

# Patent Rights in the Sports Industry

Emmanuel Oluwafemi Olowononi

## ABSTRACT

A trademark is a distinctive sign that identifies certain goods or services produced or provided by an individual or a company and distinguishes same from others. Trade mark is a symbol or sign which differentiates the goods and services of one business from another one although they may operate in horizontal business within or without the same community. Trademark is an indicative medium relied upon by consumers to create an imaginary link between a product on which such mark is used and its seller. Its major hallmark is its ability to differentiate the goods of one seller from those of others in the same line of business from one. Trademark in Nigeria is governed by the Trade Marks Act, Cap T 13, Laws of the Federation of Nigeria 2004 (hereinafter referred to as Trademark Act) and the Trademark Regulations 1990. In contributing to existing literature, the paper examines the economic aspect of mark registration in the sports industry. It examines registrable marks and identifies the possibility of registration under existing treatises globally. The paper concludes with salient recommendations toward harnessing the economic aspect of trade mark registration in the Nigerian sports industry.

**Keywords:** Industry, Nigeria, Patent, Rights, Sports.

**Published Online:** October 13, 2022

**ISSN:** 2796-1176

**DOI:** 10.24018/ejpolitics.2022.1.4.30

**E. O. Olowononi\***

Senior Lecturer, Corporate Law Practice Department, Nigerian Law School, Headquarters, Bwari Abuja, FCT; Barrister, Solicitor and Notary Public of the Supreme Court of Nigeria; Football Agent and Sports Arbitrator.  
(e-mail: immafemi@yahoo.com)

\*Corresponding Author

## I. INTRODUCTION

The grant of a patent for an invention is the grant to the patentee for a limited period of a monopoly right in respect of that invention, that is, the right to exclude others from using that invention. Patents are granted in Nigeria under the Patents and Designs Act, Cap 344 of Laws of the Federation of Nigeria 2010. The purpose of patenting is essentially economic. The state, in order to encourage technological development assures an inventor of a monopoly right to exploit the invention for a limited period of time (An Overview of Patent Laws in Nigeria, 2020). It is envisaged that the inventor, during the period of such monopoly would have derived maximum financial benefit from the exploitation of the invention. The state thus ensures that inventions which could improve the quality of life of the citizenry are exploited to the good of the greatest number of people. Under the Act, a patent may be granted either for a product or for a process. An example of a process is the process known as electroplating or indeed any chemical reaction which may give rise to a product (An Overview of Patent Laws in Nigeria, 2020). Whichever the case may be, the life of the patent lasts for 20 years provided the annual renewal fees are paid for the duration of its potential life. Where the patentee defaults in the payment of the annual renewal fee, the patent lapses, after a 6 months period of grace, if still not renewed and cannot be revived again.

The Act provides that certain matters are not patentable. These are set out in Section 1(4) and (5) of the Act (Patents and Designs Act of 1970, 1990). These include plants or animal varieties, or essentially biological processes for the production of plants or animals. Inventions the publication of which will be contrary to public order and morality are also excluded, so also are principles of a scientific nature. Apart from these exceptions, all products and processes, which meet the qualification for patentability under section 1(1) of the Act, are patentable (Patents and Designs Act of 1970, 1990).

## II. PATENTABLE INVENTIONS

It must be understood before we delve into the requirements for patentability that the grant of the Nigerian patent is made without a guarantee of validity. Section 4(4) of the Patents and Designs Act 1970 provides: "Patents are granted at the risk of the patentee and without guarantee of their validity". A Nigerian patent is granted without the registrar looking into the questions whether the application meets the requirement for patentability. The Registrar only examines the application to ensure that all the documents which are required to be filed have been filed. Once he is satisfied that the formal requirements have been met, he proceeds to issue the certificate of patent (Patents and Designs Act of 1970, 1990, Section 4). Consequently, the fact that one has been issued with a patent certificate in Nigeria does not mean that the patent is valid. The validity is open to challenge in court, and if challenged, the primary onus of proving validity rests on the patentee (Patents and Designs Act of 1970, 1990, Section 9). Thus the Nigeria patent system is called

