

STRENGTHENING THE PATENT SYSTEM IN NIGERIA*

Abstract

A strong patent system in Nigeria will, undoubtedly, create the enabling legal environment for the transfer of newer technologies to the country to take her over the threshold of underdevelopment. This article analyses the system in Nigeria; compares it with other systems around the world where massive transfers of technology, made possible by favourable patent regime, brought speedy development to such countries. The article comes to the conclusion that the Nigerian patent system as it is cannot cope with the demands of such transfers and recommends, among other things, a review of the extant Law.

Keywords: Patent system, Nigeria, Transfer of Technology, Underdevelopment, Review

1 1. Introduction

One of the ways of accomplishing economic development in any country is through commercial transfer and acquisition of technology. Of course, technology can also be transferred and acquired by other means than commercial methods. For instance, personnel may be trained at research and development institutions, technical institutes or centres of learning. Such personnel may in turn study books, periodicals or other publications on scientific and technical subjects, or read patent documents, and in that way acquire knowledge of specific technology. But these methods will inevitably fall short of enabling these personnel or others to apply that knowledge, especially the inventions described in patent documents, to manufacture products, produce goods or render services. This is true for two reasons. First, the exclusive rights to work an invention belong to the owner of that invention. Without the authorisation of the owner, others should not put to practice the patented invention. Second, as has been mentioned, not all the knowledge – know-how – which facilitates or is otherwise useful for the working of the invention is set out in the description of the invention that is found in the patent document. Hence, it becomes necessary to buy those rights, or to buy the permission to use the invention, or to buy the know-how that enables the invention to be put into practice in the most efficient way. That is the whole idea of licensing for technology transfer. There are various ways of transferring technology. But the concern of this article is to discuss how a strong patent system may be used as a vehicle for the transfer of technology.

2. Historical Background of Patent System in Nigeria

There is evidence suggesting that something like patent was used among some ancient Greek cities,¹ however, the term in the modern sense originated in England with *the Statute of Monopolies* in 1624 under *King James I of England*. Prior to this time, the crown would issue *letters patent* providing any person with a ‘monopoly’ to produce particular goods or provide particular services. This power, which was to raise money for the crown, was widely abused, and court began to limit the circumstances in which they could be granted. Parliament eventually restricted the crown’s power explicitly through the *Statute of Monopolies* so that the King could only issue to the inventors or introducers of original inventions for a fixed number of years. Section 6 of the *Statute* refers to ‘manner(s) of new manufacture... (by) inventors’, and this section remains the foundation for patent law in England and Australia. The *Statute of Monopolies* was later developed by the courts to produce modern patent law; other countries soon adopted this innovation.²

The patent system was first introduced in the former colony of Lagos and Southern Nigeria in 1900 via the Patents Ordinance No. 17 and the Patents Proclamation Ordinance No. 27 both of that year. Similar legislation was introduced in Northern Nigeria by the Patents Proclamation Ordinance No. 12 of 1902. All these Ordinances contained elaborate substantive and administrative provisions for the granting of patent rights within their respective areas of jurisdiction. Under each Ordinance, a full-fledged patents office was to be established headed by a Registrar who was given duties and powers cognate in nature to those of the Controller-General in charge of patents in the United Kingdom. Resulting from the amalgamation of the Northern and Southern Nigeria in 1914, all existing legislation on patents in the three separate entities were repealed and substituted by the Patents Ordinance No. 30 of 1916, Cap 141 of the 1923 Edition of the Laws of Nigeria. That Ordinance was amended in 1925 only as to its title and became the Registration of United Kingdom Patents Ordinance No. 6 of 1925, Cap 182 of the 1958 Edition of the Laws of Nigeria and Lagos. The advent of the 1916 Ordinance marked the end of an independent patent system in Nigeria. This situation was to last for over five decades. As implied by the title of the 1925 Ordinance the Ordinance merely made provision for the registration in Nigeria of patents that were already granted in the United Kingdom.

When Nigeria became an independent nation and subsequently became a republic, the connection with Great Britain became somewhat tenuous and as a result an independent patent system had to be established in order to take care of development in that area of the law. For, under the 1916 Ordinance as amended in 1925, a Nigerian citizen had first to apply to the United Kingdom Patent Office to be granted a patent for his invention before he could proceed to have it registered in Nigeria. This position continued for a decade after independence before steps were taken to create an

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¹The Venetian Patent Statute, enacted by the Senate of Venice in 1474, is one of the earliest patent systems in the world.

