



Legal protection against infringement of e-patent rights in Nigeria

Ibrahim Shehu

Faculty of Law, Usmanu Danfodiyo University, Sokoto, Nigeria

Abstract

Patent as one of the aspect of intellectual property works protected under the act has been seen as not merely protected as such but as a personal property since it deals with inventions of new products or items. The development in technology has now pave a way in place same in the virtual world which will be accessible to the whole world at once but should be protected in the like manner as in its traditional mode. Thus, there has been series of obstacles in protecting e-patent rights under the law in Nigeria. In this regard, this paper shall see to the nature and scope of e-patents rights in Nigeria thereby providing the necessary recommendations to it.

Keywords: legal protection, infringement, e-patent rights

Introduction

The Patent and Designs Act ^[1] concerns new, industrially applicable inventions. It is perhaps fitting that intellectual property law reserves a very special and powerful mode of protection for inventions that meet exact standards ^[2] because patent as a species of intellectual property, is protected as a personal property.

The innate technological nature and infrastructure of e-commerce relying on computer technologies, both hardware and software, highlights the prominence and significance of patent system in e-business ^[3]. Undeniably the rapid technological growth in this arena is the outcome of incentives, provided by the patents to the researchers and innovators. The business intelligentsia is however divided on the patenting of business methods. While the proponents of the system believe that patenting leads to knowledge sharing and offers distinctive Advantage to businesses, the same practice is suspected to adversely affect competition ^[4]. It is therefore contended that companies may exploit the system to obtain patents for business methods that are not new and already exist in non-cyberspace. Nevertheless, patents have been granted to inventions pertaining to financial services, electronic sales and advertising methods and business methods, including business methods consisting of processes to be performed on the Internet, and telephone exchange and billing methods ^[5].

In this regard, since the world today has now turned to a computer age where there could be advertisement and transmission of products through the digital environment (i.e virtual world) to the exclusion of the third party through the access to the website of the company where the new inventions are displayed. With this therefore, the legal protection of e-patent rights against infringement in Nigeria shall be examined through the requirements for patentability, protection of electronic patents rights in Nigeria, infringement and remedies available against the infringer of electronic patents rights including the defences that could avail such infringer from being prosecuted or sued for civil wrong before the court of law.

Requirements for Patentability

Patentability as the term implies means inventions which are qualified to be legally protected or in respect of which the law will grant a patent. But it should be noted that not all manner of inventions are patentable. Thus, the Nigeria Patent Law provides no definition of an invention, but it has been defined elsewhere as "...the act of devising or contriving as a result of purpose or fore thought, an original contrivance or the construction of that which has never existed before" ^[6]. Therefore, every invention can be considered to be a new combination of the pre-existing knowledge which satisfies some want ^[7]. With this, it should be observed that an invention is different from discovery as opined by Buckley, J. in the case of *Reynolds v. Herbert Smith & Co. Ltd* ^[8], where he said:

Discovery adds to the amount of human knowledge, merely by disclosing something. Invention necessarily involves also the suggestion of an act to be done, and it must be an act which results in a new product, or a new result, or a new process, or a new combination for producing an old product or an old result.

In this situation, section 1(1) of the Nigeria Patents and Designs Act provides that an invention is patentable

- a. If it is new, results from inventive activity and is capable of industrial application; or
- b. 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 provision therefore, the basic requirements for patentability are; novelty, inventive step and industrial application, followed by the exclusion from patentability which provides a good framework in which to explore the legal consequences and meaning of these words and phrases.

Protection of Electronic Patent Rights in Nigeria

The conventional justification for a patent system is that inventors and investors are rewarded for their time, work and risk of capital by the grant of a limited, though strong monopoly^[9]. Thus, the Act lays down the procedure to be complied with in order to secure patent protection in respect of an invention. This is because, unlike copyright which comes into existence upon fixation, patentable inventions do not enjoy automatic protection save to the extent that it is kept undisclosed and therefore protected as a trade secret^[9]. Therefore, the right to a patent in respect of an invention is vested in the statutory inventor, that is to say, the person who, whether or not he is the true inventor, is the first to file, or validly to claim a foreign priority for, a patent application in respect of the invention^[10].

In Nigeria today, as to the registration of trademarks electronically, same applies to the issue of application for patent electronically whereby the requirement for registration, issue of foreign priority, claims and examination including the duration and lapse of patent have being granted as provided for under the Nigeria Patents and Designs Act is also applicable in e-registration or e-application of patent in the digital environment^[11]. Thus, the right conferred on the patentee is also valid online^[12].

The patent system provides a framework for innovation and technological development by, on the one hand, granting an exclusive right to the owner of a patent to prevent others from commercially exploiting the patented invention for a limited period and, on the other hand, balancing this right with a corresponding duty to disclose the information concerning the patented invention to the public^[13]. This information, which is classified and stored in the patent documentation, is available to anyone and, increasingly, is accessible online through Internet-based systems^[14]. The mandatory disclosure of the invention thus enriches the available pool of technological knowledge, facilitates technology transfer, and enhances the opportunities for creativity and innovation by others.

