APPRENTICESHIP AND THE RIGHT TO PATENTABLE INVENTIONS IN NIGERIA

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ABSTRACT

This paper examined the common law position and statutory provisions in Nigeria relating to the ownership of inventions created by employees in the course of employment. The study found that the Patent and Designs Act, Cap P2 LFN, 2004 which is the principal legislation on the subject-matter discussed, does not explicitly or by necessary implications make allusions to inventions generated by apprentices, and that it would be a misnomer to regard an apprentice as an employee in the strict sense of it for the purpose of automatically vesting an apprentice's invention in his employer as if same were made by an employee. The paper also interrogated correctness of the provisions of Section 2 (4) of the PDA which gives an employer the right of ownership over an invention introduced by an independent contractor engaged to carry out a work. It concluded that since the PDA does not make express reference to apprentices but to employees, the relationship between an employer and an apprentice regarding the ownership of an invention created by the latter for the purposes of patent rights, should entirely be determined by the terms agreed upon by the parties and adequately provided for in an agreement from the onset.

KEY WORDS: Inventions, Patent, Apprentice, Employment, Employer, Employee.

INTRODUCTION

Patent is one of the legal mechanisms used in the protection of intellectual property rights. The first granted Letter Patent took place under the Venetian Statute by the Italian province of Venice in the year 1474 and has since then been widely used for the protection of ideas and inventions.[1] A patent is a grant made by the relevant government authorities

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within a country to protect new inventions or improvements that are considered to have improved the way(s) the earlier inventions were made or used.[2] It has also been described as a market monopoly granted to investors as an incentive to invent or innovate.[3] Through the use of patents, innovations and new technologies are encouraged and developed in every aspect of human activities.[4] In Nigeria, although the Patents and Designs Act does contain the definition of the term 'invention' for the purposes of granting a patent, the Oxford Advanced Learner's Dictionary defines an 'invention' as a thing or an idea that has been invented or the act of inventing something'. The same dictionary defines the term 'invent' to mean 'to produce or design something that has not existed before'. These definitions are unsatisfactory as far as the granting of patents is concerned because there are circumstances where a patent may be granted over something that has been produced before but later modified differently so as to qualify as an inventive process.[5]

Businesses around the world largely depend on the innovations and resourcefulness of employees who at some times develop new products, improve processes, create new technologies and develop new markets[6] in order to expand. In some circumstances, an employment relationship gives the employee the opportunity to create patentable inventions during the subsistence of his employment. The duty of faithful service required of an employee demands that an employee must fully disclose to his employer any invention created by him while working for his master. The major issue which revolves around this topic of discussion bothers on whether an invention created by the employee while in employment belongs to employee or to his employer? In the bid to proffer a solution, both common law and statutes have attempted to balance the interests of the employer and the employee in situations where the latter develops a patentable invention within the periscope of his employment.

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[1] Wilson Gunn, 'History of Patents'<https://www.wilsongunn.com/history/history_patents.html.> accessed 30 December 2022; John Adams, 'History of the Patent System in: Research Handbook on Patent Law and Theory' <https://www.elgaronline.com/display/edcom/9781785364112/9781785364112.00009.xml.> accessed 30 December 2022.
[2] F O Babafemi, *Intellectual Property: The Law and Practice of Copyrights, Trade Marks, Patents and Industrial Designs in Nigeria* (2006) 342
[3] W Cornish and D Llewelyn, Intellectual Property: *Patents, Copyright, Trade Marks and Allied Marks* (2003) 112.
[4] 'Patents' <https://www.wipo.int/patents/en> Accessed 30 December 2022.
[5] *Crossley Radio Corporation v Canadian General Electric Co Ltd* (1936) D L R 508.
[6] Oluwakemi Amudat Ayanleye,B Sodipo and A Arowolo, 'Ownership of Employee Inventions in Nigeria: Need for a Paradigm Shift' (2022) (117) *Journal of Law, Policy and Globalization* 61. <https://heinonline.org/HOL/LandingPage?handle=hein.journal/jawglob117&div=9&id=&page=> accessed 23 December 2022.

