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THE NIGERIAN PATENT LAW: A STATUTE BEGGING FOR AMENDMENT

BY

CHUKWUNYE AUGUSTA OJEIH* & MARY ARTHUR-JOLASINMI[♥]

Abstract

Law is an integral social process which is resorted to for organizing the society in an orderly manner, and the legal system and statute are very significant part of the larger social system. Consequently, law is generally a very dynamic subject and the practice of law ought to change to reflect the changing nature of our society. That is because law is made for man and not man for law. It has however been observed that while our society is changing, our Nigerian Patent Act remains unchanged; thereby denying this aspect of its proper law functions.

Key words: Biotechnology, genetic engineering, innovation, obsolete, patent

1.0 Introduction

Legal systems the world over are not static, they are always evolving due to the fact that new laws are enacted continuously, some become obsolete, and some legal norm lose their binding force. Again, it is because laws cannot be perfect in a dynamic society that law reforms are usually and being continuously undertaken to reflect the existing realities. According to Worthley, “our laws are not perfect and final, cannot be so in a dynamic society; they are not always even intelligible, and if intelligible, not always intelligently made”.¹

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¹ B.A. Worthley, ‘Some Reflections on Legal Research after 30years’ *Journal of Indian Law Institute* (1982)p.175 in by MOU Gasiokwu, *Legal Research & Methodology*, (Enugu: Chenglo Ltd, 2006) p.1.

Some countries have had cause to adapt the laws of other States (countries) to suit their purpose and to update theirs. Similarly, developing countries have somehow adapted the laws of their former colonial masters or have had their laws influenced by their colonial past. Conversely, some particular existing provisions of the law which were adapted or introduced may no longer be so justifiable because the reason(s) that justified the original inclusion of such provisions are no longer valid.² It is often held that one advantage of countries developing later than others is their possibility to draw on accumulated experience and knowledge of already developed countries. If this wealth of knowledge, technical and other, is to be put to efficient use, appropriate channels have to be furnished for its flow. A large part of technological knowledge is free in the sense that its transfer is ‘merely’ a problem of documentation and adaptation.

In view of the above, the thrust of this paper is consider our patent law as it stands today; the obsolete nature of it and the need to amend or update it to accommodate technology advancements, innovations, and the general realities in products and processes.

2.0 The Concept of Patent

A patent is a form of intellectual property which grants its owner monopoly over a product or process. It may granted in respect of a new invention capable of industrial application and given a monopoly right that can last up to 20 years.³ Patents are the oldest of IP rights. It is the longest standing, best known and arguably economically most viable and valuable form of protection of rights of the law of intellectual property. Patents have been granted since 1331. Its history and origin can be traced to Europe. The word ‘patent’ comes from the Latin word “*patentis*”, meaning “open”, “unobstructed”, and “accessible”. The grant of a patent started as a safe conduct pass for foreigners. Foreigners from other countries could only be allowed into Europe if they had an invention they wanted to share with the Europeans.

Just as the copyright law derives from the Constitution of the Federal Republic on Nigeria, so does the patent law. The Constitution provides that: “The National Assembly shall power to make laws for...any matter included in the Exclusive Legislative list set out in Part 1 of the Second Schedule

² Our present Paten law (Patents and Designs Act, Cap P2) is a case in point.

³ Patents and Designs Act, section 7(1).

to this Constitution”.⁴ Patent is in the exclusive list: it is an Act of the National Assembly.⁵ Under this clause, the National Assembly has the inherent power to enact legislation to provide patent protection for works eligible for patent protection in Nigeria. It means that the federal government has preempted all rights relating to patent; thus, the individual states cannot grant patent, and there is no such thing as a state patent registration. Patent applies to science, useful arts, inventions and discoveries.⁶ Patent exists only by authority of federal government grant; the department responsible for the grant of patent in Nigeria is the Patents Registry, Commercial Law Department, a department under the Ministry of Industry, Trade and Investments. This Registrar of Patents through this department receives applications, reviews them, and issues or grants patents. In effect, a patent is a legal right granted by the federal government that permits its owner to prevent others from making, using, selling, or importing an invention. There are basically three types of patent: utility patents, design patents, and plant patents. However, the great majority of patents are utility patents, granted for useful objects or processes. For more than 40 years, patent in Nigeria have been granted to the first to invent. Generally, patent law prohibits the patenting of an invention that is merely an insignificant addition to or trivial alteration of something already in existence or already known.

Patents promote public good in that patent protection incentivizes inventors. If inventors of useful discoveries could not protect their works from use or exploitation by others, there would be little motivation to expend effort, time, and money in creating inventions. Consequently, the introduction of new products and processes benefits society. For some businesses, the difference between owning patents or not can mean the difference between millions, even billions of Naira. That does not, however, mean that patent is the province of big businesses. “It can, and does, have a relevance also to small and medium enterprises. However, one of the struggles for patent law is creating a system that is equally accessible and valuable to all participants”.⁷

⁴ Constitution of the Federal Republic of Nigeria 1999 (as altered), section 4 (2).

