard to write. The process may be time consuming and expensive to undertake and their complexity may make them difficult to understand[12]. Examples of utility patents are machines, articles of manufacture, processes and composition of matters.[13] A utility patent has a detailed technical disclosure along with drawings (where appropriate) and one or more claims. The claims of a utility patent list are the elements of the invention and establish the boundaries of patent cover.[14] Utility patent may be obtained for novel, useful and unobvious inventions.[15]

2. Design Patent

According to USPTO Patent Law, a design patent is granted to any person who has invented any new and non-obvious ornamental design for an article of manufacture. The design patent protects only the appearance of an article, but not its structural or functional features. In the layman's language, a design patent is a type of patent that covers the ornamental aspects of designs.[16] Design patent is obtained in an invention if it is new in its utility and appearance.[17] It generally refers to the drawings as a standard of what is protected.[18]

3. Plant Patent

A plant patent is granted by the United States government to an inventor (or the inventor's heirs or assigns) who has invented or discovered and asexually reproduced a distinct and new variety of plant found in an uncultivated state.[19] Before this patent grant, it must satisfy the requirements of patentability. A patentable plant can be natural, bred or somatic (created from non-reproductive cells of the plant). A plant patent protects a new and unique plant's key characteristics from being copied, sold or used by others.[20]

4. Provisional Patent

A provisional patent application allows you to file without a formal patent claim, oath or declaration, or any information disclosure (prior art) statement.[21] Under the United States law,

[10] *Ibid*
[11] W. Kenton, *op. cit*.
[12] *Ibid*.
[13] W. Kenton, *Ibid*. A.B. Silverman, "What are design patents and when are they useful?"
[14] A.B. Silverman, *Ibid*.
[15] *Ibid*.
[16] M. Bellis, "A beginner's guide to design patent." http://www.thoughtco.com, accessed 11/12/2022.
[17] *Ibid*.
[18] A.B. Silverman, *op. cit*.
[19] General information about 35 U.S.C. 161 Plant Patents. http://www.uspto.gov>basics, accessed 11/12/2022.
[20] W. Kenton, *op. cit*.
[21] USPTO, "What do you mean by provisional patent." http://www.uspto.gov>basics, accessed 13/12/2022.

a provisional application is a legal document filed in the United States Patent and Trademark Office that establishes an early filing date, but does not mature into an issued patent unless the applicant files a regular non-provisional application within one year.[22] It helps to protect a new invention from being copied during the 12-month period before a formal patent application.[23]

Provisional patent is intended to give an inventor time to pitch the idea, test its commercial feasibility, or refine a product before committing to expensive and time-intensive process of a formal, application. It is short-term means of protecting an invention or concept and requires less effort and expense than a formal patent application.[24] In effect, the provisional patent is a precursor for a formal patent application, if need be. It protects an invention from being copied for 12 months before filing a formal patent application.

What is an Invention?

According to Cambridge Dictionary[25], an invention is something that has never been made before or the process of creating something that has never been made before. For example, the world changed rapidly after the invention of the phone. The invention of the silicon chip was a landmark in the history of computer etc[26]. In the words of James Burke[27], an invention is the act of bringing ideas or objects together in a novel way to create something that did not exist before. According to the Black's Law Dictionary, an invention is a patentable device or process created through independent effort and characterized by an extraordinary degree of skill or ingenuity; a newly discovered art or operation.[28]

It then follows that an invention is production of something that has never existed before or creating a process for producing something that never existed before. An invention must be new, must not have existed before and must result from an inventive activity and capable of industrial application. To WIPO inventions are the bedrock of innovation. An invention is a new solution to a technical problem and can be protected through patents. Patents protect the interests of inventors whose technologies are truly ground breaking and commercially successful; by ensuring that an inventor can control the commercial use of his invention.[29]

In summary, an invention must be new and relates more to novelty. An invention is not explicitly defined under the Nigerian Patents and Designs Act, but rather the Act in its S, 1(15) excludes discoveries from invention thus: Principles and discoveries of scientific nature are not inventions for the purposes of this Act.[30]

Inventions that Qualify For Patent Grant

The criteria that need to be satisfied to obtain a patent are set out in national intellectual property (IP) laws and may differ from one country to another. But generally to obtain a patent, an inventor needs to demonstrate that his technology is new (novel), useful and not obvious to someone working in the related field. Also describing how this technology works and what it