This essay sets out to carry out an examination of the common law rules and the relevant statutory provisions on the ownership of the employee's inventions arising out of his employment. It shall investigate the applicability of those rules and statutory provisions to situations where the contractual relationship between the parties is not one of employment, but of apprenticeship in Nigeria; and shall also examine the scope of the phrase 'in the course of employment' in connection to the employee's right to patentable inventions under the Nigerian legal framework.

EMPLOYEE'S INVENTION AT COMMON LAW.

At common law, the question as to the ownership of the employee's invention has been addressed from different perspectives and restated in this paper. Generally, the employee's invention at common law belongs to the employer[7] unless there is a contrary intention.[8]

Where, the contract of employment vests in the employer the right to own an invention created by the employee, the former has the right to the patent notwithstanding the fact that the invention was made by the employee at his own spare time and with his own resources. Conversely, if the contract of employment provides that the ownership of the invention vests in the employee, then so be it.[9] Although, parties to a contract of employment are at liberty to agree on terms and conditions which they deem appropriate, it is doubtful whether an employer who is in a position to draw up the terms of the contract of employment can accede to an agreement which literally confers the ownership of an invention on the employee-inventor.

In situations where the contract of employment is mute on the ownership of the employee's invention, it is presumed that the invention belongs to the employer provided it is established that the invention has a connection with the employee's work[10] or if it is apparent that the employee's use of the invention would involve a breach of trust and confidence on his part. Thus, in the case of *British Syphon Co Ltd v Homewood,*[11] Rexburgh J. held that the question is 'would it be consistent with good faith as between master and servant, that he should in that position be entitled to make invention in relation

[7] *British Celanese v Moncrief* (1948) Ch 564; O' Higgins, *Employment Law* (1981) 4th ed 314.

[8] *Re Selz Applications Ltd* (1954) 71 RPC 158

[9] *British Celanese v Moncrief* [1956] 1 W.L.R. 1190

[10] *British Reinforced Concrete Co. Ltd. v Lind* (1917) 116 L.T. 243; *British Syphon Co. Ltd. v Homewood* [1956] 1 W.L.R. 1190; *Sterling Engineering Co. Ltd. v Patchell* [1956] A.C 534

[11] n (2); *Adamson v Kenworthy* (1952) 49 R.P.C. 57

to a matter concerning a part of the plaintiff's business and……keep it from his employer, if and when asked about this problem……..?'

If by virtue of the contract of employment, ownership of the invention is vested in the employer, but the employee incurred considerable expenses in creating it or created it during his spare time or just after the employment had ceased, it seems that on the authority of *British Celanese v Moncrief*[12] and on the basis of fidelity, the invention is owned by the employer.

At common law, the only situation where an invention created by the employee is owned by him is where the invention takes place by work which he is not paid to do. This will involve work not connected to his employment or work done during his spare time with his personal materials and entirely independent of the employer's trade secrets as in *Re Selz Applications Ltd.*[13]

Under the common law, in any event where the invention is adjudged to be the property of the employer, the employer is not bound to pay the employee any form of compensation aside from his contractual remuneration.[14]

EMPLOYEE'S INVENTIONS UNDER THE STATUTE

The common law positions on the employees' inventions have been criticized for being unjust and inequitable especially where the ownership of the invention is vested in the employer even when the employee-inventor has expended considerable resources and time outside his course of duties to come up with an invention.[15] To mitigate the bane of the employee under the common law, countries such as Nigeria and the United Kingdom took certain steps by way of legislative interventions to modify the common law approach so as to achieve a balance of interest between the employer and employee whenever the latter makes an invention while in an employment relationship with his employer.

