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## **GUIDE ON INTELLECTUAL PROPERTY (IP) DUE DILIGENCE IN NIGERIA**



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## INTRODUCTION TO INTELLECTUAL PROPERTY (IP) DUE DILIGENCE

Conducting an IP due diligence is a detailed assessment of your company's intellectual property (IP). It is a critical process when evaluating a business for investment, partnership and acquisition opportunities. It involves an in-depth examination of patents, trade marks, designs, copyrights, trade secrets and other intellectual property assets, providing a reliable assessment of their ownership, validity, enforceability and potential infringement. In short, IP due diligence is a thorough assessment of a company's IP assets to understand their value, risks and potential for future use. In Nigeria, IP due diligence is an important practice that should be adopted to ensure that you maximise your IP for monetary value in the course of exploiting your rights or in the course of acquiring new IP through any form of partnership.

### IMPORTANCE OF CONDUCTING IP DUE DILIGENCE IN BUSINESS TRANSACTIONS

- a. **Risk mitigation:** IP due diligence helps to identify any IP-related risks that could affect your company's operations or profitability in Nigeria, such as: the existence of ownership disputes, validity, and enforceability concerns, identifying potential infringement of third-party IP rights or unauthorised use of company-owned IP, discovering valuable IP that may not have been properly recognised or protected, etc.

Conducting IP due diligence will help to uncover the above issues and ensure that stakeholders can take steps to mitigate these risks and make informed decisions.

- b. **Valuation:** Understanding the value of intellectual property is crucial in transactions. IP due diligence can help determine the fair market value of IP assets, which can be critical for securing financing, accurately pricing IP assets in M&A transactions, determining appropriate royalty rates or selling prices for IP assets.
- c. **Compliance and ownership verification:** IP due diligence ensures that the business owns or has the proper registrations/licences for its intellectual property assets. This helps prevent ownership disputes and verifies that the company complies with relevant laws and regulations.
- d. **Strategic planning:** Understanding the strengths and limitations of a company's intellectual property portfolio can influence strategic planning in mergers, acquisitions and partnering transactions. This information is critical to negotiating terms and conditions that are consistent with the company's objectives.



## NAVIGATING IP DUE DILIGENCE IN NIGERIA

To make the process of navigating IP due diligence in Nigeria easier, we have broken down some of the key steps into stages. This process can be navigated by:

- a) your in-house IP teams.
- b) outsourcing to an IP portfolio management company or IP agent.

The latter option, particularly advantageous for SMEs, offers a more streamlined approach and mitigates the financial commitment associated with setting up an in-house team.

### IDENTIFICATION OF IP ASSETS

Identifying key IP assets during IP due diligence is critical to understanding the true value and potential risks associated with a company's intellectual property. First, it is important to establish a comprehensive inventory of all existing IP assets, including details such as filing dates, registration numbers, territorial limitations and current status (pending, granted, abandoned). It is also important to examine unregistered IP such as trade secrets, know-how, proprietary software code and confidential business processes that are valuable to the business.

It is crucial to analyse each IP asset identified above for its strength, novelty, commercial relevance and competitive advantage. Consider factors such as market competitiveness, enforceability and remaining lifespan for patents. Assess the potential risks associated with each asset, such as infringement claims, validity challenges or ease of imitation by competitors. The above information will help determine which IP should be registered/protected and which should be abandoned.

### CONDUCTING CLEARANCE SEARCHES

Conducting availability searches at the Nigerian Intellectual Property Registry (IPO Registry) is also an important part of IP due diligence. In particular, it is an important preliminary stage in the registration of trade marks and patents. Clearance searches are crucial in determining whether a company's proposed IP is available for registration and to avoid infringement. Analysis of the search would help to determine whether the IP will be rejected on the basis of confusing similarity, contrary to public morality, etc.

It also helps to save time and money that would have been spent on an IP that would have been flagged by the IP office during the examination process, especially in the case of trade mark - for patents, examination is of form, not substance. However, it is important to note that IP searches are usually conducted manually at the Nigerian Trademarks, Patents and Designs Registry for a fee, and the results issued by the office are based on the records available at the time.

## ANALYSIS OF INTELLECTUAL PROPERTY RIGHTS

This is a crucial stage in IP due diligence, requiring both meticulous investigation and strategic assessment, especially in business transactions such as mergers and acquisitions (M&A), IP transfers, licensing, franchising, etc.

It is important to determine whether a chain of title exists by tracing the ownership history of each asset and verifying registration documents, assignments and licences. The aim is to ensure that the target company has a clear and legal title to all claimed IP rights. This is very important in Nigeria where many businesses operate without seeking IP protection or ensuring that the registration process is completed and certificates or other proper documentation are issued to them.

It is also important to identify any potential legal claims, liens or mortgages on the IP assets and assess the impact of these encumbrances on transferability and value. In Nigeria, records of legal claims, liens or mortgages are not usually recorded at the Trademarks, Patents and Designs Registry, so it is crucial to conduct a thorough search to determine whether there is any encumbrance on the other party's IP rights.

Issues of joint ownership or co-inventorship will also need to be addressed. This involves determining the rights and obligations of any co-owners or co-inventors, clarifying their control over the IP and the potential for future disputes. This is an important issue, particularly in relation to copyrights in Nigeria, where many records are not kept because there is no legal requirement to register the copyright with the Copyright Registry. It is important to sift through agreements to identify key information in this regard.

It is also important to examine any relevant licence, collaboration or technology transfer agreements affecting the IP assets, analysing the rights granted, restrictions imposed and any termination clauses.

