

AN OVERVIEW OF THE PROSPECTS AND CHALLENGES OF INDUSTRIAL DESIGN REGISTRATION IN NIGERIAN SETTING

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*The authors declare
that no funding was
received for this work.*



Received: 19-July-2025

Accepted: 09-August-2025

Published: 17-August-2025

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This article is published by MSI Publishers in **MSI Journal of Arts, Law and Justice (MSIJALJ)**
ISSN 3049-0839 (Online)

Volume: 2, Issue: 8 (August-2025)

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ABSTRACT: It is never in doubt that the objective of any law governing industrial design in any jurisdiction including Nigeria is to ensure the protection of the design and its owner's interest (first to file or first to claim foreign priority) provided that the said design is new or essentially better in some ways than what was created before. Unfortunately, not every design is registrable, hence the relevant age long question, when will an industrial design be deemed registrable? Again, when goods are similar, designs become an important distinguishing factor to separate any probable confusion, though the design meant here is not the end product itself but the model or pattern or even shape used to produce the final goods. This doctrinal research methodological nature of work seeks to make an overview of the prospects and challenges bedeviling industrial design registration in Nigeria perspective. Identified issues that its solution will settle long list of these problems are as listed out, statutory problems, enforcement problems, societal problems, inefficient system of registering industrial designs,

inefficiency of governmental agencies themselves, inadequate infrastructural facilities, and lack of proper records of registered industrial designs. Conclusively, an industrial design is without doubt the language of any product as well as its identity. Owners of rights should be encouraged to commercialize their innovation; therefore, its registration procedure should be in line with global standard. It is recommended that the subsisting Patent and Designs Act of 1970 needs to be re-enacted, with specifically highlighted notable provisions at the body of the work, to give it the needed flair to flow with the modern trend.

Keywords: *Overview, Prospects, Challenges, Industrial Designs, Registration, Nigeria.*

1.0 Introduction

Industrial designs are primarily those elements incorporated into mass produced products that aim to enhance their attractiveness by their appearance. The primary objective of the law governing industrial design is to protect a design that is new or essentially better in some ways than what was created before. The Patent and Design Act of 1970 defined it as “Any combination of lines or colours or both, and any three-dimensional form, whether or not associated with colours, is an industrial design, if it is intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not intended solely to obtain a technical result .On the definition of what is new and original, Duckley L.J noted that the word “original” contemplates that the person has originated something that by exercise of intellectual activity he has started an idea which has not occurred to anyone before that a particular pattern or shape or ornament, may be rendered applicable to the particular articles to which he suggests that it shall be applied . The word “new or original” involves the idea of novelty either in the pattern, shape or in the way in which an old pattern, shape or ornament is applied to some special subject matter. commenting on the provision of the Act, Abdullahi Mustapha, J. held thus, “Section 13 (1) & (2) of Patents and Designs Act reads: ... it would be seen from the above provisions that an Industrial Design can only be registered if it is new and it is not contrary to public order and morality.” Ownership originates from the registration, in other words, the right to registration of an industrial design is vested in the

Statutory Creator, whether he is the true creator or not. A statutory creator is the first person to file an application for the registration or claim foreign priority on the design. Similarity of design has nothing to do with its novelty or distinctiveness. A claim for infringement of rights in design cannot be sustained merely because the infringing product is similar to that of the plaintiff. More is required from the plaintiff bearing in mind the provisions of Section 1 of the Act. The earlier observation of the learned trial judge that owing to the absence of the design for Exhibit “S” is sound, but he derailed when he proceeded to compare the finished products as against the designs from which they were produced.

