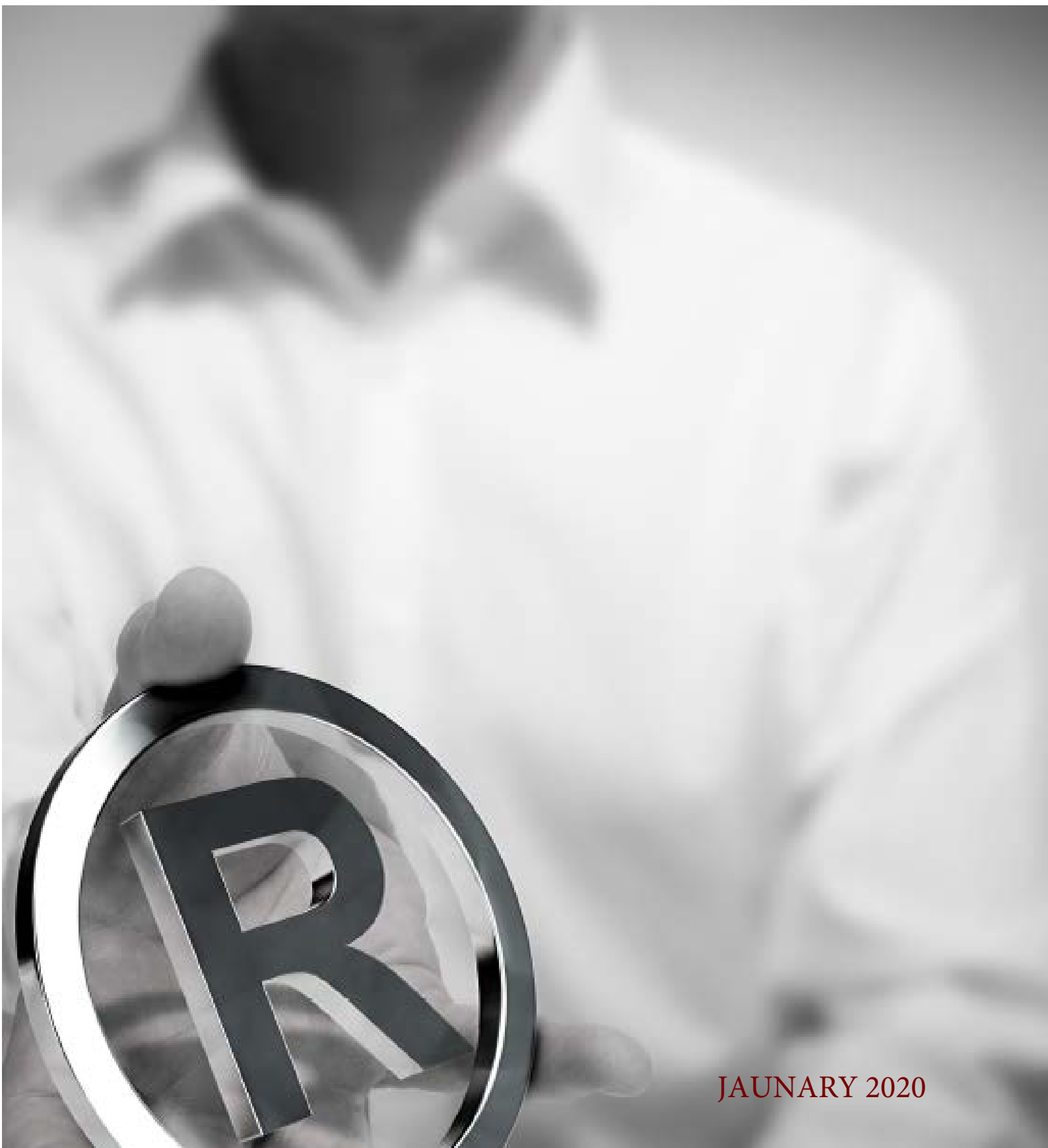


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**PROTECTING SOFTWARE AS INTELLECTUAL
PROPERTY RIGHTS IN NIGERIA**



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INTRODUCTION

Software applications are continuously being developed to solve myriads of problems in financial services, payment systems, communications, manufacturing and other areas.[1] With the use of software applications, people can now communicate with their business partners and family members thousands of miles away.

Software applications are also becoming a driving force in the IT sector which contributed 13.85 per cent to Nigeria's gross domestic product in the second quarter of 2019.[2] Recent developments with blockchain technology, robotics, artificial intelligence, digital assets and other technological advances have focused primarily on software applications.

With its rising relevance and importance to the fourth industrial revolution, there remains the possibility of software theft, counterfeiting and piracy. We therefore explore the protection of software as an intellectual property (IP) right under Nigerian law.

COPYRIGHT

The following works are granted copyright protection under the Copyright Act:

- literary works;
- musical works;
- artistic works;
- cinematograph works;
- sound recording; and
- broadcasts.[3]

Software applications can be considered as computer programs. These are classified under literary works[4] and defined as sets of statements or instructions to be used directly or indirectly in a computer to bring about a particular result.