²See the *Bambooweb Dictionary* release at pp.7 & 8

independent patent system in the country – the Patents and Designs Act. No. 60 of 1970.³ This Act repealed the Registration of United Kingdom Patents Ordinance 1925, the Patents Rights (Limitation) Act 1968 and the United Kingdom Patents Act 1949 in so far as it was in force in Nigeria. Even with this new system it became clear that the demands for rapid industrialisation of the country could not be met since it was necessary to create a socio economic and legal environment that could foster such development by making investments in Nigeria generally attractive. This is what led the Attorney-General of the Federation and Minister of Justice, in 1988, in pursuance of his powers under Section 5 of the Nigerian Law Reform Commission Act 1979, to direct the Nigerian Law Reform Commission to undertake a review and reform of Industrial Property Law in Nigeria, that is to say, the law relating to Patents, Designs, and Trade Marks. The Commission's report was submitted with recommendations for review of the patent system in Nigeria. Aspects of the report have since been incorporated into the general law, but there is still a yawning gap in the law regulating patents in Nigeria.

3. The Law of Patents in Nigeria

The Patent System

The word 'Patent' derives its origin from the Latin term '*patens*', meaning 'opened' or 'exposed'. However, the modern usage of the term is primarily confined to grants of certain rights for the protection of inventions.⁴ It is generally accepted in the industrialised countries that a comprehensive system of law, which protects industrial property rights by providing for the creators of ideas a safe and conducive atmosphere in which to develop those ideas, is a *sine qua non* of industrial and technological growth. This is no less true of patents. Indeed, the industrial success of the United Kingdom is specifically attributed to the evolution of patents in the United Kingdom. According to one English writer, 'The Patent Law was our invention, and it gave us the first place among nations in industry for over 200 years'.⁵

Basically, the patent system seeks to promote industrial and technological development by bestowing monopolistic rights on the creator of an invention thus providing him with the freedom of exploitation without let or hindrance from imitators. In return, the inventor is expected to disclose the basis of his invention to the appropriate authority and within a specified time frame to make it workable in a practicable form for the common good. Thereafter, the monopoly ceases and the invention becomes free for use by the general public. The system, therefore, provides an avenue for the dissemination of technical information and at the same time encourages the making, and commercial use of inventions. Due to the historical antecedent of Nigeria and the United Kingdom, the legal system of the former is modeled after that of the latter. Thus, the Nigerian patent system has great similarity to that of the United Kingdom. This article shall, at this point, look at the Nigerian law on patent.

Patentable Inventions

It has been stated that all patents embody invention but not all inventions are patentable.⁶ Thus, to be patentable, an invention must comply with the requirements of the Act⁷, which declare that an invention is patentable if –

- (a) It is new, results from an inventive activity and is capable of industrial application; or
- (b) It constitutes an improvement upon a patented invention and also is new, results from an inventive activity and is capable of industrial application.⁸

An invention is new if it 'does not form part of the state of the art'.⁹ In other words, an invention is deemed to be new or novel if it was not known or available to others knowledgeable in that field at the date of the application for a patent. The English Courts in *Van Der Lely v. Bamfords*¹⁰ and *Fomento v. Mentmore*,¹¹ interpreting a provision of the English Patent Law similar to s. 1(3) of the Nigerian Patent Law, seized the opportunity to shed light on this concept of newness or novelty of inventions. In the former case, the patentee claimed a hay raking machine in which the rake-wheels were turned not by an engine but by contact with the ground. The patent was held to have been anticipated by a photograph in a journal, which showed a hay rake with this feature (the issue was whether the photograph was clear enough to reveal the invention to an informed person. It was found to do so). Similarly, the patentee in the latter case claimed a ball-point pen in which the housing around the ball had a groove running in a ring below the equatorial plane of the ball; this produced a smooth flow of ink. One alleged anticipation was found to describe a method of enclosing the housing around the ball by 'peining,' that is, by hitting the open housing with a tool shaped like a candle-snuffer. Before there could be anticipation, however, it was necessary to show that peining would inevitably produce the desired ring-like groove in the

³Cited now as Patents & Designs Act, CAP P2, LFN, 2004.

