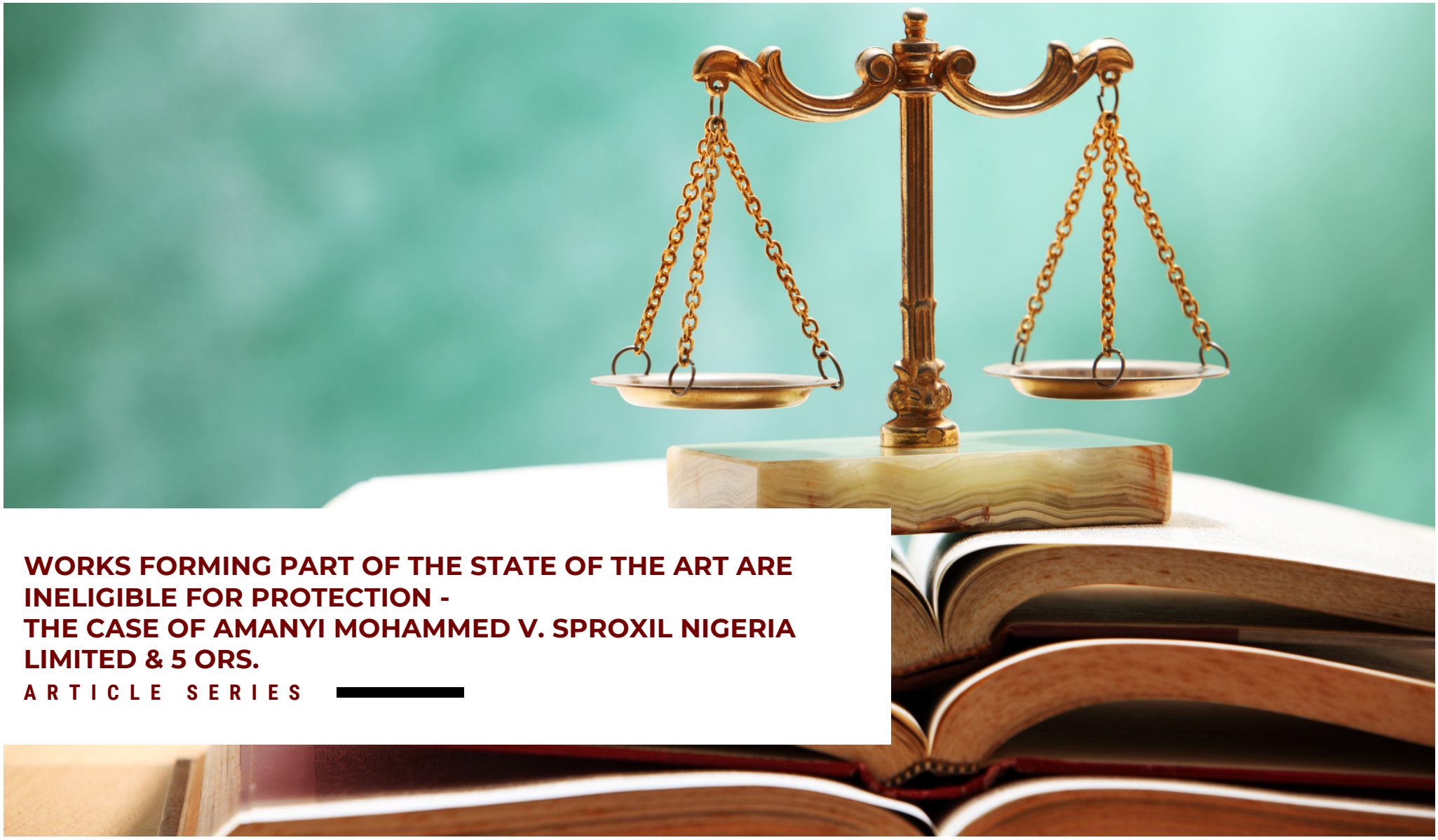

WORKS FORMING PART OF THE STATE OF THE ART ARE INELIGIBLE FOR PROTECTION - THE CASE OF AMANYI MOHAMMED V. SPROXIL NIGERIA LIMITED & 5 ORS.

