TOWARDS A PROACTIVE REVIEW OF THE NIGERIAN PATENTS AND DESIGNS ACT*

Abstract

Patents and designs are forms of industrial property that fall under the umbrella of Intellectual Property. Despite being in existence since the adoption of the first Patent Legislation in Nigeria (Patents Act 1970), there has been no significant technological advancement. This is in stark contrast to other nations around the world, which have prospered through similar means. The fault lies with our legislation, as it lacked any policy consideration or comprehensive national technology plan when it was implemented over 40 years ago. Consequently, its level of implementation has remained low throughout this period. Due to its lack of a proper basis for operation, the patent legislation was destined to fail from inception as a quick-fix solution. We must improve upon the provisions outlined in our Patents and Designs Act (Cap P2 Laws of the Federation of Nigeria [LFN] 2004). To achieve this goal, we must address certain inadequacies present within these laws by proposing key issues and making recommendations for improvement. To accomplish this task effectively, a descriptive and analytical approach was adopted while treating data generated from materials used during research on this subject matter. Primary and secondary source materials were also consulted using a critical and doctrinal approach. Our country's value system plays an integral role in how patents and designs operate within Nigeria; therefore, we must streamline our laws accordingly to account for our unique circumstances.

1. Introduction

Patents and designs are forms of industrial property which is a branch of Intellectual Property. The law of intellectual property deals with economically valuable creations of the human mind that are deemed worthy of legal protection. The premise underlying intellectual property throughout history has been the recognition and rewards associated with the ownership of inventions and creative works. Letterman defined Intellectual Property to be a legal property right in an intangible idea, although the idea may be expressed, demonstrated, or utilized in a tangible form.[1] Intellectual property which is the main body covering the research can be classified into industrial property and copyright. Copyright is regulated by the Copyright Act[2] while industrial property which is a creative work that has economic value and is protected by Law is another branch and is made up of patents, trademarks, new varieties of an organism, utility models, Industrial designs, trade secrets/undisclosed information, know-how, geographical indicators, and repression of unfair competition. All of them are regulated by their various Acts. For this research, we will limit our discussion to only patent and industrial designs which both are guided by the Patents and Designs Act[3] which is the main subject matter of this research work.

There is no doubt that the technological development of any nation is of utmost importance to its economic advancement as well as an essential instrument for the growth of international trade. The Patents and Designs Department in Nigeria has not been able to meet with the fast pace of technological development in the world and because of this, Nigeria is being left behind in the

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[1] G. Letterman, *Basics of Intellectual Property Law*, (United States of America, Transnational Publishers Inc., 2001), 1.

[2] Copyright Act, 2022

[3] Cap P2 LFN 2004.

global arena of developing Industrial Property Systems.[4] The patent system has the fastest development indices in intellectual property law all over the world, especially in developed countries; and Nigeria as a signatory to the Trade Related Aspects of Intellectual Property Rights (abbreviated as TRIPS agreement)[5] is obliged to bring its intellectual property laws into conformity with the TRIPS Agreement.

According to Twain, speaking through a character called Morgan in his book (A Connecticut Yankee in King Author's Court 1889) he said: for I knew that a country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or back ways.

The growth of knowledge and patent–related statistics can act as an indicator of the strength or weakness of a country's economy.[6] More importantly, patent and designs laws reflect the state of progress of a nation because a good patent and designs law ensures an industrialized and wealthy nation while a bad one shows a backward, undeveloped, and poor nation.

2. Historical Evolution

2.1 Historical Evolution of Patent in Nigeria

In the 19th and early centuries, patents registered in the United Kingdom were by order-in-Council made applicable in Nigeria. The colonial Government of Britain enacted several ordinances relating to patents, the first being introduced in the former colony of Lagos and Southern Nigerians in 1990 which are: Patents Ordinance No 17 of 1900 and the Patents Proclamation Ordinance No 27 of 1990 respectively. The Patents Proclamation Ordinance No 12 of 1902 introduced similar legislation in Northern Nigeria. (The Northern and Southern Protectorate had separate patent offices; each had a Registrar and a deputy. Applications for patents for invention were to be made to the Registrar, while appeals from decisions of the Registrar went to the Attorney-General. Finally, when it was decided that a patent should be granted, it was granted by the High Commissioner, in the name of the crown).[7] Despite this, the registration of patents of Nigerian origin did not change; they were only registerable in the United Kingdom.[8] Following the amalgamation of the colony of Lagos, the protectorate of Southern and Northern Nigeria to form the geographical entity called Nigeria in 1914, the legislations were replaced by Patent Ordinance No. 30 of 1916. In 1925, an amendment was introduced to it by the enactment of the Registration of the United Kingdom Patents Ordinance No. 6 of 1925.[9] The new law only provided for the registration in Nigeria of patents already granted in the UK, an anomaly that persisted even long after independence in 1960. In effect, applications were first made to the UK patent office to be granted a patent for an invention before proceeding to Nigeria to have it registered. Impliedly, it meant that it was the UK law that substantially applied to patent applications and grants in Nigeria

[4] K.Waziri, 'The Role of Industrial Property Protection in Advancing Technological Growth and Development in Nigeria', *Kogi State University Law Journal*, [2010 – 2011] (vol. 4&5), 271.

[5] Negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994, effective on 1st January, 1996.

[6] K.Waziri, (n 4), 259 -260.

[7] C. Okany, *Nigerian Law of Property*, (2nd edn., Enugu, Fourth Dimension Publishing Co. Ltd., 2000), 353.

[8] A. Obilade, The *Nigerian Legal System*, (Ibadan, Spectrum Law Publishing), 1979, 18.

