

PATENTING SOFTWARE IN NIGERIA:
**ANALYSING PATENT PROTECTION
AND REQUIREMENTS FOR
PATENTABILITY**



Introduction

In today's fast-paced world of technological innovation, safeguarding intellectual property has become more critical than ever. Intellectual property laws are designed to foster creativity and promote technological advancement. Software patents, in particular, play a pivotal role by providing a legal framework to secure technological inventions and give inventors a competitive edge. As Nigeria's tech landscape continues to evolve, understanding the intricacies of software patenting is becoming increasingly important.

This article explores patent protection for software in Nigeria, focusing on key requirements for patentability, the challenges of patent registration, and the issue of patent infringement.



Understanding Patents in Nigeria

An invention refers to the creation or discovery of a new process, material, or improvement of an existing one. In other words, it encompasses not only a novel and inventive process or material but also any enhancement of an existing patented invention, provided it is novel, results from inventive activity, and has industrial applicability.¹

A patent is a legal right granted by the relevant government authorities to protect new and useful inventions or significantly improved existing inventions. When granted, a patent gives the inventor exclusive control over the commercial use of their invention for a period of twenty (20) years. In Nigeria, the patent right is awarded to the first person to file a patent application, giving them ownership and the ability to enforce their rights over the invention.

1. Section 1(1) of the Patent and Designs Act Cap. P2, Laws of the Federation of Nigeria, 2004.

The primary legislation governing patents in Nigeria is the Patents and Designs Act (the “PDA”),² which establishes the guidelines for managing patents and industrial designs. The Trademarks, Patents, and Designs Registry within the Commercial Law Department of the Federal Ministry of Industry, Trade, and Investment, serves as the main regulatory authority responsible for enforcing the provisions of the PDA.

Patentability Requirements In Nigeria

Section 1 of the PDA provides for the patentability requirements. To be patentable, an invention must satisfy the following criteria:

1. Novelty: The invention must be entirely new and not previously known or used anywhere in the world before the patent application date. It should not have been publicly disclosed before the application date, meaning no prior publication, disclosure, or use exists that anticipates the invention. If any such prior information exists, a patent cannot be granted. Essentially, the invention should not be part of the “prior art” or existing public knowledge.

2. Inventive Step: The invention must involve an inventive step, meaning it should not be obvious to a person skilled in the relevant field at the time of the invention. An invention that is merely an obvious development or improvement based on existing knowledge or methods lacks this inventive step. The “Cripps Question”,³ formulated by the English Courts, is a common test used to assess obviousness: If the invention would have been an obvious solution to a person skilled in the art at the time, it lacks an inventive step and is not patentable.

3. Industrial Applicability: The invention must be capable of being used or manufactured in any industry. If it is an improvement upon an existing patented invention, the new invention must be significantly different and non-obvious compared to the earlier patent. In other words, the new invention should offer a tangible industrial use and not simply be a trivial modification of existing technology.



1. The Patent and Designs Act Cap. P2, Laws of the Federation of Nigeria, 2004.

2. “Was it for all practical purpose obvious to any skilled chemist in the state of chemical knowledge existing at the date of the patent which consists of the chemical literature available (a selection of which appears in the Particulars of Objections) and his general chemical knowledge, that he could manufacture valuable therapeutic agents by making the higher alkyl resorcinols; ... ?” Posed by Stafford Cripps in the case of Sharp & Dohme Inc v. Boots Pure Drug Company Ltd. (1928) 45 R.P.C. 153 at p.173.

Patenting Software In Nigeria

Software refers to the complete set of instructions, data, programs, and procedures that are used to operate a computer and perform specific tasks. It is often employed in the manufacturing or processing of equipment. Under the PDA, patents can be granted for processes, allowing the patentee to prevent others from using the patented method to directly produce a product. This suggests that software, when considered as a process or method, may be eligible for patent protection in Nigeria.

For software to qualify for patent protection, it must satisfy the three fundamental criteria of patentability: it must be novel, involve an inventive step, and be capable of industrial application. This means that the software, including the methods or processes it employs, must be correctly expressed in a tangible form to be eligible for patent protection.

Additionally, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁴ provides that patents must be available for any inventions, whether products or processes, across all fields of technology. To qualify for protection, these inventions must meet the patentability requirements. TRIPS sets uniform global standards, reinforcing the protection of innovative technologies, including software.

Who Owns A Patent In Nigeria

Patent ownership is determined by distinguishing between two categories of inventors: the True Inventor and the Statutory Inventor.⁵ The True Inventor is the individual who developed the product or process, while the Statutory Inventor is the person who files the patent application first. Patent protection is granted to the Statutory Inventor, even if the individual is not the True Inventor. However, the True Inventor is entitled to be recognised as such in the patent, whether or not they are the Statutory Inventor. More importantly, the consent of the True Inventor must be obtained by the Statutory Inventor before the application for the patent is filed. Where the Statutory Inventor fails to comply with this requirement, all rights associated with the application and any granted patent may be transferred to the True Inventor.

