

PRELIMINARIES PART II: INTELLECTUAL PROPERTY

Private Capital Insights



Summary: Intellectual property rights confer two key advantages to startups: first, it is a competitive advantage as it effectively raises the barrier to market entry. Second, it is considered as an intangible asset that could potentially bump up a company's valuation. Founders should proceed with caution as a third party may have a strong claim to your Intellectual Property rights under certain circumstances.

In 2018, Dr. Dre was involved in a long-running trademark dispute with Dr. Draion Branch, a practising gynaecologist in Pennsylvania. Dr. Draion was well known by family and friends as 'Dr Drair', and therefore sought to register that name as a trademark at the US Patent and Trademark Office. At a surface level, 'Dr Dre' and 'Dr. Drair' sounds confusingly similar. Perhaps, you might reasonably expect Dr. Dre's objection would succeed. No, it did not.

This outcome is not isolated in intellectual property disputes. Intellectual property rights confer legal protection over intangible assets and, in the context of startups, may constitute a significant portion of the company's value. It

is therefore imperative for founders to understand what these rights are and how they function.

1. CLASSIC IP RIGHTS

a. Patents

This is granted to *inventions* that meet specific criteria identified in Section 1 of Patents and Design Act, Cap P2 LFN 2004. Generally, an invention qualifies for patent if it is new, results from an inventive activity and capable of industrial application (or if an improvement upon a patented invention meeting those three criteria).

Patent may be granted in respect of a product or process, with the broad implication that the grant of patent precludes any other person from making or using the product or applying the process. The patent process typically starts with an application to the patent office.

Patent applications are complex and expensive. In the United Kingdom for example, it is not unusual for a patent application to cost thousands of pounds. This explains why the UK Intellectual Property Office recommends on the 'before you apply' [page](#) that 'Only 1 in 20 applications filed without the help of an IP Professional successfully reach grant'.

Tech hardware, pharmaceutical products, *qualifying* software etc. are eligible items for patents. However, patents cannot be obtained in respect of plant or animal varieties, or essentially biological processes for the production of plants and animals or inventions that are contrary to public policy. A grant of patent is typically for twenty years from the date of application and not grant.

One important caution: where an invention is made in the course of employment, the employer may have a statutory claim to the patent. Therefore, there is a risk to be carefully managed by the startup if one of the co-founders is in the employ of another organisation in the course of developing the patent.

b. Trademark

This is simply a **distinctive** mark of trade. Essentially, trademark indicates a connection between goods and services and some person having the right to use them in the course of trade. Infringement therefore arises where a person uses a mark that is identical with, or so closely resembles, a registered trademark that it is likely to cause confusion in the course of

trade. Apple logo (with a bite on the natural apple), SAMSUNG, Dangote and the accompanying logo are all prominent examples of trademarks around us.



In the event of conflict between a name protected by trademark and a business/company's name at the Corporate Affairs Commission, the trademarked name takes precedence. This point was reinforced in 2023 when a French company (Sanofi S.A.) successfully restrained three Nigerian companies registered at the CAC from using its trademarked name.

From a cost and lifecycle perspective, trademark registration is significantly less expensive than patent protection. In Nigeria, a trademark is initially registered for seven years and may thereafter be renewed indefinitely in successive periods of fourteen years.

c. Copyright

Under the Copyrights Act 2022, works eligible for copyright include *literary works*, musical works, artistic works, audiovisual works, sound recordings and broadcast. Unlike patent and trademarks, you do not need to take any step to register a copyright, as the law protects a copyrighted work right from inception. For most author-based works, protection subsists for the lifetime of the author plus seventy years, while other works may enjoy protection for fifty years from creation.

Nigeria is a signatory to the World Trade Organisation and has partially adopted its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). By virtue of TRIPS, computer programs (whether in source or object code) are protected as 'literary work'. This is key in the context of startups whose competitive advantage lies in original software or proprietary algorithms. In the circumstance, the underlying code is already protected by law against unauthorised copying or reproduction. For proprietary software, artificial intelligence and related field focused companies, guidance is key for a startup in navigating what qualifies as 'literary work' or 'invention' for which copyright or patent protection is optimal.

2. OTHER IP RIGHTS

Quite apart from these rights, which clearly entitle the proprietors to defined statutory legal remedies (including petition for criminal prosecution in the case of certain infringements), there exist some other intellectual property rights or remedies that startups may pursue under appropriate circumstances. These are:

Trade Secret

Also known as 'undisclosed information' under TRIPS. Trade secret is understood as any information that is:

- a. secret.
- b. by virtue of its secrecy, has commercial value, and
- c. has been subject to reasonable steps to keep it secret.

Coming into this category of trade secret is a wide array of information such as customers list and buying pattern, market entry strategy and pricing model, unique manufacturing processes etc. Ideally, you will want to keep this information secret as it is potentially disruptive if it falls in the wrong hands. Since there is no statutory protection, the only way to protect your trade secret is through contracts, whose remedy might not be satisfactory from a commercial standpoint.

An action for Passing off

You may have a remedy in 'passing off' in the instance where someone falsely represents his product as that of yours in an attempt to deceive potential buyers. This is a remedy that is potentially available to you if you are not protected by the classic intellectual property rights explained above.

The key point to note about these rights and remedies is that they are costly to enforce in case of infringement. You can have recourse to courts, with the attendant costs, delays and uncertainty on compensation levels the Courts would award.



3. VALUE ADDITION

Effective Barrier to Market Entry

Intellectual Property Rights, especially those clothed with statutory protection, serve as an effective barrier to market. If you have patented a product, let's say an eye glass with AI enhancing capability, you effectively enjoy a monopoly over that product for about twenty years from the date of filing your patent. This is an effective business proposition to investors, who are likely to take a second look at your business and commit capital.

Accounting Treatment

Another importance of IP is its accounting treatment. Intellectual Property is considered an intangible asset under financial reporting rules that sit on the Company's balance sheet. We are not financial experts in recognising and valuing these assets, but our work in this space with accountants has made us understand that IP could significantly bump the valuation of a startup.



This cascades down to raising capital and crucially in your negotiation with investors. Strong IP ownership can materially enhance investor interest and strengthen your negotiating position in term sheet discussions.

4. CONCLUSION

We have now concluded with the preliminary points a startup must bear in mind. Our next post will engage Nigerian specific regulatory blind spots in the startup space and how to carefully manage compliance.

For more information, please contact us at +2349029752441 or send us an email at info@ahl-legal.com.