⁵ Ibid. Second Schedule, Part 1, item 43.

⁶ Deborah E. Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents and Trade Secrets* [4th edn, New York: Delmar Cengage Learning, 2013], p.335.

⁷ Tanyan Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* [Great Britain: Oxford University Press, 2013], p.603.

2.1 The Functionality and Characteristics of Patent

The **functionality** of a patent can neither be underestimated, nor can anyone overestimate it: a patent

- i. Widens and adds to the store of available knowledge by providing researchers and competitors with immediate access to information at their disposal which they may study and use subject to the scope of infringing acts.
- ii. It empowers economically. This is because inventors are rewarded and the State is empowered. There is financial reward for efforts and time put into inventions. In order to understand the basis of the patent system it is convenient to take the metaphor of a bargaining system between the state and the inventor. The impetus to set up the bargaining system arises from a view held by certain states that “the progress of technology can be advanced by encouraging people to publish their new discoveries, techniques and the likes”.⁸ They therefore bargain with the inventor on the following basis: if the inventor comes to the state with an invention and reveals the invention to the state, then in return the state will reveal the invention to everyone else but, for a limited period of time will restrict the use of the invention only to the person who brought the invention to the state, or those whom he permits to use it
- iii. It encourages researches and development by rewarding labour.
- iv. It induces and promotes investment which in turn creates job opportunities: increased industrial activities will lead to less idle hands.
- v. It encourages enforcement. Although the patent system is monopolistic in nature, but the public interest is safeguarded because of the presence of a law that defends inventors, consumers, investors, and the general public interest.

A patent has the following **characteristics**:

- i. It is a legal right: it is not a chattel. It is a chose in action, meaning that it is a personal property that cannot be taken personally.
- ii. It is not an equitable right, so its enforcement does not depend on the discretion of the court.

⁸ Nigel A. Eastaway and Richard J. Gallafent and Victor A.F. Dauppe, *Intellectual Property Law and Taxation* [London: Sweet and Maxwell, 2004], p.7.

- iii. A patent is a negative right: it gives an inventor a right to stop others from negatively exploiting his invention, but it does not confer a right to use the invention in the event that the inventor does not want to. For instance, a patent gives an inventor the right to stop an invention from being used for a limited period of time, which is the period of validity. The case of *Pfizer Inc v Polyking Pharmaceuticals Ltd & Anor*⁹ is an apt illustration of this point. Thus a patentee's manufacturing or processing activities may be circumscribed by the patents of others but are generally in no way affected by his ownership of his own patents.
- iv. If a patent is contrary to good morals, no matter how novel, how nonobvious, it may not be granted. *Section 1(4)* of the Patents and Designs Act provide that patent cannot be validly obtained in respect of inventions the publication or exploitation of which would be contrary to public order or morality.

2.2 Obtaining a Patent:

In obtaining a patent, the first vital point to establish is the priority date of the applicant's invention. The essence of a patent is that it is something new which has not existed hitherto and so it is vital to establish a priority date ahead of anyone else in the field; particularly if it is in a typical race, where rival firms are pursuing the same or similar line of research.

Priority date is the date for filing the application for a patent. This date is important because not only does it establish priority over rival applications, it also sets the clock time running for the 20 year-period of validity of the patent. All applications present for filing must contain the following:

- a request for a patent to be granted;
- a specification containing a description of the invention;
- a claim; and
- an abstract, which is a brief description of the invention.

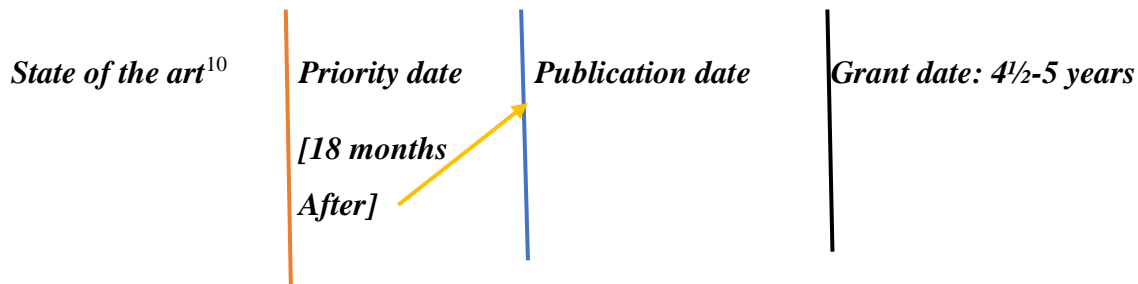
After a period of 12 months the application would be deemed to have been withdrawn if the claims and abstract have not been submitted. On the receipt of this information, the patent office would

⁹ [1998] FHCL 1.

conduct a search among other patents with a view to assessing the novelty and obviousness. Note: there are two vital factors in deciding whether or not an invention is patentable:

- If the application has not been deterred by experience, then publication takes place no more than 18 months after the priority date. From this time, the application is in the public domain and an inventor can claim damages for infringement.
- After the publication, the patent office will examine all aspects of the patent application; however, the time taken to do so varies from case to case, what is important is that it must not exceed a period of 4½ years after which a patent is either granted or refuse.

