

REGISTRATION OF TRANSFER OF FOREIGN TECHNOLOGY AGREEMENTS WITH NOTAP IN NIGERIA: SOFTWARE LICENCE AS A CASE STUDY

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ABSTRACT

Software is an intangible component of a computer that dictates what the computer does. It is found in computers of all kinds including mobile devices like mobile phones. Most software utilised in Nigeria are foreign in nature and usage of these software is usually subject to a software licence, that is, an agreement between a software developer and a software user detailing the terms of usage of a software. The National Office for Technology Acquisition and Promotion (NOTAP) regulates the transfer of foreign technology to Nigeria, requiring that such agreement (the software licence in this case) be registered with NOTAP. The aim of the study is to evaluate software licences as a transfer of technology agreement registrable under the NOTAP Act 1992. This was done by examining the concept of software licence and the provisions of the NOTAP Act applicable to software licence. The doctrinal research methodology was utilised, encompassing primary sources like statutes and case law as well as secondary sources like texts and online publications. The study finds that software licences are transfer of foreign technology agreements registrable under the NOTAP Act so long as they are for the purposes stipulated in section 4(d) of the Act. The paper recommends that the NOTAP Act be amended to empower NOTAP to regulate transfer of Nigerian technology to foreign countries.

Key Terms: Software, Licence, Computer, NOTAP.

1.0 INTRODUCTION

Ever since Charles Babbage conceived the first automated digital computer known as the “Difference Engine” in the 19th Century, computers have evolved from their initial primitive designs to more sophisticated electronic devices.¹ These devices accept, process, and store data based on instructions provided by software. Modern-day computers are of various kinds: supercomputers, mainframe computers, workstation computers, personal computers, laptops, tablets, and smartphones. Smartphones are considered computers for having the following

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¹ Seth Bullock, ‘Charles Babbage and the Emergence of Automated Reason’ (February 2008), 19-39 <https://www.researchgate.net/publication/37538625_Charles_Babbage_and_the_Emergence_of_Automated_Reason>, accessed 7July, 2024.

features: fast mobile broadband, powerful processors, large storage, rich libraries for application developments, advanced user interfaces, and high pervasiveness.²

Computers consist of hardware and software: Hardware refers to the physical components of a computer while software refers to the programs and other operating information used by a computer. It goes without saying that without software, computers have limited functionality and relevance.

As of January 2023, Nigeria had approximately 122 million active internet users, which corresponds to about half of the total population.³ The import of this is that a large number of Nigerians had some form of computer with which they accessed the internet as of January, 2023.⁴ Most of the software in computers used in Nigeria are of foreign origin.⁵ Except in cases where such software are pirated, foreign software developers usually give consent for their software to be utilised by other individuals or entities via a software licence, that is, an agreement wherein software developers grants permission for the use of their software to software users. In cases where foreign software is lawfully utilised in Nigeria, there is bound to be a software licence granting the Nigerian party access to usage of the software. Foreign software is foreign technology and thus, agreements evidencing the transfer of such foreign software to Nigeria are registrable under the National Office for Technology Acquisition and Promotion (NOTAP) Act so long as it is for any of the purposes stated in section 4(d) of the Act.⁶ In other words, it is not all software licences that are registrable under NOTAP Act.

2.0 SOFTWARE DEFINED

Software is the instructions that control what a computer does.⁷ Possati identified the following as features of software:

1. It is a form of engineering, and thus is an artifact with a function;⁸
2. This type of engineering is expressed in a non-reading form of writing;⁹
3. This engineering generates textual instruction sets connected to tasks, data, and activities, or the programs that need to be carried out.¹⁰
4. It is linked with the operation of a tangible machine, specifically the computer;¹¹ and
5. These programs come in a variety of forms.¹²

² Kin Yeung Wong, 'Cell Phones as Mobile Computing Devices' *IT Professional* (May/June 2010), 40-42

³ Statista, 'Total number of active internet users in Nigeria from 2017 to 2023' <<https://www.statista.com/statistics/1176087/number-of-internet-users-nigeria/>> accessed 30 May, 2024.