the deposit system of patenting as opposed to the examination system adopted in the industrialised countries, where rigorous examination as to compliance with the requirements for patentability is undertaken. As earlier mentioned the patentability of the Nigerian patent can be looked into anytime by the court upon the suit of any person interested. Section 9 of the Act provides that on the application of any person, including a public officer acting in the exercise of his functions, the court shall look into the questions whether an invention in respect of which a patent has been granted is patentable, the question whether the description of the invention conforms with the requirement for clarity and completeness set out under section 3(2), and the question whether at the time the application for the patent was filed, there already existed a prior application or a grant of a patent in respect of the same invention (An Overview of Patent Laws in Nigeria, 2020, n.99). Where the court finds that a patent does not pass the test of validity under the provisions of section 1 or 3(2) of the Act, the patent will be declared null and void. The rationale for the adoption of the deposit system of patenting is that in a developing country such as ours, there will be a shortage of persons of adequate expertise in all fields of technology and science who will be able to assess the novelty of any invention being sought to be patented (An Overview of Patent Laws in Nigeria, 2020, n.99). The deposit system shifts the burden of establishing patentability from the registrar to whoever wishes to oppose the patent. This system, apart from saving the government revenue it might otherwise pay out to experts who will assess the application, it is also speedy (An Overview of Patent Laws in Nigeria, 2020, n.99). One does not waste any time waiting for the application to complete the laborious process of assessment.

Patentable inventions Section 1 of the Patents and Designs Act 1970, prescribes the conditions for patentability. It provides:

1. Subject to this section an invention is patentable.
  - (a) if it is new, results from an 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.

Three conditions are primarily set by this provision for patentability:

1. The invention is new.
2. The invention involves an inventive step.
3. The invention must be capable of industrial applicability.

The secondary provision which is made under section 1(1)(b) is that an invention will still be patentable if it is an improvement on an already patented invention (An Overview of Patent Laws in Nigeria, 2020, n.99). The condition for patentability shall now be examined to understand the precise meaning of the provisions of the Act. In this process, reference will be made mainly to judicial pronouncements of the English court on provisions of the English Patents Act which coincide with the provisions of the Nigerian Law. There has been very few patents litigation in Nigeria, therefore the paucity of judicial pronouncements on the interpretation of our legislative provisions.

### III. THE INVENTION MUST BE NEW OR AN IMPROVEMENT ON A PATENTED INVENTION

The requirement of novelty is the primary focus of the law of patents. In other word, for an invention to qualify to be validly patented, the discovery must be completely unknown anywhere in the world at the time the application for the patent is filed. Thus, if anybody else had made the discovery before the applicant, a valid patent cannot be granted (An Overview of Patent Laws in Nigeria, 2020, n.99). In defining novelty, the Act adopts a two-step approach. The Act first provides in section 1(2)(a) that an invention is new, if it does not form part of the state of the art, then it goes further to define “the art” and “state of the art” as follows:

“the art” means the art or field of knowledge to which an invention relates and “the state of the art” means everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever (by means of a written or oral description, by use or in any other way) before the date of the filing of the patent application relating to the invention or the foreign priority date validly claimed in respect thereof, so however that an invention shall not be deemed to have been made available to the public merely by reason of the fact that, within the period of six months preceding the filing of a patent application in respect of the invention, the inventor or his predecessor in title has exhibited it in an official or officially recognised exhibition.” (Patents and Designs Act of 1970, 1990, Section 1(3)).

Thus, the parameters for determining novelty would seem to be fairly objective so long as the invention has not been made available to the public. This has been judicially interpreted in *GentechInc's Patent* (1989) R.P.C. 147 at 204 as meaning:

Thus, to form part of the state of the art, the information given (by the user) must have been made available to at least one member of the public who was free in law and in equity to use it. (*GentechInc's Patent*, 1989)