⁴Encyclopaedia Britannica 15th Ed. Vol. 13, p. 1071

⁵H. Stafford Hartfield, *Inventions and their use in Science Today*, London (1939), p. 175 – quoted from *Industrialisation without National Patents* by Eric Schiff, p. 9

⁶Working Paper on the Reform of Industrial Property Law by the Nigerian Law Reform Commission, p. 65.

⁷Patents and Designs Act, CAP P2, LFN, 2004.

⁸Ibid. Section 1(1).

⁹Ibid. Section 1 (3)

¹⁰(1963) R.P.C. 61, HL

¹¹(1956) R.P.C., CA.

correct position; and the earlier document, it was held, only gave instructions that 'might well' produce this effect. On the other hand, 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 product, which it concerns, or as to the industrial result it produces. In the same vein, an invention is capable of industrial application if it can be manufactured or used in any kind of industry, including agriculture.¹²

The Act clearly lists the areas in respect of which patents cannot be validly obtained to include: plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products) and inventions the publication or exploitation of which would be contrary to public order or morality.¹³ Principles and discoveries of scientific nature are also not inventions for the purposes of the Act.¹⁴ However, in *Genentech v. Wellcome Foundation*,¹⁵ the Court of Appeal ruled this position to be incorrect. It has been opined that the exclusion of these and certain inventions (such as a substance capable of being used as food or medicine or in the production of food; or a process for producing such substance; or any invention capable of being used as a surgical or curative device; or pharmaceutical products) from patent protection constitutes an effective means of encouraging the development of local technology in such fields without undue competition from outside.¹⁶ This discriminatory approach towards patentability is seen as a means by which the less developed countries can improve their indigenous technological capabilities without fear of contravening the principle of national treatment as laid down in the Paris Convention. In this connection, it has been observed that in the field of patents, the Paris Convention leaves member states entirely free to establish the criteria of patentability, to decide whether patents should be granted for products only, for processes only or for both and in which field of industry and for what term.¹⁷

Patents of Improvement

The Act gives recognition to an improvement upon a patented invention as an independent invention in its own right as long as the requirements as to newness, inventive activity and industrial applicability are observed.¹⁸ However, there is a major dissimilarity in this area to the Nigerian Law in the Laws of France, Denmark, Norway and Sweden in which provisions for patents of improvement do not require the presence of an inventive step.

The Right to Patent

The Statutory Inventor

Generally, the right to apply for a patent is conferred on the actual inventor, his heirs or assigns. However, under the Act, the right to patent is conferred on the statutory inventor who is defined as a person who is first-to-file, or validly to claim a foreign priority for a patent in respect of an invention whether or not he is the true inventor.¹⁹ The 'first-to-file' basis is used in the Act in contradistinction with the 'first-to-invent' method used under the United States Patent Law.²⁰ This, in reality, makes it possible for any person to obtain a right to a patent merely on the basis of being the first-to-file for an application for a grant of patent regardless of whether or not he is the actual inventor or the right in the invention has been duly transferred to him either by contract or by operation of law. Undoubtedly, this position could be subject to abuse by encouraging piracy. May be this thought also operated on the minds of the legislators, as the safeguards provided in subsections (2) and (3) of section 2 would appear to indicate. The safeguards are to the effect that –

- (a) The true inventor has a right to be named in the patent and such right is not subject to contractual modification; and
- (b) Where a person obtains a patent grant without the consent of the true inventor or his successors-in-title, all rights arising from the grant shall be deemed to be transferred to the true inventor or his successors-in-title.

Employee Inventions

Where, however, an invention is made in the course of employment or in the execution of a contract for the performance of specified work, the right to a patent in the invention is vested in the employer or, as the case may be, in the person who commissioned the work. This is with a proviso, however, that the employee-inventor will be entitled to fair remuneration taking into account his salary and the importance of the invention if his contract of employment does not require him to exercise any inventive activity but he has in making the invention used data or means that his employment has put at his disposal, or if the invention is of exceptional importance.²¹ However, a person is not an inventor within the meaning of the Act if he has merely assisted in doing work connected with the development of an invention without

¹²Op. cit. Section 1(2)(a)-(c).

¹³Ibid. Section 1 (4) (a) & (b).

¹⁴Ibid. Section 1(5). See also *Kolle* (1974) 5 I.I.C. 140 at 147-148; *IBM/Document Retrieval* (1990) O.J. EPO 12.

