



# Navigating Patent Law for Start-ups in Nigeria

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## 1.0 Introduction

Nigeria is the hotspot for start-ups within the African continent as several start-ups run by Nigerians are attracting huge venture capital investment leading to several start-ups acquiring the ‘unicorn’ status also known as achieving the billion dollar valuation.<sup>[1]</sup> Nigeria's start-up ecosystem has seen significant growth in recent years, with start-ups becoming more prominent especially those within the fintech, e-commerce and logistics sector. The growth of tech start-ups in Nigeria is largely attributed to internet connectivity and a tech-savvy population.<sup>[2]</sup> Start-ups in Nigeria are growing exponentially, as at 2021 the Nigerian start-up ecosystem saw \$1.5 billion in venture capital investment and in 2022 Nigeria had 3,360 start-ups, the highest in Africa and in 2023 start-ups in Nigeria raised \$400 million in funding.<sup>[3]</sup> Flutterwave, a fintech payment platform is the highest valued Nigerian start-up with a valuation of \$3+ billion and other start-ups like Moniepoint, Inter Switch, Opay, Andela have all reached the billion dollar valuation mark making them unicorn start-ups.<sup>[4]</sup>

## 2.0 Overview of Patent in Nigeria

A patent is the right granted by the law for the protection of inventions that are new, involve an inventive step, and are capable of industrial application. The right confers on the inventor the exclusive rights to use, mass-manufacture and work the patented invention and gain benefits therefrom for a period of 20 years commencing on the date of application for the grant of such patent. Patents may cover entirely new products, or enhancements to pre-existing products or they may cover entirely new or improved processes for performing an activity.

Patents are crucial for start-ups developing innovative technologies and new processes. For start-ups, patents offer a host of benefits inclusive of providing exclusive rights to inventions, allowing licensing opportunities to generate

<sup>[1]</sup> ‘Top 10 Biggest Startups In Nigeria By Market Valuation’ (Mondaq, 13 September 2024) <<https://www.mondaq.com/nigeria/venture-capital/1517110/top-10-biggest-startups-in-nigeria-by-market-valuation#authors>> accessed 5 November 2024.

<sup>[2]</sup> Ibid.

<sup>[3]</sup> Oluwatomisin Amokeoja, ‘Accelerating Startup Growth: Nigeria’s Incubators’ (Forbes Africa, 26 October 2023) <<https://www.forbesafrica.com/entrepreneurs/2023/10/31/accelerating-startup-growth-nigerias-incubators/>> accessed 5 November 2024.

<sup>[4]</sup> Ibid (n.1)

additional revenue and attract investors by protecting innovation.<sup>[5]</sup> Patent protects the assets of a start-up, which is the lifeline of such start-up, therefore by providing exclusive right to use the innovation and the opportunity to financially exploit it by licensing the invention out, start-ups possess a huge revenue base in intellectual property rights protection. However, the most important benefit is the attraction of investors, the best way of attracting investors is through intellectual property protection and where necessary registering the invention as a patent.

### 3.0 Patentability

The law regulating patents in Nigeria is nuanced and filled with regulatory measures that may prove daunting for beginners. These essentials refer to the criteria for eligibility of patent protection. For an invention to be patented, three conditions have to be satisfied which are i) the invention must be new ii) it must involve an inventive step and iii) it must be capable of industrial application.

#### a) Novelty<sup>[6]</sup>

Novelty is a fundamental requirement in any patent application and it is an undisputed condition of patentability. Novelty is not something that can be proved or established, only its absence can be proved. Importantly, an invention is new if it does not form part of the state of the art. The state of the art comprises all matters available to the public before the priority date i.e, the date of application.<sup>[7]</sup> Prior art refers to all existing knowledge prior to the patent application filing and this can happen by way of written or oral disclosure.

For the invention to retain its novelty, it must not be disclosed to the public before the date of patent filing. Acts which amount to disclosure and therefore form part of the prior art are

**I. By description of the invention in a published writing or publication**

**II. By the description of the invention in spoken words uttered in public and**

<sup>[5]</sup> Ibid (n. 5)

<sup>[6]</sup> Patent and Design Act, s. 1(2)(a).

<sup>[7]</sup> Ibid, s. 1(3).

**III.** By the use of the invention in public or by putting the invention in a position that enables any member of the public to use it, such disclosure being a “disclosure by use”

Therefore, any disclosure to any person will be deemed to be public disclosure except it was expressly stated to have been given in confidence or the relationship between the parties is such as to presume that it was made in confidence, such as a lawyer/client, doctor/patient relationship.

