

# Registrable and Non-Registrable Trademarks under the Nigerian Law

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## ABSTRACT

A trademark is a mark used in relation to goods for trade in Nigeria. It could be a device, brand, heading, label, name, signature, word, letter, or a combination thereof (Trade Marks Act, Cap. T13 s. 67(1), Laws of the Federation of Nigeria (LFN), 2004). For a mark to be beneficial to the owner under the Law and have proprietary interest, it must be registered. It could be registered in part A or Part B of the trademarks register (Trade Marks Act, Ss. 9(1) and 10(1)). Not all marks can be registered under the Law, hence there are registrable and non-registrable marks under the Trade Marks Act. The owner of a Registered trademark has the exclusive right to the use of that trademark in respect of the goods in which it is registered (*Procter and Gamble Co. v. Global Soap and Co. Ltd. & Anor*, (2013)). It is my recommendation that all marks used in trade should be registered so that the owner will reap from the fruit of his labor by having a monopoly right and action in infringement.

**Keywords:** Nigerian Law, Non-registrable, Proprietor, Registrable, Trademark.

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## I. INTRODUCTION

Trademark is one of the important subjects of intellectual property Law. It is a monopoly right. It is used only for goods in Nigeria but are used for goods and services in other jurisdictions like United States of America. It has long been used by manufacturers and traders to identify their goods and distinguish them from goods made and sold by others. Hence, a trademark is a merchandising short cut, which induces a purchaser to select what he wants, or what he has been led to believe he wants (Nathan, 2011). Thus, the owner of a trademark exploits his human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of congenial symbol (Leeds, 1955). Therefore, a trademark is a mark used or proposed to be used in relation to goods for the purposes of trade, it is protected by law which falls within the intellectual property law. For a trademark to confer a proprietary right it must be registered, hence there are registrable and non-registrable trademarks.

### A. Meaning of Trademark

In the words of (Curzon, 1988) trademark is a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or registered user to use the mark whether with or without any indication of the identity of that person. According to the Oxford Dictionary of Law (Martin & Law, 2006) a trademark is a distinctive symbol that identifies particular products of a trader to the general public. The symbol may consist of a device, words, or a combination of these. The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) provides that a trademark is any sign or any combination of signs, capable of distinguishing the goods or services of one from those of other undertakings (Article 15(1)).

The Trade Marks Act, (Cap. T13, s. 67(1)) provides that trademark means:

“Except in relation to a certification trademark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means in relation to a certification trademark, a mark registered or deemed to have been registered under section 43 of the Trade Marks Act.”

It then follows from the Trade Marks Act, that marks are used only in relation to trade and not in relation to services. Under the Act (*Procter and Gamble Co. v. Global Soap and Co. Ltd. & Anor*, (2013)),

a mark: “Includes a device, brand, heading, label, ticket, name, signature, word letter, numerical or any combination thereof.”

To qualify for protection a mark must be used or intended to be used. Therefore, a mark which is neither used nor intended to be used does not qualify. In *Ducker’s Trade Mark*, (1928), Lord Hamworth MR observed that the words proposed to be used means a real intention to use, a resolved or settled purpose which has been reached at the time the mark is to be registered. Trademarks could be registrable or non-registrable.

## II. REGISTRABLE MARKS

A trademark must of necessity be registered before the proprietor of the mark can benefit from the protection granted under the law. Such a mark may be registered in Part A or Part B (Trade Marks Act, s. 9(1)-10(1)) of the trademarks’ register. The Part A mark must be distinctive on registration that is, adapted to distinguish. While Part B should be capable of distinguishing, that is, distinctiveness acquired through use.

### A. Part ‘A’ Registration

In order that a trademark (other than a certification trademark) be registrable in Part A of the register it must contain or consist of at least one of the following essential particulars (Trade Marks Act, *op cit.*, s. 9(1)(a)-(e)):

- 1) The name of a company, individual or firm, represented in a special or particular manner.
- 2) The signature of the applicant for registration or some predecessor in his business.
- 3) An invented word or invented words.
- 4) A word or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or surname.
- 5) Any other distinctive mark.

Provided that a name, signature, or words other than such that fall within paragraph (a) to (d) of this section shall not be registrable under paragraph (e) of this section, except upon evidence of its distinctiveness (Trade Marks Act, *op cit.*, s. 9(1)(a)-(e)). The case of *Ferodo Ltd. v Ibetto Industry Ltd.* (1999, pt. 592) is illustrative on this point.

