

## RESOLVING THE CONUNDRUM IN INVENTIVE ACTIVITY REQUIREMENT IN PATENT APPLICATION\*

### Abstract

Patent is granted for products or processes that show advancement in technology and part of the advancement is that there must be a noticeable improvement between prior art and the invention sought to be patented. Though the Nigerian Patent Act states that inventive activity is a requirement for patent grant, but what are the considerations thereof and who determines what amounts to inventive activity in comparison with prior art. How does the court interpret the inventive activity requirement and is the extant provision of the act adequate in proffering structure for determination of inventive activity. This work is an analysis of the inventive activity requirement, the role of the court in determining what amounts to inventive activity criteria and a discourse on the steps taken in other jurisdictions in determining the difference between prior art and the claimed invention as justification for patent grant. In the course of this research, it was discovered that the Nigerian Act has limitations as to the determinant factors of the inventive activity requirement. Recommendations are suggested in amending the current Patent Act to regulate the technicalities in determining 'inventive activity' and ensure the requirement is put in the right perspective.

**Keywords:** Inventive activity, Patent Grant, Person Skilled in the Art, Non-Obviousness,

### 1. Introduction

According to the Patent and Designs Act<sup>1</sup>, which is the governing legislation for Patent in Nigeria, an invention is patentable if it results from inventive activity, and 'an invention results from inventive activity if it does not obviously follow from the state of the art....'<sup>2</sup>. Therefore, an invention will be said to result from inventive activity if with respect to the method, the application, the combination of methods, or the product which is derived from it, or as to the industrial result it produces, it is substantially different from what has been made available to the public. What is the factor for determining what is substantially different? Is there a criterion for ascertaining the difference between prior art and the purported invention? If, however, the patent grant gets to litigation, what guides the courts in taking a decision one way or the other in determining the difference between prior art and the purported invention with respect to inventions that are very technical and scientific in nature.

The quest for the inventive step is perhaps the most difficult aspect of the patent application procedure<sup>3</sup>. Inventive activity or inventive step is of immense importance in determining what invention deserves a patent grant and must be applied appropriately to ensure that the justification for patent grant is not defeated. A patent is granted for an invention which is a product or a process that provides in general, a new way of doing something, or offers a new technical solution to a problem<sup>4</sup>. A major justification for patents....is that incentives and rewards to inventors result in benefit for the society<sup>5</sup>, the reward theory of intellectual property justifies patent on the basis that inventors should be rewarded for coming up with useful inventions and patents guarantee this recompense so that inventors obtain sufficient reward for their inventive activity. According to WIPO,<sup>6</sup> 'the invention must involve an inventive step that, in view of the prior art, could not be obviously deduced by a person with ordinary skill in the relevant technical field'. This criteria for patentability ought to be aptly applied to ensure that the aim of intellectual property protection which includes protection of ideas and information that are of commercial value<sup>7</sup>, will be sustained.

### 2. The Inventive Activity Requirement: The Position

Article 27 of the TRIPs Agreement provides that patents shall be granted for any invention, whether products or processes, in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application<sup>8</sup>. This is the standard for patentability in every country, being that the objective of the patent system

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<sup>1</sup> Cap P2, Laws of the Federation 2004

<sup>2</sup> Sec 1(2)(b) Patent & Designs Act Cap P2, Laws of the Federation 2004

<sup>3</sup> P Torremans and J Holyoak, *Holyoak and Torresmans Intellectual Property Law* (2<sup>nd</sup>edn, Butterworths, 1998) 78

<sup>4</sup> WIPO, 'Patents' <https://www.wipo.int/patents/en/> Accessed 5 March 2024

<sup>5</sup> A R Chapman, 'A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science' In WIPO, *Intellectual Property and Human Rights* (Geneva: WIPO, Publication No 762 (E) 1999) 127

<sup>6</sup> WIPO, 'How to Protect Inventions Through Patents' <https://www.wipo.int/patents/en/protection.html#>