Under section 7(1) PDA a patent is valid for 20 years but the time actually begins to count from the date of the application [the priority date]; and not the date of publication nor the date the patent was granted. So, in effect, the number of years of actual exploitation of invention is no more than 16 years.

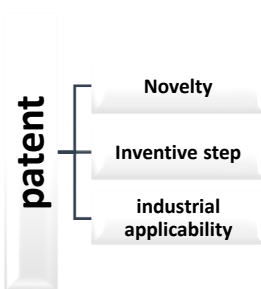


2.3 Patent Protection (Patentability)

Patent protection is obtained by asking the government for it and paying the fees: grant is not automatic. This very strong form of protection is reserved for inventions which satisfy rigorous

¹⁰ See PDA section 1(3).

standards (e.g. novelty and inventiveness¹¹) and an application for a patent has to be drawn up precisely and accurately stating the scope of the invention and the claims made in respect of which the protection is sought.¹² Thus, patent law concerns new, innovative, not obvious to persons skilled in the art, and industrially applicable inventions even to agriculture.



A patent may be for a product such as new type of leather shoe which automatically converts to rubber shoe when it touches water or a knife that doubles as a lighter, or it may be for a new industrial process, for a new way of compounding anti-malaria drug or a novel technique for making keys.

To obtain patent protection in Nigeria, the law provides the requirements in section 1(1) (a) (b) of the Act thus:

Subject to this section, an invention is patentable if it is new, results from inventive activity and is capable of industrial application; or if it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application.

From the above, it means that for an invention to be patentable it must satisfy three conditions, namely:

- i. It must be new (novel)

¹¹ Patents and Designs Act, section 1(1). Novelty means that the product or process must be new and must not have existed in the state of the art before the priority date either in Nigeria or anywhere else in the world. Inventiveness on the other hand, means that the novel invention is not obvious to a person having skill in the particular to which the invention relates.

¹² This is provided generally in section 3 of the Act.

- ii. It must exhibit/involve a sufficient “inventive step” (be non-obvious); and
- iii. It must be industrially applicable (useful).

The Patents and Designs Act goes further to state in section 1(2):

For the purposes of subsection (1) of this section: -

- (a). an invention is new if it does not form part of the state of the art;
- (b). an invention results from inventive activity if it does not obviously follow from the state of the art, either as to the method, the application, the combination of methods, or the product which it concerns, or as to the industrial result it produces; and
- (c). an invention is capable of industrial application if it can be manufactured or used in any kind of industry, including agriculture.

Before delving into the legal consequences and the meaning of the words and phrases as used in the Act, it is important to state that the Act contains no definition of what an invention is. Either this is because those responsible for drafting the Act felt that the task was too daunting, or that a definition might be later seen as sterile and a fetter on the development of the law in tune with technological development. Another explanation was that they did not really know with any certainty¹³. I add, another reason is that our legal draftsmen in Nigeria merely followed the footsteps of the colonial masters (Britain), it adopted the UK Patent Act hook-line-and-sinker with very little or no variations. It is a case of ‘follow the leader.’

2.3.1 Novelty (Newness) requirement:

Patent law requires that an invention (or any improvement to an invention) be “new” or novel. The test of newness is used in the dictionary sense: it must not have existed in the prior or state of the

¹³ See David Bainbridge, *Intellectual Property* [England: Pearson Longman, 2009], p.349.

art. Meaning that if the invention is known in Nigeria or patented or described in a printed publication in this or a foreign country before its invention by the applicant, it cannot be patented. This provision articulates the “first to invent” rule that is followed in our Nigerian patent law. The case of *Windsurfing International Inc v Tabur Marine*,¹⁴ the court stated that the windsurfing board cannot be patented because it has been in the state of art.

In the same vein, a patent cannot be obtained if and when it is abandoned. Abandonment is shown when the inventor expressly or impliedly demonstrates an intent to abandon his right to a patent. Abandonment usually requires an intentional act. Delay alone in filing an application does not usually constitute abandonment; although if no steps are taken to patent the invention and delay is unreasonable abandonment may be found.

2.3.2 Inventive step (nonobvious) requirement:

To be patentable, an invention must feature an inventive step: an invention will involve an inventive step ‘if it is not obvious to a person skilled in the art, having regard to any matter which forms part of the state of art’. Failure to satisfy this requirement is variously described as ‘lack of inventive step’, or ‘obviousness’. An invention that surmounts this hurdle is described as ‘nonobvious’.