2.0 The Prospects and Challenges of Industrial Design Registration in Nigeria

The primary objective of the law governing industrial design is to protect a design that is new or essentially better in some ways than what was created before. This protection is of immense importance to artists, lace designers and designers of other types of products. When goods are similar, designs become an important distinguishing factor. One thing to note at this point is that not every design is registrable, the relevant question is when will an industrial design be deemed registrable? The Act sets out conditions under which an industrial design will be deemed registrable. Section 13(1) Patent and Designs Act provides that subject to this section, an industrial design is registrable if:

(a) it is new, and (b) it is not contrary to public order or morality. The design to be registrable must be new and this means that it has not previously been registered or published in Nigeria prior to the date of application for registration. The word “new or original” involves the idea of novelty either in the pattern, shape or in the way in which an old pattern, shape or ornament is to be applied to some special subject matter. Issues with section 13 of the Act are the conflicts of publication and design being new, to what extent does publication vitiates registrability of designs. In the case of *F. O. Ajibowo Co. Ltd v Western Textiles Mills Limited* which focused primarily on the issue of “publication” And “Newness” which was fully considered and applied.

In the case of *F.O. Ajibowo Co. Ltd v Western Textiles Mills Limited* the issue of “publication” was fully considered and applied. In this case, the plaintiffs/respondents, a limited liability company, were textile manufacturers. The defendants/respondents, also a limited liability company, dealt in textile piece goods and were the customers of the respondents. After they had been incorporated on 15th November 1972 the appellants acquired all the rights, benefit and title in respect of a textile check design, known as K13/14 Registration No. 0003441. The design had been previously registered in the name of Francis Ajibowo & Co. who was issued with a certificate or registration dated 30th December 1971 by the Registrar of Patents and Designs. Earlier, on 13th August 1971, Francis Ajibowo & Company (the appellants’ predecessor in title of the design) ordered 10,000 yards of designs from the respondents. The respondents accepted the order by the appellants, but according to the respondents took delivery of only 7,774 yards of the said order, refusing to clear the balance of 2,226 yards despite repeated requests from the respondents to do so. Because of this, a second order by the Francis Ajibowo & Co. for another 10,000 yards of the same new design, booked by letter dated 23rd October 1971, was not executed. As has been pointed out earlier Francis Ajibowo & Co. registered the design just over two months later on 30th December 1971. They transferred the registered design to the appellants after their incorporation on 15th November 1972. On 13th August 1972, that is ten months after they had rejected the second order of Francis Ajibowo & Company, the plaintiff applied to the Registrar of Patents and Designs for the registration of the same design which had already been registered by Francis Ajibowo and Company. The design was again registered for the plaintiffs. Later however, when it was discovered that the design had been registered for another company, the plaintiff’s registration was cancelled by the Registrar. On 24th March 1973 the respondents, no doubt, angered by this decision, instituted proceedings against the defendants/appellants in the Lagos High Court seeking, inter alia, a declaration that the design registration No. 000344 effected in the name of Francis Ajibowo & Co. is null and void. The Lagos High Court found in favour of the respondents and held that: (a) That registration of Design No. 000344 effected on 30th December 1974 in the name of Francis Ajibowo & Company Limited is hereby declared null and void. The Registrar of Patents and Designs shall cancel the