Accessed 5 March 2024

<sup>7</sup> W Cornish and D Llewelyn, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights* (5<sup>th</sup>edn, London, Sweet & Maxwell, 2003)6

<sup>8</sup> Sec 1(1)(a) of The Act also provides that an invention is patentable if it is new, results from inventive activity and is capable of industrial application. Nigeria is a party to the TRIPS Agreement and this provision is on all force with the TRIPS Agreement.

is to encourage scientific and technological advancements in the society<sup>9</sup> an inventor is expected to use his brain to enrich the art substantially through his problem-solving skills<sup>10</sup>. If the aim of patent is to reward an inventive effort, then what is being rewarded should be of adequate value, it must merit the reward. It should be a new advantage and advancement in technology. It is not enough that the claimed invention is new in the sense that it is different from the state of the art, it is important however that it must be inventive, ‘the result of a creative idea, and it must be a step, that is, it must be noticeable. There must be a clearly identifiable difference between the state of the art and the claimed invention’<sup>11</sup>, a person with ordinary brain and skill in the art should not be able to derive the claims of the invention<sup>12</sup>

The novelty and non-obvious<sup>13</sup> requirements work together. The former seeks to assure the public domain remains undisturbed, while the latter demands that the claimed invention be sufficiently removed from the prior art, meaning in most cases the invention reflects a leap forward<sup>14</sup>. This reward for inventive ingenuity ...in most systems, indeed, it is the first to apply for a patent, rather than the first to invent, who is given priority<sup>15</sup>. The grant of patent entitles the patentee to a monopoly of 20 years<sup>16</sup> which enables him to work the patent and reap the benefits of his invention before competition arises. This competition might be inevitable because part of the requirement for patent grant is complete disclosure of the product or the process which will enable one skilled in the art to work the invention<sup>17</sup>. This full disclosure also entitles more research and scientific improvement to be effected on the patented product and according to the patent system a subsequent patent can be granted to a patented invention if it constitutes an improvement but would also satisfy the criteria of newness, inventive activity and must be capable of industrial application<sup>18</sup>. The justification for patent includes a reward for sharing knowledge regarding new invention<sup>19</sup>, which gives others the opportunity to improve on existing inventions and therefore a stimulant in economic growth flooding the society with more products and technology, provided it satisfies the concept of advance and progress in the state of the art.

The requirement for inventive activity deals with the extent of the difference between what was previously known and what the inventor claims to have devised. There must be a significant contribution to the state of the art<sup>20</sup>. The ‘state of the art’ or prior art as used in some jurisdictions, refer to any knowledge existing before a patent application’s relevant filing or priority date, whether it existed through written or oral disclosure<sup>21</sup>. Inventive step means that the invention must be substantially different from anything previously known. The solution must not be obvious to those with a knowledge of the technical field of the invention<sup>22</sup>. Inventive activity or non-obviousness means that the difference between the invention and prior art should not be obvious to one who is skilled in the art with respect to that field of invention or knowledge. The inventive step requirement is intended to prevent exclusive rights forming barriers to normal and routine development<sup>23</sup>, an inventive step is one which does not logically flow from available information about the product or process. It is pointless to grant patent to one who re-invents something without any substantial improvement on what was in existence, doing that would cause a clog in the wheel of advancement in technology. It would also defeat the objective of the intellectual property system, which is to protect innovations and creations, and reward innovative and creative activity<sup>24</sup>. If there is no adequate protection for inventions, inventors will thrive in secrecy and this will prevent knowledge to be made available to the public. Technical details of new inventions will not be disclosed in such a system and society will not benefit to the same extent<sup>25</sup>. To that extent, before an invention can be patented it must be deserving of such patent protection in the sense that the product or process is one that is unique and different from what is in the public domain or one that does not obviously follow from the state of the art.