Whereas novelty is a quantitative requirement – is the invention new, inventive step is qualitative in nature – is the invention obvious?¹⁵ An obviousness objection can be raised during examination or, after the patent has been granted, in opposition proceeding, or revocation proceeding. More specifically, the requirement of inventive step ensures that patents are granted for meritorious inventions, as opposed to obvious extensions and modifications of the prior art.¹⁶ The inventive step enquiry asks whether the invention is obvious to a person skilled in the art, having regard to what forms part of the state of art. The person skilled in the art is expected only to have scrutinized the information available in their own closely related fields.¹⁷ In determining whether or not an invention is nonobvious some of the secondary usually put in consideration are:

- a) Commercial success: - an invention that is a commercial success may be nonobvious;

¹⁴ [1985] RPC 59.

¹⁵ *Molyndyke AB v Proctor & Gamble Ltd* [1994] RPC 49, 112.

¹⁶ A. Griffiths, ‘*Windsurfing and Inventive Step*’ [1999] IPQ 160, 163.

¹⁷ *John Manville Corp.’s Patent* [1967] RPC 327.

- b) Long-felt need and failure of others;
- c) Commercial acquiescence; and
- d) Copying: - infringement of the patent by another suggests non-obviousness.

2.3.3 Industrial application requirement:

An invention is capable of industrial application if it can be made or used in any kind of industry including agriculture. Industry has been widely construed to include almost all commercial enterprises.

This requirement demonstrates the practical nature of patent law, which requires that the invention should be something which can be made industrially or relate to an industrial process. The invention has to be something that can be worked industrially, and to some extent this requirement distinguishes patent from other forms of intellectual property such as original works of copyright. It confirms the difference between ‘industrial property’ and copyright. Consequently, only that which is capable of industrial use is regarded as deserving protection by the grant of a patent. Thus, for instance, if an invention is still at a theoretical stage, no matter how advanced, it will be premature to make an application if its potential industrial applicability is yet to be demonstrated.

2.4 Exclusion from Patentability

As stated earlier, an invention is capable of industrial application if it can be made or used in any kind of industry, including agriculture. Though, this does not cover methods of treatment of human or animal bodies by surgery or therapy, or of diagnosis practiced on human or animal bodies. The reason is based on: (a) *public policy*: it will be against public policy to grant a patent monopoly on a method of treatment. It is not in society’s interest for one doctor or a group of doctors to rely on monopoly to deny the use of a method of treatment to other doctors and patients; (b) unhampered medical attention: another reason is to ensure that medical practitioners and veterinary surgeons are not subjected to restraint by a patent when tending patients. The benefits of a new treatment should be available to all.

It should be stated that this exclusion does not extend to products consisting of substances or compositions used in any such methods. Consequently, drugs are capable of industrial application and are patentable in principle. There are other exclusions from patentability as provided by the Act. The Act provides in section 1 (4) (5) that patents cannot be validly obtained in respect of:

- (4) (a) plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products); or
 - (b) inventions the publication or exploitation of which would be contrary to public order or morality (it being understood for the purposes of this paragraph that the exploitation of an invention is not contrary to public order or morality merely because its exploitation is prohibited by law.
- (5) Principles and discoveries of a scientific nature are not inventions for the purposes of this Act.

The exclusion of these can be justified on the ground of lack of technical effect, in some cases it because some of these are more appropriately protected by copyright (e.g. computer programs), or because they are too abstract and removed from immediate industrial application or manufacture. The exclusions in s.1 (4)(b) are based on policy considerations relating to social welfare, morality and ethics.

2.5 Patenting Inventions through National Office for Technology Acquisition and Promotion (NOTAP):

This is the federal agency responsible for the evaluation and registration of technology transfer agreements, the promotion of intellectual property, technology advice, and support services;¹⁸ the short form of it is “the National Office”.¹⁹ Part of the functions of this Office is:

- a) The encouragement of a more efficient process for the identification and selection of foreign technology;
- b) The development of the negotiation skills of Nigerians with a view to ensuring the acquirement of the best contractual terms...for the transfer of foreign technology;
- c) The registration of all contracts or agreements having effect in Nigeria on the date of the coming into force of this Act,...for the transfer of foreign technology to Nigerian Parties; and without prejudice to the generality of the foregoing...for or in connection with any of the following purposes, that is to say the right to use patented inventions.

¹⁸ NOTAP<<https://www.uk.practicallaw.thomasreuters.com>> accessed 25 May 2023.

¹⁹ National Office for Technology Acquisition and Promotion Act, Cap N62, LFN 2004, section 1(1).