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INTRODUCTION

In a judgment delivered on 3 December 2019 in Amanyi Mohammed v. Sproxil Nigeria Limited & 5 ors. [1], the Lagos Division of the Federal High Court held that the mere issuance of an Acknowledgement of Copyright Notification by the Nigerian Copyright Commission ('the NCC') neither confers copyright nor is it conclusive proof of copyright authorship or ownership.

The Court also decided that a person who asserts that his copyright has been infringed by a subsequent patent or copyright must satisfy the two-part test of proving that he has copyright over such work and that his right has been infringed by the acts of the third party.

THE PARTIES

The Plaintiff, Amanyi Mohammed, is an individual claiming copyright in a work that identifies fake products through the use of short message services (SMS) that are sent through mobile phones ('Zapper Anti-Piracy code').

The 1st Defendant, Sproxil Nigeria Limited (Sproxil'), is a mobile solution provider and the developer of the Mobile Authentication Service and Method for Verifying the Authenticity of a Product ('the MAS') which allows customers authenticate their medication through SMS received on their mobile phones.

The MAS works by placing scratch cards on the products. When consumers purchase the product, they scratch off a label to reveal a secret code. The code is sent via SMS to a designated phone number and the consumer receives a reply indicating whether the product is genuine or not.

The 2nd Defendant, Ashifi Gogo, is the co-founder of Sproxil's parent company in the United States of America ('USA'), Sproxil Inc., and the inventor of the MAS technology. He has garnered a lot of international recognition and accolades for the deployment of the technology and following the launch of the invention, made the list of Fortune's under 40 most prominent inventors. The 4th Defendant is the Nigerian Agency for Food and Drug Administration and Control ('NAFDAC') and is in partnership with Sproxil to combat counterfeit drugs and food items through the use of the MAS.

[1] FHC/1KJ/75/2012.

AMANYI MOHAMMED'S CLAIM

The Plaintiff alleged that in 2006, he produced the Zapper Anti-Piracy code which identifies fake products through mobile phones. The functionality of the Zapper Anti-Piracy code is that manufacturers of products would imprint 12 digit numbers on each of their products and cover same with a silver panel. The 12 digit numbers will be in a computer database and will be programmed into mobile telephone networks. A consumer, upon purchasing a product, simply scratches off the silver panel to reveal the 12 digit numbers and sends same by an SMS to a code in a mobile telephone network into which the numbers have been programmed, and he gets an instant reply, confirming the originality or otherwise of the product. After preparing the work, the Plaintiff made several attempts to deploy it and eventually expressed the work in writing on a paper and titled it the Zapper Anti-Piracy code. He then filed it as a literary work and was issued an Acknowledgment of Copyright Notification dated 27 November 2008.

The Plaintiff was still making attempts to deploy the work when he came across publications on how the Defendants had already deployed what he perceived to be an imitation of the Zapper Anti-Piracy code. In the publications, the 4th Defendant, NAFDAC, stated that it had, in alliance with Biofem (an indigenous company involved in the importation, distributing and marketing of quality pharmaceutical and medical devices in Nigeria and West Africa) and the 1st Defendant, Sproxil, launched the MAS with Sproxil's technology. NAFDAC explained how, with Sproxil's technology, members of the public can verify the authenticity of the drug(s) they intend to purchase.

However, the Plaintiff asserted that copyright subsists in the work in his favour and that the Defendants' deployment of same, without his prior consent, constitutes an infringement of his copyright in the work. The Plaintiff consequently instituted a suit at the Federal High Court seeking mainly, a declaration that the Zapper Anti-Piracy code is eligible for copyright, and is not patentable. He also sought a declaration that Sproxil's MAS is an infringement of his copyright in the Zapper Anti-Piracy code.

At the Federal High Court, the Plaintiff, in asserting that the Zapper Anti-Piracy code was a literary work eligible for copyright, relied on Section 51 of the Copyright Act[2] and the case of *Microsoft Corp. v. Franike Asso. Limited (2012) 3 NWLR Part 1287 301 at page 321, where the Court of Appeal had held that "By virtue of section 1(a) of the Copyright Act, a literary work is eligible for copyright … and…literary work includes computer programme"*.

The Plaintiff further argued that the MAS is not patentable as a patent involves physical products, and it is for this reason that patentable inventions are required to be of industrial applicability under section 1 of the Patents and Designs Act[3].