[9] Now cap 182 Laws of the Federation of Nigeria and Lagos 1958; FO Babafemi, *Intellectual Property: The Law and Practice of Copyright, Trade Marks, Patents and Industrial designss in Nigeria*, (2nd edn., Ibadan, Justinian Books Limited, 2006), 346.

up till 1970.[10] In 1970 the Federal Military Government promulgation Patents and designss Decree No. 60 of 1970 repealing the Registration of UK Patents Ordinance No. 6 of 1925,[11] Right (Limitation) Act 1968, and the UK Patnts Act 1949 in so far as it was in force in Nigeria.[12] The Decree came into force on the 1st of December, 1971, and deals with both patents and industrial designs. The said Act was later incorporated in 1990 Laws of Federation of Nigeria which is now encapsulated in Laws of Federation of Nigeria 2004. It is apparent that the 2004 Act is a reproduction of the 1970 Act and did not add anything to the existing law.

2.2 Historical Evolution of Industrial Designs in Nigeria

In Nigeria, legislative enactment in this field is still very recent. The United Kingdom Designs (Protection) Act 1949 was the Law in force until 1970 when the Patents and Designs Act was passed.[13] This Act which repealed the United Kingdom Designs (Protection) Act 1949 now provides for the original registration of Industrial designs in Nigeria.[14]

3. Justification of the research.

Equally important is the fact that despite the length of time since the first patent legislation was put in place in Nigeria, no considerable progress has been made technologically since the adoption of the same. In contrast, however, evidence abounds of other nations of the world that have been propelled from poverty to prosperity through the adoption of the patent system. Where then lies the fault? Is the fault in us as a people or in the legislation itself?[15] The fault lies in the legislation as neither the law enacted by the colonial overlords nor the Homegrown Patents and Designs Act was based on any policy consideration. The enactment of the Act was not founded on any coherent and comprehensive national technology plan because none existed at that time.[16] The absence of national planning consideration in the enactment of the law could be seen from the low level of implementation it has enjoyed in the over 40 years of operation. The Act which was a quick fix was destined to fail as it lacked a proper basis for its operation. For that reason, it had serious repercussions on Nigeria's development.

Society is in eternal flux, and laws should abide by the same to meet up with local, regional international developments. Where laws do not meet up with societal changes, law review becomes necessary. Law review does not involve only reviews in the substantive areas of law; it also involves enhancing the quality of the bodies or institutions that enact, administer, and enforce these laws. This paper advocates for a review of the Patents and Designs Act.[17] The Act which is the principal instrument that regulates the regime of patents and designs requires upgrades and modifications to be in tune with the emerging technological changes in the world. Regulations and laws that were made with the realities of the 19th century must be upgraded and reformed to meet the fresh challenges of the 21st century. There should be reform of the law and policy on patents

[10] F. Dada, 'Legal Effect of the Nigerian Patent Law on Sale of Drugs and Consumer Protection in Nigeria', *Global Journal of Human-Social Science: Economics*, [2014], (vol. 14, Issue 6, Version 1), 9.

[11] Now cap 182 Laws of the Federation of Nigeria and Lagos 1958.

[12] *Section 31(1) and (2)* of the 1970 Act.

[13] Patents and designss Act, Cap 344 LFN 1990 now Cap P2 LFN, 2004; *Section 31(1)*.

[14] F. Babafemi, (n 9), 413.

[15] O. Oyedepo, 'The Significance of Patent as a Tool for Development: Lessons for Nigeria', *Law and Policy Review (LPR)*, [2011], (vol. 1), 138.

[16] O. Oyedepo, 'Patent and Economic Development in Nigeria', <http://segunoyedepoandco solicitors.com/1/post/2013/1/patent-and-economic-development-in-nigeria.html>, accessed 10 March, 2022.

[17] Cap. P2, LFN. 2004 which shall hereinafter be referred to as the Act.

and designs, encouragement of research and development, stimulation of research and development, and redirection of our efforts in attracting Foreign Direct Investment (FDI which is the controlling ownership in a business enterprise in one country by an entity based in another country e.g. through mergers and acquisition) as well as providing the necessary conditions for transfer and promotion of technology and innovation.

Our value system is crucial to the working of the patents and designs in Nigeria. We need to streamline the law on patents and designs to take account of our peculiar circumstances; also to provide an opportunity to reevaluate our needs for technology development as well as provide the necessary infrastructure towards moving to technological height which we can attain given the right atmosphere. Again, except Nigeria takes a positive step in exploiting and utilizing its intellectual property by reviewing the Act to comply with international standards, it may blunder into a storm because of the diminishing oil revenue

Countries like the UK, and India,[18] (From The Patent (Amendment) Act, 1999, to 2002 to the present Act 2005), etc., their patent laws have constantly passed through a series of amendments and modifications while our laws have sadly assumed a snail pace compared to them. To sum up, the provisions of our Patents and Designs Act (the Act) as presently constituted need to be improved upon, the need for a thorough review of the Act which is archaic and has lots of deficiencies contained in is necessary. Therefore, Nigeria to achieve its vision 20:20 (To be one of the 20 largest economies in the world, able to consolidate its leadership role in Africa and establish itself as a significant player in the global, economic, and political arena) must develop the Act to its optimal level.

This Article is aimed at proposing issues of importance to be included in the Act as well as making recommendations to the inadequacies in the Act.

4. Weaknesses of the Act

4.1. Patent Application – ***Section 3(2)*** **of the Act:** The purpose of the patent specification is to ascertain the scope of monopolies as provided for in *Section 3(2) of the Act* which says that the scope of the protection conferred by a patent shall be determined by the terms of the claims, and the description included in the patent application shall be used to interpret the claims. Hence, the patentee's monopoly right is limited technically to what is apparent on the face of his claim, regardless of whether or not this truly defines the progress claimed by the patentee. The patentee in drafting his claim may be caught between two evils on the one hand:

(1) drafting the claim widely and clearly and running the risk of competitors being able to easily understand it and therefore finding means of copying it or inventing around it.
(2) On the other hand, not making it sufficiently clear to enable it to be put into practice by a man knowledgeable in that field and, thereafter, running the risk of having his patent invalidated on that ground.