Based on its functions, the National Office has been mandated to assist in the patenting of all inventions and innovations carried out by government funded Research Institutes and others in private sector. In doing this, NOTAP, through its information network, provides the following services:

- I. Link the inventors with patent offices all over the world.
- II. Assist inventors in drafting patent applications covering the invention in question.
- III. Process patent application through Industrial Property Offices.²⁰

The procedure for a patent is as specified by the Patent law: the application for the grant of a patent is made to the Registrar of patent which is under the federal Ministry of Commerce, in the Commercial Law department, Abuja. It is worthy of note that the patent application is merely examined by the Registrar of patent to ascertain formal compliance. Once the application satisfies the statutory requirements of appropriate fees, the Registrar is likely to grant the patent without enquiries to its novelty, inventiveness and industrial applicability or whether the specification sufficiently discloses the invention.

2.6 Ownership of Patent and Rights Conferred by Patent

In common with other intellectual property rights, a patent is a form of personal property that may be assigned,²¹ licensed,²² or transferred.²³ The owner of a patent is the person who is registered as the proprietor whether or not he is the deviser of the invention. The proprietor is the person to whom the patent is granted and who, therefore, has the right to work the patent. To facilitate patent applications there is a rebuttable presumption that the person making the application is entitled to the grant of the patent. **Section 2 (2)** of the Act provides that: *The true inventor is entitled to be named as such in the patent, whether or not he is also the statutory inventor, and the entitlement in question shall not be modifiable by contract.* Consequently, if and where the inventor is not the proprietor of the patent, he has a right to be mentioned as being the inventor in any patent granted and in any published application. This is because a large number of inventions are made by employees and usually in such cases, the employer will be the proprietor although the inventor

²⁰ NOTAP, <notap.gov.ng> accessed 25 May 2023.

²¹ Patents and Designs Act Laws of the Federation of Nigeria 2004, section 24.

²² Section 10 *ibid.*

²³ See generally section 24 of the Act.

will be named as such. Failure to identify the inventor will prevent an application from proceeding. If an invention turns out to be of outstanding benefit to the employer, the employee may apply for compensation award.²⁴

Disclosure is a central pre-requisite for the grant of a patent and it must be total, with nothing of substance withheld; otherwise it might be difficult for others to make use of the invention once that patent has expired. After the expiry of the patent, the invention falls into the public domain and any one is free to make use of it. Thus the whole patent transaction can be thought of as a bargain or contract between the inventor and the State; both parties bringing consideration to that contract.²⁵ This is because the person applying for the patent brings consideration in terms of fees, and by adding his invention to the store of public information, ultimately giving his invention to the State or even the world at large.

Consequently, the strength of protection afforded to inventions through the patent system is one reason why patent is of a shorter duration than what is available for works of copyright which subsists for the lifetime of the author and seventy years after his death.²⁶ The nature of patent protection was prescribed by the court in *Hicton's Patent Syndicate v Patents & Machine Improvements Co Ltd*, in the following terms:

Every invention to support a patent must either suggest a new way of making something...or it may mean the way of producing a new article altogether; but I think you are losing the grasp of the substance and seizing the shadow when you say that the invention is the manufacture as distinguished from the idea. It is much more true²⁷ to say that the patent is for the idea as distinguished from the thing manufactured. No doubt you cannot patent an idea, which you have simply conceived, and have suggested no way of carrying out, but the invention

²⁴ Patents and Designs Act LFN 2004, section 2(4).

²⁵ David Bainbridge, *Intellectual Property* [4th edn; Hamsphire: Ashford Colour Press Ltd, 1999] p.318.

²⁶ Copyright Act 2022, section 19(1) (a) (2).

²⁷ *Sic.*

consists in thinking of or conceiving something and suggesting a way of doing it.²⁸

Section 6 (1) PDA says: A patent confers upon the patentee the right to preclude any other person from doing any of the following acts –

- (a) where the patent has been granted in respect of a **product**, the act of making, importing, selling or using the product, or stocking it for the purpose of sale or use; and
- (b) where the patent has been granted in respect of a **process**, the act of applying the process or doing, in respect of a product obtained directly by means of a process, any acts mentioned in paragraph (a) of this subsection.

Section 6 (2) stipulates that the scope of the protection conferred by a patent shall be determined by the terms of the claims; and the description (and the plans and drawings, if any) included in the patent shall be used to interpret the claims.

Section 6 (3) says that the right under a patent –

- (a) shall extend only to acts done for industrial or commercial purposes; and
- (b) shall not extend to acts done in respect of a product covered by the patent after the product has been lawfully sold in Nigeria, except in so far as the patent makes provision for a special application of the product, in which case the special application shall continue to be reserved to the patentee notwithstanding this paragraph.

