
Vítor Palmela Fidalgo

# The struggle to protect patents in Africa

Vítor Palmela Fidalgo, Inventa International, discusses some of the fundamental difficulties with protecting patents in Africa and recommends some solutions to prevent these difficulties occurring.

Contrary to real estate, intellectual property is more *democratic;* you do not need an amount of capital or goods to generate more capital. You just need your brain and some creativity. Of course, this romantic idea is thwarted by the huge amount of money which is spent every year on R&D. However, there are several "Eggs of Columbus" to be discovered all around the world.

Nonetheless, to obtain intellectual property as a patent, it is not just to invent something: a good business environment and a suitable, reliable and enforceable legal system are necessary.

The current problem in Africa comes from the fact that, despite all the efforts made by stakeholders and from major multinationals to tiny companies (or inventors), protecting a patent does not pay off and/or can be useless.

Excessive red tape and the lack of available information are among the factors involved. However, the main issue involves the flaws in the legal system and this is what we will address in this article.

Here are, as far as we are concerned, the main legal questions in Africa:

**1. Outdated laws**

Despite the harmonization brought about by the *Trips Agreement,* most of the African countries still apply their outdated legislation. For instance, whereas a patent is valid for 20 years in Germany, France or The United States, in Angola, Ethiopia, Gambia, or Madagascar the validity is 15 years. In some cases it is even less, as is the case for Tanzania and Namibia.

It is worth pointing out that the patent term aims to give the patent holder enough time to capitalize on their investment and to promote the investment in more research. If for some inventions 10 or 15 years is enough time to profit, for others, such as pharmaceuticals patents, 20 years is often very short, considering the time that they must spend introducing the drugs on the market.

Furthermore, some patent laws limit the granting of chemical patents, as is the case in Egypt, when only the process is patented. For these type of patents, the term is solely 10 years.

Finally, another example is the substantive examination of patents which is not mandatory in some countries, such as Nigeria, forcing the stakeholders to be aware of any existing patent publication, since all the applications, in principle, will be granted.

**2. The alleged public interest**

By invoking the public interest, governments are able to

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## Résumé

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break patents and grant compulsory licenses. Under the guise of this legal tool, sometimes governments favor local companies to the detriment of foreigner patent owners. The public interest is used as an excuse to rip off legitimate intellectual property rights holders.

**3. Lack of enforceability**

This problem manifests itself in several ways, namely in the systemic backlog that affects the granting of the patent and the lack of expertise of the courts to deal with IP matters, which is further aggravated by the above-mentioned outdated laws.

In this sense, it is important to stress that even new legislation will not solve this problem. For this particular problem, the principal issue has more to do with inadequate enforcement rather than the legislation itself.

## Possible preventative solutions

Needless to say, this scenario makes it very difficult to enforce patents in Africa. However, there is always something that can be done in order to mitigate the harmful effects.

Not protecting your invention is not an option at all. Regardless of all the hurdles and the ineffectiveness of the legal system, without protection there is nothing. All the competitors will be able to work the invention without any constraint and the patent holder will not have a legal title even if it is only to negotiate with infringers.

Moreover, as for the relevant pharmaceutical patents, sometimes it is better to negotiate licenses. This approach will avoid unfair public measures against the patent, drive out competitors and enable the patentee to monetize the IP right, even gaining fewer royalties.

A constant patent surveillance is another advisable option. The behaviour of some companies is well known, which after a "freedom

to operate" search, decide to invest and develop in Africa a product which is patented in Europe or The United States.

A final point to consider is that cease and desist letters are always a good tool. The effectiveness of the letter will depend on the particular case and the nature of the entity receiving it. However, considering our experience, we believe that for most of the cases it is very effective. Actually, seeking redress through the courts court in some African jurisdictions should be the last resort.