The implication of the judicial interpretation is that if the information regarding the invention is disclosed confidentially to a person or a group of persons, under circumstances which makes it obvious that they are not expected to disclose to any other person or to make use of the information, then the invention has not been made available to the public as to form part of the state of the art. It has further been judicially held that to form part of the state of the art, the disclosure of the invention must be "an enabling disclosure" (An Overview of Patent Laws in Nigeria, 2020, n.99). In other words, the information provided must be sufficiently detailed as to enable a person skilled in that field of knowledge make use of it (An Overview of Patent Laws in Nigeria, 2020, n.99). The courts have tended to be very willing to declare that an invention has been made available to the public once the possibility has been established that relevant information about the invention has been made available to at least one person. Thus, it had been held that if an invention is disclosed in a book which has not been sold but only displayed for sale in a bookshop, sufficient disclosure had been made to make the invention part of the state of the art (An Overview of Patent Laws in Nigeria, 2020, n.99). So also, where a book, written in French was in the British museum, in a room not accessible to the public and only its title appeared in the catalogue of the museum, it was held that it had been made available to the public. Disclosure to the public could also be by prior use. It has been held though, that where the invention is used such that an analysis of the product will not disclose the nature of the invention, disclosure to the public would not be said to have been made. An obvious example is where a new process is employed in the manufacture of an established product; an analysis of the product will not reveal any information about the process.

Therefore, the process still remains patentable though it had been used prior to the date of the application for a patent. In *Merrell Dow Pharmaceuticals Inc. v. Norton & Co. Ltd* (1994) it was held that the prior use of a product was to be considered in the same way as a prior published document. In both cases prior use will not invalidate the patent where information available will not enable a person skilled in that field of knowledge produce the substance.

#### A. *Prior Applications or Grants*

Included in the body of sources that must be considered on the question of novelty are prior applications or prior grants of patents. The position of the courts is that where a patented invention coincides with an earlier application filed or patent granted, the subsequent patent will be rendered invalid. The test for determining when such a situation arises was set out at length in the dictum of Aldous J. in *P.C.G. Research Ltd. v. Ardon International* (1993, FSR 197 at 218).

Novelty has been a requirement of patent law for hundreds of years and there are a number of well-known authorities which help to illustrate what must be established. They are still good law. It is sufficient for me to refer to the judgement of the Court of Appeal in the *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. Ltd* (1972) R.P.C 457 at 485. In that case, the Court of Appeal stated:

The earlier publication and the patentee's claim must each be construed as they would be at the respective relevant dates by a reader skilled in the art to which they relate having regard to the state of knowledge in such art at the relevant date. The construction of these documents is a function of the court, being a matter of law, but since documents of this nature are almost certain to contain technical material, the court must by evidence, be put in a position of a person of the kind to whom the document is addressed, that is to say, a person skilled in the relevant art at the relevant date. .... If the prior inventor's publication contains a clear description of, or clear instructions to do or make, something that would infringe the patentee's claim if carried out after the grant of the patentee's patent, the patentee's claim would have been shown to lack the novelty, that is to say, it will have been anticipated .... If of the other hand, the prior publication contains a direction which is capable of being carried out in a

manner which would infringe the patentee's claim, but would be at least as likely to be carried out in a way which would not do so, the patentee's will not have been anticipated, although it may fail on the ground of obviousness. To anticipate the patentee's claim the prior publication must contain clear and unmistakable directions to do what the patentee claims to have invented.

In *Hills v. Evans* (1860, 31 L.J. Ch. 457 at 463) Lord Westbury L.C. in the same vein as the foregoing dictum stated:

The antecedent statement must, in order to invalidate the subsequent patent, be such that a person of ordinary knowledge of the subject would at once perceive and understand and be able practically to apply the discovery without the necessity of making further experiments ..... the information .. given by the prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent.

The conclusion under this head is that the earlier patent or application must be such that it exactly coincides with the subsequent application or grant. It is not enough to state that the subsequent grant or application logically follows from the previous application or grant. Such an argument justifies nullification on the ground of obviousness, and not on the ground of anticipation (An Overview of Patent Laws in Nigeria, 2020, n.99).

#### IV. IMPROVEMENT ON PRIOR INVENTION

The subject of disclosure by prior use is closely related to the secondary provision for novelty contained in our law. Thus, it can be stated that if an invention is related to an existing patented invention but could not have been anticipated based on information available regarding that existing patent, it would qualify as a patentable improvement on the existing patented invention (An Overview of Patent Laws in Nigeria, 2020, n.99).

Thus, the invention of the jet propulsion engine was based on the initial invention of the internal combustion engine but could not have been anticipated by an ordinary person having possession of the knowledge of internal combustion engine. It required a spark of inventive genius to take that leap from one level of the same technology to the other. This then brings us to the next condition of patentability which is the requirement that the invention must evolve from an inventive activity (An Overview of Patent Laws in Nigeria, 2020, n.99).

