

Conditions of Patent and its Applicability in Protection

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Abstract

This article intends to provide the issues of patent and its applicability in Tanzania when it comes to own the invention. The author categorised this article into five aspects of which, each aspect provides its own information for the same purpose. For instance, part one (1) of this article provides for the brief introduction in order to apprehend general idea of the legal instruments governing patent worldwide; at part two (2) the author provides the definition and contents of patents serves for the proper manner as to which the patent should be taken or considered is; the third (3) part provides for the worldwide conditions which should be considered as well once a person wants to protect and register its innovation; the fourth (4) part stipulates the applicability and practice of patent protection in order to see to what extent does the patent is safe and adequate under the legal system. And the last party, chapter five (5) provides for the summary of the previous parts, and conclusion for the entire article.

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INTRODUCTION

As it has been stipulated, the intellectual property is categorised in two (2) aspects namely as industrial designs and copyrights. Among other designs, innovation and invention are governed under Patent Industrial Design. Among other legal instruments, the patent industrial designs are governed by the Paris Convention for the Protection of Industrial Property [1]. The Paris Convention is the first international legal instrument to govern patent and was introduced in 1883. The Paris Convention sets out substantive provisions relating to protection of patents including the common rules and right to claim priority [2]. Patent Cooperation Treaty [3] provides for facilities between parties with matters related to filing, searching and examination of applications for the protection of inventions and rendering special technical services [4].

In 2000, another legal instrument was introduced for the same purpose, and that legal instrument is known as Patent Law Treaty [5]. The Patent Law treaty was adopted in Geneva as a supplement of Patent Law Treaty. Later on in 1982 the Council of Africa Regional Industrial Property Organisation (ARIPO) adopt the Harare Protocol [6] serves for

Southern countries of Africa including Tanzania to receive and process patent and industrial design applications on behalf of states party to protocol [7]. However, in 1987 the United Republic of Tanzania introduces its patent law and namely as Patent Act [8]. The Trade Related Aspects of Intellectual Property Agreements [9] (TRIPS) established the minimum norms for the protection of intellectual property rights including innovation and invention.

PERCEPTION OF PATENT

As it has been noted, patent is a branch of intellectual property that protects ideas in form of innovation or invention [10]. Patent is described and defined in various legal instruments for the same purpose. With similar definition, the Patent Act [11] defines a patent as an invention to mean a solution to a specific problem in the field of technology and may relate to a product or technology [12]. A patent is a creature of law that allows inventors to apply for and obtain exclude rights to exclude others from making, using, or selling an invention once the inventors meets the standards of requirements including inventive step, novelty, disclosure, and industrial application [13].

Similarly, Kihwelo and Nditi [14] define that, patent is referred and used to granted rights exploiting from innovation and invention. Durhan [15] urges that patent cover practical invention in the useful acts. The author further says that any technological advance from a new microchip to an improved formula can be subject to patent. A patent it can be taken as a special form of designing which shall be protected as a form of artistic expression [16].

The brief information above described the definition of patent in order to simplify and provide adequate understanding of patent and its relevance as to what extent the article should further go. Through the provided definition, the contents itself facilitate the availability and its existence which suffice the protection of the invention as intended. In support to the above, the following part discusses conditions of the patent which are entitled for the protection.

CONDITIONS OF PATENT AND ITS PATENTABILITY

Patent is inevitable product which is new with inventive step and it has to be applicable in industrial aspect. Section 8 of the Patent Act provides that ‘an invention is new if it is new, involves an inventive step and is industrial applicable’ [17]; and yet the Act provides that ‘an invention is new if it is not anticipated by prior art’ [18]. In order for the novelty to be considered as patentable and provide position for patentability, an inventor has obligations to produce an intellectual work which has never been heard in the field where it belongs [19]. The philosophy behind is to reward the inventor(s) in order to promote and encourage the development of technology. Kihwelo and Nditi further say that

Patent right is granted to anyone who invents any new and useful process, instrument of manufacture or composition of a matter or any improvement of the prior art.

On other hand, the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement [20] provide that a patent

Patent should be available for any inventions, whether products or processes, in all fields of

technology, provided that they are new, involve an inventive step and capable of industrial applications [21].

Similarly, the Patent Law Treaty [22] provides that Patent should be construed as reference to inventions, inventors’ certificates, utility certificates, utility models, patents or certificates of addition, inventors’ certificates of addition, and utility certificates of addition.

Additionally, Kihwelo and Nditi [23] urge that Novelty of an invention depends on whether such invention is contemplated in, i.e., it does form part of the state of the prior art. The state of the prior art in the case of an invention is taken to comprise all matters (whether a product, a process, information about either, or anything else) which have at any time before the priority date of that invention been made available to the public by written or oral description, by use or in any other way.