¹⁵(1989) R.P.C. 147; repeated in the *Merill Lynch* case on appeal (1989) R.P.C. 561 and reaffirmed in *Chiron v. Murex Diagnostics* (1996) F.S.R. 153.

¹⁶Nigerian Law Commission *Working Paper on the Reform of Industrial Property Law*, op. cit., p. 70.

¹⁷Yankey, *International Patents and Technology Transfer to Less Developed Countries* (1987), p. 204.

¹⁸Op. cit. Section 1(1)(b). See also *Fomento v Mentmore* (supra).

¹⁹Ibid. Section 2(1).

²⁰*Nicolai* (1972) 3 I.I.C. 103 and *Kingston* (1992) E.I.P.R. 223

²¹Op. cit. Section 2(4)(a).

contributing any inventive activity.²² Under the English Patent Law, however, where the employee-inventor is one of a relatively high status, the following tests are applied:

1. Was the invention made in the performance of the employee's duties?
2. Would the responsibilities of the employee render it inconsistent for the employee to hold the invention for him or herself?

This last question raises the issue of whether the employee has a special obligation to further interests of the employer's business. The English Court of Appeal held in the case of *Reiss Engineering v. Harris*²³ that he does.

Procedure for Acquiring Patent

Applications for patent are usually made to the Registrar of Patents in the prescribed form, containing the required information and accompanied by the prescribed fee²⁴ and, where appropriate, a declaration signed by the true inventor requesting that he be mentioned as such in the patent and giving his name and address. Also, where an agent on behalf of the applicant makes the application, a signed power of attorney must accompany the application.²⁵ A patent application must relate to only one invention, but may include in connection with that invention, claims for any number of products, any number of manufacturing processes for those products, any number of applications of those products, any number of processes, and for the means of working those processes as well as for the resulting product or products and for the application of those products.²⁶ When an application is made, the Registrar is mandated to examine same as to its conformity with the relevant provisions of the Act. Where the application does not comply with the Act, he must reject it. In the same vein, where the application satisfies the requirements of the Act, the patent must be granted as applied for.²⁷

Rights Conferred by Patent

A patent confers upon the patentee the right to preclude any other person from doing any of the following acts, namely:

- (i) 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; and
- (ii) 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 of the acts mentioned above.²⁸

We must note here that, the rights under a patent extend only to acts done for industrial or commercial purposes and not to acts done in respect of a product covered by the patent after the product has been lawfully sold in Nigeria.²⁹

Licenses

Patents are granted to inventors in order to encourage industrial and technological growth. A patent has been likened to a contract between the State and the inventor in which the State gives to the inventor the right to exclude others from making use of the invention under an implied condition that the inventor undertakes to work or exploit his invention in the State in order that the community may benefit from the patented invention.³⁰ Ideally, the patentee should be in a position to work his invention. He may, however, not be able to do so due to financial and other constraints. In such cases the law provides for the granting of voluntary and non-voluntary licences specifically for the working of patented inventions by other persons. There are basically three types of licences under the Act. These are discussed hereunder:

Licences of Right³¹

The patent of invention confers the exclusive right of exploitation on its owner but the owner may request the Patent Office to make an entry in the register to the effect that licences under the patent are to be available as of right. Any licensee under the patent will, however, be notified of this request by the Patent Office. He is, therefore, by this notice allowed to forward his objection to the entry, if any, within a prescribed time limit in the absence of which the entry will be effected in the register and published. A licence of right is essentially a contractual licence (the only element of compulsion being that the terms are fixed by the court, if the parties cannot agree). The consequence of this is that the licence contract has to be submitted for registration. Any person may while the patent is the subject of an entry, require the owner to grant him non-exclusive licence under the patent on terms of which, in the absence of agreement between

²² Ibid. Section 2(5).

²³ (1987) RPC 171.

²⁴ See 1st Schedule to the Rules made under Section 30 of the Act for the fees payable.

²⁵ Op. cit. Section 3(1)(a) & (b).

²⁶ Ibid. Section 3(3) (a) & (b).

²⁷ Ibid. Section 4(1) & (2).

²⁸ Ibid. Section 6(1).

²⁹ Ibid. Section 6 (3).

³⁰ Baxter, *World Patent Law and Practice*, p. 116

³¹ Op. cit. Section 10.

the parties, will be fixed by the court. The owner of the patent may at any time upon payment of the balance of all annual fees, which would have been payable if no entry has been made, request the Patent Office to cancel an entry.