registration and expunge it from the registrar. (b) The design was published before it was registered and was therefore not new. It violated the provisions of section 13(1)(a) and is not registrable under section 22(1)(b) of the Patents and Designs Decree. The learned trial judge said: I am satisfied that the material ordered by Mr. Ajibowo was made to design in Exhibit 1 which is the subject matter of this action. There is no direct evidence that Ajibowo sold the quantity of the material he took delivery of to the public but I am satisfied that since he is a trader, he ordered the material for sale and he must have sold the quantity to the public and held that “Considering the evidence before me I have found that the Defendant’s predecessor in title, Mr. Ajibowo placed order for a quantity of material to be made to the design in August 1971, and part of which order he received and sold to the public. By his default the plaintiffs were forced to sell the balance of that quantity to their customers who trade as traders and would sell them to the public. It was after this that Mr. Ajibowo applied and registered the design in December of that year. I therefore hold that there has been publication of the design before its registration, and it is not therefore new”. Unanimously upholding the appeal of the defendants/appellants the Supreme Court stated that the plaintiffs/respondents relied on three types of prior publication viz: (i) Publication of the design to them by the defendants/appellants (ii) Publication to the 3rd and 4th plaintiffs’ witnesses. (iii) Publication by presumed sale by the defendants/appellants after they had purchased the textile materials from the plaintiffs/respondents. The Supreme Court of Justices were however of the view that there was no proof or publication in the instance case in any of the above and went on to hold: (a) The law is that the publication of an industrial design is confidential if the person to whom the disclosure is made is under an obligation as to secrecy or has himself an interest in the design. (b) The onus is on the plaintiffs/respondents to prove prior publication and this they have failed to do. Fatai – Williams J.S.C. said, inter alia. In the first place, before a sale could amount to publication under the Decree, there must be evidence that the sale by the Defendants/appellants, assuming that they did at all, was before registration. There is clearly no such evidence. Secondly, it does not follow that because they have bought the textiles manufactured from the design they must have sold it since it is equally possible, there being no evidence of any sale to any particular individual, that none

of what the plaintiffs/respondents sold to them in August, 1971 was resold before registration of the design on 30th December, 1971. The finding that they must have sold the textiles containing the design before registration and that they had thereby published the design, is clearly a non sequitur... The appeal was accordingly allowed.

Also, in the case of *Blank v. Footman, Pretty & Co.*, Blank, the proprietor of design, showed it to Hummel before registering it. Hummel was a commission agent who had the sole right to sell Blank's goods in England. It was held that Hummel, therefore, had an interest in the Design and thus the communication made to him must be regarded as confidential. And being confidential, it does not amount to publication.

Similarly, in *Controlled Plastic Limited v Black Horse Plastic Industries Limited* the plaintiff who was a manufacturer of plastic materials registered one of his products, large colander as a design under the Patents and Designs Act of 1970 and obtained a Certificate of Registration. The plaintiff alleged that sometime in 1989 the defendant infringed his design and brought this action claiming damages and injunction. At the hearing, however, the defendant argued that the design of the plaintiff was not registrable because it was not original or new. Giving judgment for the plaintiff, Ezekwe, J. said "I am also of the view that the plaintiff's design is original or new. There is no other design that was placed before me in order to compare whether the design of the plaintiff was new and/or original. What is before me is Exhibit A, A1 and I am satisfied that the large colander of the plaintiff which is duly registered is new or original.

On Sunday *Uzokwe v Densy Industries (Nig) Ltd & Anor* the issue was whether the design was new at the time it was registered, in compliance with the requirements of Section 13(1)(a) of the Patents and Designs Act. The case of the appellant at the trial was that he is the registered owner of Design 4464 in respect of Kitchen plastic. He claimed that at the time of the registration of the design in March 1991 it was a new design which he created. He started the production of plastic containers after the registration of the design. However, he discovered shortly after the registration that his right had been infringed by the respondents. The 1st respondent however

countered that the design was not new and that the appellant was in fact not the creator of the design. The respondent further said that it was a common design which was available in the market, and which has been produced before the registration of the appellant's design. The 2nd respondent also denied newness of the design. The learned judge found in favour of the appellant and awarded N10, 000.00 damages against the respondents. The appeal of the respondents to the Court of Appeal was successful. The appellant being dissatisfied with the judgment of the Court of Appeal appealed to the Supreme Court, affirming the judgment of the Court of Appeal, Ogwuegbu J.S.C. who read the leading judgment of the Supreme Court said: "I am satisfied that the learned trial judge was in error in coming to his conclusion that the two products are similar and produced from one design by mere cursory perusal of the external appearance of Exhibit 2 and Exhibit 5. Similarity of design has nothing to do with its novelty or distinctiveness. A claim for infringement of rights in design cannot be sustained merely because the infringing product is similar to that of the plaintiff. More is required from the plaintiff bearing in mind the provisions of Section 1 of the Act. The earlier observation of the learned trial judge that owing to the absence of the design for Exhibit "S" is sound, but he derailed when he proceeded to compare the finished products as against the designs from which they were produced.