Importantly, the criterion underlying qualification for registration of trademark under Part A of the register is “distinctiveness.” In this regard, S. 9(2) of the Trade Marks Act, defines “distinctive” ‘to mean adapted, in relation to the goods in respect of which a trademark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trademark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration’. However, a trademark can be regarded as being distinctive either by its being inherently adapted to distinguish *per se* or by reason of its actual use or any other circumstances, the inference can be drawn that it is in fact adapted to distinguish (Trade Marks Act, s. 9(3)).

(Babafemi, 2006) opines that the effect of the above statutory provision is that the Registrar in considering an application to register a trademark must consider both its inherent adaptability to distinguish and also the extent to which it is shown by evidence (if there is such evidence) to be distinctive and I agree entirely with him. In addition, the first part of section 9(3) of the Trade Marks Act is a question of law and refers to the nature of the mark itself, while the second part appears to be a question of fact, but the phrase “capable of distinguishing” was taken as capable of distinguishing in law (*York Traylor Holdings Ltd. v Registrar of Trademarks*, (1982)). Being “inherently adapted to distinguish” means that the mark was “...adapted of itself, standing on its own feet (*Weldmesh Trademarks*, (1966)).” Section 9(1) of the Trademark Act will be considered in detail hereinunder:

#### 1) *The name of a company, individual or firm*

For the names under this head to qualify for registration as a trademark under Part A, they must be represented in a special or particular manner (Trade Marks Act, 9(1) (a)). This is to ensure that the mark is distinctive and allows other traders who have the same or similar names the honest use of their real names. The effect is that the representation of a name in normal type will not be registered. In *Standard Cameras Ltd. Application* cited by Bainbridge (1999) the name Robbin Hood represented in a stylized way with the letters ‘R’ and ‘d’ showing an archer and a target respectively was accepted for registration. A name printed in block letters does not qualify for registration. This is because ordinary block letters are not peculiar and are highly likely to occur to somebody else as a common way or representing a word. *Re Application by Glenlieth Holdings Ltd.* (1989) is instructive. It decided further that the name must be a real name as opposed to an imaginary name, that peculiarity does not lie in using a name not answered by any known living person only.

It is pertinent to note that a name may be unusual or even unique, yet still be unregistrable because at the time of making the application for registration, the name had become so well-known through use as to be a household word. In *Tarzan Trade Mark* cited in Bainbridge (1999) the word ‘TARZAN’ was originally an invented word. By the time the estate of Edgar Rice Burroughs came to apply to register the mark in United Kingdom, it had become so well-known and had passed into everyday language, that it would not serve the purpose of a trademark as being an indication of originality. It was no longer an invented word.

## 2) Signatures

A signature may rightly be said to be *prima facie*, or distinctive of the person who signs it. A signature mark can be especially effective because of its personal connotations, and it shows that the proprietor is very confident about the quality of his goods. However, the disadvantage of registering only a signature as a trademark lies in its not being easily recognized and recollected when described.

## 3) Invented words

What qualifies as an invented word has been the subject of judicial pronouncements. In *Phillpart v. Witeley Ltd.* (1908), Parke J. held that the word (or words) was required to be newly coined and convey no obvious meaning to the ordinary English man. A slight change to an ordinary word may not be sufficient to overcome an objection on this ground. In *Lacteal Trade Mark* (1994), cited in Bainbridge (1999) it was held that “lacteal” was not an invented word having regard to “lacteal” (meaning relating to or resembling milk) because lacteal will be known to a reasonable number of the public and certainly to those in milk trade.

Nevertheless, an invented word does not have to be totally devoid of meaning. One way of predicting whether an invented word was registrable was to consider whether its registration would have made it difficult for other traders to describe their own goods or whether it would have been an unnecessary fetter on the English Language as used in business.

In the words of Lord Shand in *Eastern Photographic Materials Co v Controller General of Patents, Designs and Trade Marks* (1898):

“For a word to qualify as invented there must be invention and not the appearance of the invention only...the words should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use with a diminutive or a short and meaningless syllable added to it or mere combination of two known words will not be an invented word...and a word will not be invented which with some trifling addition or very trifling variation still leaves the word one which is well known or in ordinary use and which will be quite understood as intended to convey the meaning of such a word.”