Section 6 (4) states that where, at the date of the filing of a patent application in respect of a product or process or at the date of a foreign priority validly claimed in respect of the application, a person other than the applicant –

- a) was conducting an undertaking in Nigeria; and
- b) in good faith and for the purposes of the undertaking, was manufacturing the product or applying the process or had made serious preparations with a view to doing so,

then, notwithstanding the grant of a patent, there shall exist a right (exercisable by the person for the time being conducting the undertaking, and not otherwise) to continue the manufacture or

²⁸ (1909) 26 RPC 339 @ 348.

application, or to continue and complete the preparation, and thereafter undertake the manufacture or application, as the case may be, and in respect of any resulting products to do any act mentioned in subsection (1) of this section.

2.7 Justifications for Patent Protection

Various justifications have been put forward for the protection of patents. The basic reason, however, is that a man should own what he produces. The Constitution of the Federal Republic of Nigeria, 1999 (as altered) provides that “the exploitation of human or natural resources in any form whatsoever reason, other than the good of the community, shall be prevented”.²⁹ This is in line with Article 17 (1-2) of the Universal Declaration of Human Rights (UDHR) which states that “everyone has the right to own property and that no one shall be arbitrarily deprived of his property”. Copinger and Stone James put it even more strongly when they said that:

Nothing with greater propriety be called a man’s property than the fruits of his brain. The property in an article or substance according to him by reason of his own mechanical labour is never denied him. The labour of his mind is no less arduous and consequently no less worthy of the protection of the law.³⁰

The following extracts from Machlup and Penrose³¹ explores the justification for a patent: it is possible to distinguish four fundamentally different lines of argument to justify the creation of patent:

- a) A man has a natural property right in his own ideas. Their appropriation by others must be condemned as stealing. Society is morally obligated to recognise and protect this property right. Property is in essence exclusive. Hence enforcement of exclusivity in the use of a patented invention is the only appropriate way for society to recognise this right.

²⁹ Section 17(2).

³⁰ Copinger and Stone James, *Copyright* [London: Sweet and Maxwell, 1958] p.2.

³¹ F. Machlup and E. Penrose, ‘The Patent Controversy in the Nineteenth Century’, *Journal of Economic History* (1950) (1) 9-26.

- b) Justice requires that a man receive, and therefore that society secure to him, reward for his services in proportion as these services are useful to society. Inventors render useful services. The most appropriate way to secure to inventors reward commensurate with their services is by means of exclusive patent rights in their inventions.
- c) Industrial progress is desirable to society. Inventions and their exploitation are necessary to secure industrial progress. Neither invention nor exploitation of invention will be obtained to any adequate extent unless inventors and capitalists have hopes that successful ventures will yield profits which make it worth their while to make their efforts and risk their money. The simplest, cheapest, and most effective way for society to hold out these incentives is to grant exclusive patent rights in inventions.
- d) Industrial progress is desirable to society. To secure it at a sustained rate it is necessary that new inventions become generally known as part of the technology of society. In the absence of protection against immediate imitation of novel technological ideas, an inventor will keep his invention secret. The secret will die with him, and society will thereby lose the new art. Hence it is in the interest of society to induce the inventor to disclose his secret for the use of the future generations. This can best be done by granting exclusive patent rights to the inventor in return for public disclosure of his invention.³²

3.0 Why the Patent Law is not working in Nigeria as Expected

According to Olusegun Oyedepo, “the patent in Nigeria has remained comatose and impotent as a lever for growth and development”³³ despite its existence in Nigeria for over five decades. The reason for this sad state of things are not far to seek. The patent law is conked out in Nigeria for the following reasons:

1. The obsolete nature of the Act. The Nigerian Patent Law which is the instrument that regulates the regime of patents in Nigeria has been a century; and even if we discountenance the period of the colonial rule in Nigeria, our ‘home-grown’ patent law has been in existence for over fifty years. In Nigeria, the first patent laws were the Patent Ordinance and Patent Proclamation

³² Tanya and Jennifer (n7) 608.

³³ Olusegun Oyedepo, ‘Patents and Economic Development’ *Nigerian Law Journal* (2013) (15) p.149.

which were enacted for the Colony of Lagos and Southern Protectorate respectively.³⁴ In 1902, the Patent Proclamation was enacted for Northern Nigeria. In 1916 after the amalgamation of the Southern and Northern Protectorates, the Patent Ordinance was enacted. From 1925, patents were first to be obtained in the United Kingdom and subsequently registered in Nigeria.³⁵ This law was in operation in Nigeria until 1970 when the Federal Military Government promulgated the Patents and Designs Decree.³⁶ This statute remains the law in Nigeria with very little amendments (if any); this law has been merely recycled under different Chapters in our Laws of the Federation.

The Nigerian Patent Law (Patents and Designs Act) was fashioned on International Bureau for the Protection of Intellectual Property (BIRPI) model law for developing countries; it was not founded on any national planning considerations,³⁷ in particular any coherent and comprehensive national technology plan because none existed at the time. The law was a quick fix and it lacked, and still lacks, proper basis for operation.