Another registrability challenge is public policy requirement. For a design to be registrable, it must not be contrary to public order or morality. Public order or morality must be deemed to cover such matters as good government, the administration of justice, public services, national economic policy and the proper interest of the state and society. In other words, an industrial design must not run contrary to the attainment of the above objective. The Act does not state specifically which designs should be excluded for registration. The following should however be excluded: (a) works of sculpture other than casts or models used or intended to be used as models or patterns to be multiplied by an industrial process (b) wall plaques and medals (c) printed matter primarily of a literary or artistic character, including book jackets, calendars, certificates, coupons, dressmaking patterns, greeting cards, leaflets, maps, plans, post cards, stamps, trade advertisement, trade forms and cards transfers and the like.

3.0 Who Can Register under the Act?

The Act categorized Persons who may Apply to Register an Industrial Design (1) Statutory Creator: The Act provides that the right to registration of an industrial design shall be vested in the statutory creator that is to say, the person who, whether or not he is the true creator, is the first to file, or validly to claim a foreign priority for an application for registration of the design.

(2) Persons who employ or commission others to create a Design: Section 14(4) Patents and Designs Act provides that where an industrial design is created in the course of employment or in the execution of a contract for the performance of specified work, the ownership of the design shall be vested in the employer or, as the case may be, in the person who commissioned the work.

(3) Persons to whom the design has been assigned: Section 24(1) Patents and Designs Act provides that a person's rights in a patent application in an application for the registration of a design, in a patent or in a registered design may be assigned, transferred by succession or held in joint ownership.

(4) Persons to whom a contractual licence has been granted: Section 23(1) Patents and Designs Act provides that: (a) a patentee or design owner may by a written contract signed by the parties grant a licence to any person to exploit the relevant invention or design; and (b) in the absence of any provision to the contrary in the contract, the licensee shall be entitled to do anywhere in Nigeria in relation to the patent and design any of the acts mentioned in Sections 6 or 19 of this Act as the case may be.

3.1 Foreign Priority in Design Registration

Nigeria is a party to conventions and treaties relating to intellectual properties. For example, Nigeria is a signatory to the Patent Cooperation Treaty (PCT), in line with the Paris Convention for the Protection of Industrial Property (1883).

According to Section 27 of the Patents and Designs Act, the Minister may declare a country or country as a convention country (ies) by an order in the Federal Gazette. When this is done, an application filed by a person in Nigeria who has earlier made

the same application in a convention country shall be entitled to foreign priority. In other words, the application filed in Nigeria shall be deemed to be filed as at the time the application was made in the other country. However, for such an application to enjoy foreign priority, it must be made within six months of making the foreign application. Consequentially, the application with foreign antecedent shall be granted, over a new local application with no prior filing.

4.0 Requirements for Filing Industrial Design

- a. The design must be “new.” A design meets the newness criteria if no identical design has been made available to the public before the date for application for registration.
- b. The design must be “original.” Designs are considered as ‘original’, if they have been independently created by the designer and are not a copy or an imitation of existing designs. If the design simply makes minor changes to an earlier design, it will not be considered as a new design and as such, it will be ineligible for design protection.
- c. The design must not be dictated exclusively by the technical function of the product. If this is the case, the design registration is not the appropriate form of intellectual property. A more relevant application would be a patent application.
- d. The design must not include protected official symbols or emblems such as the national flag, the coat of arms etc.
- e. The design must not be one which is considered to be contrary to public order or morality. The right to the registration of a design is vested in the person who is the first to file an application for the registration of the design.
- f. The applicant must not publicize the design before seeking to register the design.
- g. The applicant must provide a specimen of the design.