[5]

To qualify for copyright protection, what is required is originality and a fixed form of expression.[6] The requirement for originality is met where sufficient effort is expended in the development of the software.[7] Software programs run on codes and would, therefore, meet the requirement for a fixed medium of expression. It is also evident that effort is expended in creating a software program. Unlike other forms of IP rights, a copyright would be eligible for protection once it is created and fixed in a definite medium. It does not need to be registered to enjoy protection. A software will be protected for 70 years from the end of the year in which the author dies. For corporate organisations, copyright lasts for a period of 70 years from the date the software was published. Subsequently, the author of a software program can prohibit or authorise the reproduction, distribution and adaptation of the program.[8]

PATENTS

Patents are granted to an inventor to own and enforce their idea.[9] Therefore, people wanting to create a similar software program will be prevented from doing so. A patent expires 20 years after the date of filing the patent application.[10] The right to patent an invention in Nigeria is vested in the first to file a patent application. It is also possible to claim valid foreign priority. An invention can be patented if it meets the following conditions it is new[11] and it constitutes an improvement to a previously-patented invention.

In either case, it must result from an inventive activity^[12] and be capable of industrial application.^[13] There are also other conditions which the Registrar of the Patent and Design Registry must consider. These include:

- the application is not for a plant or animal patent;^[14]
- the invention is not contrary to public order and morality;^[15]
- the application is in respect of only one invention;
- the application contains the statutorily required details such as:^[16]
- the applicant's details such as full name and address;
- a description of the relevant invention;
- a claim or claims;
- evidence of payment of prescribed fee; and
- power of attorney where the patent application has been made through an agent.

The inference drawn from this is that once a patent application meets the foregoing requirements, it can be registered. However, the Nigerian Patent and Designs Registry currently refuses to register software applications as a patent. Software has become a technology tool used to augment business processes, but the Registry does not consider software eligible.

TRADE SECRETS PROTECTION

The intellectual property right in software may also be protected by keeping information about the software confidential. Confidential business

information provides an entity with a competitive edge that may be considered a trade secret.^[17] Given the position of the Patents and Design Registry, individuals and entities may explore this protection under trade secrets by preserving processes or codes with commercial value. This would give the software owner a competitive advantage over competitors.

Although Nigeria does not have legislation trade secret protection, measures can be taken to maintain such secrets. Actions such as restricting the trade secrets to only necessary persons, requesting the signing of non-disclosure agreements and taking steps towards preventing public access are measures that could be taken to protect the software application. Software trade secrets can be maintained indefinitely as long as the secrecy is preserved and prevented from becoming public knowledge.

CONCLUSION

IP rights for software under Nigerian law is limited to copyright and trade secrets. These rights are available without formal registration. First, for copyright because it is not mandatory, but registration with the Nigerian Copyright Commission can be undertaken to show prima facie evidence of the copyright. Also, for trade secret because Nigeria had no legislation on such protection.

Regardless of which IP right decided on, the following factors must be considered:

- a trade secret has the advantage of not being limited in time. Patents last for 20 years and copyright for 70 years,

although they are subject to renewal. A trade secret may therefore last indefinitely provided it is not revealed to the public;

- trade secrets do not need to be registered and they take immediate effect. Generally, trademarks and patents must be registered before they can enjoy protection;
- copyright and patents are territorial rights. A trade secret is not limited by

territories and guarantees protection anywhere it is used;

- a trade secret is more difficult to enforce than a patent or copyright;
- the moment a trade secret is made public, anyone may have access to it and use it at will. Patents and copyright do not face the same disadvantage as they ought to be disclosed to the public; and
- a trade secret may be registered as a patent or copyright by someone else who has access to similar information.

Notes

[1] Ife Ogunfuwa, 'Nigeria's software industry in need of government boost', *Punch NG*, 28 April 2019, available at: <https://punchng.com/nigerias-software-industry-in-need-of-government-boost>, last accessed 13 November 2019.

[2] National Bureau of Statistics, Nigerian GDP Report, Q2, 2019, available at [https://nigerianstat.gov.ng/elibrary?queries\[search\]=GDP](https://nigerianstat.gov.ng/elibrary?queries[search]=GDP), last accessed 7 November 2019.

[3] Section 1, Copyright Act.

[4] Section 51, Copyright Act.

[5] *Ibid.*

[6] Section 1, Copyright Act.

[7] Section 1(2)(a), Copyright Act.

[8] Section 5, Copyright Act.

[9] 'How Do Patents Work: Everything You Need to Know', *UpCounsel*, available at: <https://www.upcounsel.com/how-do-patents-work>, last accessed 14 November 2019.

[10] Section 7(1), the Patent and Designs Act.

[11] An invention is new where it does not form part of the state of the art.

[12] 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. See section 1(2), Patents and Designs Act.

[13] Section 1, Patents and Designs Act.

[14] Section 1(4), Patents and Designs Act.

[15] *Ibid.*

[16] Section 3, Patents and Designs Act.

[17] 'What is a Trade Secret?', *World Intellectual Property Organisation*, available at:

https://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm, last accessed 13 November 2019.

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