## 4) Words not having a direct reference to the quality or character of goods and not being according to its ordinary signification a geographical name

A word that has direct reference to the character and quality of goods in question will not be registrable as a trademark, otherwise, the fair and honest description of his goods by another trader will be hampered. Laudatory words having a direct reference to the character or quality of goods are not registrable in Part A but will be registered in Part B only if the word or words will not make it difficult for other traders to describe their own goods. The phrase “I can’t believe is Yoghurt” was refused registration in Part A as a laudatory phrase. It was however accepted for Part B of the register (*I can’t believe it’s Yoghurt Trade Mark*, (1992)). Words that were descriptive without necessarily being laudatory were also refused registration in Part A. There is nevertheless an obvious problem associated with this provision due to the fact that most trademarks are somehow descriptive of the goods and so to some degree have reference to their character or quality. In *Macfoy Ltd. v. Davis Corporation* (1956), Dickson C.J. opines that “the test must first be on the probability of an ordinary person understanding the words in the application of the goods as describing or indicating or calling to mind either through their nature or some attribute they possess.”

Geographical names and surnames *per se* are not registrable as trademarks under Part A. But geographical names and surnames which are not so according to their ordinary signification are registrable. This is to stop a trader from monopolizing a particular name that should not be restrictive. In *Magholia Metal Co. Trade Marks* (1897) the Court observes as follows:

“Geographical name must...in the absence of special circumstances be interpreted so as to be in accordance in some degree with the general and popular meaning of the words and a word does not become a geographical name simply because some place upon the earth’s surface has been called by it, example, we have agreed with Keke Walsh J. that the word monkey is not good to be a geographical name by showing merely that a small and by no means generally known island has

been called by that name. If indeed in its primary and obvious meaning the words have reference to a locality as the word “Melivse”, it may be a geographical name within the subsection. Even when the primary signification is not geographical, if the name is a local name and the name is given because of the connection of the article with the locality; it may well be a geographical name within the meaning of the subsection.”

However, a geographical name, when used as a trademark in connection with a category of goods may be saved by the nature of the goods or by some other circumstances from carrying *prima facie* geographical signification. For instance, the words North Pole, even though a geographical name was held as adapted to distinguish the applicants’ goods and therefore registrable when used in connection with bananas.

This principle was enunciated in *Bailey & Co. Ltd. v. Clark Son & Morland Ltd.* (1938). In *Liggett & Myers Tobacco Ltd. v. Registrar of Trade Marks* (1969), cited in Babafemi (2006) the court per Kassim J. held that although geographical name in the absence of special circumstances must be interpreted so as to be in accordance with the general and popular meaning of the word, a word does not become a geographical name, just because some place upon the earth is called by it.

Suffice it to say that Part A mark has the advantage of validity over Part B. For Part A marks, after expiry of the first seven years of registration (that is upon first renewal), the original registration remains valid in all respects (Trade Marks Act, *op cit.*, s.14(1)). Except the registration was obtained by fraud; or the trademark is deceptive, immoral, or scandalous.

#### B. Registration Under Part ‘B’ of the Register

The Trade Marks Act (s. 10(1)) provides that:

“In order for a trade mark to be registrable in Part B of the register, it must be capable, in relation to the goods in respect of which it is registered or proposed to be registered of distinguishing goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.”

Unlike the Part A mark, a Part B mark does not have to be distinctive when registered (*‘Jerry-Lynn’ TM.*, (1999), FSR491.). All that is required is that it should be capable of becoming distinctive in use (Trade Marks Act, *op cit.*, s. 10(2)). As soon as it becomes distinctive the owner of the mark can make a fresh application to register it in Part A.

It is generally provided in the Trade Marks Act (s. 10(3)) that a trademark may be registered in Part B notwithstanding any registration in Part A in the name of the same proprietor of the same trademark or any part or parts thereof. The basic difference between the requirement for registration in Part A and registration in Part B is that a mark which can be registered in Part A must be adapted to distinguish, while a mark which can be registered in Part B must be capable of distinguishing. Oyewunmi (2015), stated that where a mark is not sufficiently qualified for registration in Part A of the register, it may be registrable under Part B, in so far as the mark is capable of being distinguishing.

It is generally provided in the Trade Marks Act (*op cit.*, s. 10(3)) that a trade mark may be registered in Part B notwithstanding any registration in Part A in the name of the same proprietor of the same trade mark or any part or parts thereof. The basic difference between the requirement for registration in Part A and registration in Part B is that a mark which can be registered in Part A must be adapted to distinguish, while a mark which can be registered in Part B must be capable of distinguishing.