- h. The applicant must also provide basic information including the name of the applicant, address, an indication of the kind of products associated with the design, and the title of the design.
- i. The applicant will also be required to pay the application fee and other professional fees.
- j. A Power of Attorney, if application is being made by an agent.
- k. Certified copy of the priority document if claimed.

4.1 Steps/ Process of Registration

1. Once the application is filed with all the supporting documents then the Registrar will issue an Acknowledgement Notice confirming the receipt of the application.
2. Examination and Acceptance
3. Then an examination of the application to ensure the formal requirements are met and that the design does not contravene public order or morality. If the application meets the requirements, then an Acceptance Notice will be issued. Otherwise, a refusal notice will be issued.
4. Approval of registration

Once the design application has been accepted, the design is registered, and a registration certificate will be issued, and a duplication of the design certificate will be included in the Register of Industrial Designs.

5.0 Challenges to the Protection Conferred Upon a Proprietor of an Industrial Design

(1) Statutory Problems: The patent and Designs Act have not undergone reasonable amendment since its inception. This is not an encouraging thing. The Act is not exhaustive in its provisions. There are some lacunae in its provisions. As a result, some of the problems associated with industrial designs were not addressed. One of the obvious features of the Act is the lack of precision in many sections of the Act. For example, Section 12 which defined Industrial Design was not clearly defined.

The definition of the term “industrial design” is so long and winding, with punctuation that its meaning is lost in verbiage.

Another issue is Section 13(a) dealing with registrable design; the provision is not clear on when a design is new and not contrary to public order or morality.

Another issue is Section 14(1) which provides that the right to registration of an industrial design shall be vested in the statutory creator that is to say, the person who, whether or not he is the true creator, is the first to file, or validly to claim a foreign priority for an application for registration of the design. From the foregoing provisions, it is quite clear that the first to file a claim obtains a right to register, one would think that this section creates room for fraud.

Another area of the section that deserves mention is the issue of remedies for infringement of industrial designs. It is clear from the analysis of the remedies for infringement of industrial designs that the Act does not represent a serious attempt at providing remedies for those whose rights are infringed. This is a serious lacuna, more so, when the Act does no expressly authorized reliance on the English or common law for support. It is therefore arguable whether it is right for the Nigerian Courts to rely on the remedies available under the common law as a matter of course without even seeking to rely on any indigenous statutory provision to that effect. From the foregoing issues examined above and others, we can rightly say that some provisions of the Act are ambiguous and that there are some lacunae in the Act which in no small way are challenges to effective protection of industrial design in Nigeria.

(2) Enforcement Problems: This is also one of the challenges to effective industrial designs protection in Nigeria. The pace of judicial proceeding is slow. The enforcement of industrial designs as well as other branches of intellectual property is the exclusive preserve of the Federal High Court. The Federal High Courts is not in all 36 states of the federation. This always poses a problem for lawyers and the litigants who are constrained to travel to another state to institute their actions. The Nigerian judiciary is bedeviled with manpower and infrastructural constraints such as insufficient number of judicial officers, poor record management facilities, absence of research assistants for presiding officers of court and the non-availability or

insufficient court halls, to mention but a few. Also, the recurrent remuneration related crisis in the judiciary nationwide has impacted on the pace of judicial proceedings before the courts in Nigeria. On the other hand, there are no effective alternative dispute resolution mechanisms. Even though, there are three centers or institutions for alternative dispute resolution in Nigeria, that is, two in Lagos and another in Abuja. It still has not really helped the situation, as the entire process is cumbersome.