4.2. Patents being granted at the risk of the patentee and without guarantee of their validity, as provided for in Section 4(2): Possibly one of the biggest challenges about patent rights in Nigeria is the fact that patent examiners are not experts in the fields of science, engineering, and

[18] The Patents Act, 1970.

technology; they are not required to have advanced degrees or training in the above fields. The effect of this lack of expertise is that patent examiners in Nigeria are unable to perform more than a superficial search of the registry records to locate prior art and as such there is no substantive examination of the specifications and drawings that are submitted for filings. This is potentially dangerous because the average person finds it difficult to read and understand patent specifications and drawings, therefore increasing the possibility of patents being registered when there are prior patents covered by the new registration. That aside, *section 4(2)* of the Act which requires only formal examination by the patent officer without the requirement for substantive examination measured against the 'state of the art'[19] does not promote the challenge involved in understanding the existing state-of-the-art by patentees.[20] Substantive examination remains the basis of important patent systems in the world. Registrar of patents will not, while considering any patent application, enquire whether the subject of the application is patentable (i.e. without inquiries as to its novelty, inventiveness, and industrial applicability); whether description and claims satisfy requirements of law or whether there has been a prior application for, or prior grant of, patent in respect of same or similar invention as that under consideration.[21]

Consequently, the fact that one has been issued with a patent certificate in Nigeria does not mean that the patent is valid. On application of any person including a public officer acting in the exercise of his functions, the court shall look into the question: (1) whether an invention in respect of which a patent has been granted is patentable; (2) whether the description of the invention conforms with requirement of clarity and completeness under *section 3(2); and (3)* whether at the time the application for the patent was filed there already existed a prior application in respect of the same invention.[22] Where the court finds that a patent does not pass the test of validity under the provisions of *section 1 or section 3(2) of the Act*, the patent will be declared null and void. The processes involved in granting a patent work (a legal right in the Act) should be one of the primary essences of the Act, not only was it reduced in importance, but the priority of it is totality misplaced. Patents are therefore granted at the risk of the patentee and without guarantee of their validity.[23]

4.3. Grant of Monopoly - Section 7(1) of the Act:

The grant of monopoly puts the patentee in an insecure position because there is no statutory consolation at the expiration of the patent at the twentieth (20th) year from the date of application for registration. This time limitation is probably based on the premise that the patent term should attempt to balance the interests of the investor on the one hand who has a right to his property and should be allowed to enjoy it like other proprietary owners, and the public generally on the other hand who wants to participate freely in the protected subject matter as early as possible. The fixing of the patent term has however been described as arbitrary because it appears not to be reflective of genuine economic needs.[24] Arguably, the patent should belong to the owner without any time limitation, until he chooses to divest himself of his right to the property. Just like other forms of property (e.g. real property where someone buys a land or a plot of land), the state does not readily

[19] that is the current state of knowledge as exists in the field concerned at that time which involves using current technology to assess the technology being patented

[20] O. Oyedepo, 'Patent and Economic Development in Nigeria' (n 16).

[21] There is no provision for search at any stage before the grant as seen at the international level.

[22] *Section 9(1)* of the Act.

[23] *Section 4(4)* of the Act

[24] P. Goldstein, *Copyright, Patent, Trademark and Related State Doctrines Cases and Materials*, (Chicago, Callagham & Co., 1973), 509.

divest the owner of his interest,[25] and even after his death, it is passed on to his heirs or successors. Why then should a holder of the patent have to part with property in it after twenty years (20), which may be just as the invention is gaining ground?

In some industries, particularly where tests and trial runs have to be carried out before the product is finally released into the market; the period available for exploitation may be considered less than the twenty-year term. An example is the pharmaceutical industry, where thorough official testing of new drugs to establish their safety often has to be carried out, with the effect that their introduction into the market is delayed for several years and therefore, the period during which profit is made from the invention is greatly reduced. The fact that a patent right is conferred on the first to apply for a grant in respect of any new product or process,[26] who may not necessarily be the first to invent,[27] often renders it very important for an inventor to commence steps towards the grant of a patent right as early as possible. In the meantime, carrying out tests and trial runs becomes necessary for the proper perfection of the invention. Obviously, at this stage, the product is not yet ready for the market, but the twenty-year term would have started running from the date of application for the patent. The lack of a provision in the law for a renewal of the twenty-year term has adverse consequences for such investors.

Again, where a patentee is unable to effectively exploit his patent due to political or economic instability, the court has no discretion to extend the patent term where the ends of justice will be better served in this way. An example can be seen in the repealed British Patents Act 1949, which permitted an extension of the fourteen-year patent term on the grounds of war, loss, and inadequate remuneration.

It is suggested that a provision for renewal will be a safe middle course to adopt, rather than further extending the patent term. The question that follows is whether an invention that has not yielded sufficient returns after twenty years of exploitation is a viable one. This is especially true in industries where technological change is rapid (e.g. communications industry) and within a few years, an invention has become outmoded and therefore, unmarketable. On the other hand, however, while a provision for renewal of the patent term may serve to encourage indigenous inventors, it is not unlikely that it will further put the nation at the mercy of the developed nations from where the majority of patented inventions originate. For this reason, any extension that will have the effect of delaying the early release of these foreign inventions to the public is likely to be frowned upon. The dilemma here becomes glaring when it is realized that Nigeria and indeed all member countries of the Paris Convention on Industrial Property are bound to accord equal treatment to all patent applicants and owners; notwithstanding the big gap in the technological capabilities between the developed and the developing nation.[28]

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[25] Unless it is for overriding public interest, and this is subject to the payment of compensation (*sections 28 and 29* of the Land Use Act 1978). Even copyright subsists for between fifty to seventy years after the death of the author or creator of the work- see the first schedule to the Copyright Act (n 3))

[26] *Section 2(1)* of the Act.