The advantage of the licences of right to the applicant is that the availability of his invention is publicised and that the annual fees for maintaining his patent are reduced by half. The advantage to a person requesting a licence is that, in default of agreement, the court will fix the terms of the licences, taking into account all interests concerned. The advantage to the general public is that no one may be excluded from working the patented invention.³²

Contractual Licences

This category of licences is divided by the Act into the following compartments:

- (i) The form of contractual licence;
- (ii) Rights of the licensee;
- (iii) Invalid clauses in licence contracts;
- (iv) Right of the licensor to grant further licences;
- (v) Non-assignability of licences; and
- (vi) Contractual licences involving payment abroad.³³

However, this section is silent on the issue of withdrawal of a patent or declaration of it invalid after a contractual licence has been granted on its basis. What is the legal position in such a situation? The question seems to have been directly answered by the discretion given to the Courts in English-speaking African countries to order re-payment of royalties and other related payments. Thus, in such a situation, the Court may –

- (i) decide whether and to what extent repayment would be reasonable under the circumstances; and
- (ii) establish the proportion of the licensee payments which is directly related to the withdrawn or invalid patent.³⁴

Compulsory Licences

The Act provides for compulsory licensing,³⁵ perhaps, to check abuse of patent monopolies through non-working of patented inventions. Dealing with a similar provision in the European Patent Law, the European Court of Justice in *Commission v. UK*³⁶ held that if an invention were not being worked, compulsory licences would be available. It has also been opined that compulsory licensing has an important dissuasive function: the knowledge that he may be unable to prevent the grant of a licence is an incentive for the owner of the patent to enter into a licence contract.³⁷ The law at present allows application for compulsory licence to be made after a period of four years after the date of filing a patent application or three years after the grant of patent, whichever expires last.³⁸ The granting of compulsory licence, it must be added, is a sort of sanction for the abuse of monopoly arising from non-working of a patented invention by the patentee.

Infringement of Patent Rights and Remedies

An infringement of a patent occurs when the subject matter claimed in a patent has been utilised by someone other than the owner, without the owner's approval or in disagreement with the terms of use given by the owner. If any of the rights conferred on the inventor or patent holder under the Act is infringed, such infringement is actionable at his suit.³⁹ The plaintiff patentee is entitled, in such action, to claim such reliefs as are usually available in any corresponding proceedings in respect of the infringement of other proprietary rights. Such reliefs range from damages, injunction to order for accounts.⁴⁰ Thus, in the English case of *Rodi & Wienenberger v. Showell*,⁴¹ the plaintiff claimed against the defendant for purportedly infringing their 'expandable watch-strap' for which they had a patent. In a majority decision, however, the House of Lords, after a thorough evaluation of the evidence before it, held that there was no infringement. Under the Act, proceedings for infringement, revocation and such associated matters are brought in the Federal High Court, which, alone, is conferred with jurisdiction to entertain matters relating to intellectual property rights.⁴² The grantee of a licence may require the patentee to sue an infringer, and if he refuses to do so, he may himself sue, though the patentee/licensor could intervene in the proceedings.⁴³

³²See Working Paper on the Reform of Industrial Property Law, op. cit, p.88

³³Op. cit. Section 23 (1), (2), (3), (4) & (6).

³⁴Ibid. Section 42, WIPO Model Law for English-Speaking African Countries.

³⁵Op. cit. Section 11.

³⁶Case C-90/30, (1992) ECR I-829.

³⁷WIPO, see Commentary on compulsory licences in the *Model Law for English-Speaking African Countries on Patents*, pp. 124 & 125.

³⁸See item 1, Part 1, First Schedule to the Patent and Designs Act, CAP P2, LFN, 2004.

³⁹See generally, Section 25, op. cit.

⁴⁰See 1st Schedule to Patents & Designs Act, para. 25 (2).

⁴¹(1969) RPC, 367.

⁴²See para. 26(1), *ibid*

⁴³See para 25(4), *ibid*.