When an invention is created by an employee within the scope of their employment, the patent rights typically belong to the employer. This also applies to inventions developed under an employment contract. However, if the employee's role does not specifically require them to invent but they create an invention using the employer's resources or the invention holds significant value, the employee is entitled to fair compensation, taking into consideration their salary and the importance of the invention. This right to compensation is enforceable in court and cannot be overridden by contractual agreements.

4. Article 27(1) of Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017).
5. Section 2(1) of the PDA



When an invention results from contributions by multiple individuals, only those who made a substantive inventive contribution are recognised as inventors. In other words, individuals who provided mere assistance without making a significant inventive contribution are not considered inventors.

Procedure For The Registration Of Patent In Nigeria

Patent protection rights are not granted automatically; they require formal registration to become effective. This applies equally to patents for both products and processes. The PDA outlines the procedure for securing patent protection for an invention. The steps to be followed are as follows:

1. Conduct a search: Before filing a patent application, it is essential to conduct a search to determine whether the invention is patentable. This search, conducted at the Trademarks, Patents, and Designs Registry, helps identify any existing patents or prior art⁶ that may prevent the grant of a patent.

2. Prepare the application: When filing a patent application, the following documents must be submitted;

- Applicant Information: Detailed information about the applicant, including their full name and address. The applicant must have an address within Nigeria.
- Power of Attorney: If the application is filed through an agent, an endorsed Power of Attorney authorising the agent to act on behalf of the applicant must be included.
- Patent Specification: A detailed patent specification, including claims, must be submitted in duplicate.
- Plans and Drawings: If applicable, plans and drawings relevant to the invention must be submitted in duplicate.
- Inventor Declaration: A declaration by the true inventor, where applicable, must be included.

6. Section 1(3) of the PDA defines “art” to mean the art or field of knowledge to which an invention relates.

3. Filing the Application: The patent application can be submitted either electronically or in hard copy at the Trademarks, Patents, and Designs Registry.

4. Payment of prescribed fees: The application must be accompanied by the required filing fees.

5. Examination of the Application: The Registrar will review the application to ensure it meets the criteria for patentability and complies with all formal requirements.

6. Grant of Patent: If no opposition is filed within two (2) months of the application being published, the patent will be granted, and the applicant will be issued a certificate of registration.

It is worth mentioning that an applicant may claim foreign priority for a Nigerian patent application based on an earlier patent application filed in another country. If foreign priority is claimed, the Nigerian application will be considered as having been filed on the same date as the foreign application, provided the Nigerian application is submitted within twelve (12) months of the foreign filing date.

To benefit from this priority, the Nigerian application must include the following details about the foreign application:

- The date of the foreign application;
- The application number;
- The country in which it was filed; and
- The name of the applicant.

Additionally, the Nigerian application must be accompanied by a certified copy of the foreign application within three (3) months of the Nigerian filing. Foreign priority is only granted if the earlier application originated in a country recognised as a "convention" country by the Nigerian Minister or listed in the Federal Gazette.

Challenges In Registering A Patent In Nigeria

Registering a patent in Nigeria can present several challenges, primarily due to the lengthy and bureaucratic nature of the process. The registration procedure involves multiple stages of review and approvals, which can be complex and time-consuming. To efficiently navigate this intricate process, it is crucial to engage an experienced patent legal practitioner who can provide guidance through each step and ensure compliance with all procedural requirements.

6. Section 1(3) of the PDA defines "art" to mean the art or field of knowledge to which an invention relates.

Another significant challenge is the general lack of awareness and understanding of patent laws and intellectual property protection in Nigeria. Many individuals and businesses underestimate the importance of securing patent protection, which can result in missed opportunities and potential legal disputes. Critical awareness and education on the benefits of patents and working closely with a knowledgeable legal practitioner are essential to effectively managing intellectual property rights and safeguarding inventions.

Additionally, conducting a thorough patent search is vital to confirm that the invention is novel and not already covered by existing patents. This step helps prevent potential conflicts and ensures the uniqueness of the invention. However, this search process can often be cumbersome and time-consuming. A legal practitioner with considerable expertise in patents can assist in performing a comprehensive search and analysing the results, which is crucial for avoiding infringement issues and strengthening the patent application.

Infringement On Patent

The protection offered by a patent is defined by the claims and description of the invention as detailed in the patent application. Under the PDA, patent infringement occurs when an individual, without the patentee's authorisation, engages in any act that falls within the exclusive rights granted to the patentee. This includes unauthorised actions such as the importation, sale, use, or manufacturing of the patented invention for industrial and commercial purposes.