[27] For example where two or more persons or bodies (working independently) are simultaneously engaged in research and invention, the right to patent is vested in the first to apply for a grant in respect of the end product or process.

[28] *Article 2(1)* ibid; provides as follows: 'Nationals of any country of the Union, as regards the protection of Industrial property, enjoy in all the other countries of the union the advantages that their respective laws now grant, or may hereafter grant, to nationals …'

Furthermore, one needs to question the efficiency of a single term being uniformly applicable to all patented products and processes, regardless of the nature of the invention, the cost and length of time of research leading to it, and the importance of the invention. Normal inventions are likely to be unduly rewarded by a fixed term, while inventions with expensive technological breakthroughs are inadequately compensated. The term granted should reflect the degree of innovativeness of the patentee and the value of the invention itself, rather than a blanket period applying to all patents.

4.3. The Notification of the Expiration/Surrender of Patent – *Section 7(3) & 8(1)* of the Act: will be made only to the Registrar of Patents and Designs by written declaration who will record that in the Register. Following this provision, it will be discovered that the public was not put into consideration as to put them in the know so that they will be able to exploit the patent which is now in the public domain by publication in the federal gazette unlike when a patent grant is made. Unless a visit is made to the registry to check the register, one will not be in the know that a patent has expired or been surrendered.

4.4. Nature of Industrial Designs - Section 12 of the Act. This section provides that Any combination of lines or colours or both, and any three-dimensional form whether or not associated with colours, is an industrial design if it is intended by the creator to be used as a model or pattern to be multiplied by an industrial process and intended solely to obtain a technical result. This definition is so long with punctuation that its meaning is lost in verbiage; it is also not wide enough. Therefore, it is submitted that the absence of any mention of two-dimensional forms[29] or drawings may seem to introduce a lacuna.[30] This is because, though the Copyright Act[31] defined an artistic work to include, irrespective of artistic quality, any of the following works or similar works - (a) paintings, drawings, etchings, lithographs, woodcuts, engravings, and prints; (b) maps, plans and diagrams; (c) works of sculpture; (d) photographs not comprised in an audiovisual work; (e) works of architecture in the form of building models; and (f) works of artistic craftsmanship, including pictorial woven tissues and articles of applied handicraft.

The same does not preclude the use of such artistic works as designs on items of industrial manufacture. In the situation that copyrighted material is employed as the designs of an industrial product, where would the protection come from? This is a problem that some jurisdictions have been grappling with and have been forced to admit the existence of dual protection for some intellectual property, especially designs that qualify for copyright and industrial design protection. In addition, the Copyright Act[32] states that 'An artistic work shall not be eligible for copyright if at the time the work is made, it is intended by the author to be used as an industrial design, as defined under the pattern designs.' Since a pattern is a two-dimensional form and qualifies as an industrial

[29] Two-dimensional is a term used to describe a geometric figure that has length and width but no depth, such as a triangle or a square. All two-dimensional figures can be drawn on a plane (flat surface) while a three-dimensional, term used to describe a figure that has length, width, and depth. For example, a geometric solid such as a cube or sphere is a three-dimensional figure.

[30] Just like India which recognized the protection of two-dimensional form in their Act thus, *section 2(d)* of the India designs Act, No 16 of 2000 which defines designs to mean 'only features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye…'

[31] *Section 108* Copyright Act (n 2)

[32] *Section 2(6)*, (n 2).

design, a picture or pictorial representation that happens to be used as a design on t-shirts or other products ought to be considered for protection as industrial design; that the intention of the author was, at the time the work was made' not 'to be used as a model or pattern to be multiplied by an industrial process', should not constitute a bar. Works protected by copyright could be adapted to suit certain needs, one of which could be adoption for use on industrial goods. An artistic work, that is placed on a product for its aesthetic value, ought to be recognized and protected as an industrial design.

4.5. Examination of Applications for Registration - *Section 16(2)* of the Act: The above section specifically precludes the Registrar from examining whether the designs are new under *section 13(1) (a)*[33] while making *section 13(1) (b)*[34] and *section 15*[35] of the Act its test tube for registration of industrial designs. This method of examination is non-substantive and it is anomalous in three respects: Firstly, the validity of registration is uncertain, consequently, the rights conferred by such registration are not absolute; Secondly, it will open a floodgate of litigation; and Thirdly, the essence of filing an application and accompanying claim of novelty to the Registrar is defeated if he cannot verify the claim of novelty either by conducting a detailed search in the Register of designs and comparing the existing specimen and claims.

4.6. Lack of Precision in Many Sections of the Act

4.6.1. Section 1(4) (b):

Patents cannot be validly obtained in respect of (b) inventions the publication or exploitation of which would be contrary to public order or morality…

The concept of public order covers the protection of public security and the physical integrity of individuals as part of the society as well as the protection of the environment. That of morality is related to the belief that some behaviors are right and acceptable, whereas other behaviors are wrong; this belief is founded on the totality of the accepted norms which are deeply rooted in a particular culture.[36] Whether a moral evaluation is a proper concern for patent offices has been a matter of considerable debate.