It is pertinent at this point to consider the case of *Rhone Poulence S.A. and May & Baker Limited v. Lodeka Pharmacy Limited*,⁴⁴ which deals with the issue of infringement of patent. In that case, the first plaintiff was the owner of a United Kingdom patent given in respect of the 'new phenthiazine derivatives', and improvements thereon, registered in Nigeria under the Patents Ordinance,⁴⁵ while the second plaintiff, May & Baker, was their subsidiary company and also an exclusive licensee for the sale and distribution of the product concerned in Nigeria. The defendant was an indigenous company involved in the importation and sale of drugs. The plaintiffs' invention was prepared under the trade name of 'Largacti', and was widely sold and used in Nigeria, having acquired a very good and wide reputation. The defendant imported and sold the drug in Nigeria, and was sued by the plaintiffs who sought an injunction to restrain it from further breaches of their patent rights.

There was evidence that the defendant had supplied 250,000 tablets of the drug to the Federal Ministry of Health, and had received order for further supplies to the Ministry. The defendant was also alleged to have displayed the same drug at its stand in an exhibition of pharmaceutical products in 1964. The defendant in its defence contended that, while it may amount to an infringement to distribute the drug concerned to the public, the supply of it to the Federal Ministry of Health could not be an infringement, relying on s.46 (1) of the United Kingdom Patents Act of 1948, which exempted persons from liability for use of patents for government services. Somehow, the Nigerian Patents Ordinance,⁴⁶ which was in force in the country at the material time, did not make provision for such exemption from liability. The Court, per Ikpeazu J., thus held that the exemption, though contained in the United Kingdom Patents Act, was not made part of the Nigerian Patent Law, since no such exemption existed in the Patents Ordinance. He, therefore, granted the required injunction against the defendant.

Duration, Lapse and Surrender of Patent

A patent expires at the end of the twentieth year from the date of the filing of the relevant patent application. Also, it lapses if the prescribed annual fees are not duly paid in respect of it. However, a grace period of six months is allowed for the payment of the fees, the payment of which guarantees the continuation of the patent as if the fees had been duly paid. The question, however, is: can another person apply for such patent if after the grace period the original owner still fails to pay the fees? The Act is silent on this point. It is suggested, however, that such patent should still be left open for the original owner until it expires by effluxion of the statutory period. On the other hand, a patentee may by written declaration addressed to the Registrar, surrender his patent. The expiration, lapse or surrender of a patent must be registered and notified.⁴⁷

It is pertinent at this point to consider a legal issue inherent in section 7 (2) of the Act, namely, whether a lapsed patent can be restored? Clearly, the Act does not provide for restoration of lapsed patent. Rather, it allows a grace period of six months for the payment of any unpaid prescribed annual fees or surcharges. And, once the payment of such fees is made within the six months period, the patent continues as if the fees had been duly paid from the onset. The implication of this provision, therefore, is that, if the fees are paid outside the six months grace period due, maybe, to some unforeseen circumstances or financial constraints, the patentee cannot restore his patent. How proper and encouraging is this situation?

Let us examine what obtains elsewhere in this regard. Under the 1977 English Patents Act, which repealed the 1949 Act, if renewal fees are not paid after the expiration of 20 years, the patent in question is not necessarily lost irretrievably; the patentee may apply for its restoration within one year after its expiry. However, before the restoration application is granted, the Comptroller must be satisfied that:

- (a) The proprietor of the patent took reasonable care to see that any renewal fee was paid within the prescribed period or that that fee and any prescribed additional fee were paid within the six months immediately following the end of that period; and
- (b) Those fees were not so paid because of circumstances beyond his control.⁴⁸

In *Convex Ltd. 's Patent (Application for Restoration)*,⁴⁹ the application for restoration of a patent which had lapsed was made in due time; in the Patent Office decision, the view was taken that the case proceeded under the 1977 Act from the date when action was taken for restoration, and that on the facts the proprietors consequently had not exercised reasonable care in seeing that the patent was maintained and hence the patent was refused.

³⁹(1965) L.L.R. 9

⁴⁵(1929), Cap 182.

⁴⁶Ordinance No. 3, 1925.

⁴⁷Op. cit. Sections 7 and 8.

⁴⁸See Section 28 (1) of the 1977 English Patents Act.

⁴⁹[1980] R.P.C. 423. See also *Director of Public Works v. Ho Po Sang* [1961] A.C. 901; and *Free Lanka Insurance Co. Ltd. v. Ranasinghe* [1964] A.C. 541.

It is submitted that, like in the United Kingdom, where a patent has ceased to have effect by reason of a failure to pay any renewal fee within the prescribed period, let it be possible for a patentee under the Nigerian Patents Act to apply for restoration within a given period. This calls for legislative amendment in this direction.