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<sup>9</sup> D Oriakhogba & I Olubiyi, *Intellectual Property law in Nigeria: Emerging Trends, Theoris and Practice*, (Paclerd Press Limited, 2021) 216

<sup>10</sup> What is Inventive Step? <https://Pintz.com/blog/what-is-inventive-step> Accessed 22 February 2024

<sup>11</sup> WIPO, *Intellectual Property Handbook*, (2<sup>nd</sup>edn, Geneva: WIPO, Publication No 489 (E) 2004) 20

<sup>12</sup> C Ekeocha, ‘Patentability of Innovations: Novelty Inventive Step & Industrial Application’ <https://alexizinyon.com/2020/10/09/patentability-of-innovations-novelty-inventive-step-industrial-application/> Accessed 4 March 2024

<sup>13</sup> The term ‘non-obviousness’ is used in some jurisdictions to refer to ‘inventive step’

<sup>14</sup> C A Nard, *The Law of Patents* (3<sup>rd</sup> edn, New York Wolters Kluwer Law & Business, 2014) 347

<sup>15</sup> W Cornish and D Llewelyn, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights* (ibid) (n 7) 130

<sup>16</sup> Sec 7(1) Patent Act

<sup>17</sup> Sec 3(2) ibid

<sup>18</sup> Sec 1(1)(b) ibid

<sup>19</sup> T Hart, L Fazazani and S Clark, *Intellectual Property Law* (4<sup>th</sup>edn, Palgrave Macmillian 2006) 11

<sup>20</sup> A Oyewunmi, *Nigerian Law of Intellectual Property* (1<sup>st</sup>edn, Lagos, University of Lagos Press and Bookshop Ltd, 2015) 153

<sup>21</sup> World Intellectual Property Organization, *Intellectual Property Reading Material* (WIPO 1995) 131

<sup>22</sup> Inventive Step, <https://www.prv.se/en/patents/the-advanced-patent-guide/before-applying/requirements-for-patents/inventive-step/> Accessed 22 February 2024

<sup>23</sup> Inventive Step, [https://www.epo.org/en/legal/guide-epc/2022/ga\\_c3\\_4.html](https://www.epo.org/en/legal/guide-epc/2022/ga_c3_4.html) Accessed 22 February 2024

<sup>24</sup> P Torremans and J Holyoak, *Holyoak and Torresmans Intellectual Property Law* (ibid) (n 3) 12

<sup>25</sup> P Torremans and J Holyoak, *Holyoak and Torresmans Intellectual Property Law* (ibid) (n 13) 23

### 3. Tightening the Inventive-Step Requirement in Patent Application

What is the determinant factor in accessing inventive step or non-obviousness as the case may be, to justify patent grant. Different jurisdictions access inventive step differently, in the United States according to 35 U.S.C S.103, a claimed invention is unpatentable 'if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious to one of ordinary skill in the relevant art. In resolving obviousness, the scope, content of the prior art, differences between the claimed invention and prior art and the level of ordinary skill in the relevant art is relevant. The test for obviousness has been a long battle but the United States Supreme Court made some clarifications in a few cases. In *Hotchkiss v Greenwood* there was a comparison between invention, the patent application and the skill relevant to person in that field of knowledge. In *KSR International Co v Teleflex inc.*<sup>26</sup> the court cited *Grahams*<sup>27</sup> factors in considering obviousness which are

- The scope and content of the prior art
- The level of a skilled person
- The differences between the invention being claimed and the prior state of the art, and
- Objective proof of non-obviousness