2. Section 1(4)(a) of the Patent law does not promote the advancement of scientific development in the areas of biotechnology. Biotechnology is the application of scientific techniques to modify plants, animals and micro-organisms. Biotechnology is also genetic engineering which is the application of modern biotechnology for ecological, agricultural, medicinal, and other purposes. In the internal scene, medicine, science, agriculture, and pharmacology present innovative issues in patent law. Our patent law should include these trailblazing matters into the Act.

Again, under this section, patents cannot be validly obtained in respect of plant or animal varieties, or essentially biological process for the production of plants or animal (other than microbiological processes and their products). Put succinctly, section 1(4)(a) excludes from patentability varieties of animals or plants or any essentially biological process for the production of animals or plants; however, this does not extend to micro-biological processes or the products of such processes. One problem with this section is how to differentiate between biological and micro-biological processes. Be that as it may, the development of strains of plants and crops that are resistant to

³⁴ All these were in 1900.

³⁵ Registration of United Kingdom Patents Ordinance, section 3.

³⁶ No. 60 of 1970 now Patents and Designs Act, Cap P2, LFN 2004.

³⁷ G.S. Yankey, 'International Patents and Technology Transfer to Less Developed Countries' [Aldershot: Avebury, 1987] cited by Oyedepo (n16) 150.

drought and disease have led to the issuance of patents in advanced climes. Genes and other genomic inventions are patentable so long as they meet the requisite statutory criteria of novelty, non-obviousness, and utility and fully disclose the use to which the gene can be put.³⁸

3. There is no designated Commission for patent in Nigeria. This is because the patent office in Nigeria occupies an obscure office in the Ministry of Trade and Commerce in Abuja – in Abuja only. Despite the gigantic role that patent ought to play in Nigeria. There is a total neglect of the operations of the patent system. The library that is supposed to serve the Registry is non-functional; the near total neglect of the Patents, Designs and Trademark Registry is a reflection of the esteem in which the patent system is held.

4. There is no substantive examination of patent application in Nigeria in this age and time. Section 4 of the Patents and Designs Act provides *inter alia* that “The Registrar shall examine every patent application as to its conformity with subsections (1) (3) and (4) of section 3 of this Act”. By this provision, the law requires only formal examination and nothing more. This by extension, means an ‘arm-chair’ examination of a patent application. Substantive examination requires that the invention sought to be patented is measured against the state of the art.³⁹ Formal examination does not foster the challenges involved in understanding the existing state-of-the-art by patentee. Formal examination encourages the registration of underserving inventions and is unhelpful to the training of engineering and scientific staff.

5. Finally, corruption in Nigeria provides the icing on the cake for the breakdown of the patent system in Nigeria. As noted by the court:

It is a notorious fact that one of the ills which have plagued and are still plaguing the Nigerian nation is corruption in all facets of our national life. It is an inconvertible fact that the present economic morass and or quagmire in which the

³⁸ Deborah E. Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents and Trade Secrets*, [4th edn; New York: Delmar Cengage Learning, 2013] P.444.

³⁹ Patent and Designs Act LFN 2004, section 1 (3) defines the state of the art as everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever... before the date of the filing of the patent application.

country finds itself is largely attributable to the notorious virus which is known as corruption.⁴⁰

A successful patent requires hard work in research and development (R&D); it requires risk and long term investment in exploitation of invention. The current atmosphere to get rich quick, by hook or crook, fired by corruption is not congenial to the flourishing of the patent system. Corruption is a disease which afflicts which not only afflicts public office holders alone but the society as a whole. Consequently. “If it must be eradicated effectively, the solution to it must be pervasive to cover every segment of the society”.⁴¹

4.0 The Way Forward

The object of law is to solve difficulties and adjust relations in social and commercial life and it must grow with the development of the nation; anchored in this it is recommended that

- I. A separate Act be enacted for Nigerian patent law. It should be separated from Design law. Having the two merged together was following in the footsteps of our colonial masters – the United Kingdom. Even at that presently, the UK has a Patent Act separate from its Designs Act.
- II. In enacting a separate Act for patent in Nigeria, it should be overhauled completely and upgraded to be in tandem with the realities and exigencies of time. This is necessary in this era of vast technological advancements and innovations. Section 1(4) (a) of the Act should either be expunged or completely modified to incorporate genetically modified organisms (biotechnology). Nigeria can no longer be in denial that genetic engineering has indeed become a part of everyday living. The law should be that whoever invents or discovers and asexually reproduces any distinct and new variety of plant may obtain a patent therefor. What is important is that the plant be of a new variety which must be asexually reproduced, must be distinctive, must be novel, and must be non-obvious. We are in the ‘century of biology’. Recent developments in the biological sciences are giving us a better

⁴⁰ Ogbuagu JSC (quoting Chief Afe Babalola SAN) in *AG Ondo State v AG Federation* [2002] 9 NWLR (Pt772) 337.