##### A. Inventive Activity

Inventive activity is defined in Section 1(2)(b) of the Act as follows:

an invention results from an inventive activity if it does not obviously follow from the state of the art, either as to the method, the application, the combination of methods, or the product which it concerns, or as to the industrial result it produces. (Patents and Designs Act of 1970, 1990)

In *Technograph Printed Circuits Ltd. V. Mills & Rockley (Electronics) Ltd.* (1972) R.P.C. 346) it was held that in considering whether an invention is obvious it is necessary to examine the question whether the new product or process could have been suggested to persons skilled in the art and undertaking a study of other relevant documents which a diligent researcher would know about. It has however been argued that all published documents have to be assumed to be available for study of persons to whom the patent specifications have been addressed. This point was further made by the English Court of Appeal in *Allmanna Svenska Elektriska A/B v. The Burntisland Shipbuilding Co. Ltd.* (1951, 68 RPC 63 at 69).

The matter of obviousness is to be judged by reference to the "state of the art" in the light of all that was previously known by persons versed in that art derived from experience of what was practically employed, as well as from the contents of previous writings, specifications, textbook and other documents ... When the relevant facts (as regards the state of the art) are known, the question: Was the alleged invention obvious? Must in the end of all be as it were a kind of jury question. The relevant question to be asked and answered is in form and substance the question

formulated by Sir Stafford Cripps ..... ‘The real question is: Was it for all practical purposes obvious to any skilled chemist in the state of chemical knowledge existing at the date of the patent, which consists of the chemical literature available ... and his general chemical knowledge, that he could manufacture that he could manufacture valuable therapeutic agents by making the higher alkyl resorcinols.

See further dictum of Lopes L.J. in *Savage v. Harris & Sons* (13 RPC 364 at 370).

The material question to be considered in a case like this is, whether the alleged discovery lies so much out of the track of what was known before as not naturally to suggest itself to a person thinking on the subject; it must not be the obvious or natural suggestion of what was previously known.

Thus, an invention will not qualify for a valid patent if, given the state of the art at the date the application therefor was filed, regardless of the fact that the inventor undertook independent research and arrived at his invention without relying on available literature, is such as could have been arrived at by a person skilled in the art, having access to all available information on the subject as the date of the filing of the application (An Overview of Patent Laws in Nigeria, 2020, n.99). Whether an invention is obvious or not is however a question of fact in respect of which the court and patent lawyers require expert advice before rendering a verdict.

### B. Industrial Applicability

It is not every invention which is new or results from an inventive activity that can be patented. Patent laws are especially design to promote industrial development. They are to provide incentive for creativity for persons involved in industrial endeavours. Therefore, an invention will not be patentable, if it is not industrially applicable. Section 1(2)(c) (Patents and Designs Act of 1970, 1990) defines the concept of industrial applicability as follows “an invention is capable of industrial application if it can be manufactured or used in any kind of industry including agriculture”. However, as the definition of industry has been extended in the provision to include agriculture, it has been suggested that the intention of the legislature is to allow patenting in respect of product or processes used in almost all kinds of commercial enterprise. There is no judicial pronouncement on this issue, to which one can readily refer, therefore one would say that the point is moot as to those areas of endeavour outside the traditional industrial activities in which patents can be granted (An Overview of Patent Laws in Nigeria, 2020, n.99).

It has also been suggested that the requirement for industrial applicability may be referring to utility of the invention. In other words, an invention will not be patentable, it is argued, if it has no practical application A last point under this head is to draw attention to the fact that methods of treatment of the human or animal body by surgery or therapy or of diagnosis practiced on the human body or animal body have been specifically excluded from the definition of industrial applicability under the English 1977 Patents Act (An Overview of Patent Laws in Nigeria, 2020, n.99). Though there is no such specific exclusion in our law, one can surmise that such matters should not in any case fall under the definition of matters which are capable of industrial application.