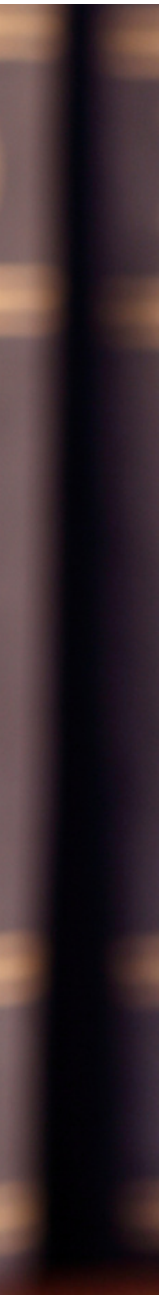
The Plaintiff also submitted that his copyright in the Zapper Anti-Piracy code which was the same as the MAS both in substance and character took effect upon completion of the work and the Defendants had infringed that copyright by launching and deploying the MAS without the Plaintiff's consent.

SPROXIL'S POSITION

Sproxil's position was that the parent company of Sproxil, Sproxil Inc., first developed the MAS technology in the USA and currently has patent application numbers 13/081,909 and 13,081,882 for the various aspects of the technology. To protect its right over the MAS, Sproxil Inc. applied and obtained from the Nigerian Patent Registry, certificate numbers NG/C/2010/434 and NG/C/2010/435 in respect of the MAS, which were then assigned to Sproxil.

Sproxil further contended that prior to 2008, when the Plaintiff allegedly conceived the idea of his code, mobile telephone companies all over the world and in Nigeria had made use of the same scratch card system to top up their airtime on mobile phones. The Plaintiff was therefore neither the inventor of the mobile phone, the telecommunications network, the authentication platform infrastructure or any of the equipment used in his alleged copyright.

[2] Cap C28, Laws of the Federation of Nigeria 2004
[3] Section 1 of the Patents and Design Act - (1) Subject to this section, an invention is patentable-- (a) if it is new, results from inventive activity and is capable of industrial application.

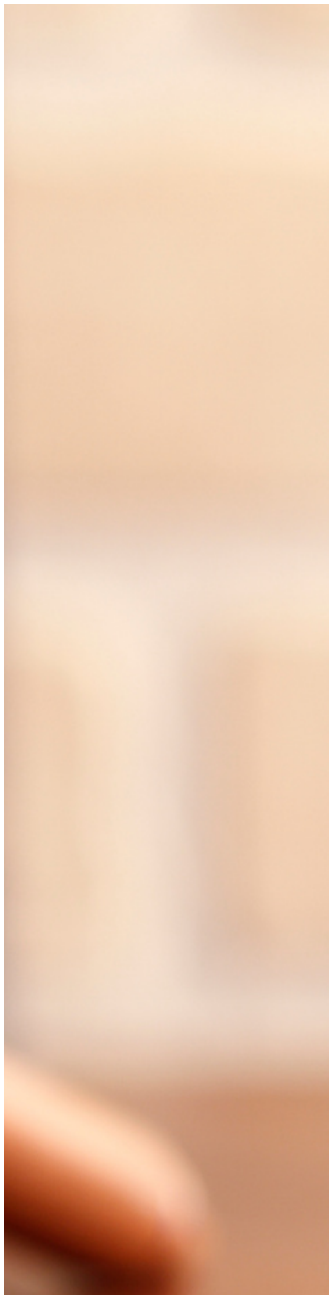


In support of Sproxil's position that the Plaintiff's alleged copyright formed part of the state of the art, Sproxil tendered two International Patent Application Numbers PCT/IB02/04358 and PCTIB02/ 00728 and one United Stated Patent Application Number 11/311,146, which were all patents granted in respect of the same subject. Furthermore, there was evidence to show that one Michael Akinlabi was also claiming patent over the same product in **Suit No: FHC/IKJ/CS/173/2011 – Michael Akinwunmi Akinlabi v NAFDAC, Sproxil & ors**. and was in fact contending that he invented his product on how to combat counterfeiting of products in the market long before the Plaintiff's idea was born.

Sproxil submitted that the Plaintiff's case was based on a misconception of the rights protected by copyrights and patent. Relying on the definitions given by authors, Sproxil distinguished the nature of copyright from the nature of patent.