In Nigeria, the Patents and Designs Act, Cap P2, Laws of the Federation of Nigeria, 2004, is the principal legislation on the right of a patent to an employee's inventions. Section 2(4) of the Act clearly provides that where an invention is made in the course of employment or in the execution of a contract for the performance of specific work, the right of a patent in the invention is vested in the employer or, as the case may be in the person who commissioned the work,

[12] n (9).
[13] n (8).
[14] G O S Amadi, 'Employee's Inventions and the Contract of Employment' (1990) (4) *The Nigerian Juridical Review* 61.
[15] Roger W. Rideout, The Principles of Labour Law (Sweet & Maxwell 1976 2nd ed.) 237.

provided that, where the inventor is an employee, then- (a) if – (i) his contract of employment does not require him to exercise any inventive activity but he has in making the invention used data or means that his employment has put at his disposal, or (ii) the invention is of exceptional importance, he is entitled to fair remuneration taking into account his salary and importance of the invention, and (b) the entitlement in question is not modifiable by contract and may be enforced by civil proceedings.

With respect, the above legislation is fraught with certain lacuna which may portend unfortunate tendencies most likely to occasion more injustice than it seeks to address. The phrase 'in the course of employment' is suggestive of the existence of a contract of employment involving a master-servant relationship, while the phrase 'in the execution of a contract for the performance of a specified work' impliedly connotes a contract for service between an independent contractor and his employer. Both phrases do not envisage a contractual relationship between an apprentice and his employer. Again, the use of the expression 'in the course of employment' within the context of this legislation is wide and vagrant, and if given a broad interpretation, may defeat original intentions of the framers of this law. These shortcomings are further expounded in the ensuing discussions.

'IN THE COURSE OF EMPLOYMENT'

The provisions of Section 2 (4) of the Patents and Designs Act suggest that the right to a patent in an invention introduced by an employee in the course of employment is vested in the employer. For the singular purpose of identifying when it can be positively affirmed, that the right to a patent in an invention created by an employee is vested in the employer, it is very important to examine the meaning of the phrase 'in the course of employment' as it is one of the key determining factors as far as this subject-matter is concerned. The problem of ascertaining the exact meaning of 'in the course of employment' arises due to the fact that different facts present different cases. This difficulty was recognized in the case of *Jaimakani Transport Ltd. v Abeke,*[16] where Coker F.J. said that the application of the principles of 'in the course of employment' to the realities of a situation is fraught with considerable difficulties. Be that as it may, certain tests exist which the courts have over the years applied in determining what is meant by 'in the course of employment'. One of such tests is to look at what the employer has expressly, impliedly or apparently authorized his employee to do.

[16] (1963) 1 All NLR 180.

Once it is shown that an employee's operation is geared towards achieving the purpose of the employer's business, the courts will be inclined to hold that the employee acted within the scope of his employment.[17] The phrase 'in the course of employment' was given a judicial interpretation by the House of Lords in the case of *Sterling Engineering Co. Ltd. v Patchett*[18] to mean where the employee uses his employer's time and his materials to make an invention. In March, 2020, the Academic Staff Union of Universities (ASUU) embarked on an industrial action following a disagreement with the Federal Government over the funding of the Nigerian universities and the implementation of the Integrated Payroll and Personnel Information System (IPPIS) which lasted for more than 9 months. The period of that strike coincided with the era of Covid 19 pandemic which ravaged the whole world and called for serious research efforts from different quarters aimed at combating the pandemic through proactive innovations especially from academic research institutions. Despite the ongoing strike at that period, researchers, for instance at the University of Lagos, developed a new AmbuVent Ventilator and hand-sanitisers which formulation included the utilization of local plants. In this highlighted instance, the pertinent issue that may come up for determination is whether the said invention can be regarded to have been created by the academic staff (employees) of the institution mentioned in the course of their employment so as to vest the right to its patent in the employers considering the fact that at the material moment of the creation, the researchers were mainly lecturers whose salaries and allowances were suspended due to the strike? In other words, would it be correct to say that such employee inventors created the invention in the course of their employment by using their employer's time and materials so as to justify the vesting in the employer of the right to patent in the invention?[19]

The provisos to section 2 (4) appear to be quite nebulous and cumbersome. Under the first proviso, if the inventor is an employee whose contract of employment does not mandate him to exercise any inventive activity, so long as it is shown that the employee used data and means that his employment put at his disposal, the invention vests in the employer while a fair remuneration is paid to the employee inventor. What is the position of an employee whose contract of employment requires him to exercise inventive activity but he makes an invention at his spare time using his personal data and means instead of those provided by his employment? Would it be just for such an employee in such a

[17] *Rose v Plenty* (1976) 1 All ER 97; *Iko v John Holt & Co Ltd & Anor* (1957) 2 FSC 50

[18] [1955] 1 All E.R. 369 at 373.