## ENFORCEABILITY EVALUATION

This involves analysing the target company's products and services against potential infringement claims by competitors. It would also include considering existing litigation or pre-emptive strategies to mitigate risk. For IP acquisitions in Nigeria, it is important to assess the likelihood of successfully defending the target company's trade marks against infringement or dilution claims and to evaluate the resources and legal costs associated with enforcement actions. It is also important



to assess the potential copyright infringement issues associated with the target company's use of creative content.

## ESTABLISH BRAND PROTECTION / ANTI-COUNTERFEITING PREVENTION AND ENFORCEMENT MEASURES

Brand protection and anti-counterfeiting measures are essential tools for protecting the intellectual property rights and indeed the reputation of companies anywhere in the world. This is particularly important for any company doing business in Nigeria because of the prevalence of counterfeiting in the country.

It is therefore important for businesses operating in Nigeria to engage a team of external counsel to assist the company in establishing a brand protection/anti-counterfeiting regime for the company. This is particularly useful if the company does not have a dedicated in-house legal/intellectual property team.

The external counsel would be responsible for developing a comprehensive legal and administrative strategy to prevent and detect counterfeit products in the Nigerian market. They would also provide assistance in drafting and enforcing contracts with distributors and suppliers to ensure compliance with brand protection policies, running a monitoring service, conducting market research and taking legal action against counterfeiters.

## ASSESSING THE COMMERCIAL VALUE OF THE IP ASSETS

Determining the commercial value of IP assets in IP due diligence is critical to making informed decision. There are different approaches and factors to consider when determining the commercial value of IP assets. This is usually done by carrying out an IP valuation. The valuation can be based on current and future revenues. These estimates of present and future revenue streams generated by the company's IP would typically apply to patents with strong market potential, established trade marks or copyrighted works with ongoing royalties. The valuation may also be made by comparing the target IP with similar assets that have recently been sold or licensed, or by calculating the cost of creating or acquiring the IP.

The results of the valuation would provide critical insight into the company's intellectual property assets and assist the organisation in making informed decisions about monetising its intellectual property assets through licensing, franchising, collaborations or sale of the intellectual property rights.



## UNDERSTANDING LOCAL RULES

- **Commercialisation rules:** In Nigeria, the National Office for Technology Acquisition and Promotion (NOTAP) sets maximum royalty rates for services such as trade mark, technical know-how agreement, franchise, and others.

For trade mark royalties, payment ranges from 0 to 0.5 % of net sales and is strictly permitted if and only if the trade mark is applied to locally manufactured goods. In the case of a technical know-how agreement, the technology royalty is often based on a percentage of sales and ranges from 0 to 5 % of net sales, depending on the complexity of the technology. In the case of a franchise, the following fees are allowed: Initial/basic fee: A flat fee (which should be properly specified), franchise/continuing fee: 0.5 %-2 % of net sales or revenue, and marketing/advertising fee: 1 % of net sales or revenue.

In addition, any contract or agreement that is not submitted to NOTAP for registration within 30 days of its effective date is subject to a late filing penalty of NGN 100,000.00 (or more depending on the value of the agreement). Therefore, it would be safe to comply with the threshold already set by NOTAP licences or franchises.

- **Tax rules:** In Nigeria, any activity involving the transfer of intangible assets is subject to Value Added Tax (VAT). This is because intellectual property licensing fees are regarded as payment for a service. However, whether it falls within the scope of Nigerian VAT depends on the location of the recipient of the IP service. In addition, under Nigerian tax rules, income from the assignment of IP assets is subject to capital gains tax, while income from IP licensing may be subject to corporate income tax. Licence fees and royalties are tax deductible expenses as determined by the Federal Inland Revenue Service (FIRS).

## PROTECT IP THROUGH WATERTIGHT CONTRACT

To effectively protect your intellectual property, it is essential to have a number of key agreements in place, which should be regularly reviewed and updated as necessary. These agreements include:

- **Non-disclosure agreements (NDAs):** NDAs are legal contracts that prohibit individuals or companies from disclosing confidential information to third parties. Companies should have NDAs in place with employees, contractors, suppliers and other parties who have access to the company's confidential information.
- **Employment agreements:** Employment agreements should include provisions relating to intellectual property ownership and confidentiality. These agreements should specify that the company owns all intellectual property created by employees in the course of their

employment and that employees are prohibited from disclosing confidential information.

- **Licensing agreements:** If a company licences its intellectual property to third parties, it should have licensing agreements in place that set out the terms and conditions of the licence, including payment terms, limitations on use and restrictions on sublicensing. In Nigeria, trademark licences can be registered at the IPO Registry as a registered user.
- **Assignment agreements:** Assignment agreements are used to transfer ownership of intellectual property from one party to another. Companies should have assignment agreements in place with employees and contractors who create intellectual property on behalf of the company. Assignment records can also be done at the Nigerian IPO registry by filing the assignment agreement and submitting the appropriate form. A certificate of assignment will then be issued by the Registry.
- **Joint Development agreements:** When a company collaborates with another company or individual on the development of intellectual property, it should have a joint development agreement in place that specifies the ownership rights and responsibilities of each party.

## CONCLUSION

Conducting IP due diligence is essential for any SME or company. This gives the opportunity to identify the value of the company's IP and also to know the extent of good will of the acquirer or any investment. Having a guide to know how IP due diligence works will provide better understanding on how IP tools can be a veritable tool for business success.

### Contact us:

**Website:** [africaiphelpdesk.eu](http://africaiphelpdesk.eu)  
**E-mail:** [africa.iphelpdesk@euipo.europa.eu](mailto:africa.iphelpdesk@euipo.europa.eu)  
**Phone number: Europe (Spain): +34 96 513 9810**  
**Opening hours: Monday to Friday,**  
**8:30 to 18:30 (CET/CEST)**

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