Sproxil cited the definition given by John O. Asein in his book 'Nigerian Copyright law and practice', where the learned author defined patent as: *"a document issued by a sovereign authority, conferring a monopoly right on an inventor for a limited period of time. As a means of promoting technological and industrial development, the monopoly granted through the issuance of a patent is in return for the disclosure of the invention."*

Sproxil's argument was that copyright on the other hand is primarily concerned with the unauthorised and unlawful copying or reproduction of the physical work of another person. Copyright is not concerned with the copying of ideas. The infringing material must be derived from the original work. The Defendants further argued that the primary rights granted by copyright consist mainly of the exclusive rights to reproduction, publication, performance, adaptation, commercial distribution and broadcasting, as provided under sections 6, 7 and 9 of the Copyright Act. The Plaintiff had failed to show by evidence the infringement by publication, reproduction, performance or other means.



Thus, Sproxil submitted that the Plaintiff had failed to prove that the Defendants had infringed his alleged copyright by the doing of any of the acts contemplated under section 15 of the Copyright Act[4].

NAFDAC'S POSITION

NAFDAC contended that assuming without conceding that the Zapper Anti-Piracy code was protected by copyright, it is empowered (being a governmental agency responsible for regulation of drugs in Nigeria) under the Second Schedule to the Copyright Act[5], to make use of any work protected by copyright for public interest without being liable to the copyright owner for infringement. In driving home this point, NAFDAC also relied on Section 5 of the NAFDAC Act[6] which prescribed the functions of NAFDAC to include collaborating with any organisation to regulate and control the production, importation/distribution, sale of fake drugs.

NAFDAC, relying on the case of Ukpabio & Anor v. National Film and Video Censors Board (2008) LPELR - 4129 (CA), argued that where in performing any of its functions listed under section 5 of the NAFDAC Act in the general interest of the public and such performance happened to infringe on a private right, that private right is not enforceable in court. Hence, the action taken by NAFDAC was done under its statutory duty and in the interest of public health and safety. NAFDAC further submitted that it had made no monetary gain from the work. NAFDAC stated that the Plaintiff had failed to substantiate any of the infringement claims against it. The Plaintiff's allegations of copying his ideas cannot be protected by copyright, not being fixed in any definite medium of expression nor does the Acknowledgement of Copyright Notification issued by the NCC to the Plaintiff confer any copyright on him.

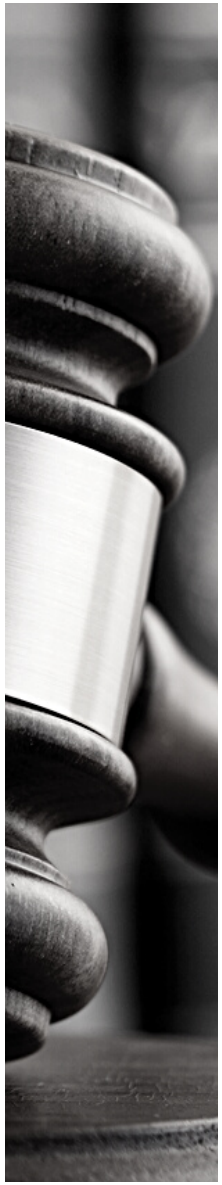
THE DECISION

The Federal High Court, per Honourable Justice I.N Buba, affirmed in entirety the arguments of the Defendants. It agreed that Amanyi Mohammed's work formed part of the state of the art as at November 2008 and, as such, was ineligible for copyright protection under Nigerian Law.

[4] Section 15 of the Copyright Act provides that 'Copyright is infringed by any person who without the licence or authorization of the owner of the copyright- (a) does, or causes any other person to do an act, the doing of which is controlled by copyright...'
[5] Item K to the Second Schedule of the Copyright Act provides that 'any use made of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific or other institutions as may be prescribed, where the use is in the public interest, no revenue is derived therefrom and no admission fee is charged for the communication, if any, to the public of the work so used'. .
[6] Cap NI LFN 2004

The Court stated that the subject matter of the suit was at all material times common knowledge particularly since 2001 when GSM phones were introduced to Nigeria and Amanyi Mohammed could not have been the inventor of the authentication system. The Court further noted that there was sufficient evidence to show that similar works existed as evidenced by patent application numbers 13/081,909 and 13,081,882, which had been published and made available to the public prior to Amanyi Mohammed's work, and **Suit No: FHC/IKJ/CS/173/2011 – Michael Akinwunmi Akinlabi v NAFDAC, Sproxil & ors.** which showed that a similar work was the subject matter of that dispute.