## V. PATENT IN SPORTS

Inventors have begun to obtain patent protection for sports method inventions like the one above. Recently-granted patents cover, for example, a method for putting a golf ball (Miller, 1997), a method for fitness training (Schwarz, 2001)<sup>1</sup> a method for training baseball pitchers (Ryan *et al.*, 1997),<sup>2</sup> and a method for training swings (Latella, 2001)<sup>3</sup>. A player, team, or league gains significant benefits from exclusive control over a technique that provides a competitive advantage: it can capture sizeable economic rents by dominating sports contests or force others to license the invention.

There are three types of patents allocated: utility patents, design patents, and plant patents. Design patents protect the ornamental designs of articles of manufacture in order to foster the decorative arts. Plant patents are afforded to inventors who discover and invent a novel, non-obvious and distinctive variety of plant and

<sup>1</sup> describing how a “fitness method for an exerciser combines the benefits of isometric-like exercising with isotonic exercising for simultaneous training of the exerciser’s cardiovascular and skeletal musculature systems and strength and endurance build-up”.

<sup>2</sup>stating that the invention “may be used to train an athlete, such as a baseball pitcher, to accurately repeat a sequence of coordinated leg, arm and torso movements”.

<sup>3</sup>protecting a method of training golf and similar swings where “balls of varying sizes, weights, and pliability are placed between a limb and a reactionary surface to restrict movement of a limb and nearby limbs wherein specific muscles groups are stretched and trained while imitating swing motion to induce muscle memory”.



subsequently reproduce it. Clearly, sports moves and plays have nothing to do with the underlying standards for design or plant patents. Accordingly, the potential for such manoeuvres to receive patent protection must be examined under the requirements for utility patents (García, 2011).

Patents in sports are not uncommon. After all, patents are generally readily provided to tangible inventions. The ornamental design of athletic shoes has received protection (Das, 2000). Sporting goods such as a new type of hockey stick or an improved putter have been afforded protection as well. However, the trend in patent law appears to be to allow patentees to claim human movements that are connected with their inventions. Shoe companies are one of the largest sectors utilizing design patents. They predominantly seek protection for the upper portion of shoes and their treads because of their ornamental, non-functional purpose. The traditional sports related utility patent protects physical objects such as a new type of hockey stick, an improved putter, or a method for drilling the finger holes in a bowling ball. Examiners have over the years allowed patentees to claim human movements which are connected with their inventions. There have been patents such as "Golf Putter and Method of Putting", "Method for Aligning a Golf Putting Stroke", and "Exercising Method ' which all combine human movement with a claimed physical object. Methods of playing games have also been patented where physical boundaries have been claimed, equipment to accompany the game has been protected, but these patents typically are not claiming any human movements as part of the invention (Kukkonen, 2003).

Until recently, most commentators believed that patents for sports techniques were an uncertain proposition at best. Nevertheless, ambitious inventors have persisted in seeking patents often successfully. The Arena Football League, for instance, recently became the "only sports league in history to play [a] patented, rival-free game" when it patented its method and rules of play (Bambauer, 2005). In light of such successes, the potential for exclusive control over a novel and useful sports technique will motivate inventors to seek patents (Bambauer, 2005, p. 403).

A patent permits the holder to exclude others from using her invention. For example, the inventor of a new golf putting method can prevent anyone else in the United States from putting this way without permission, which is generally given in exchange for compensation. This negative "right to exclude" raises important concerns for professional sports at three different levels: among individual players, among teams, and among leagues (Bambauer, 2005, p. 403). A recently issued patent entitled "Method of Putting ' (Kukkonen, 2003) directed to one's golf game came to the attention of many lay people both domestically and abroad through articles criticizing its issuance (Kukkonen, 2003). The inventor of the controversial patent, Dale Miller, reportedly began using the claimed method after breaking his wrist (Kukkonen, 2003). Rather than give up golf, Miller started holding the putter in his right hand, clasping his left hand against his right wrist and found a grip that allowed him to lower his handicap from fifteen to eight (Kukkonen, 2003). Miller's patent is believed to be the first pure sports method patent issued by the Patent Office since the only reference to the putter (or any other article) in the claims of the patent is that the dominant hand grips the putter (Kukkonen, 2003).

First, a player could patent either a competitive sports method (such as a new way to putt, grip a tennis racket, or pitch a baseball) or a sports training technique (such as the use of a new nutritional supplement or weight training program). The player could then exploit her control in one of two ways: she could prevent her competitors from using the technique, thereby putting them at a disadvantage, or she could require them to compensate her in exchange for a license to employ it. Both tactics present an opportunity for substantial remuneration (Bambauer, 2005, p. 403).