[22] *Op. cit.*
[23] C.M. Kopp, "What is Provisional Patent Application (PPA)." http://www.investopedia.com. Updated July 5, 2021 and accessed 13/12/2022.
[24] *Ibid.*
[25] [25] Cambridge Dictionary, 'Meaning of Invention', www.dictionary.cambridge.org, accessed on 6/12/2022.
[26] Cambridge Dictionary, 'Meaning of Invention', www.dictionary.cambridge.org, accessed on 6/12/2022.
[27] James Burke, 'Invention Technology', www.britannica.com, accessed 6/12/2022.
[28] B.A. Garner, '*Black's Law Dictionary,*' *op. cit.* p. 901.
[29] WIPO, 'Inventions and Patents,' http://www.wipo.int, accessed on 6/12/2022.
[30] S. 1(15), Patents and Design, Cap P2 Laws of the Federation of Nigeria (LFN), 2004.

can do.[31] An invention is deemed patentable or qualifies for patent grant under the Patents and Designs Act;

(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 an inventive activity and is capable of industrial application.

1. Novelty/Newness

The first requirement of the invention in respect of which a patent is sought is novelty. It must not have been made available or known or disclosed to the public prior to the date of the application for patent. The question of newness under the Nigerian law has a special meaning assigned to it. Section 1(2) of the Patents and Designs Act[32] provides that an invention is new if it does not form part of the state of the art. The art is defined as the art or field of knowledge to which an invention relates.[33] "The state of the Art" means everything concerning the art or field of knowledge which has been made available to the public anywhere and anytime 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 foreign priority date validly claimed in respect thereof.[34]

The above definition of 'the state of the art' is subject to an exception which is that an invention shall not be deemed to have been disclosed or made available to the public merely by reason of the fact that within the period of six months preceding the filing of the patent application, the inventor or his successor in title has exhibited in an officially recognized international exhibition.[35] To Bainbridge[36] novelty is really a question of whether the invention has been anticipated by a previous patent, or by publication or by use. Whether publication in a limited circulation journal published in a remote part of South Africa should count is a moot point. The act or series of act that make the invention available to the public do not have to be on a particular wide scale. Using an invention in public in one locality only will suffice to anticipate a patent.[37]

In the English case of **Windsurfing International Inc.** v. **Tabur Marine (Great Britain) Ltd.**[38], the court held that a boy who built a sailboard and used it in public for a few weekends was declared invalid for lack of newness. In **Arewa Textiles Plc. & Ors.** v. **Finetex Ltd.**[39], the Court of Appeal held that a product produced by a process gives monopoly to the product when made with a particular process or method or means and when the product is patentable, but in the instant case wax print is not new, and therefore not patentable.

Oyewunmi[40] opines and I agree entirely with him that beyond the exceptions, the ambit of the provision relating to newness is extremely wide. In determining whether or not an invention is new (within the definition set out above), the law does not differentiate between sources of information. Therefore, it is irrelevant whether the information is published by the inventor or

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[31] WIPO, 'Inventions and Patents,' *op. cit*
[32] *Op cit*.
[33] S. 1(3) of the Patents and Designs Act, Cap P2, LFN, 2004.
[34] *Ibid*.
[35]
[36] D. Bainbridge, *Intellectual Property*, London: Pitman Publishing, 1999, 350 – 351.
[37] *Ibid*.
[38] (1985) RPC 59.
[39] (2002) LPELR – 5361 (CA).
[40] A.O. Oyewunmi, *Nigerian Law of Intellectual Property*. Lagos: University of Lagos Press and Bookshop Ltd., 2015,150.

others. Once the information about an invention has been communicated to any member of the public, free of any obligation of secrecy or confidence, such invention will be deemed to have failed the test of newness; on the ground that it has been anticipated.

Furthermore, Oyewunmi[41] stated that the test of newness under the Nigerian law is universal; meaning that disclosure which defeats newness is not restricted to geographical boundaries of the country. Consequently, disclosure in another part of the world, no matter how obscure the place and no matter how remote the possibility of having access to it, is anticipatory of any subsequent invention.

It is my opinion that the text of novelty under the Act[42] is too wide and thus, capable of putting local and indigenous inventors at disadvantage compare to the inventors in advanced nations or countries. This is due to the fact that inventors at advanced countries have at their disposal highly sophisticated equipment and facilities needed for carrying out inventive activities. A narrower test will be more favourable to the industries in Nigeria because the test of newness will be restricted within its geographical boundaries, wherein publication in a foreign country or very distant geographical area will not be held as anticipatory of an invention.