The Court, therefore, upheld the Defendants' arguments and found in favour of the Defendants and against Amanyi Mohammed.



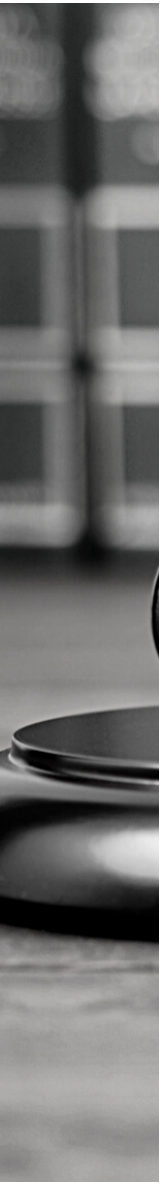
RELEVANCE OF THIS DECISION TO COPYRIGHT DEVELOPMENT IN NIGERIA

The Federal High Court's decision is instructive in a number of ways, especially for copyright owners who seek to enforce their rights against third party infringers. Some of the significant issues which the Court highlighted included the following:

- **Acknowledgment of Copyright Notification issued by the NCC does not confer ownership or authorship on a work neither does it clothe it with the regalia of a copyrighted work.**

Unlike the other genres of intellectual property, registration is not a requirement for conferment of copyright on a work. Copyright vests automatically where sufficient effort has been expended on the work to give it an original character or where the work has been fixed in any definite medium of expression[7].

[7] Section 1(2) of the Copyright Act.

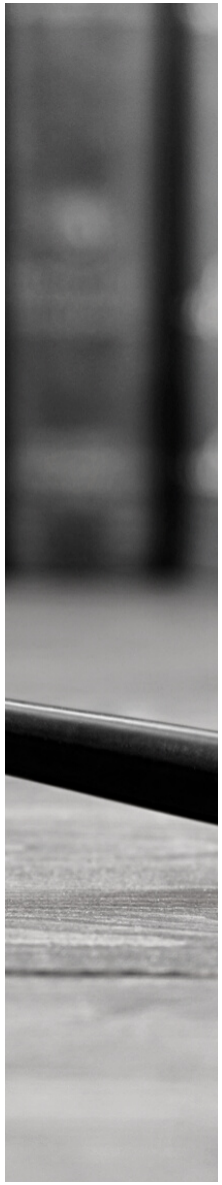


The NCC however allows persons who claim ownership of a work to register and deposit a copy of the work with the NCC as public notification of the existence of the work. Consequently, the issuance of a document called Acknowledgment of Copyright Notification by the NCC does not confer ownership or authorship on a work; it only shows that the person who claims ownership has registered his claim with the NCC.

- **Works forming part of the state of the art are ineligible for protection**

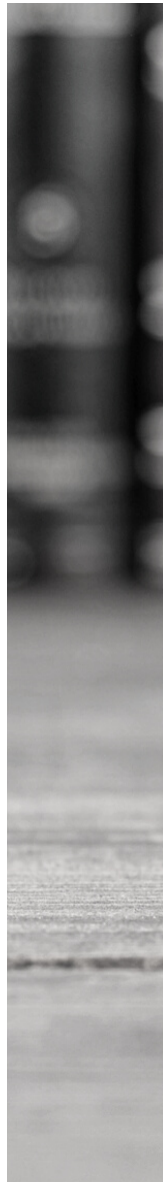
The 'state of the art' means everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time[8]. Thus an invention is new if it does not form part of the state of the art[9].

Consequently, where a work forms part of the 'state of the art' as in the instant case, it fails to satisfy the requirement of newness and is ineligible for protection as a patentable work under the extant Nigerian framework for patentable inventions.



- **Proof of infringement**

It is important for copyright owners to know that a person who asserts that his copyright is infringed must specifically plead and prove it. It is not enough to merely state generally that such right has been infringed. He must plead and show by adducing sufficient evidence, proof of the alleged infringement, regardless of whether such alleged infringement falls under any of the other categories of intellectual property.



[8] Section 1(3) of the Patent and Designs Act Cap 344 LFN 1990.
[9] Section 1(2)(a) of the Patent and Designs Act Cap 344 LFN 1990.

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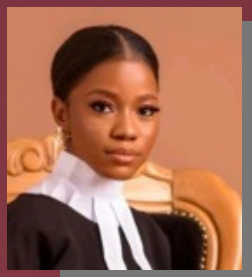

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