Nullity of Patent

The Federal High Court is vested with powers to declare a patent null and void on the application of any person (including a public officer acting in the exercise of his functions) on the following grounds, namely:

- (i) if the subject of the patent is not patentable under the Act; or
- (ii) if the description of the invention or the claim does not conform with section 3(2) of the Act (supra); or
- (iii) if for the same invention a patent has been granted in Nigeria as the result of a prior application or an application benefiting from an earlier foreign priority.

From the above disjunctive provision, it is undoubted that the court may declare null and void a patent on the occurrence of any of the three grounds, and where that happens, the patent in question will be deemed to have been null and void since the date of its grant. The Registrar on the information of the proper officer of the court is mandated to register and notify such declaration.⁵⁰

Revocation

The Act is somehow silent on the issue of revocation. However, in the Draft Industrial Property Decree prepared by the Nigerian Law Reform Commission, the Patents Office is mandated to revoke a patent if it is satisfied that:

- (a) the patent was granted on the application of a person not entitled under the provision of the Act to apply for it;
- (b) the patent, as claimed, was obtained wrongfully in contravention of the rights of the applicant or any person under or through whom he claims;
- (c) the invention is not new;
- (d) the invention does not involve an inventive step;
- (e) the invention is not capable of industrial application;
- (f) the invention is not patentable within the meaning of the relevant provision of the Act;
- (g) the description of the invention does not disclose the invention clearly or completely enough for the invention to be evaluated and worked by a person skilled in the art;
- (h) the claim or claims do not define concisely and clearly the scope of protection sought;
- (i) a prior application, or an application benefiting from a foreign priority, has been made in Nigeria in respect of the same invention;
- (j) the patent was obtained on a false suggestion or representation;
- (k) an amendment or a direction to amend the description or claims by the applicant or the patentee for purposes other than correcting a clerical error or an obvious mistake was obtained by fraud.⁵¹

The Act, however, forbids a revocation when an action for infringement or proceedings for invalidation are pending in a court, except with the leave of the court.⁵² And, a patentee is entitled to be notified of the Registrar's intention to revoke his/her patent just as he/she is entitled to be given opportunity to be heard.⁵³

Although the grounds for invalidation and revocation may be similar, the main difference between the two is that whereas revocation is an extra-judicial power vested in the Registrar, invalidation proceedings can only be instituted before a Court of Law.

4. Conclusion and Recommendations

Intellectual property rights, being products of creative activity, need some degree of protection. Otherwise, they will be exposed to theft like any other property left unprotected. A patent, which is a concession granted by the state to an inventor for a fixed period to restrain others through the legal process from manufacturing or vending his patented invention without his authorisation, is often classified as a personal property. Thus, the state has a duty to grant it protection as it does to other types of property in order to prevent chaos and resort to self-help. It has been stated that there is nothing, which may more rightfully be called property than the creation of an individual's brain.⁵⁴ Undoubtedly, the theft of an unprotected intellectual property right may cause loss of investment, poverty and sorrow to the owner of the right, and, possibly, his untimely death. Justifying this argument, Kozinski said:

This is necessarily true because if an individual spends his time and effort acquiring an object, that object must, in his judgment, be necessary for promoting his life and comfort. For instance, to deprive a man of the house he has built for shelter or the corn he has grown to feed himself will certainly be detrimental to his life. Thus, if he did not have exclusive rights over these objects, and they could

⁵⁰See generally, Section 9(1) & (2), Op. cit.

⁵¹See Section 88(1) of the Draft Industrial Property Decree

⁵²Op. cit. Section 88(2).

⁵³Ibid. Section 88(3).