It then ordinarily follows that newness is defeated by oral disclosure publishing by document or prior use in a public place. However, where the use is secret or experimental it may not defeat newness. However, Oyewunmi[43] stated that the rationale for the strict test of newness is to ensure that public interest is not prejudiced by the conferment of exclusive rights in respect of a product or process formerly available to all. The patent monopoly is aimed at rewarding inventiveness and is not merely conferred as a priviledge or favour.

Babafemi[44] in his book stated that in considering novelty, it is important to look at the prior publication which exists from two points of view. First, was the publication available to the public before the relevant date? Secondly, does it disclose the invention? He further stated that our law is again silent as to whether to destroy novelty, a prior publication must itself disclose the entire invention or only a part of it. If it reveals only a part of it, then the question must remain whether what is left or new in the invention is adequate to form the subject matter of a valid patent. In response to the above question, he opined that prior publication of only a part ought not to invalidate a claim to novelty for the part not published.

In my considered view, prior publication of a part which is not the substance and not the substantial part of the invention should not invalidate a claim to novelty or be anticipatory of an invention to the part not published. However, where the prior publication is the substance of the invention, it should then invalidate the claim of newness for the part not published.

2. Inventive Activity

Inventive activity deals with the difference between what was previously known and what the inventor claims to have invented. In other words, whether the invention differs from previous effort in the field as regards method, application, combination of methods or the product, which it concerns or the industrial result which it produces; the invention must contribute significantly to the state of the art.

Section 1(b) of the Patents and Designs Act provides that an invention results from inventive activity if it does not obviously follow from the state of the art, either as to the method, or the

[41] *Op. cit.*
[42] S. 1 Patents and Designs Act, Cap P2 LFN, 2004.
[43] Oyewunmi, *op. cit.*, p. 151.
[44] F.O. Babafemi, *Intellectual Property*. Ibadan: Justin Books Ltd., 2007, p. 353.

application, the combination of methods, or the product which it concerns, or as to the industrial result it produces. Oyewunmi[45] opined that the inventor is required to duly exercise his inventive faculty in a manner considered sufficiently ingenious to justify the grant of the patent; otherwise the patent may be invalidated.

In elucidation of the above, the Court in **Hills** v. **Evans**[46] decided that to invalidate a patent, the state of the art must be such that a person of ordinary knowledge of the subject matter would at once perceive and understand, be able to practically apply the discovery without the making of further experiments.

Obviousness is critical in determining inventive step. Thus, obviousness is judged by looking at the invention as a whole and considering the entire state of the art at the relevance.[47] Oliver LJ in the English case of **Windsurfing International Inc.** v. **Tabur Marine (Great Britain) Ltd.**[48] postulated a four step test for ascertaining obviousness thus identifying the inventive concept embodied in the patent; the court then assumes the mantle of the normally skilled but unimaginative addressee in the art at the priority date, imputing to him what was, at that date, common general knowledge in the art in question; identify the differences between the prior art and subject matter of patent application and the alleged invention; fourthly, the court asked itself question whether viewed without any knowledge of the alleged invention, those difference constitute steps which would have been obvious to the skilled man or whether they require any degree of invention. The above four steps merely provides a structured way for assessing whether the requirement of inventive step has been fulfilled.

3. Industrial Application

Industrial application is one of the requirements of patentability under S. 1(1)(a) of the Act[49]. This requirement demonstrates the practical nature of the patents law which requires that the invention must be capable of industrial application. S. 1(2)(c) of the Act[50] provides that an invention is capable of industrial application, if it can be manufactured or used in any kind of industry, including agriculture. Invention has to be something that can be worked industrially. This requirement majorly distinguishes patents from other subjects of intellectual property such as copyright. It is an industrial property.

4. An Improvement Upon A Patented Invention and Must be New, Result from Inventive Activity and Must be Capable of Industrial Application

This condition is to the effect that invention is patentable if it constitutes an improvement on an already existing patented invention. S. 1(1)(b) of the Act[51] on improvement patents also states that it will also satisfy the three conditions already stated above – newness, inventive activity and industrial application. This provision of improvement patents is very useful to developing nations like Nigeria, for it will stimulate local (Nigerian) inventors to improve on foreign inventions and still be granted patent. An illustration of improvement patent is the case of **James Oitomen Agboronfo** v. **Green Haulage & Transport Ltd.**[52] wherein the plaintiff was granted patent for inventing harmless and improved boiler, which improved on existing

[45] Oyewunmi, *op. cit.*, p. 153.
[46] (1862) 31 L.I., Ch. 457 at 494.
[47] D. Bainbridge, *op. cit.*, 360.
[48] (1965) RPC 59 at 73.
[49] S. 1(1)(a) of the Patents and Designs Act., *op. cit.*
[50] *Ibid*.
[51] Patents and Designs Act, *op. cit*.
[52] (2003) 4 LPLR 139.

electric boiler by not working without water, consequently preventing five disasters. The special features of this boiler are that it does not shock but will glow red and hot like the already existing imported boiler. Secondly, it is only activated when filled with water.