Infringement is considered any unauthorised activity involving the patented invention that contravenes the patentee's rights. The Federal High Court has jurisdiction over patent infringement cases and is empowered to grant a range of remedies. These remedies include:

- Injunctions to stop the infringing activity,
- Damages to compensate the patentee for losses suffered,
- Orders for accounting of profits, requiring the infringer to surrender profits made from the infringement.

Conclusion

Although patenting software is still an emerging area in Nigeria, it is essential for inventors to have a clear understanding of the legal landscape. By navigating the complexities of PDA, including the specific requirements for software-related patents, inventors can effectively safeguard their innovations.

This protection plays a significant role in fostering the growth of Nigeria's tech ecosystem. As Nigeria continues to make advancements in technology and intellectual property laws, staying abreast of developments will be crucial for inventors and businesses looking to leverage patent protection to drive innovation and economic growth.

This article is to provide general guidance and information and does not in any way constitute legal advice. Should you require any legal advice or further assistance on the above, please contact:



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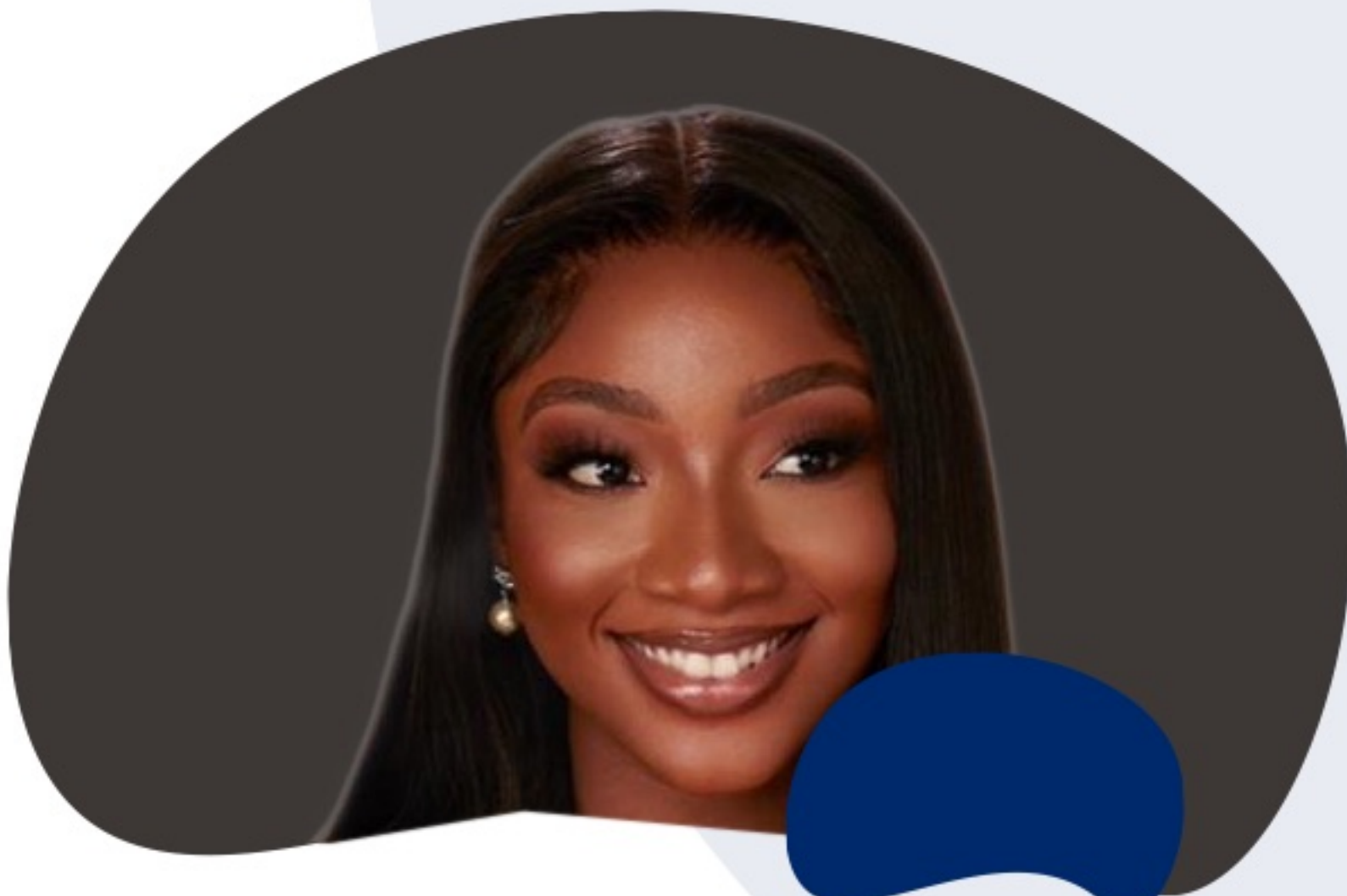
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