Using the first approach, a player could win consistently and capture a large portion of available player revenues. Current professional sports resemble winner-take-all markets in that the most successful competitors reap a disproportionate share of the rewards (Bambauer, 2005, p. 403). The few top athletes gain the majority of salary and endorsement earnings, while the majority of competitors settle for small shares of the remainder (Bambauer, 2005, p. 403). A patent on a technique conferring a competitive advantage permits the player who holds it to improve her success and hence her share of the rewards; the degree of athletic and financial success increases as the relative advantage conferred by the patented technique increases (Bambauer, 2005, p. 403). In addition, a competitive sports technique patent rewards the first competitor to protect an invention, not the one who best employs it (Bambauer, 2005, p. 403). If Rick Barry had patented shooting free throws under-handed, he would have enjoyed exclusive control over this method even if Larry Bird could shoot that way more accurately. Thus, a sports technique patent would tend not only to improve a player's competitive position, but also to secure that improvement. Sustained success makes a player attractive both to teams (increasing salary revenue) and to advertisers (increasing endorsement revenue) (Bambauer, 2005, p. 403).

Using the second approach, a player could obtain indirect financial benefits through licensing. To avoid the competitive disadvantage discussed above, an inventor's rivals can purchase the right to use a patented invention from the holder, who can extract increasing revenues from them as the advantage conferred by the patent increases. This possibility creates a dilemma for competitors: in order to prevent the patent holder from gaining a larger share of the rewards of winning, her rivals must assign her a part of their current (and

possibly future) shares. Moreover, sports patent holders can take advantage of the fact that people in winner-take-all markets tend to overestimate their chances of success (Bambauer, 2005, p. 403). Competitors who view a patent as critical to their success should offer compensation for a license based on their perceived expected winnings. Since on average their own valuations exceed their statistical expected winnings, rivals tend to overcompensate the patent holder, transferring a larger share of their revenues than would be economically efficient or practically wise. Depending on the sport, the type of technique patented, and the degree of competitive advantage conveyed, a player might realize an even more lucrative reward through this licensing scheme than by capturing the lion's share of revenues through winning consistently (Bambauer, 2005, p. 403).

Second, a team might patent a sports method or sports training technique and seek to exclude players on other teams from using it. This approach offers a potentially significant competitive advantage on the field. Every member of the team could employ the patented technique, while no members of opposing teams could do so. As a result, a team patent would probably have an even greater deleterious effect on outcome uncertainty than one available only to a single player. Moreover, a patent could also help the team in related transactions. For example, the team might become more attractive to free agent players, who would seek to become associated with the team's success for both pecuniary reasons, such as obtaining a share in revenues from endorsements available to athletes on successful teams, and non-pecuniary reasons, such as increased individual achievement using the patented technique, enjoyment from winning consistently, and development of a reputation as a "winner." The on-field and off-field effects bolster each other sustained success in athletic competition helps a team attract and retain talent, helping it to maintain its winning ways. Competing teams would face difficulties in overcoming the patent-owning team's built-in advantage.<sup>4</sup> As with players, a team could likely choose between capturing a disproportionate share of revenues<sup>5</sup> and extracting sizeable license fees from competitors. Continual success by a single team in a league would likely make fans less interested in that league's sports product because of the lack of uncertainty in outcome.<sup>6</sup>

Third, a professional sports league (or other governing organization) might patent a competitive sports method or sports training technique and seek to exclude players and teams outside its membership from using it. For example, if the National Basketball Association ("NBA") had a patent for the one-handed set shot, it could prevent players in the National Collegiate Athletic Association ("NCAA"), American Basketball Association ("ABA"), and even Scholastic Basketball Association from employing this technique. This tactic could allow the league holding the patent to capture a disproportionate share of revenues within its sport: if the invention improved competition or made contests more entertaining, fans might prefer to consume the league's version of a sport rather than alternatives.<sup>7</sup> By shifting demand away from its competitors, a patent-owning league could also inhibit future competition, stopping other leagues from forming by preventing them from competing on equal terms or by forcing them to pay a high "start-up" cost to license the patented technique. If major professional sports are, in effect, natural monopolies, then inhibiting horizontal competition may cause little harm.