[19] In the American case of *Board of Trustees of the Leland Stanford Junior University v Roche Molecular Systems, Inc.* (2008) 1509-1510, the Supreme Court was of the view that mere employment is insufficient to vest title to an employee's invention in the employer.

circumstance to be denied the right to a patent in the invention? The glaring silence by the Act on this hypothesis is a serious gap which needs to filled by the insertion of a clause which would allow an employee to own an invention generated by him at his spare time by the use of his personal data and means even though his contract of employment requires him to take inventive steps. The problem is in respect of the second leg of the said proviso which states that where an employee's invention created is considered to be of importance, he will be entitled to receive a fair remuneration taking into account his salary and the importance of the invention. What this means is that the moment an employee's invention is adjudged to be of importance, such an employee is automatically dispossessed of any right to the invention. In this case, it is immaterial whether or not the employee's contract of employment requires him to exercise any inventive step. Also not to be considered in this connection, is the fact of whether or not the employee used his personal data or means. Unfortunately, the criteria for adjudging the importance of an invention are not stated. Assuming the invention is considered irrelevant by the employer of the employee inventor but same is considered to be of utmost importance to mankind by other organizations, would it be justified for the employer to still claim ownership of the invention under the Act but refuse to pay reasonable compensation to the employee inventor? With these inherent shortcomings, one begins to wonder whether the Act was actually meant to curb the harshness of the common law positions or to make it more complicated for the employee.

'IN THE EXECUTION OF A CONTRACT FOR THE PERFORMANCE OF SPECIFIED WORK'

The general rule is that where an organization engages an independent contractor to perform work for her business, that organization will not be liable for any wrongdoing committed in the performance of that work. This is because independent contractors operate under a contract for service, on their own account and at their own risk.[20] However, there are exceptions under which an employer can be held vicariously liable for a wrong committed by an independent.[21] The orthodoxy is that vicarious liability is justified by a cluster of reasons. Chief among them is the argument that an enterprise which introduces risks into the world in order to benefit from them should compensate those harmed by the materialization of such risks even if it was not their fault that the risks occurred in any particular case.

The import of the second arm of Section 2 (4) of the Patents and Designs Act is that where an invention is made by a person while executing a contract for the performance of a specified work, the right to a patent in the invention is vested

[20] *Woodland v Essex* CC (2013) UKSC 66.
[21] *Barclays Bank Plc. v Various Claimants* (2020) UKSC 13.

in the person who commissioned the work. This provision undoubtedly, refers to a situation where an independent contractor is engaged to perform a specific task on behalf of an employer and the course of carrying out the work, creates an invention. Going by the tenor of the said provisions, any invention so created by the independent contractor, belongs to the employer. If by the general rule, an employer is exculpated from liability in respect of a wrong committed by an independent contractor in the course of a work he is employed to do, it is submitted that there is no justification whatsoever for conferring automatic ownership of an invention created by an independent contractor on the employer even if the invention is made on the worksite of the employer provided it is within the scope of the contractor's engagement. Since the employer does not determine mode or method adopted by the independent contractor in executing the work, any invention arising out of it should be solely owned by the independent contractor. Under the U.S. law, an invention covered by a patent application is owned by the individual inventor (whether an employee or an independent contractor) who is responsible for the invention and where it is desired that the invention should be assigned to the employer, there must be a written agreement to that effect signed by the inventors.[22] The opinion of this paper suggests that it would be acceptable to all sensibilities if the second arm of Section 2(4) were couched in a manner which would give the employer and the independent contractor to adequately address their relationship concerning the ownership of an invention generated by an independent contractor in a written agreement.[23] Where however, there is no explicit provision in the agreement as to the ownership of an invention, and a dispute arises, the court should look at all the circumstances surrounding their relation and consider whether it is necessary to imply that the employer owns the independent contractor's invention since contractual terms can be negotiated.