Fisher<sup>28</sup> is of the view that in ascertaining the level of skill possessed by ordinary workers in the field of technology in question, there are other considerations to be put in perspective. Considerations such as: how educated the ordinary workers are they, the level or speed of growth in technology in that field, how difficult the science is and how good at it most practitioners are. The answer to these questions will therefore determine what will be attributed to the ordinary worker and what level of skill that will be required of him to possess. There are also secondary factors which can be considered which include commercial success, long felt but unsolved needs, failure of others and unexpected result. In considering commercial success of the invention, if the answer is positive, it is a pointer to the fact that the invention was non-obvious if not competitors of the inventor would have recognized the commercial viability and explored it. However, if the invention is not commercially recognized, it does not mean that invention is obvious because there are several factors that give rise to the commercial success of a product and one of them is a good advertising strategy. So, to conclude on commercial success 'there must be a nexus or causal relationship between the commercial success of the product and technical merits of the claimed invention'<sup>29</sup>. If the need is long felt and unsolved, it could mean that there were attempts made but were unsuccessful thereby showing the invention was non-obvious. This consideration has been countered on the basis that competitors would have decided to focus on a different area as result of the R & D required in the development of the invention, so it very well might not be conclusive in deciding the non-obvious nature of an invention.

The court in the KSR case modified the test for non-obviousness standard and further provided the criteria that can be used to review the obviousness of a patent claim some of which include:

- combining prior art elements according to known methods to yield predictable results etc
- If no new elements are used in the invention but a combination of familiar elements,
- Hindsight bias, the tendency to exaggerate the possibility that a particular event that occurred in the past could have been predicted in advance, should not be over-rated.

In that case, the issue before the court was the use of electronic sensor based adjustable gas pedals. Teleflex accused KSR International of using a gas pedal technology claimed in a Teleflex patent. In its defence, KSR contended that the patent was erroneously granted being that the concept was prior art, that the combination of an electronic sensor and gas pedal technology was obvious and followed from the state of the art. The court agreed with KSR in holding that the sensor based gas technology was obvious, it further held that 'The results of ordinary innovation are not the subject of exclusive rights under the patent laws, were it otherwise, patents might stifle rather than promote the progress of useful arts' In the UK, the *Pozzoli* approach is used flowing from the English case of *Pozzoli Spa v BDMO SA & Anor*<sup>30</sup>, The court outlined the factors in determining 'inventive step'

1. (a) Identify the notional 'person skilled in the art'(b) identify the relevant common general knowledge of that person;
2. Identify the inventive concept of the claim in question or if that cannot readily or if that cannot readily be done, construe it;
3. Identify what, if any, differences exist between the matter cited as forming part of the 'state of the art' and the inventive concept of the claim or the claim as construed;
4. Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

<sup>26</sup> 550 U.S. 398 (2007)

<sup>27</sup> *Graham v. John Deere C.* 383 U.S.1 (1966) (US.at 17-18). This case is one of the cases that stand for the assertion that more than novelty is required for a patent to be granted.

<sup>28</sup> Recorded Lecture on Inventiveness during the Patent-X Course organized by WIPO and Harvard Law School in 2023

<sup>29</sup> C A Nard, *The Law of Patents* ibid (n 9) 435

<sup>30</sup> (2007) EWCA Civ 588

Whilst this approach could be viewed as more realistic, it is also viewed as more subjective and therefore more difficult to follow<sup>31</sup>

In the European Union the method for evaluating inventions are as follows

- What is the closest state of the art?
- What unique technical characteristics distinguish the invention defined in the claim and the state of the art mentioned in the question above?
- What technical consequences does this distinction have?
- What is the objective technical problem underlying the invention the claim has been filed for?
- Would an expert have recognized that problem? Would an expert have resolved it correctly?

Therefore, the European Patent Office takes up the problem and solution approach as can be seen in the outline above, a patent application will usually provide evidence that the offered solution solves the problem it suggested to solve<sup>32</sup>, this approach is said to be more stable and predictable. Under the Nigerian Patent Act, an invention results from inventive activity if it does not obviously follow from the state of the art<sup>33</sup>, the inventive step must be one which is not obvious and does not follow logically from available information about the product or process. Though the test for obviousness is an objective test but to invalidate a patent, is the state of the art one which a person of ordinary knowledge of the invention would at once understand and naturally apply the principles without need to carry out further research. The Act does not define what the state of the art is, does it amount to anything in the public domain, everything that has been made available to the public. Patent disclosure is the public claim of data about an invention<sup>34</sup>. The art as defined means ‘the art or field of knowledge to which an invention relates’ while the state-of-the-art means

Everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever (by means of a written or oral description, by use or in any other way) before the date of the filing of the patent application relating to the invention or the foreign priority date validly claimed in respect thereof, so however that an invention shall not be deemed to have been made available to the public merely by reason of the fact that, within the period of six months preceding the filing of a patent application in respect of the invention, the inventor or his successor in title has exhibited it in an official or officially recognized international exhibition<sup>35</sup>

Flowing from the above provision of the Act, every information related to that field of knowledge is part of the state of the art, and that cannot be patented. In the English case of *Femento Industrial S. A. v Mentmore Manufacturing Co.Ltd* <sup>36</sup>, the held that the use of the gift of three pens to three individuals who were free to use them as they wanted was amounted to prior use, as the use of the pens amounted to an anticipation of the invention. In cases of confidential disclosure, the court has held such use not to amount to prior use and did not defeat the criteria for patentability. There are diverse opinions as regards public disclosure when such disclosure was experimental, and that having regard to the nature of the invention it was not feasible to carry out the experimentation other than in the public<sup>37</sup>.

However, any information made available in an official or officially recognized international exhibition does not amount to information that has been made available to the public. Information made available to the public in such an international exhibition must have been so made available within the grace period of six months as provided by the Patent Act. Do learned conferences fall within the concept of international exhibition, it is the view of the writer that this exception should be extended to official or officially recognized learned conferences where research or scientific updates could be discussed. Exhibition is a public showing (as of works of arts, objects of manufacture, or athletic skill<sup>38</sup>, it can also be defined as a public event at which pictures, sculptures, or other objects of interest are displayed, for example at a museum or art gallery. Considering the meaning of exhibition, should the grace period be limited to international or internationally recognized exhibitions alone or has there been cases whereby the courts in Nigeria have had to interpret that provision of the Patent Act. Issues like this would never be resolved until the courts have had the opportunity of adjudicating on them.

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<sup>31</sup> Patentability: What is Inventive Step? <https://www.boult.com/patent/what-is-inventive-step/> Accessed 22 February 2024

<sup>32</sup>Reliance on a Purported Technical Effect for Inventive Step, <https://www.patents.co.uk/news/2023/reliance-on-a-purported-technical-effect-for-inventive-step-interpreting-g-2-21> Accessed 22 February 2024

<sup>33</sup> Sec 1(2) Patent & Designs Act Laws of the Federation of Nigeria, 2004

<sup>34</sup> F O Agbo & G S Gwom, ‘Prior Art and Disclosure in Patent Legislation: Comparing Nigeria and Selected Jurisdictions’ *Nnamdi Azikiwe University Awka, Journal of Commercial and Property Law*, Vol.8 (2) 2021

<sup>35</sup> S.1(3) Patent & Designs Act

<sup>36</sup> (1956) R.P.C 87

<sup>37</sup> O A Ayodele & F O Damola, ‘Patentability of Inventions under the Nigerian’s Patents and Designs Act: An Examination’ *NAUJIL* 18 (2) 2017

<sup>38</sup><https://www.merriam-webster.com/dictionary/exhibition> Accessed 1 March 2024

In Nigeria, it seems the technological and innovative practices are slow and there are different opinions as to the reason for that. Could be as a result of the nation's slowness or laxity in technological advancement? since Nigeria is still classified as a developing country. It could also be the lengthy and cumbersome patent examination process, delays in the approval of patent applications can discourage inventors and hinder the timely commercialization of innovations<sup>39</sup>. This then means that there could be inventions that are not patented as a result of the rigors involved in patenting. On the other hand, is the current legislation on patent adequate to describe what inventions are deserving of patent grant, in essence have inventive activity, and therefore offer the required protection to them?