⁴¹ Per Uwais JSC in *AG Ondo v AG Federation*, *ibid*.

understanding of the natural world: at the same time, new tools are been developed that are collectively referred to as biotechnology.

- III. Better still, as a corollary to the above, Nigeria should adopt an alternative mode of protecting genetically modified organisms/plant varieties. This is because today, in the United States of America, it is possible to obtain a patent for a new breed of animal. In Europe, particularly the United Kingdom, there are legal protections of biotechnology inventions. As far back as May 1998, the European Parliament voted to accept the common position text of the Directive on the legal protection of biotechnology inventions. The recitals to the Directive gave important information as to its *raison d'être*. It is seen as important because of the increasing role in a broad range of industries being played by biotechnology and genetic engineering. Adequate legal protection is needed to encourage the high risk investment in R&D in inventions – be it a product or process: it should not be forgotten that Article 1 of TRIPS agreement requires that patent protection must be provided for products and processes in all areas of technology. These are to be protected under national patent laws, and that national laws shall be adjusted accordingly.

- IV. In amending our patent law, it is expedient that we have an optimal patent system which would differentiate between industries, types of knowledge, and types of inventions/inventors. For instance, the electronic industries want speed and short-term protection; while the pharmaceutical industries want long-term protection because it takes a number of years before a new drug can be sold to the public.

- V. Section 4 (1) of our Patents law requires only formal examination of patent granted under the Patents and Designs Act. It is seen that even NOTAP follows same step – that is when a patent is obtained through the National Office. Substantive examination requires that the invention sought to be patented is measured against state of the art i.e. the current state of knowledge as is existing in the field concerned. It involves using current technology to assess the technology being patented. Consequently, successful patenting requires that a firm understands the existing state-of-the-art technology well enough to improve on it. Substantive examination lies at the heart of important patent systems in the world. It is

disheartening that the Registrar of patents in Nigeria who is required to conduct the formal examination does not have the prerequisite knowledge of the prior art involved – what is conducted is ‘arm-chair’ examination. Elsewhere in the world, especially UK where we borrowed the patent system, substantive examination is conducted by trained examiners with requisite knowledge of the prior art who can competently determine the issues of validity of the invention being sought to be patented.

- VI. Again, the patent law in Nigeria should borrow a leaf from the Commission to the European Communities which has adopted the Directive for the protection of inventions by a Utility Model (UM); the utility model created a unique intellectual property in the United Kingdom. This model has a lot in common with patent but is less expansive and is quicker to obtain. A harmonized UM is seen as a means to encourage the freedom of goods protected by the right. It is also perceived as being particularly important for small and medium sized enterprises which are unable to make full use of the patent system (for example because of lack of resources or expertise) particularly in relation to improvements to existing technologies.
- VII. Finally, the patent office should be made autonomous just as the copyright office was made independent with a Commission named the Nigeria Copyright Commission (NCC) as provided by the Copyright Act;⁴² vesting it with the status of a body corporate which can sue and be sued in its corporate name. The suggested Nigeria Patent Commission will, among other functions, be responsible for all matters relating to patent including administration, regulation, and enforcement in Nigeria. It is believed and expected that such a Commission would work more without a glitch between government and individuals, organised private sector and other organisations, whether at the local or international level. It is further suggested that the functions of NOTAP be merged with the proposed autonomous Patent Office; part of which is the adaptation of foreign technologies to suit our local needs. This suggestion conforms to the ideas of the erstwhile American President Washington, in a speech to congress, concerning the Patent Act, when he said in part that: The advancement of agriculture, commerce and manufactures by all proper means will not, I trust, need recommendation, but I cannot forebear intimating to you the

⁴² Copyright Act 2022, section 72.

expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad as to the exertions of skill and genius in producing them at home.

5.0 Conclusion

This paper has examined the patent law in Nigeria and has in its own way examined the link between patent technological and economic advancements. It has also examined why the Nigeria patent law is comatose, and proffered ways of making the patent law work.

At the time when the Nigerian patent law was introduced and during most of the last century, when patent laws were passed in the Western world (where we borrowed our patent law from), the position of the inventor and the organisation of inventive activity were clearly not what they are today. The rationale of the patent system at that time was two-fold: induce those with inventive capacity to undertake such activities and to bring such men and women to disclose the secrets of their inventions. However, the patent system has long left that left that level. Thus, an update of the Nigerian patent law is long overdue; the society has, is and will always be highly dynamic, as such certain stands of yester-years as regards our patent law no longer stands in the present state of economic, social, and technological advancements. As has been observed, the economic history of any country will show conclusively that a strong and efficiently working patent system has been coincidental and coterminous with the relative progress and development of that country scientifically and industrially, if and only if it is a working patent system.