THE APPRENTICESHIP SYSTEM

The apprenticeship system remains the oldest and most popular form of training involving a combination work and learning.[24] Historically, apprenticeship emerged before the medieval era when guilds, journeymen and craftsmen

[22] Steven P. Lipowski, 'Protecting Your Rights: Protecting Works Created by Employees and Independent Contractors' <https://www.ruderware.com.business-transactions/protecting-your-right-protecting-works-created-by-employees-and-independent-contractors/> accessed 26 December 2022.

[23] John C Martin, 'Who Owns the Intellectual Property Developed by an Independent Contractor?' < https://www.hg.org/legal-articles/who-owns-the-intellectual-property-developed-by-an-independent-contractor-7502> accessed 26 December 2022.

[24] Michael Gessler, 'Concept of Apprenticeship: Strengths, Weaknesses and Pitfalls' in *Handbook of Vocational Education and Training Developments in the Changing World of Work* (Springer and Cham)Chapter35 677-709 <https://www.researchgate.net/publication/325660506 concept of Apprenticeship Strengths Weakness and Pitffalls> accessed 22 December 2022.

flourished, setting the template for the exploitation of productive forces and the corresponding relations of production.[25]

More than ever before, employers around the world are recognizing the benefits desirable from apprenticeship arrangement. Through the apprenticeship system, more qualified workforce is developed and grown for the future by introducing new talents or improving existing employees. The fact that many employers in diverse sectors engage in the training of apprentices despite the huge costs involved, shows that the apprenticeship system is of benefits to the employers during the period of training.[26]

A contract of apprenticeship arises when a person binds himself to serve and learn for definite period of time from an employer (master), who on his part contracts to teach or train the person systematically for a trade or employment in which art or skill is required. It is therefore presupposed that the employer is an expert in the trade or employment in question. This means that the employer-employee relationship does not technically exist in a contract of apprenticeship.[27] At common law, there are basic rules which apply differently to a contract of employment on the one hand and a contract of apprenticeship on the other hand. For instance, whereas a contract of employment can be made orally or in writing, a contract of apprenticeship must be writing,[28] attested by and made with the approval of an authorized labour officer. Also at common law, a contract of apprenticeship must be by deed and cannot be enforced if it is made orally or merely reduced in writing.[29] By virtue of section 9 (3) of the Labour Act, a person under the age of sixteen years lacks the capacity to enter into a contract of employment, but may enter into a contract of apprenticeship. Section 90 of the Labour Act makes it clear that a worker is not and does not include an apprentice. Through the apprenticeship scheme, workforce is recruited and developed to grow the employer's business and apprentices who are intellectually endowed may possibly create important inventions that are patentable. Michael Faraday was an apprentice when he made discoveries that helped to bring electricity into people's homes. Through his invention, electricity became a useful energy and that turned Faraday into a big celebrity.[30] Flowing from the above discussions, the pertinent question is whether an invention created by an apprentice in the

[25] Ibid.
[26] L Gambin and T Hogarth 'Employers and Apprenticeships in England: Costs, Risks and Policy Reforms' *Empirical Res Voc Ed Train* 9 (16) (2017)<https://doi. org/10.1186/540461-017-0060-5> accessed 22 December, 2022.
[27] *Horan v Hayboe* (1904) 1 KB 288
[28] Section 49 (1) L A
[29] *MacDonald v John Twiname* Ltd (1953) 2 QB 304
[30] Faraday 'The Apprentice who Popularized Electricity' <https://www.bbvopenmind.com/en/science/leadingfigures> accessed 3rd March 2022.