Any person claiming to be the proprietor of a trademark may make an application to the Registrar for the registration of the trademark either in Part A or Part B (Trade Marks Act, s. 18(1)). A person can qualify as a proprietor of a trademark either by authorship or by use of the trademark. In *Aston v Harlee Manufacturing Co.* (1960) and *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd.* (1984), the courts held that the proprietor of a trademark may be the author or the user of the trademark. Authorship here involves the originator of the word(s) or design, and use refers to a situation where a person is entitled to be registered as the owner of a trademark either by assignment or transmission or by any other valid acquisition of same.

#### C. Certification of Trademarks

The purpose of certification trademark is to indicate goods with certain objective standards, for example, in respect of material, safety or quality. Hence, certification trademark means-a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, method of manufacture, quality, accuracy or other characteristics from goods not so certified, shall be registrable as certification trade mark in Part A of the register in respect of those goods

in the name as proprietor thereof, of that person (Trade Marks Act, s. 43(1)).

Provided that a mark shall not be registrable in the name of a person who carries on a trade in goods of the kind certified. The registration of a person as proprietor of a certification trademark gives the person the exclusive right to use the trademark in relation to the goods so registered. There shall be deposited at the office of the Registrar rules approved by the Minister governing every registered certification trademark, which said rules shall include provisions as to the cases in which the proprietor is to certify goods and to authorize the use of the trademark and may contain any other provisions as the minister deems fit. It is crucial to point out that a certification trademark shall not be assignable or transmissible otherwise than with the consent of the minister (Trade Marks Act, s. 43(1,3,7,9)). There is no gainsaying that certification trademark is a special trademark registrable under Part A of the register.

### III. NON-REGISTRABLE MARKS

A trademark may be distinctive or capable of distinguishing and yet will not be automatically registered for reasons provided in the Trade Marks Act (ss. 11-13). The Act contains certain specific prohibitions on the registration of trademarks, which are as follows:

#### A. Deceptive or Scandalous Matters

It is unlawful to register as a trademark or part of a trademark any matter the use of which would by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice or be contrary to law or morality or any scandalous design (Trade Marks Act, s. 11). In *PZ v. Chami* (1971) the Supreme Court held that in deciding whether a trademark which is sought to be registered is likely to deceive or cause confusion, what is to be considered is whether there is a real tangible danger of confusion if the mark is registered. In *Re Hallelujah Trade Mark* (1976) the word hallelujah was rejected as a mark with regards to women clothing and underclothing on the grounds that it will affect the sensibilities of adherent Christians in the society.

The question whether a trademark is likely to deceive or cause confusion is always determined on the peculiar facts of each particular case. Nevertheless, the courts (*Neutrogena Corp v. Golden Ltd.*, (1996); *Swiss Miss Trade Mark*, (1997)) have always taken into consideration the intelligence and education of the likely consumers of the goods on which the trademark is used.

Marks which are contrary to law or morality are those which are generally not permissible under our law, as well as those the use of which are likely to offend the moral sensibilities of a particular society. Scandalous design includes obscene or pornographic design, culturally or ethnically offensive designs etc.

#### B. Names of Chemical Substances

No word which is commonly used or accepted name of any single chemical element or simple chemical compound, as distinguished from a mixture shall be registered as a trademark in respect of a chemical substance or preparation. This prohibition does not apply to a word which is used to denote only a brand or make of such an element or compound as made by the proprietor or registered user of the trademark as distinguished from that element or compound as made by others (Trade Marks Act, *op cit.*, s. 12(1-2)).

#### C. Identical and Resembling Trademarks

The Trade Marks Act (s. 13(1)) provides that no trade mark shall be registered in respect of any goods or description of goods that is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods; or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion. This provision is however subject to honest concurrent use. Further, in the case of honest concurrent use, or other special circumstances, the Court or Registrar may permit the registration of trademarks that are identical or nearly resemble each other in respect of same goods or description of goods by more than one proprietor subject to discretionary conditions or limitations, if any, as the Court or the Registrar, as the case may be, may think it right to impose (Trade Marks Act, *op cit.*, s. 13(2)).

In line with the above, a subjective test is therefore normally adopted, and the Court must in such cases consider the person with imperfect recollection, the incautious, the illiterate as well as those who may place orders by telephone. In *Bell Sons & Co. v. Godwin Aka & Anor*, (1972) and *PZ v. Chami*, the courts held that the onus is on the applicant to satisfy the Registrar or the Court that the trademark applied for is not likely to deceive or cause confusion.