⁴ Computers are a major means of accessing the internet.

⁵ Abdusalam O. Ajetunmobi. *Information and Communications Technology in Nigeria* (Princeton & Associates Publishing Co. Ltd., 2017), 109.

⁶ Chapter (Cap) N62 Laws of the Federation of Nigeria (LFN), 2004. The law is hereinafter referred to as NOTAP Act.

⁷ Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/software>> accessed 30 May, 2024.

⁸ Luca M. Possati, 'Towards a Hermeneutic Definition of Software' *Humanities and Social Sciences Communications* [2020] (7) (71), 4.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

The three types of software are: system software, programming software and application software. Software can be open-source or closed-ended. Open-source software is software that is distributed publicly with its source code, allowing for its use, modification, and distribution while closed-end software is software that its source code remains with the software developer and thus the rights to its use, modification, and distribution remains with the software developer.

3.0 SOFTWARE LICENCE

Software is the intellectual property of its developer. These software developers usually have copyright over the software, and thus, have the exclusive right to control the usage and distribution of such software. Usage of software created by a software developer requires the permission of the software developer. This is where a software licence comes in.¹³ It is a legally binding agreement between a software developer and a software user that sets out binding guidelines for the use and distribution of software.¹⁴ According to Rustad and Kavusturan, a software licence entails:

a conveyance of abstract, intangible rights with respect to the licensed intellectual property. The rights conveyed and (if any) reserved determine what the licensee can lawfully do with the licensed intellectual property. The essence of a software license is the licensor contractually grants the licensee the right to use software, databases, and other content.¹⁵

The agreement sets out the terms of use for software and defines the rights of both the software developer and the software user. The terms and conditions of a software licence usually include the following: fair use of the software, limitations of liability, warranties, disclaimers and protections. Each software licence has a unique structure and context based on the requirements of the parties involved.¹⁶ The parties to a software licence are usually the software developer (licensor) and the software user (licensee).

Software licensing differs from the sale of physical goods, as the licensor retains ownership of the intellectual property rights.¹⁷ A software licence grants the software user permission to use software in ways which would ordinarily infringe on the copyrights of the software developer. Software licensing is expedient because it protects the licensor's intellectual property, and it allows a licensee to utilise the licensor's software legally.

3.1 Forms of Software Licence

There are numerous forms of software licence. Software licences are categorised according to the duration of the licence, persons who can access the software, the extent of usage,

¹³ Software license is synonymous with software license agreement.

¹⁴ The agreement is generally geared towards protecting the copyrights, patents, trademarks and trade secrets of software developers.

¹⁵ Michael L. Rustad & Elif Kavusturan, 'A Commercial Law for Software Contracting' *Washington and Lee Law* [2019] (76) (2), 827.

¹⁶ Henry W. Classen, 'Fundamentals of Software Licensing' *Idea: The Journal of Law and Technology* [1996] (37) (1),1.

¹⁷ *ibid*, 6.

modification, and distribution of the software, the mode of executing the licence, proprietary rights of parties to the licence, etc. Below are the common forms of software licence.

1. Use-Only Software Licence

This is a software licence that regulates software that is developed specifically for an industry or institution for its internal use only.¹⁸ Such software usually prohibits the copying or distribution of the software.¹⁹

2. Shrink-Wrap Software Licence

This licence got its name from its placement on the back of software packages, underneath the shrink-wrap.²⁰ Synonymous with Original Equipment Manufacturer (OEM) software licence, this licence governs commercially available and non-customised software that comes with physical products. The agreement is usually concise and can typically be contained in a page.²¹

3. Click-Wrap Software Licence

This is an online agreement between a software developer and user stipulating the terms and conditions of its usage, distribution and modification. It usually requires a click on a button on dialogue box or pop-up window in order to agree to the terms of the agreement.

4. Browse-Wrap Software Licence

This is also an online agreement between a software developer and user wherein the user agrees to the usage of the software by browsing the website or downloading the software. The terms and conditions of software use are usually posted on the website.

5. Produce and Sell Software Licence

Produce and Sell Software allows the licensee to produce and sell a digital product or service.²² A Produce and Sell Software Licence regulates the transfer of such software and usually allows the licensor to receive royalties for every digital product sold.

