

# THE WHITE COLLAR

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## The Smell of Success: Sensing the Rights of the Future

### "I'm Suing You for Stealing My Smell"

**O**n a pleasant Sunday afternoon, you walk into a store with the smell of warm freshly baked bread wafting you in. You decide to use the same process of baking bread at your store and replicate the same smell in your store and then you get a letter from the Lawyers of the original store for an action in Patent Infringement! Today that might sound absurd even to Intellectual Property experts but the future of IP protection; brand creation and consumer loyalty may well be premised on the nose. Yes the nose.

### Aromachology- The Economic Value of Smell

In the last two decades clinical studies have shown how smell can influence human behaviour emotionally, cognitively and even physically. It has come to be called aromachology. In particular consumer-purchasing habits have been known to be influenced positively by consumers' exposure to certain smells- lavender, fresh bread, fresh coffee and rosemary are some of the more documented smells that produce positive reactions in these studies. With the link between the sensory organ of smell and positive buyer behaviour now apparent, it will only take a little time before Product Designers and Brand specialists design consumer product offerings that leverage heavily on smell, or if you like, create "smell signatures" that are associated with their products.

In fact anyone buying a new pair of sport shoes from the globally recognisable sports brands- Nike, Adidas et al will immediately recognise the 'fresh smell' of new shoes once they come out of the box, and certain electronic manufacturers', Apple for instance, already have a 'new smell' for their products once out of the box. The question is whether a 'smell' can actually be a protected Intellectual Property on which an actionable suit is premised?

### Can You Own a Smell?

In the United States of about two million registered trademarks there are only twelve pertaining solely to smell. The United Kingdom is even far less tolerable to the idea- there are just two ever registered smell trademarks at the UK Intellectual Property Office. In the European Union only one smell trademark has ever been registered, and it has now expired, making it a rare historic occurrence.

So if it is so difficult to achieve why all the fuss about it? Well, in 2004 two Americans won the Nobel Prize in Medicine for identifying a system of 'Receptors' with which the human sensory organ of smell can record and recognise smells. Up until their work



there was no way of mapping out what a smell was except by using a human nose or the less widely accepted electronic nose technology or a description of the properties creating the smell.

### It Can't Be Seen It Can't Be Touched But its Still Mine

With the newly identified 'Receptor' system of recognising smells we are some way to being capable of definite and distinct description of smell. That means the description of a smell (i.e. specific properties defining it) may soon be graphically representable, separate from say the description of the perfume holding it (i.e. liquid composition/chemical formula in the bottle). The significance in law is that for the first time it may be possible for a particular smell to be defined, solely by its olfactory features, as 'real property' to which proprietary rights can attach to.

In the ground-breaking European Court of Justice case **RALF SIECKMANN v DEUTSCHES PATENT- UND MARKENAMT** Case No- C-273/00 of 2000 the ECJ, which had previously been closed to the notion of registration of smells as protected trademarks, held that 1) it was possible to register a trademark incapable of being seen 2) such a sign must be capable of graphical representation that is "clear, precise, self-contained, easily accessible, intelligible, durable and objective" so that it is capable of being precisely determined by relevant parties, and therefore allow for certainty. 3) Such a sign must be distinctive and capable of being a trade origin indicator.

The Court rejected the currently available methods of graphically representing signs by chromatography (chemical composition of compounds) spectrogram (visual representation of sound frequencies) or electronic nose devices. Needless to say that although the Court left the door open for the registrability of smell

trademarks, the specificity required and the absent technology to do so all but makes it impossible to. So why bother?

### The Significance- It Smells like Potential

Now if all this still seems a little absurd to you then with a little patience consider that the world's most valuable brand- Apple, is worth \$145.3billion i.e. this is a non-tangible asset that translates into real economic value. Smell is a new aspect of brands still yet unexplored and undeveloped which we now know has significant influences on consumer behaviour. We can therefore assume that, for instance, an Apple brand feature for smell, which does not exist today, is an untapped asset and would increase the entire value of the Apple brand, making it an interesting area for potential future developments.

Small wonder that in the US a hydraulic-fracturing fluid producer- Flotek Industries Inc, whose fluid is used to extract Oil is already attempting to trademark the orange juice-like smell of its fracturing fluid. The economic value of the unique orange smell that distinguishes it from its competitors' fracturing fluids without the orange juice-like smell may enter into millions of US Dollars and this is the true value smells, yet untapped, can present in the near future.