The following part presents a worldwide position to be considered for the protection of patent with regards to the recognition of the invention.

Novelty

Novelty has reference to newness and the invention is new if it is not anticipated by prior art. That means, novelty must have not been existed and if existed there must be a difference between the existed one and new one, and the new one shall have some improvements compared to the prior one. For instance, the case of *Inhale Therapeutic System v. Quadrant* [24] the judge Laddie J expounds the two requirements by emphasizing the strict nature of the novelty test. He said that a claim could be anticipated in two ways. First, if the prior art describes something falling within its scope then, assuming that it is enabling, the claim is anticipated.

Inventive step

As it has been noted, ‘inventive step’ is described as an invention shall be considered as involving an inventive step with regards to the prior art within the meaning of everything which made available to the public anywhere in the world by means of written or oral

disclosure [25]. That invention is not being obvious to inventor's skill at the art on the date of the filing of the application or priority is claimed, on the priority date validity claimed in respect thereof. In respective, inventive step is complete once the following requirements observed, and these are

- a) The identified inventive step is embodied by the patent,
- b) Skilled imputed normally, and the common knowledge is addressed in the art to the prior date,
- c) Identify the differences between the invention in the matter cited and matter alleged,
- d) Declaration of the differences viewed without knowledge of the alleged invention,
- e) Describe steps which are obvious to the invention as it required any degree of invention [26].

Industrial applicability

'Industrial applicability' as an application of the patent according to its nature where it can be made or used at technological aspect in any kind of industrial including agriculture, fishing and services [27]. In its context, the concept of industrial applicability is far beyond its extent which include all sort of practical.

Disclosure

In order to prove whether the invention is novel or otherwise, two categories shall be observed. Disclosure of the invention should be disclosed, and the inventor as an ordinary person with skills should be able to perform the disclosed invention if she/he attempts to do so by the using of disclosed matters and common knowledge [28].

PRACTICAL ASPECT OF PATENT PROTECTION

Historically, the protection of patent originated from UK with the grant of letters 'Patent' under the Royal Seal that conferring a royal privilege on the patentees to carry out activities in a monopolistic way [29].

The patent can be protected internationally where the invention originality file an international application under the patent copyright treaty [30]. For the patent to be

protected, an inventor must file an application, and that application must describe the invention in such a way that inventors' skilled could be able for the practical [31]. The Patent cooperation treaty provides that applications for the protection of inventions in any of the contracting states may be filed as international applications under this Treaty. And further, the PCT provide for the requirements as specified in the treaty including regulations, a request, a discretion, one or more claims, one or more drawing where is required and an abstract for the invention [32].

As well, there are cases such as *Hartranft v. wiggmann* [33] and *Diamond, Commissioner of patents and trademark v. Chakrabarty* [34] explain the contents of patentable invention which shall be considered. These cases clearly indicate that in order for the invention to be novelty, a patent as a product should not have distinctive name, character and use [35]. Additionally, the concept of prior disclosure has been stipulated in the case of *Hill v. Evans* [36]. In this case, Lord Westbury held that the antecedent statement must be such that a persona of ordinary knowledge of the subject would at once perceive, understand and be able to practically to apply the discovery without the necessity of making further experiments and gaining further information before the invention can be made useful.

As it has been indicated, the authorities provide for the safeguard of the patent regarding to its definition. The patent should be taken as an item which has a combination of three categories include invention, with a specific solution to the problem, and that solution shall be related to the product. Once it has been proved this is a patent, the legal system of the country has a duty to protect the invented product and provide a security of the intended product with certificate of recognition.

SUMMARY AND CONCLUSION

As it has been articulated above, the patent to be protected it is clearly that there should be a novelty invention with step related to industrial application, and disclosure. If an inventor wants its innovation to be secured, that invention shall be acknowledged with the recognition internationally. The law requires a

state where the invention introduced to file an application in order to protect the invention because the announced invention have various advantages to the inventor including the encouragement of invention, technological development and at the same time it can produce an income to the inventor and the state as well. For instance, in the case of *Sarkaria Jin Bishwanath Prasad Radhey Shyam v Hindustan Metal Industries* [37] a court stipulate that the object of patent law as to encourage scientific research, new technology, and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant monopoly is the disclosure of the invention at the patent office which after the expiry of the fixed period of the monopoly, passes into the public domain.