The Act does not define the benchmark for public order or morality and how such terms could be measured for application in terms of patents. This is very crucial in a country like Nigeria that is multi-ethnic, multi-cultural, and multi-religious and where the yardstick and parameters for assessing morality differ among ethnic groupings, social standings, tribes, and religions

4.6.2. Paragraph 23, Part 11 of the First Schedule to the Act:

Which is the interpretation section defines a 'Minister' to mean 'a Minister of the Federation and includes a State Commissioner'. In practice, this definition might present some problems of consistency and engender conflicts. If a Commissioner in a state within the Federation is empowered, in the same way as a Federal Minister, to grant compulsory licenses concerning patented products when he is satisfied that it would be in the public interest to do so; there might be room for abuse or conflict in the exercise of such powers. This is more so since the Act does not define what would amount to an exercise 'in the public interest' which is discretionary. This is

[33] (1) Subject to this section, an industrial designs is registrable if – (a) it is new;
[34] (1) Subject to this section, an industrial designs is registrable if – (b) it is not contrary to public order or morality.
[35] This provides for applications for registration.
[36] C. Colston, *Principles of Intellectual Property Law*, (London, Cavendish Publishing Limited, 1999), 75.

especially so since the Minister (which also includes a state commissioner) may also use the powers conferred under *paragraph 20 of Part 11 of the First Schedule* to the Act to compulsorily authorize the making, purchase, use, or otherwise of a patented product in times of national or community emergency.

4.7. Silence of the Act on the Protection of Traditional Knowledge

The Act is silent on the protection of traditional knowledge (abbreviated as TK). Traditional Knowledge is defined as the knowledge traditionally being used by the public, such as a community for time immemorial; usually, this knowledge is passed on from one generation to other generation in families.[37] Normally, there may not be any written document describing such knowledge. The non-protection of TK in the Act has severally led to 'Bio-piracy'[38] which means the use without authorization, especially for commercial purposes or the appropriation of traditional knowledge or other forms of biological resources, without acknowledging the source of same or giving any form of compensation to the original discoverers or guides or possessors of that bio-cultural knowledge. It has proved difficult to prevent bio-piracy because the Act is silent about the protection of TK. Given the vast potential of natural medicine, Nigeria must take more definite steps to protect and better document its huge indigenous medical knowledge, which may be sustainably exploited and utilized for improved healthcare delivery, wealth, and job creation and even commercialized as raw materials or as finished products. All these are essential to the economy of the country and can greatly boost same because failure to do so will only rid the country of its economic benefits.[39] Research and pharmaceutical companies patent or claim ownership of traditional medicine plants, though indigenous people have used such plants for generations. As such, they do not recognize the indigenous peoples' traditional ownership of such knowledge and deprive indigenous peoples of their fair share in the economic, medical, or social benefits that accrue from the use of their traditional knowledge or practices and the nation-state wherein this knowledge is found lose huge sums which could have been garnered from the proper economic and cultural use and preservation of same in the local communities. Prof. Turner observed that 'international drug development agencies are now looking to natural medicine plants as a source of new drugs; what is referred to as bioprospecting'. This development is making herbal practitioners uncomfortable.[40] Once TK is removed from an indigenous community, the community loses control over how that knowledge may even be developed and patented in foreign countries, to the exclusive use and benefit of third parties, without any recognition for the source communities which leaves a huge dent in the natural resources conserving practices of the community and their culture and gradually erodes the rich bio-diversity of such community and country. If TK is protected under the Act, Nigeria being a

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[37] N. Subbaram, *Practices & Procedures with commentary on the Patent Act, 1970 & Patent Rules, 2003*, (2nd edn., India, Wadhwa and company Nagpur Law publishers, 2007), 95.

[38] Waziri K., 'Protection of Traditional Knowledge in Nigeria: Breaking Barriers', *Journal of Law, Policy and Globalization*, [2014], (vol. 29), 176.

[39] A factual situation was reported by Mgbeoji, I., of local farmers in Ibadan, Nigeria, who developed an insect-resistant cowpea and of course, they would have been unable to publish their findings or their results in any reputable journal reviewed by their peers. However, on a trip to Nigeria, one Angharad Gatehouse, a scientist at the University of Durban, obtained some of these seeds. Using formal technique, he identified in scientific language, the genetic mechanism which causes the locally developed cowpeas to be insect-resistant. The scientist promptly left the university and joined the Agricultural Genetic Company of Cambridge and they proceeded to apply for a patent on the invention. See K. Waziri, (n 41), 177.

[40] Bolanle, A., 'Traditional Medicine Practice in Nigeria', *Village Voice*, (29 September, 2008), <http//:www.magazine.paxherbals.net/thdmag/issue-08/traditional medicine practice-in-nigeria.html> accessed 18 May, 2021.

nation rich in natural medicine plants has a lot to gain. Not only will it reap the economic benefits that will go a long way in balancing its economy, but the returns to the Nigerian economy would run into billions of dollars. It will equally give the nation–state more control over its TK, such that the same can be safeguarded from exploitation and used sustainably and continuously. Protection of traditional knowledge by incorporation in the Act creates a conducive climate for transfer of such knowledge, for research and development (R&D). In addition, it will attract national and foreign investment because these foreign companies/developed countries need the traditional knowledge for R&D, and without the ease of bio-piracy; they are compelled to enter into legitimate partnerships with either the government or the people. By so doing, benefits due through payments of royalties, patent fees, and generation of foreign exchange are returned to the country and to the communities from which TK is derived thereby generally boosting the economy of the country and stimulating the development of trade and commerce in the country, as the country becomes known as a steady market for certain traditional resources. Therefore, the government can no longer shut its eyes on recent international developments in this regard and must break the necessary barriers to protect its TK, such as done by other countries like India that have patents on Basmati rice and Ayahuasca used in indigenous Amazonian healing. Additionally, there is a US Patent on Turmeric for healing wounds; a patent for the use of Turmeric powder in the US was granted in 1996. Therefore, the Nation needs to act fast in this regard.