It then follows from the foregoing discourse that a trademark is excluded from registration if it so nearly resembles a registered trademark as to be likely to deceive or confuse illiterates even though it is not likely to deceive literates or educated persons.

#### IV. DEFENSIVE REGISTRATION OF TRADEMARKS

Ordinarily, a mark cannot be registered so as to cover goods belonging to a class different from that in respect of which the mark is proposed to be used. Nevertheless, some trademarks are so well known that members of the public, seeing them on quite different goods, would be likely to assume that those goods are connected with the proprietor that uses the mark. Hence, the Act provides that where these well-known marks consist of invented words, they can be registered in respect of goods for which the mark is not initially intended to be used Trade Marks Act, s. 32.

The effect of defensive registration is that it bars any person from using the mark on any product whether or not the mark is used for the goods of the sort concerned.

#### V. EFFECT OF REGISTRATION

The proprietor of a registered trademark has the exclusive right to the use of that trademark in connection with the goods in respect of which it is registered, and that right shall be deemed to have been infringed upon by any person who uses a mark identical to or nearly resembling the registered mark as to be likely to deceive or cause confusion (Trade Marks Act, s. 5(1-2))

The Supreme Court in *Dyktrade Ltd. v. Omnia Nig Ltd.* (2000) Per Salihu Modibbo Alfa Belgore, J.S.C held that trademark when registered will entitle the proprietor to sue or institute an action for any infringement of the trademark. Registration entitles the proprietor to the exclusive use of the trademark and also the right to sue for passing off the goods of the proprietor.

The registration of a trademark confers some rights and benefits on the proprietor or registered user of the trademark in accordance with the provision of the law.

#### VI. RIGHTS CONFERRED UPON THE PROPRIETOR OF A TRADEMARK

The Trade Marks Act (s. 5(1)) provides that:

“Subject to the provisions of this Section and Sections 7 and 8 of this Act, the registration of a person in Part A of the register as proprietor of a trademark (other than a certification trade mark) in respect of any goods, shall if valid, give or be deemed to have given to that person the exclusive right to the use of that trade mark in relation to those goods.”

The import of the above statutory provision is that registration is *prima facie* evidence of use.

#### VII. DURATION AND RENEWAL OF REGISTRATION OF TRADEMARKS

The registration of a trademark shall be for a period of seven years but may be renewed from time to time in accordance with the provision of the Act. Provided that in relation to registration as of a date before the commencement of this Act, this subsection shall have effect with the substitution of a period of fourteen years for the said period of seven years (Trade Marks Act, s. 23(1)).

The Registrar shall upon application made by the registered proprietor of a trademark in the prescribed manner and within the prescribed period, renew the registration of the trademark for a period of fourteen years from the date of expiration of the original registration, as the case may be (which date is in the section referred to as ‘the expiration of the last registration’) by Trade Marks Act, s. 23(1). This provision of the Act was enunciated by the Court by Mustaph J. in *A B Chami & Co. Ltd. v. W J Bush & Co. Ltd.* (1996) where he observes that:

“Section 23 of the Act provides that the registration of a trademark shall be for a period of seven years, after which the registration may be renewed at intervals of fourteen years from the date of expiration of the original registration or the first renewal of registration.”

The effect of the above provisions of the Act is that the duration for renewal is indefinite, it could be for a duration of seven or fourteen years, while first registration is for a duration of seven years. The Courts above adopted the provision of section 23(2) of the Trade Marks Act to state that renewals may be done at intervals of fourteen years.

#### VIII. CONCLUSION AND RECOMMENDATIONS

Trademark as a monopoly right is registrable under the Nigerian law and such registration confers

protection. Registration of trademark is prima facie evidence of ownership of the trademark and the proprietor of such a mark has the exclusive right to the use of the said mark and can sue another who uses the said registered mark for trademark infringement. But not all marks are registrable under the Law. The registrable marks must be adapted to distinguish and or capable of distinguishing and they are name of company, individual or firm; signatures; invented words; Words not having a Direct Reference to the Quality or Character of Goods and not being According to its Ordinary Signification a Geographical Name. While non registrable marks are deceptive or scandalous matters; names of chemical substances; identical and resembling trademarks. Only marks used in relation to goods for trade are registered under the Nigerian Law.

It is my recommendation that marks used in relation to goods for trade should be registered by the proprietors so as to ripe from the fruit of their intellectual labor. Also, the populace should be educated to understand the benefits and importance of the registration of trademarks.

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