### The Nigerian Perspective

Bringing the conversation home, our Intellectual Property protection framework in Nigeria provides for Copyright, Patents and Trademarks, and of course these represent the traditional IP rights. The Trademarks Act (TA) 1990 and the Patents and Designs Act (PDA) 1990 respectively form the governing laws in Trademarks and Patents. Copyright protection exists on the basis of the Berne Convention of 1886, which is applicable under Nigerian municipal law in the Copyright Act 1990. The Berne Convention allows authors of literary

and artistic works be protected immediately they produce them without the need for registration, entitling them to all Copyrights of the work and related works derived from the original.

Section 9(1) of the Trademarks Act 1990 stipulates that for a Trademark to be registrable in Part A (one of the two possible registrable parts) it must pertain to either of the following:

- (a) the name of a company, individual, or firm, represented in a special or particular manner;
- (b) the signature of the applicant for registration or some predecessor in his business;
- (c) an invented word or invented words;
- (d) 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 a surname;
- (e) any other distinctive mark"

Section 10(1) for Part B registrations maintains:

"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 or the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists..."

For its own purposes section 1 of the Patents and Designs Act 1990 stipulates that an invention is patentable if:

- (a) if it is new, results from inventive activity and is capable of industrial application; or
- (b) if it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application."

### 'Catching Up to the Future'

In considering the possible protection of smells as an Intellectual Property in our Nigerian framework, it appears that they would fit comfortably as either Patents or Part B Trademarks. Both section 10(1) of the TA 1990 and section 1 of the PDA 1990 appear sufficiently wide enough to accommodate smells. This is of course, a consideration made of laws that are now 25 years old and as impressive as they may be for holding out this long, need to be brought up to speed to cater for the advancements being made in the IP industry as well as the precision and specificity necessary for certainty in any practical legal framework for protecting such rights.

Separate from the catching up of the governing laws is the need for the regulator the Trademarks, Patents and Designs Registry itself to understand the needs of not just contemporary Nigeria but also the global market for IP in the future. For instance if a company wanted to register such a 'smell signature' how would it do so? The Registry would require 'smell experts' with the ability to distinguish, process, catalogue and store different smells, something which it is still getting up to speed with for the more traditional trademarks and designs.

### Smells Like Success

What is clear is that as new technology emerges on the back of new discoveries products will become more distinct and companies will go above and beyond to protect that distinctness in order to provide themselves with competitive advantages. The IP industry will need to push its frontiers in ways we have not seen before to enable them achieve that competitive advantage, and so to will the laws that protect this innovation. Even today, given the time and efforts businesses invest into creating a distinct and recognisable brand capable of giving it market advantage- think the Telecoms providers, advertising and even the brand associations they carefully cultivate- imagine a future where someone invents the "smell of success", bottles it and offers it for sale. The question we're asking here is "who's going to be their lawyer?"

## NIGERIAN LAW FIRMS LEAD AT THE LAW DIGEST AFRICA AWARDS 2015 CONTINUED FROM PAGE 5

for corporate transactions by winning both the M&A Team of the Year and the Capital Team of the Year.

The Nigerian firms did not have it all their way through, with AB & David of Ghana picking up the Property, Infrastructure and Construction Team of the Year and its Managing Partner, Isabel Boaten picked up both the Female Managing Partner of the Year and the Young Managing Partner of the Year awards, beating the likes of Dr. Adefulu of Odujinrin Adefulu & Co, Babajimi Ayorinde of TNP, Michael Orimobi of Tokunbo Orimobi & Co and Ola Alokolaro of Advocaat.

The much coveted prize of Managing Partner of the Year went to Alan Keep of

Bowman Gilfilan of South Africa. South Africa Breweries also picked up the In-House Team of the Year (Trade & Industry), but the undisputed In-House Team of the Year was Oando.

Speaking to our reporters, Seyi Clement, the editor of Law Digest and the sponsor of the award said that " Law Digest Africa Awards is a brand new concept in recognising and honouring excellence in the African legal services market, by recognising the contributions of individual lawyers, law firms and in-house teams equally. I am pleased that the award has been well received across the continent. The quality of the submissions have been very impressive, which made judging very difficult. He

expressed his appreciation to the judges which included Chief Bayo Ojo, SAN, Seye Kosoko of Standard Chartered and other senior practitioners from England, Kenya and Ghana"

Seyi Clement expressed satisfaction that Nigerian firms are competing on an equal footing with their long established counterparts from South Africa and in some cases out-performing them as well. He said that the award represents a mark of quality which is essential for firms to maintain a competitive edge in a highly competitive market, such as legal services.

The award presentation ceremony will be held in Lagos on 6 November 2015 at Four Point by Sheraton.