4.8. Inadequate Enforcement Mechanism:

This is an institutional problem that aids in the ineffectiveness of the patent system because Nigeria lacks the manpower and materials necessary for adequate enforcement and investigation of patent claims. Countries like South Korea, China, and Brazil, have benefitted hugely in economic development by recognizing, enforcing, and respecting intellectual property.[41]

Counterfeiting which means the fraudulent imitation of products to deceive and mislead the ultimate consumer is an instrument of destruction and has ripped many the dividends of their intellectual property rights. Counterfeiting is a global threat, but it is worrisome that Nigeria has turned into a safe place for perpetrators of this menace and remains an entrance to the rest of the world for counterfeit products, and fake goods are constantly being offered alongside genuine goods to unsuspecting and undiscerning consumers. Counterfeiters are producing better fakes and the works of these infringers have permeated everywhere in Nigeria and have shown that 'all things are possible' An Example is the Smart cards for cable decoders which have been forged and used in this country. So are the food and beverage products, counterfeit drugs, cosmetics, shoes, bags, etc not left out? The sad reality is that just as technology is evolving and companies developing sophisticated anti-counterfeiting techniques, counterfeiters are equally getting better at producing fakes. Even the fake drugs appear even more original than the genuine ones. For instance, Cable News Network's (abbreviated as CNN) Gupta, reported the case of Nneka and Chimezie Ononaku, a couple in Nigeria who unintentionally poisoned their infant son after feeding him teething medicine that was contaminated and antifreeze.[42] The Nation newspaper recorded that counterfeit frustrates efforts to deal with the high burdens of disease has harmful effects on patients' health

[41] D. Ike, 'Intellectual Property Crime in Nigeria', *Journal of Commercial and Contemporary Law (JCCL),* [2011], (vol. 1), 158.

[42] A. Erondu, 'Menace of counterfeits and pirated products', *Business News,* 2009, <http//:www.Businessdayonline.com/2009/06/menace-of-counterfeits-and-pirated-products/>, accessed 3 September, 2022.

and can kill.[43] The World Health Organization (WHO) estimates that fake anti-malaria drugs alone kill approximately 100,000 Africans a year and these counterfeit medicines deprive governments of 2.5% - 5% of their revenue.[44] This problem is certainly not limited to Nigeria but to other developing countries. In the U.S. for example, counterfeiters cost businesses an estimated $200 billion a year.[45] One major problem that may result from a company's goods being counterfeited in Nigeria is that when word gets out to the market that some of the goods are fakes, consumers tend to avoid purchasing that brand, which often leads to the loss of millions of Naira. Nigeria received her share of counterfeit pharmaceuticals in 1989 when over 150 children died as a result of Paracetamol syrup containing DIETHYLENE GLYCO, this problem of fake drugs was so severe that neighbouring countries like Ghana and Sierra Leone officially banned the sale of drugs, foods, and beverages made in Nigeria.[46] Such problems led to the establishment of the National Agency for Food and Drug Administration and Control (abbreviated as NAFDAC).[47] To combat counterfeiting and stay steps ahead of counterfeiters in Nigeria, companies such as GlaxoSmithKline (GSK) have in collaboration with Nigeria's National Agency for Food and Drug Administration and Control (NAFDAC), piloted innovative approaches that are aimed at protecting patents in Nigeria from counterfeit medicines. What GSK and NAFDAC have done is take advantage of the fact that in the area of telecoms, Nigeria is currently Africa's largest market with close to 100 million mobile phones. Using mobile phones, GSK began a six-month anti-counterfeiting program in February 2011, about its antibiotic, AmpicloxTM. The company placed a scratch-off code on the back of the Ampiclox antibiotic pack. Using this code; consumers would send a text message to a central NAFDAC toll-free phone number for verification; the mobile service looks up the code and sends a verification text back to consumers. There is also a toll-free phone number for consumers to call if they have any questions thereby, helping the company identify counterfeit Ampiclox in the market. Additionally, there is a need for accountability on the part of agencies charged with the task of enforcing the Act. Corruption which is the icing on the cake has a major role to play in the factors undermining the effective enforcement of existing laws.

5. Recommendations

Having examined the defects in the Act, it is paramount to make recommendations for the development of patents and designs in Nigeria in other to be on the same pedestal with other Countries. The recommendations include:

5.1. Therefore, to avoid being caught up between the two evils in S**ection 3(2) of the Act**, it is proposed that only Legal Practitioners draft the claims.

5.2.. Concerning S**ection 4(2) of the Act**, it is recommended that Recommendation: Nigerian patent system be called the DEPOSIT SYSTEM of patenting where the work of the Registrar of patent is purely administrative as opposed to the EXAMINATION SYSTEM adopted by the Industrialized

[43] B. Okhakume, 'Our Pharmaceutical Products market', The *Nation Newspaper*, [2011], (vol. 1 No. 023), 61.

[44] M. Ogisi, 'Fake Medicine Common in Many Sub-Saharan African Countries', *Gallup World*, 2011 <http://www.gallup.com/poll/149942/fake-medicine-common-sub-saharan-african-countr ies.aspx> accessed 10 February, 2021.

[45] Lan, and ors, 'Understanding Word-of-Mouth in Counterfeiting', 2012, <http://www. Scirp.org/journal/psych> accessed 10 February, 2023.

[46] F. Dada, (n 10), 10

[47] The body was established to regulate and control drugs, drug products, cosmetic or medical devices and processed foods. The enabling legislation is listed as NAFDAC Act (Cap N1, LFN 2004).