REFERENCES

1. The Paris Convention for the Protection of Industrial Property, 1883
2. Summary of the Paris Convention for the Protection of Industrial Property, 1883
3. Patent Cooperation Treaty, 1970
4. Art. 1(1) of the Patent Cooperation Treaty, 1970
5. Patent Law Treaty, 1982
6. The Harare Protocol on Patents and Industrial Design, 1982
7. See also Kihwelo PF and Nditi NNN *Intellectual Property Law Manual*, the Open University of Tanzania, 1st Edition, 2008
8. Patent Act, 1987
9. The Trade Related Aspects of Intellectual Property Agreements.
10. Section 7 of the Patent Act, 1987
11. Section 7(1) of the Patent Act, 1987
12. A patent is an official legal right of the inventor to make or sell his or her invention for a particular period of time.
13. See also Blackeway JR *at all* the patent infringement litigation handbook: avoidance & management (2010:9).
14. Kihwelo and Nditi (2008:26); see also section 2 of the UK patent Act, 1977
15. Durhan AL Patent Law Essentials: A Concise Guide (204:14).
16. See also Durhan (2004:14).
17. Section 8 of the Patent Act
18. Section 9 of the Patent Act
19. similarly, section 1(1) of the UK Patent Act of 1977 provide that A patent may be granted only for an invention in respect of which the following conditions are satisfied, and that is to say
 - a) The invention is new,
 - b) It involves an inventive step,
 - c) It is capable of industrial application,
 - d)
20. Art.27(1) of the Trade Related Aspects of Intellectual Property Agreements, Annex C1
21. Art. 27(1) of the TRIPs
22. Art. 2 of the Patent Cooperation Treaty of 1970 (Modified 2001).
23. Kihwelo and Nditi (2008:39)
24. *Inhale Therapeutic System v. Quadrant*¹ (2001) IP&T 1229
25. Art 10 of the patent act, 1987
26. See also the case of *Windsurfing International Inc. v Tabur Marine (GB) Ltd* [1985] RPC 59.
27. Article 11 of the patent Act, 1987
28. See also section 6(1) of the UK Patent Act, 1977; Kihwelo and Nditi (2008:40) further provide that to prove that the invention is not novelty because of contemplation in the art, two points are to be satisfied. These are the application should disclose the invention in a claim albeit the law accommodates a regulated disclosure. The requiring is called disclosure. The second is that an ordinary skilled man should be able to perform the disclosed invention if he attempts to do so by using the disclosed matter and common general knowledge. This requirement is called enablement.
29. Guru M and Rao MB Patent Law in India (2010:8); authors further state that A patent was noted as a name of the document containing a command from a sovereign and authenticated by a present of a wax with the expression of great seal of the realm. The system provides for grant of letters of patent for the sole working or making a new manufacture to the first inventor for manufacture.
30. Article 3(1) of the PCT
31. See also Durhan (2004:14)
32. Article 3(2) of the PCT

33. *Hartranft v. wigmann* 121 U.S. 609,615 (1887)
34. *Diamond, Commissioner of patents and trademark v. Chakrabarty* 447 US 303, 206 USPQ 193
35. With similar perception, Kihwelo and Ndiy (2008:38) emphasis that Novelty has references to newness and the invention is new if it is not anticipated by prior art. That means it must have not existed in the prior art of if existed there must be a difference between the prior art.
36. *Hill v Evans* (1862) 31 LJ (NS) 457
37. *Sarkaria Jin Bishwanath Prasad Radhey Shyam V Hindustan Metal Industries* (1979) 2SCC 511
38. Kihwelo PF, Ndiy NNN. *Intellectual Property Law Manual* the Open University of Tanzania, 1st Edition (2008).
39. Guru M, Rao MB, *Patent Law in India* (2010).
40. Blackeway JR, et al. *The Patent Infringement Litigation Handbook: Avoidance & Management* (2010).
41. Durhan AL, *Patent Law Essentials: A Concise Guide*, 2nd Edition (2004).
42. Patent Act, 1987.
43. Patent Law Treaty, 1982.
44. The Harare Protocol on Patents and Industrial Design, 1982.
45. The Paris Convention for the Protection of Industrial Property, 1883.
46. The Patent Cooperation Treaty, 1970.
47. The Trade Related Aspects of Intellectual Property Agreements.
48. UK Patent Act of 1977.
49. *Diamond, Commissioner of Patents and Trademark v. Chakrabarty* 447 US 303, 206 USPQ 1903.
50. *Hartranft v. Wigmann* 121 U.S. 609,615 (1887).
51. *Inhale Therapeutic System v. Quadrant* (2001) IP&T 1229.
52. *Hill v Evans* (1862) 31 LJ (NS) 457.
53. *Sarkaria Jin Bishwanath Prasad Radhey Shyam V Hindustan Metal Industries* (1979) 2SCC 511.

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