⁵⁴R.R. Boowker, *Copyright, Its History and Its Law* (1962) p. 48.

therefore be taken away from him, this deprivation would cause him great discomfort and untimely death.⁵⁵

A patent, it has also been stated, confers the right to secure the enforcement power of the State in excluding unauthorised persons, for a specified number of years, from making commercial use of a clearly identified new and useful technological invention.⁵⁶ Such protection is necessary to reward the inventor and motivate him for further research. The World Intellectual Property Organisation unequivocally agrees with this position as it states that:

Inventions are rarely the result of instantaneous stroke of genius. They are usually the result of a long and hard thinking experimentation with a precise aim and hope of arriving at a new solution amounting to an invention. In other words, inventions are usually the result of methodical research. It is not only just but is also necessary in order to encourage the making of the investment required for research, that an invention, once made it, should be allowed to be used, at least for a limited time, only by the person who made it (the inventor) or by the enterprise for which it was made (the employer of the inventor).⁵⁷

Research and development generally require substantial human and material resources. It is by allowing the inventor the exclusive use of an invention for a limited period of time, that he can recoup these costs and still have funds to undertake some further research.⁵⁸ For the general public to benefit from any inventive activity, the inventor needs a kind of encouragement that will spur him to venture into further research. It has, thus, been authoritatively held that:

The economic philosophy behind the clause empowering Congress to grant patent and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors... Sacrificial days devoted to such creative activities deserve rewards commensurate with the service rendered.⁵⁹

Furthermore, granting an inventor patent protection will give him the confidence to commit more resources into construction of the needed factory, the acquisition of plants, equipment and other productive facilities, recruitment and training of the necessary personnel in readiness for mass production of the invention. He requires such monopoly to recoup his investments. According to Irving B. Shapiro, Vice-Chairman of the Board of Dupont:

The worldwide patent system is sometimes criticised because it grants the inventing organisation the exclusive use of its invention for a period of time. From our viewpoint, it is precisely the proprietary rights granted by the patent system that make research and development worth doing. There is little practical incentive to incur the costs of invention if its commercial fruits are to go to competitors.⁶⁰

Apart from the personal benefit and protection the patent system grants to the inventor, it has also been held that it serves as a source of technical information,⁶¹ as it places the whole technical information at the disposal of the public for all interested persons to learn and know the new process. Such dissemination of information, Fritz notes, often gives other inventors new ideas for entirely different processes or products, perhaps in different industries, and equally bolsters general technical knowledge and curiosity.⁶²

Above all, the state benefits if an inventor is protected because of the usefulness of some of the inventions, like life-saving drugs. Such inventions contribute to rapid economic and technological development, without which, these would have been the responsibility of the government alone. This is not to say, however, that it is the patent itself which enables the transfer of the technology; rather, by making the title and exclusive rights of the patentee secure, it emboldens him to transfer his technology to others for commercial exploitation. It is, therefore, submitted that the current Patents Law in Nigeria should be amended to accommodate the dynamism in the field of technology,⁶³ especially making principles and discoveries of scientific nature patentable inventions under the Act as against the present provision of Section 1(5) of the Act. Also, Section 7 of the present Act should be amended to make it possible for the owner of lapsed patent to renew the prescribed fees at any time after the expiration of the grace period of six months, provided that it is still within the 20 years statutory period of the grant. Furthermore, since the Government has so far shown interest in the acquisition of technological capacity by establishing Centres for the perfection of indigenous technological breakthroughs, it is suggested that such Centres become a focus of the importation of technology. This, no doubt, would be of net benefit to the country.

⁵⁵Alex Kozinski, 'A Market Oriented Review of the Patent System', 6-Patent Law Review 1974, 5, p. 112.

⁵⁶The International Encyclopedia of Social Sciences (London: Simon and Schuster and Prentice Hall International: 1972) Vols 11 and 12 Unabridged, p. 461.

⁵⁷IPO, 'The Importance of Technological Information Contained in Patent Documents for use in Research and Development Activities', National Seminar on Commercialization of Inventions and Research Results, Abuja, November 25 – 27, 1997, p.2.

⁵⁸WPO, 'HPO's Development Cooperation Programme in Respect of the Promotion of Inventive and Innovative Activity', National Seminar on Commercialization of Invention and Research and Development Results, Abuja, Nigeria, Nov. 25 – 27, 1997, para. 4.

⁵⁹See *Mazen v. Stein*, U.S. 203 (1954). This, probably, applies to other countries too.

⁶⁰*Dupont Management Europe*, Vol.1, No.2, (Nov. 1973).

⁶¹See *Patterson v. Gas Light Company* (1877) 3 AC, 244.

⁶²Fritz Machlup, 'Patents', in International Encyclopedia of the Social Sciences, p. 466

⁶³See Paul O. Ebiala, 'Transfer of Technology as a Veritable Vehicle for Economic Growth in Nigeria: The Law Connection' - International Review of Law and Jurisprudence, 2021, p. 160.