Nations, where rigorous examinations as to compliance with the requirement for patentability (substantive conditions) are undertaken. Therefore the examination system is recommended as it eliminates as much as possible invalidity of the patent grant, upon application and to grant only valid patents. Examination often takes a long time and involves the examiner in a great deal of work; this should be copied from the industrial nations and be made applicable to Nigeria by its reflection in the Act.

5.3. It is submitted that **Section 7(1) of the Act** should be amended to provide an opportunity for a Patentee to renew his patent for further periods of five (5) or ten (10) years after the twentieth (20th) year from the date of the filing of the relevant patent application. This is reasonable in the sense that such renewal (or extension of time as in exceptional cases), will enable the patentee to enjoy the dividend of what he has invented fully.

5.4. Concerning **Section 7(3) & 8(2) (c) of the Act**: Our recommendation in this regard is that the notification should be made also to the public by publication in daily newspapers, alongside the federal gazette and not only in the Register so that interested members of the public will be aware of the expiration or surrender. This will help put the public on notice so that they may be able to exploit the patent which has now fallen into the public domain.

5.5. **Nature of Industrial Designs - Section 12 of the Act:** This section of the Act should be revisited and given a clearer definition. Our submission is that the absence of the phrase 'two-dimensional form' in the definition of the nature of industrial designs under the Act is an area that needs to be revisited. Furthermore, overlapping protection for any intellectual property would not defeat any known purpose for the public use of knowledge, provided the period of such protection does not extend into perpetuity.

5.6.. With regards to S**ection 16(2) of the Act**, it is recommended that the consideration of the applications made for the registration of an industrial design should not only be based on public order and morality as the only test tube but also on the newness of the designs. This is paramount so as not to conflict with an existing design leading to a state of confusion and uncertainty of the rights of the design's owner.

5.7. It is our submission regarding the imprecise sections of the Act that -

5.7.1. Section 1(4) (b), that 'Public Order' must be deemed to refer to any patent that is capable of causing a breach of peace or going contrary to any law subsisting for the maintenance of peace and public order. This leg of prohibition could be used to regulate several types of inventions from being presented for patent, for instance, products that could impinge on the susceptibilities of a particular ethnic or religious group and lead to protestations capable of distorting socio-political equilibrium within the society concerned.

5.7.2. Paragraph 23, Part 11 of the First Schedule to the Act, A suggested better approach would have been for the exercise of such powers to be vested in the Federal Minister only, and where it is to be exercised by a state commissioner, then, it would have to be by delegation and approval of the Federal Minister. This makes for consistency in the channel of approval and grant of such licenses as against where every commissioner in the states of the federation has such a right. More

importantly, patents and designs are under the Exclusive Legislative List under the Nigeria Constitution, which means that it is only the National Assembly and the Federal Government that can make laws and regulations in that aspect[48]

5.8. **Protection of Traditional Knowledge in the Act**

The scope of the Act should be expanded to accommodate the protection of traditional knowledge (abbreviated as TK). The Indian government compiled a searchable database of traditional medicine in the Traditional Knowledge Digital Library (TKDL) that could be used as a of prior art by patent examiners when assessing patent applications. Indian Parliament has passed laws such as, 'The Indian Biological Diversity Act 2002' and 'Plant Variety Protection and Farmer's Right Act 2001' which protect their TK in unique ways.[49] Through the Nigerian Natural Medicine Development Agency, the Nigerian government has developed a Virtual Library, designed to be a dedicated focal reference center for Traditional Medicine Knowledge and Practice (abbreviated as TMKP).[50] TMKP is still unable to give protection to TK, due to the unique nature of TK. We recommend that immediate steps be taken to protect it in the Act by incorporating of same.

5.9. **Adequate Enforcement Mechanism:**

We submit that pro-active enforcement of the existing laws should be undertaken with vigorous anti-counterfeiting raids and intensive prosecution of all suspects and collaboration with other governmental agencies like the Economic and Financial Crimes Commission (EFCC),[51] Anti-Counterfeiting Collaboration (ACC),[52] Standard Organization of Nigeria (SON),[53] NAFDAC, Consumer Protection Council (CPC),[54] Nigerian Customs Service(NCS),[55] Nigerian Police Force

[48] *Item 43* of the Exclusive List to the 1999 Constitution of the Federal Republic of Nigeria as amended.

[49] K. Waziri, (n 41), 175.

[50] It is modeled after the Traditional Knowledge Digital Library of India.

[51] It was established in 2003 by President Olusegun Obasanjo and this is specifically provided for in section 46 of the EFCC Establishment Act, Cap E7, LFN 2004; where it is empowered by law to investigate, prevent and prosecute offenders who engage in counterfeiting of currency, theft of intellectual property etc.

[52] A brain child of Oyebode and Aluko (an innovative Nigerian Law firm). ACC was conceived in October 2006, with the aim of bringing brand owners, enforcement agencies and interested parties together to form an effective opposition party against counterfeiters and infringers. It is a non-Governmental, non-political and non-profit making coalition.

[53] It was established to standardize the methods and products of industries in Nigeria and to ensure that government policy on standardization of industrial products are complied with. It is empowered to monitor non-edible products. It has a procedure called Standard Organisation of Nigeria Compliance Assessment Programme (SONCAP); the compliance process is in two stages: The first stage, Product Certification, is applicable the first time a product is to be imported into Nigeria while the second stage, Shipment Certification, is applicable on a shipment-by-shipment basis. It is guided by the Standard Organisation of Nigeria Act, Cap S9, LFN 2004.

[54] It is a parastatal of the Federal Government of Nigeria, supervised by the Federal Ministry of Trade and Investment. It is guided by the Consumer Protection Council Act, Cap C25, LFN 2004. This Act seeks to afford the consumer of goods and services so much so that where the rights of a consumer has been violated, the consumer shall have a right of civil action for compensation or restitution in any court of law. More importantly, the average Nigeria is grossly uninformed and is often deceived into buying low quality products that often have no return value or warranties.