However, if multiple major leagues are feasible, or if a major league used a patent to weaken other levels of the sport, such as collegiate athletics, then a patent-wielding league could enhance its position to the detriment of its sport. While patents for competitive sports methods, such as athletic "moves," pose the most obvious risk, patents on sports training methods may present an equally important problem. Advances in weight training, nutrition, supplements, and conditioning have helped athletes such as Mark McGwire, Barry Bonds, and Lance Armstrong equal and shatter long-standing sports records (Bambauer, 2005, p. 403, 406). Part of McGwire's success seems attributable to his use of the then-legal supplement androstenedione (Bambauer, 2005, p. 403, 406), which has effects similar to testosterone and anabolic

<sup>4</sup>Minimally, one would expect that such a patent would increase other teams' costs by forcing them to find alternatives to the patented technique (known as "inventing around" the patent) and to pay additional salary to players who would not be able to benefit from the protected invention.

<sup>5</sup>In some leagues, rules governing team revenue, such as revenue sharing agreements, limit rent capture by teams. However, consistent success would likely translate to increased revenue from non-shared sources such as sale of local television rights, local sponsorship, and merchandising fees.

<sup>6</sup>Substantially reduced competitive uncertainty would shift the entertainment model of professional sports towards that of other options such as theatre, movies, and television programs. Consumers purchase these products not because of outcome uncertainty — Hamlet always dies at the end, and few viewers doubt that Spider-man will triumph in the movie's denouement but because of interest in how the outcome is achieved. As such, reduced outcome uncertainty would harm professional sports only to the extent that this uncertainty is a competitive differentiator from other entertainment products. Professional wrestling in the form of World Wrestling Entertainment, for example, attracts spectators and merchandising revenue despite greatly reduced outcome uncertainty.

<sup>7</sup>This possibility assumes that a league such as the National Football League ("NFL") or NBA competes with other practitioners of the same sport. Competition seems more likely horizontally (for example, the NFL against the Canadian Football League or the now-defunct XFL) than vertically (for example, the NFL against collegiate teams in the NCAA or the NBA against high school basketball) because college basketball games only partially substitute for demand for NBA games; college basketball is perceived by fans and advertisers as a different product with different rules, level of play, and attractive elements (such as fans' loyalty to their alma maters). Hence, the risk to competition from a league owning a patent on a competitively valuable technique increases as other contests in its sport increasingly substitute for its games.

steroids. Bonds has faced persistent allegations that his increased muscle strength results from steroid use. Controversy over issues such as the use of anabolic steroids persists because these drugs are extremely effective in improving competitive success as part of training and conditioning programs (Bambauer, 2005, p. 403, 406). In endurance sports, techniques such as erythropoietin (“EPO”) use give athletes an enormous edge: a key participant in a blood doping scandal with the Festina cycling team stated that cyclists not using EPO or similar drugs wound up “at the back of the pack.” (Bambauer, 2005, p. 403, 406). A player, team, or league that controlled a similarly effective technique would gain a competitive advantage, even if it competed under the same playing rules as other contestants (Bambauer, 2005, p. 403, 406). In addition, patents on sports training techniques might have broader uses than those for competitive methods, especially in team sports. A training method that increased strength, endurance, or coordination would benefit all players on a team, while a competitive technique might be more limited, particularly in sports with specialized roles such as football or baseball. For example, a small advance in techniques for building muscle might prove more valuable to an NFL team than a revolutionary advance that allowed punters to kick the ball much farther.

## VI. CONCLUSION

In conclusion, this article has examined trademark as an indicative medium relied upon by consumers to create an imaginary link between a product on which such mark is used and its seller. It argued that there is major hallmark in its ability to differentiate the goods of one seller from those of others in the same line of business from one another. It examined the law trademark law in Nigeria which is governed by the Trade Marks Act, Cap T 13, Laws of the Federation of Nigeria 2004 and the Trademark Regulations 1990. In contributing to existing literature, the paper provides insight to the economic aspect of mark registration in the sports industry. It argued that registrable marks identify the possibility of registration under existing treatise globally.

The paper concludes with salient recommendations toward harnessing the economic aspect of trade mark registration in the Nigeria sports industry.