#### **b) Inventive Step<sup>[8]</sup>**

In order to decide whether an invention is a patented invention, it must be novel, if the invention is novel; next, it is necessary to consider whether it involves an inventive step.

The expression ‘inventive step’ conveys the idea that it is not enough that the claimed invention is new, that is, different from what has existed, but that this difference must have two characteristics. Firstly, it must be ‘inventive’, that is, it must be the result of a creative idea, and it must be a ‘step’, that is, it must be noticeable. Secondly, it is required that this advance or progress be significant and essential to their invention.

In determining if an invention involves an inventive step, the question is whether the invention would have been obvious to a person having the ordinary skill in the art. This is known as the test of obviousness, if a start-up founder or member of the start-up core development team can make a similar invention of another start-up, in that instance the invention is said to be obvious and therefore does not involve an inventive step. In *Windsurfing International v Tabur Marine (Ltd)*<sup>[9]</sup> the Court held that the sailboard invented by the Plaintiffs did not involve an inventive step because, though some improvements were made, they were such that anyone familiar with sailing would have obviously made identical improvements.

#### **c) Industrial Application<sup>[10]</sup>**

An invention is capable of industrial application if it can be made or used in any

<sup>[8]</sup> Ibid, s. 1(2)(b)

<sup>[9]</sup> (1985) RPC 59.

<sup>[10]</sup> Patent and Design Act, s. 1(2)(c).

kind of industry, including almost all commercial enterprises. Only an invention that is capable of industrial use is regarded as deserving protection by the grant of a patent. Thus, if an invention is still at the idea stage, no matter how advanced, it will be premature to make an application if its potential industrial applicability is yet to be demonstrated.

Accordingly, start-ups in Nigeria are guided by this trinity element of patentability and must ensure their inventions are within the scope of each element to qualify for patent protection.

#### 4.0 Pathway for Startups

Nigerian start-ups looking to navigate patent law effectively and support their growth can leverage on the following:

1. **File for Patent Protection Early:** Start-ups should prioritize early patent filings for any novel inventions. In Nigeria, the **Patent and Designs Act** mandates that inventions must be new, involve an inventive step, and be capable of industrial application. This "first-to-file" system provides priority to the initial applicant, so filing promptly is essential to secure rights. Patent rights last for 20 years, offering long-term exclusivity to leverage innovation.
2. **Engage in Professional Patent Searches and Assessments:** Conducting thorough patent searches before investing in the patent process is vital to avoid infringement and ensure the invention is genuinely novel. This also helps assess the patent landscape and understand competing technologies. Professional assistance from IP lawyers can also help evaluate if the invention meets Nigerian patentability standards.
3. **Use a Combination of IP Protections:** Patent protection can be reinforced by using other forms of intellectual property (IP), such as trademarks for branding and trade secrets for proprietary processes. This multi-layered approach ensures broader protection. For example, a start-up's software might be patented for its unique technical process, while the brand logo is trademarked, and the algorithm is kept as a trade secret.
4. **Implement Strong Internal IP Policies and Agreements:** Start-ups should establish clear policies for handling intellectual property, including requiring non-disclosure agreements (NDAs) for employees, contractors, and partners. This minimizes the risk of IP theft or leakage, especially for

confidential trade secrets or innovations not covered by patents. Drafting robust employment contracts that specify IP ownership and confidentiality terms can further protect the start-up's assets.

**5. Consider International Patent Protection:** If your start-up plans to operate internationally or attract foreign investment, it may be wise to secure patent protection beyond Nigeria. The **Patent Cooperation Treaty (PCT)** allows for international patent applications, which can provide a foundation for protection in multiple countries. This strategic step makes the business more attractive to investors who may seek assurances on IP security across markets.

Taking these proactive steps can help Nigerian start-ups maximize their innovations' potential and safeguard their competitive edge in the market.

### 5.0 Conclusion

Navigating patent law is important for start-ups aiming to protect their innovations and foster sustainable growth. By understanding the essentials—such as identifying patentable inventions, securing rights early, and maintaining vigilance against infringement—start-ups can safeguard their competitive edge and attract investors with a robust IP portfolio. Furthermore, aligning patent strategies with business goals not only helps secure exclusive rights but also enhances a start-up's market position and potential for expansion. In an era where innovation drives success, mastering the basics of patent law empowers start-ups to leverage their innovations fully and build a solid foundation for long-term success.

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