[55] It is primarily the 'gate keeper' of every nation. It was brought into being in 1891 and saddled with the responsibilities of revenue collection, accounting for same, anti-smuggling activities (more specifically counterfeiting) and trade facilitation. In discharging its functions, the Nigerian Customs Service has an 'Enforcement, Investigation, Inspection and Intelligence' department which amongst others organizes all anti-smuggling measures at the international borders.

(NPF),[56] National Immigration Services (NIS),[57] amongst others will go a long way to reducing the issue of Counterfeiting to the barest minimum. EFCC generally considers patents and designs as a secondary issue in their mandate and would rather assist the body in charge to carry out its mandate than take the lead. We recommend that it should be added as part of EFCC's major responsibility. In addition, adequate equipment should be provided for these agencies to carry out their duties effectively. Agencies charged with the task of enforcing the country's patents and designs Laws should be made accountable.

5.10. **Revamping of Justice Delivery System:**

Our recommendation is that having a specialized patent and designss Infringement court in the Federal High Court as was practiced in the UK under the Patents Act 1977 where a patent court was created in the High Court with two specialist judges hearing patent matters. If this is done, it will allow for the development of subject matter expertise, which will foster timely adjudication, as well as accurate and more consistent rulings. Also, it will signal to the public and foreign investors that the government respects Intellectual Property Rights and is willing to enforce infringement of those rights. One possible solution to the problem of trained judges would be to organize continuing legal education seminars for judges in this area of law. Such targeted training seminars could be organized by the Nigerian Bar Association, perhaps in cooperation with the American Bar Association. In addition, other means of resolving disputes like arbitration and mediation should be encouraged.

6. Conclusion

The Act which is the principal instrument that regulates the regime of patents and designs has existed for almost 40 years since it was adopted and requires upgrades and modifications to be in tune with the emerging technological changes in the world. This is especially so in the present world of biotechnology, genetic engineering, and nanotechnology. In the technologically driven world today, where 'knowledge moves at the speed of thought', it is necessary that regulations and laws which were made with the realities of the 19th century must be upgraded and reformed to meet the fresh challenges of the 21st century. On the success of a patents and designs system, other nations like the UK, India, etc., provide useful lessons for a nation like Nigeria that is eager to climb up the ladder of development. The effect of the lesson learned should be reflected in the reform of the law and policy on patents and designs, encouragement of research and development, stimulation of research and development, and redirection of our efforts in attracting foreign investment. When we learn these lessons, we may truly say that we are on the road to development. All these can only be possible through a review of the Act which would be a veritable starting point. Even though the patent was first introduced to Nigeria in 1900 and a homegrown patents and designs Act had been in place for over forty years without much to show it demonstrates that merely enacting the Act is not sufficient.

[56] There is an establishment of the Nigerian Police Force Squad charged with the responsibility in the lawful execution of their functions under the section 9 of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act, Cap C34, LFN 2004. The 'Force Squad' is however empowered to arrest, seize goods (all such goods seized shall be forfeited) and conduct lawful investigation into matters arising under the Act. Any person that obstructs the Force Squad in the performance of the lawful duty will be liable under the Act.

[57] It was extracted from the Nigeria Police Force in 1958; it was formally established by an Act of Parliament (*section 5* of Immigration Act, L.N. Cap 171, 1963). It is a department under the control and supervision of the Federal Ministry of Internal Affairs (FMIA). It takes care of border patrol management alongside other responsibilities.

We need to streamline the law on patents and designs to ensure compliance with the international obligations we have entered into; and also to provide an opportunity to reevaluate our needs for technology development as well as provide the necessary infrastructure towards moving to a technological height which we can attain given the right atmosphere. Again, except Nigeria takes a positive step in exploiting and utilizing its intellectual property by reviewing the Act to comply with international standards it may blunder into a storm because of the diminishing oil revenue.

In addition, Nigeria's proposed Intellectual Property Bill, titled: A Bill for an Act to Provide for the Establishment of the IP Commission of Nigeria, Repeal of Trademarks Act CAP T13 LFN 2004 and Patents and Designs Act, CAP P2 LFN 2004 and make comprehensive provisions for the registration and protection of trademarks, patents and designs, plant varieties, animal breeders and farmers rights' and for other related matters which is yet to passed amongst other things, seeks to extend the scope for patentable inventions to include computer programme (if it is not scientific or mathematical nature and does not contravene the provisions of the Act) in *Part c, section 105* of the Bill. This when passed will be of great help.

There should be an effective Autonomous Industrial Property Commission. This will ensure that innovators and investors are assured of their investments and will spur research and development. This proposal is to bring all agencies under one umbrella and ensure an effective and balanced development of the Intellectual Property system in the country. Intellectual and Industrial Properties will be under one administration to be placed under the Federal Ministry of Justice and will be managed through the commission.

However, the above suggestion was captured in the Nigerian Intellectual Property Commission (NIPCOM) Bill now on the floor of the National Assembly (A Bill for an Act to provide for the Establishment of the IP Commission of Nigeria, Repeal of Trademarks Act CAP T13 LFN 2004 and Patent and designs Act, CAP P2 LFN 2004 and make comprehensive provisions for the registration and protection of trademarks, patents and designs, plant varieties, animal breeders and farmers rights' and for other related matters) under Article 1.

The NIPCOM Bill if passed into law would provide the opportunity to manage and regulate all intellectual property rights under one administrative office which would reduce administrative costs, allow for synergy, guarantee efficiency, dispense with bureaucracy, and harmonization of IPR administration in Nigeria. If these weaknesses discussed are looked into and corrected as well by reviewing the Act, Nigeria will rise to economic significance.