course of learning a trade or skill from his employer or master can fall under the provisions of the Patents and Designs Act highlighted above. In other words, can an apprentice be regarded as an employee for the purpose of bringing him under the coverage of the Act where he makes an invention? In Nigeria, there may be an unfortunate tendency to misconstrue an apprentice to mean an employee since the person under whose supervision the apprentice learns is sometimes referred to as 'employer' or 'master'. Such an erroneous construction may also arise due to the fact that the legislative provisions on the relationships of employment and apprenticeship are both contained in the Labour Act. The divergent common law rules and statutory enactments applicable to a contract of employment and to a contract of apprenticeship clearly show that the two relationships are not the same and cannot be taken as one. In the case of *Okoh v Unilag,*[31] the Supreme Court defined an employee as a person who is paid to work. An apprentice is not paid to work, but rather binds himself to serve and learn from an employer. The essence of apprenticeship is learning. In the entire gamut of the Patents and Designs Act, the word apprenticeship is totally outside its contemplation as no mention is made of it. In the case of *Olalomi Ind. Ltd. v NIDB,*[32] the apex court, inter alia, held that in the interpretation of statutes, a statute should not be given an interpretation that that will defeat its purpose. Rather, it must be given a literal, plain and unambiguous interpretation so as not to defeat the intention of the law.[33] One of the cardinal principles of interpretation of statutes is to exclude what is not stated in the statute. This is expressed in Latin as 'expressio unius est exclusio alterius' meaning what is not stated is deemed excluded.[34] The implication of this is that the common law rules and the provisions of Section 2 (4) of the Patents and Designs Act, 2004 pertaining to inventions made in the course of employment will not apply where an apprentice makes an invention while learning under his employer. It therefore follows that from the wordings of Section 2 (1) of the Act, where an invention originates from an apprentice who is learning a trade or skill from his employer, the right to a patent in respect of the invention shall vest in the apprentice rather than the employer except there is a contrary intention as contained in the agreement between the parties. The logical justification for this proposition stems from the fact that by the very nature of a contract of apprenticeship, it is difficult to envisage that an apprentice who has bound himself to acquire knowledge from his master, would be required to embark on any inventive activity even though he might have utilized data or means made available to him by his

[31] (2011) 14 NWLR Pt.1268 563 at 566.
[32] (2009) 16 NWLR Pt. 1167 266 at 277.
[33] *Aqua Ltd v Ondo Sports Council* (1988) 4 NWLR pt 91 622; *Fawehinmi v IGP* (2000) 7 NWLR pt 665 481; *Awolowo v Shagari* (1979) 6-9 SC 51; *Alamieyeseigha v FRN* (2008) 16 NWLR pt 1004 1.
[34] *Bagwai v Goda* (2011) 7 NWLR pt 1245 28; *Awoye v Obasanjo* (2006) All FWLR PT 334 1967.

employer. The fact that the invention is of exceptional importance should not be a ground that will suffice to divest him of his right to a patent.

CONCLUSION

From the above discuss, it is evidently clear that in Nigeria, there is no statutory provision which explicitly addresses the ownership of an invention created by an employee under the appendage of a master. The rules applicable to apprenticeship under the Labour Act differ in material aspects from those which regulate the relationship between employer and employee. To assume that both are one and the same, is an unfortunate misapprehension capable of denying the apprentice his right to an in invention created him in the course of service and learning from his master. Since the Patent and Designs Act does not mention the word 'apprentice' so far as the subject-matter of this discussion is concerned, it suggested that whenever an apprenticeship contract is executed, a clear provision in the agreement regarding the ownership of inventions created by an apprentice should be adequately incorporated therein. The best time to do this is at the point of entering into relationship with the employer. Where there is a default in this regard, there should be no valid rationale whatsoever for forcibly divesting an apprentice of his invention under the guise of doing so in consonance with the provisions of Section 2(4) of the Patent and Designs Act. Drawing an analogy from India for instance, where the Patent Act, 1970 is silent on the matter of ownership of patents within the employer-employee relationship, the court in the case of Darius Rutton Kavaasmanek v Gharda Chemicals, held that an employer cannot claim ownership over an employee's invention even if the former's resources were used for the development of it.

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Sterling Engineering Co. Ltd. v Patchell [1956] A.C 534

Woodland v Essex CC (2013) UKSC 66.