The patent system has played a vital role in promoting the development of the underlying technical infrastructure for the internet and e-commerce that take place across its networks^[15]. E-commerce relies in a critical way on various computer and network technologies, both hardware and software. However, the new technologies pose challenges to the conventional legal scheme for the patent system. Thus, in order to be eligible for patent protection, an invention must fall within the scope of patentable subject matter^[16]. Article 27.1 of the TRIPS Agreement provides that, subject to certain exceptions and conditions under the Agreement, patents shall be available “for any inventions, whether products or processes, in field of technology, provided that they are new, involve an inventive step and are capable of industrial application”. While it is possible to provide limited exceptions, which are allowed under the TRIPS Agreement, under national and regional laws, the general rule is that patent protection for an invention will not be refused simply because it falls in a particular field of technology. Meaning that the TRIPS Agreement is one of the legal framework protection the e-intellectual property rights in the digital environment. In *State Street Bank & Trust v. Signature Financial Group*^[17], the Board of Appeal of the European Patent Office held that a computer system involving a number of independent management tasks, including financial and inventory management and a system operation method was patentable as such. As noted earlier, patents are granted only to inventions that are novel, involve an inventive step and are useful or industrially applicable. Therefore, the same requirements apply in the cyberspace^[18].

In the light of the above, since Nigeria is a developing country in the area of technology, there has not been any case treated by the Nigerian courts dealing with the issue of patent protection in the digital environment. Likewise, the domestication of the provision of TRIPS Agreement into our national law has not been made. Still, reference could be made to the provision of TRIPS Agreement in examining the nexus between the protections of patentee’s rights as provided for traditionally and its applicability in the digital environment but cannot be relied upon since the requirement of its reliance had not been made yet in Nigeria. Therefore, it is satisfied from the provision of TRIPS Agreement that patentee’s rights are duly protected in the virtual world to the exclusion of the third party on the issue of infringement.

Infringement of Electronic Patents Rights.

During the subsistence of a patent, the patentee has the right to preclude all other persons from commercially exploiting the invention, subject matter of the patent. Such exploitation includes, where the patent has been granted in respect of a product, the acts of making, importing, selling or using the product, or stocking it for the purpose of sale or use^[19]. To this end, the rights conferred on a patentee under section 6 of the Act are deemed to be infringed by any person who does or causes the doing of any of the stipulated acts, without the licence or other permission of the patentee^[20]. The unauthorised manufacture, importation, sale or other commercial dealing in patented medicines, electronic gadgets, tools, equipment and other products, as well as the use of patented processes, without due authority are therefore actionable as infringement^[21].

In this regard, in the virtual world if an alleged infringer operates a system containing all of the claimed elements within the territory in which the invention is protected, there would be a straight forward claim for infringement^[22]. Meaning that if, as an instance, the Nigerian Patent and Design Act makes a provision as to the claim that relates to infringement of patent on the internet, then once an infringer operates a system containing all these

claims, therefore, it will be termed as an infringement under the Nigerian law. But on the contrary, such position is not applicable or available under the Patents and Designs Act at the present time because there is need for the review and amendment to this Act and the likes in order to fit this position and answer contemporary issues which protection of intellectual property rights on the internet is part.

Remedies

Section 25(2) of the Act provides for the different remedies which may be granted to a patentee whose rights have been infringed. Thus, the provision of the section is to the effect that an infringement of the rights of a patentee or design owner shall be actionable at the suit of the patentee or design owner in question; and in any action for such an infringement all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of the infringement of other proprietary rights. With this therefore, like the remedies available for other intellectual property in the digital environment as explained above, same applies here to the electronic patent rights once the claims has been laid before the court and it is satisfied that such act as occurred, then the court shall determine the available remedies meant for the claimant.

Defences

The performance of the acts stipulated in section 6 of the Act constitutes infringement of the patentee's rights only where unauthorised. Therefore, authority by the patentee, by way of an assignment or license, authority by the court by way of a compulsory licence, as well as the authority of the minister to produce a patented product in public interest all constitute valid defences to infringement action, provided the beneficiary of the authority exercise it within the confines of the grant.

With the exception of the above limitations to the rights of the patentee, all other acts which fall within the scope of the patentee's claims constitute infringement of the patent and are actionable unless the prior consent of the patentee has been secured. Thus, same is applicable in the virtual world relating to the protection of rights conferred upon patentee having examined the provision of TRIPS Agreement on patentable subject matter including the rights conferred thereto, though the Agreement is still not adequate in this respect which needs amendment to fully provide for the protection e-patents right in the virtual world.

Conclusion/Recommendations

It could be deduced there-from the above analysis that patent rights in the virtual world need adequate protection against any sort of infringement in order to fully protect the interest of the owner or registered user of the work. Also, it was asserted that works could be accessed and infringed upon in the virtual world without the permission of the legal owner or licensed user. Thus, treaties like TRIPS Agreement etc. have been established to curb this situation which is then left for signatory states to domesticate same in their own national laws.

In this regard, this paper therefore recommends that since Nigeria is a developing country in technology, domestication of the provisions of international instruments to which Nigeria is signatory and amendment of our local laws to suit this contemporary situation will go a long way in the protection of e-patent rights in Nigeria.

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