## REFERENCES

- Allmanna Svenska Elektriska A/B v. The Burntisland Shipbuilding Co. Ltd (1951). 68 RPC 63 at 69.
- An Overview of Patent Laws in Nigeria. (2020). <http://www.nigerianlawguru.com/articles/intellectual%20property%20law/AN%20OVERVIEW%20OF%20THE%20LAW%20OF%20PATENTS%20IN%20NIGERIA.pdf> accessed 25/11/2020 at 13:30pm.
- Bambauer, D. (2005). Legal Responses to the Challenges of Sports Patents. *Harvard Journal of Law & Technology*, 18(2).
- Das, P.K. (2000). Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays. *Indiana Law Journal*, 75(3).
- García, G. R. (2011). He Shoots, He Scores...and Receives Copyright Protection? How the Current State of Intellectual Property Law Fumbles with Sports. *U. Denv. Sports & Ent. L.J.*, 81. <https://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/11/Garcia-FINAL-Online-Version.pdf>> Accessed 1/12/2020 at 10:14am.
- Genentech Inc. (1989). Patent R.P.C. 147 C.A.
- Hills v. Evans (1860). 31 LJ. Ch. 457 at 463.
- Kukkonen, C. A. (2003). Be a Good Sport and Refrain from Using my Patented Putt: Intellectual Property Protection for Sports Related Movements. *Journal of the Patent and Trademark Office Society*.
- Latella, F.A. (2001). Method of swing training for sports. *U.S. Patent No. 6,176,790*. Washington, DC: U.S. Patent and Trademark Office.
- Merrell Dow Pharmaceuticals Inc. and another v. N. H. Norton & CO. LTD. (1994). *Reports of Patent, Design and Trade Mark Cases*, 111(1), 1–20. <https://doi.org/10.1093/rpc/1994rpc1>.
- Miller, D. D. (1997). Method of putting. *U.S. Patent No. 5,616,089*. Washington, DC: U.S. Patent and Trademark Office.
- Patents and Designs Act of 1970, Chapter 344 of Laws of the Federation of Nigeria 1990. (1990). [http://www.commonlii.org/ng/legis/num\\_act/pada195/](http://www.commonlii.org/ng/legis/num_act/pada195/).
- Ryan, N., Yates, L., House, T. R. (1997). Training apparatus, method for training an athlete, and method for producing a training device. *U.S. Patent No. 5,639,243*. Washington, DC: U.S. Patent and Trademark Office.
- P.C.G. Research Ltd. v. Ardon International (1993) FSR 197 at 218.
- Savage v. Harris & Sons. (1896). 13 RPC 364 at 370.
- Schwarz, L. (2001). Fitness method. *U.S. Patent No. 6,190,291*. Washington, DC: U.S. Patent and Trademark Office.
- Technograph Printed Circuits Ltd. v. Mills & Rockley (Electronics) Ltd (1972). R.P.C. 346.



**Emmanuel Oluwafemi Olowononi** is a Senior Lecturer at the Nigerian Law School, Headquarters, Abuja, Nigeria. He studied Law at the University of Ilorin and also obtained his Ph.D. Degree in Law with speciality in football contracts, football disputes and football arbitration. He was called to the Bar in 2006 with Second Class Upper Division. He is a Notary Public, Football Agent and Sports Arbitrator. He has written extensively in both local and international journals on Sports Law, Sports Arbitration and Entertainment Law. He teaches Corporate Law Practice and Property Law Practice at Bar Part II as well as Commercial Law and Law of Evidence at the Bar Part I programme of the Nigerian Law School. He has authored and co-authored books such as Corporate Law & Allied Practice Manual; Commercial Transactions Law in Nigeria; Law of Evidence in Civil and Criminal Litigation; Precedents, Drafts and Forms for Lawyers in Nigeria; Synoptic Guide on Corporate Law Practice in Nigeria and Nigerian Constitutional Law among others. As a Bar Man, he currently serves as a Branch Secretary and member of the National Executive Council (NEC) of the Nigerian Bar Association (NBA). He is the founder Institute of Capacity Building, Entertainment and Sports Law Development, an Institute leading and pacesetter professional capacity building, Entertainment and Sports Law Development on the continent of Africa through research, trainings, publications and public lectures.