Non Patentable Inventions

Satisfaction of the criteria herein above enumerated for patentability does not automatically make an invention patentable. This is because the Patent and Designs Act[53] clearly stipulates the inventions that are excluded from enjoying patent grant in Nigeria. Section 1(4) (a-b) of the Act[54] provides that patent cannot be validly granted in respect of –

(a) Plant and animal varieties or essential biological processes for the production of plants and 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).

Following from the above provision of the Act[55], the exclusion from patentability ranges from the nature of the invention as biological, natural products as opposed to man-made invention, to contraries to public order or morality[56]. This is to be discussed below.

1. Plant and Animal Varieties of Biological Processes

This is provided for in S. 1(4)(a) of the Nigerian patent and Designs Act 2004 as stated above. Hence Oyewunmi[57] opined that varieties of living organisms obtained through new processes in horticulture, animal husbandry and others are not patentable. Processes and techniques of evolving such new varieties, where such processes are essentially biological in nature are also not patentable. Suffice it to state, that the effect of the provision of the Act (the Nigerian Law) is that new varieties of biological products are not patentable, which is contrary with the current International Intellectual Property regime.

However, notably the Agreement on Trade Related Aspect of Intellectual Property rights (TRIPS Agreement) requires member countries of World Trade Organisation (WTO) to provide legal protection for new plant varieties, thus; Article 27 (3)(b) of TRIPS Agreement provides *inter alia* that plant varieties are eligible for protection either through patent protection or a system created specifically for the purpose or a combination of the two. Developed country like the United States of America (USA) kept to the International Intellectual Property regime on patent protection by granting patent to new plant varieties.[58]. While Nigerian Law does not grant patent to new plant varieties[59].

2. Contrary to Public Order or Morality

Patent shall not be granted to a product which publication shall be contrary to public order or morality.[60]

[53] S. 1(4) of the Patent and Designs Act Cap P2 Laws of the Federation of Nigeria (LFN) 2004.
[54] *Ibid.*
[55] *Op cit.*
[56] A. O Oyewunmi p. 156.
[57] *Ibid* p. 157.
[58] 35 US Code, United States Plant Patent Act 1930.
[59] S. 1(4)(a) of the Patent and Designs Act *op cit.*
[60] S. 1(4)(b) of the Patent and Designs Act 2004 *op cit*

Rights Conferred By Patent

The grant of Patent is associated with certain rights. It confers to the patentee the rights as stated in S.6(1) of the Act[61] thus;

The right to preclude any other person from doing any of the following acts –

(a) where the patent has been granted in respect of a product, the act of making, importing, selling or using the product, or stocking it for the purpose of sale or use;
(b) Where the patent has been granted in respect of a process, the act of applying the process or doing in respect of a product obtained directly by means of the process, any other act mentioned above.[62]

However the rights under a patent shall extend only to acts done for industrial or commercial purposes[63]. And shall not extend to acts done in respect of a product covered by the patent after the patent 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 shall continue to be reserved to the patentee[64].

CONCLUSION

Patent is a government grant to an invention which is new, results from an inventive activity and capable of industrial application. Not all inventions qualify to be granted patent under the Nigerian law. The Nigerian Patent and Designs act excludes certain inventions from grant of patent such as plant and animal varieties or essentially biological processes for the production of plant and animal, other than microbiological processes and their products. Hence Nigerian Law draws a distinction between biological and microbiological processes. In this distinction microbiological processes/techniques are patentable while biological processes are not.

Importantly, the TRIPS Agreement provides for the patentability of new plant varieties, which provision developed country like USA has included in its Law, but Nigerian has not incorporate that aspect of the TRIPS Agreement into its Law.

RECOMMENDATIONS

It is recommended that the Patent and Design Act Cap P2 Laws of the Federation of Nigeria 2004 be amended to include:

1. The grant of patent to new plant and animal varieties.
2. That for an invention to be deemed to have been made public, it must be so made by the owner of the invention and no other.
3. That disclosure of an invention should be restricted to geographical boundary.
4. That an invention is anticipated only when the substantial part of the invention is disclosed.

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