#### **4. Is Inventiveness a Defeat of Professional Expertise?**

Patents are granted to protect the right to an invention that is considered novel or an essential improvement of an invention that already existed in some ways that are better than the said invention<sup>40</sup>. Inventive activity is one which does not obviously flow from what is available in the state of the art and as can be noted, one common standard used by the courts in determining what is obvious is accessing it through the eyes of one who is skilled in the art. The invention must not be something that anyone with basic knowledge of the field could have come up with<sup>41</sup>. The important question now is who is the person skilled in the art, is he a normal person in that field of knowledge or must he have exceptional and enhanced skills to determine what would be obviously flow from the state of the art. The phrase 'person skilled in the art' or as provided by 35 U.S.C 103 'Person having ordinary skill in the art to which said subject matter pertains' is not expressly provided in the Nigerian patent Act with respect to who can detect inventive activity. The Act made reference to 'a person skilled in the art or field of knowledge to which the invention relates'<sup>42</sup> when making provision for complete disclosure of a patent application to enable a person skilled in the art be able to use the information and work the invention. The Act also provides that the court in hearing proceedings may sit with and be advised by two assessors having expert knowledge of matters of a technological or economic nature<sup>43</sup>. Therefore, the Act did not identify or describe who is qualified to identify inventive activity with respect to prior art. A grey area is acknowledging prior art through the eyes of a Person Having Ordinary Skill in The Art (PHOSITA), this leads to examining who a person skilled in the art is. What is the relevant knowledge required for such a person as noted in one of Graham's factors which is 'the level of ordinary skill in the pertinent art', so that that subsist, is that the required skill adequate for accessing inventive activity. In *Winsurfing International Inc. v Tabur Marine*<sup>44</sup> Oliver L.J outlined the test for accessing inventive activity as follows

1. The court must identify the inventive concept embodied in the patent.
2. The court must assume the mantle of the normally skilled but imaginative addressee in the art at the priority date and impute to him what was, at that date, common general knowledge in the art in question
3. It must identify what, if any difference exists between the matters cited as being 'known or used' and the alleged invention
4. Finally, the court has to ask itself if whether, if viewed without any knowledge of the alleged invention, those differences constitute steps which would have been obvious to the skilled man or whether they require any degree of invention.

In the stated outline, a skilled person is referred to as 'normally skilled but imaginative addressee' which means the person does not need exceptional skills but should be imaginative in the area in question. In *Technograph Printed Circuits Ltd v Mills and Rockley (Electronics) Ltd*<sup>45</sup>, Reid L.J defined a person skilled in the art as 'a skilled technician who is well acquainted with workshop techniques and who has carefully read the relevant documents. This person has unlimited capacity to soak up the contents in the relevant documents but is at the same time incapable of a scintilla of the invention'. The person is a hypothetical person who is uninventive but skilled in the area of technology to which the patent is directed: they are taken to have an ordinary level of skill, rather than being super skilled<sup>46</sup>. Believing that every profession or area of knowledge would require same level of skill would be detrimental in correctly accessing the skill needed in detecting inventive activity. The level of skill relevant in one field of knowledge would be different from the level of knowledge vital in another field of knowledge and this depends on a variety of factors. Every field of knowledge is unique in its ways, so the level of skill depends on how technical that area is, the ease or difficulty in solving problems and the average knowledge that is common in that field of knowledge.

<sup>39</sup> P A Aidonojie, T A Majekodunmi, O I Edetalehn et al 'A Facile Review on the Protection of an Invention in Nigeria: Issues and Challenges' *Sriwijaya Law Review*, Vol 5(2), PP.161-174. <https://jurnalhukumdanperadilan.org> Accessed 3 March 2024

<sup>40</sup> D O Oriakhogba, 'DABUS Gains Territory in South Africa and Australia' Revisiting the AI-Inventorship Question,' *South African Intellectual Property Law Journal* 9 (2021): 87-108