(3) Societal Problems: Societal problems have also posed a challenge to effective protection of industrial design in Nigeria. There are many problems in society which have influence society negatively. There are: (a) High Rate of Illiteracy: In Nigeria where a lot of people are becoming literate, we still have large number of illiterates, this in turn is a challenge to effective protection of industrial design. The illiterate design owners whose designs have gained reputation may not even know when their designs are infringed. Even when they find out that their designs are infringed, they may resign themselves to fate and do nothing. On the other hand, an illiterate customer may not be able to differentiate the registered design from the infringing one. As a result, the infringer will continue to perpetrate their fraud without the intervention of the law enforcement agencies and regulatory bodies. (b) Corruption: corruption in the form of bribery influences outcomes of the legal and statutory process. Bribes can alter outcomes of the legal and regulatory process. Corruption has been largely responsible for the close to nil ratio of final judgments in criminal cases that is, almost none has been competently concluded. (c) Lack of Awareness: Awareness has not much been canvassed in respect of this area of law and as such people are ignorant about this area of law. As such infringers take advantage of this public ignorance against the public. (d) Greed and Poverty: The rate of poverty in the country has also hindered the protection of industrial designs in Nigeria. People tend to use all kinds of means to make money including imitating other people's design. Greed among Nigerians is on the increase. An average Nigerian wants to be a Billionaire overnight. As a result, people indulge in duplicating other people's work.

(4) Inefficient system of registering industrial designs: Industrial designs as a form of property are protected by registration. The main purpose of registration is to afford industrial design owners consistent and predictable protection. The registrar of

Patents and Designs is the officer in charge of registering designs and there is a register in which industrial designs are registered. The system of registration is inefficient, for example, inability to process applications timeously and efficiently.

Another issue is that of electronic registration. Registration of industrial designs though now seems seamless but seems technical to be conducted electronically. If a prospective design owner is desirous to register an industrial design, he must go to Abuja, where the Registrar's office is situated, or may rely on the newly operational online system. This mechanical approach is very cumbersome and poses a challenge to effective protection of industrial designs.

(5) Inefficiency of Governmental Agencies: there is no statutory body to regulate industrial designs in Nigeria and as such the governmental agencies charged with the responsibility of regulating industrial designs do not do much. There is no adequate machinery to enable these agencies to work effectively. For example, the agencies are not provided with vehicles to enable them to move from one place to another to fish for infringers. Also, they are not adequately funded. These bodies are not provided with funds so as to enable them to work effectively. They also lack manpower. As a result of this, they do not function effectively.

(6) Inadequate Infrastructure: The basic infrastructure needed for the effective protection of industrial designs in Nigeria is not only grossly inadequate but also, appears to be non-existent. The problem of poor communication network has adversely hindered the protection of industrial design. The Nigerian Telecommunications Limited (NITEL) is no longer functional. Also, the introduction of Global System Communication in Nigeria (GSM) has not really help the situation, as there are still lapses in the efficiency of the communication system, including its exorbitant cost to users. The means of transportation, particularly the roads, railways and air also contribute to the inefficiency of the governmental agencies. The railways are no longer in existence. The roads are in bad shape and in dire need of reconstruction or rehabilitation as the case may be. Due to the poor state of the roads, governmental agencies hardly perform their functions. The airlines are not left out, as the aviation industry has consistently witnessed dismal performances with little or nothing to show for its existence. The power and energy situation in the country is

very alarming. The much talked about transfer of technology has remained a mirage in the face of epileptic power supply in the country. Equally, equality has devastating effects on the economy. Absence of other infrastructure like buildings, also hinders the governmental agencies from working effectively.

(7) Lack of proper records of registered industrial designs: There are no proper records of all the registered industrial design in Nigeria. The Registrar does not keep data base form of all the registered designs. As a result of this, the Registrar may inadvertently register a design that is similar to the one that is already registered.

Conclusion

Conclusively, an industrial design is without doubt the language of a product as well as its identity. It drives a consumer's choice and is a key factor in the consumer's purchase decision. Industrial designs and their protection are therefore very important for both small- and medium sized enterprises (SMEs) and larger companies. There is also an urgent need to amend the Patent and Designs Act to be more relevant with modern trends. The current framework is not clear on how reverse engineering could affect the enjoyment of intellectual property rights. Owners of rights are encouraged to commercialize their innovation by utilizing available intellectual property management mechanism.

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