<sup>41</sup> 'The legal Requirements of Patent Registration in Nigeria' <https://www.mondaq.com/nigeria/patent/1301092/the-legal-requirements-of-patent-registration-in-nigeria> Accessed 1 March 2024

<sup>42</sup> Sec 3(2) Patent & Designs Act

<sup>43</sup> Sec 26(2) *ibid*

<sup>44</sup> (1985) R.P.C. 59 at 73-74

<sup>45</sup> (1972) R.P.C 346 at 355'

<sup>46</sup> <https://www.lexisnexis.co.uk/legal/glossary/person-skilled-in-the-art> Accessed 1 march 2024

If most people working in the field of developing new cryptographic software tools are mathematics PhDs with extensive knowledge of prior cryptographic schemes, then the 'scope of the prior art' will include much more than if they are computer scientists who dabble in cryptography. But conversely, the relevant art literally defines the field in which the PHOSITA can be described<sup>47</sup>.

Therefore, the level of knowledge depends on the field of knowledge, the higher the field of knowledge or the more complicated that field of knowledge is will determine what is normal to one that is skilled in that area. The expression 'ordinary skill' is intended to exclude the 'best' expert that can be found. It is intended that the person be limited to one having the average level of skill reached in the field in the country concerned<sup>48</sup>. Putting Nigeria into consideration, Sec 26(2) provides that the two assessors that should sit with the judge should have expert knowledge in technological or economic matter. Of foremost importance is the use of the term 'expert', does this conflict with the provision of the law in other jurisdiction which provides that the person should have ordinary skill in that area of technology. Secondly, the Act does not specify the area that the assessors would have knowledge in, should they be knowledgeable in technology generally or be knowledgeable in the particular field of knowledge in dispute. These are areas that the courts would give interpretation when faced with patent infringement litigation issues. The law is there but can only be interpreted when there are cases to be adjudicated on and this research work did not come across any Nigerian case in this area.

## **5. Conclusion and Recommendations**

It is believed that there is no one cap that fits all. There is evidently no best approach in determining what amounts to inventive step, each country will formulate its law in a way that best advances its social and economic needs and interests. Currently, this provision of the law is adequate but it is left to the judges to interpret the law on a case-by-case basis. It is presently not a hindrance to patentability in Nigeria due to several reasons. Patentability has not evolved in Nigeria, the current patent Act does not recognize 'Person Skilled in the art' with respect to identifying inventive activity, unlike what is obtainable in other jurisdictions. There is a dearth of cases on patent in Nigeria, and specifically on issues bothering on inventiveness. Could it be as a result of non-inventiveness, scientific or technological skill of Nigerians or is it the blame on the administrative structure of patent registration in Nigeria. The role of the patent registrar is of immense importance in ensuring that inventions that satisfy the criteria for patentability are registered, therefore is the patent registrar intellectually equipped to note inventions that are new, have inventive activity or are capable of industrial application as provided by the act through patent examination? Patent examination is carried out by patent examiners to verify the originality and quality inventions brought by patentees in patent applications<sup>49</sup> Is the role of the registrar merely administrative hence leaving the criteria of inventive activity to be noted by contenders and objectors of any patent grant to notice and take it up? On the other hand, do the courts have the right 'assessor' per time to guide the court in resolving patent laws issues with respect to the inventive activity requirement? It is believed that the patent Act needs a review which includes resolving the technical issues that surround the inventive step requirement that will aid both the registrar and the court.

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<sup>47</sup> J Boyle & J Jenkins, *Intellectual Property: Law & The Information Society- Cases & Materials* (5<sup>th</sup>edn 2021) Centre for the Study of the Public Domain)751

<sup>48</sup> WIPO, *Intellectual Property Handbook*, (2<sup>nd</sup>edn, Geneva: WIPO, Publication No 489 (E) 2004) 20

<sup>49</sup> J L King, 'Patent Examination Procedures and Patent Quality', *Patents in the Knowledge-Based Economy* (National Academics Press 2003) 56