6. Software Escrow Agreement

This is an agreement wherein software source code is deposited with a third party known as an escrow agent, which is to be released to the licensee upon fulfilment of stipulated conditions.²³

7. Permissive Software Licence

The agreement places minimal restrictions on software users, allowing them not just the usage of software but also the liberty to modify and even distribute the software. The Licensor permits extensive usage, modification, and distribution of the software.

¹⁸ (n.5), 106.

¹⁹ *ibid.*

²⁰ F. Lawrence & Mark P. Grant, *Law of the Internet* (Matthew Bender & Co. Inc. 1997), I-18.

²¹ (n.5), 107.

²² *ibid.*, 108.

²³ *ibid.*

8. Public Domain Software Licence

Software that is licensed under the public domain may be distributed, modified and used without limitation. Once a software is in the public domain, the software developer's copyrights cease to exist, and the software can be utilised by the public.

9. Subscription-Based Software Licence

To utilise software, users of such software may be required to pay a recurring fee for the software for a specified period, usually monthly or yearly. In other words, access to the software is hinged on taking out a subscription for the software.

10. Perpetual Software Licence

The licence stipulates a one-time fee payment for a licence upon which the licensee can use software for life. The licensee may however be required to pay for software updates or support, after paying the stipulated fee.

11. Proprietary Software Licence

The agreement stipulates that ownership of the software remains with the software developer and that the software user is only permitted to use the software. Limitations are usually placed on the distribution, modification, and usage of software. The subscription can be monthly or yearly.

12. Copyleft Licence

This software licence allows the modification and redistribution of a software. To ensure that the software stays free and open-source, this licence mandates that any modified versions be distributed under the same licensing terms.

3.2 Major Clauses of a Software Licence

1. **Breach of Contract:** This clause basically stipulates that if any term of the software licence is violated, the agreement between the parties would be broken.
2. **Device Usage:** This specifies how the software is to be used e.g., on a single computer or on multiple computers on a site.
3. **Governing Law:** Here, the law governing the resolution of any dispute that arises from the software licence is stated.
4. **Liability:** This usually sets out the limit of the licensor's liability.
5. **Modification:** This states whether the software can be modified by the licensee or not.
6. **Transfer or Assignment:** This clause states whether the licence can be transferred or assigned to a third party by the licensee.
7. **Exclusivity:** Here, it is stipulated whether the licensor can licence the software to parties other than the licensee.
8. **Rights:** This details the rights of both the licensor and the licensee.
9. **Terms of Termination:** This stipulates how the agreement is to be terminated if there is a need to do so.
10. **Remedies:** Here, the remedies for breaching the contract are stated.
11. **Warranties:** The warranty information is contained in this clause.
12. **Scope of Licence:** The rights and restrictions of the software user are stated here.

13. Duration: This stipulates the period within which a software user can utilise a software.
14. Fees: In this section, the fees the user pays for the software is indicated.

3.3 Intellectual Property Rights of Software Developers

As stated earlier, software is the intellectual property of its developer. This is because software is an intangible asset arising from human intellect. Intellectual property rights are thus rights safeguarding creations of human intellect. There are four common types of intellectual property rights: copyright, patent, trademarks and industrial designs.²⁴ A patent protects inventions and innovative processes by granting inventors rights to exclusively use, produce and trade their inventions within a specific period. While trademarks protect names, symbols and signs associated with goods or services, trade secrets protect confidential information of businesses like such businesses' practices, formulas and processes. A copyright endues its holder with legal ownership of an intellectual property, granting the holder the exclusive right to distribute, reproduce, publish or sell such intellectual property. Software developers usually wield copyright over their software.

In Nigeria, intellectual property rights like patents, copyrights, trade secrets and trademarks are recognized and provided for under the Copyright Act, 2022,²⁵ Patents and Designs Act,²⁶ and the Trademarks Act 2004.²⁷ It is noteworthy that Nigeria is a signatory to numerous intellectual property treaties like the Paris Convention for the Protection of Industrial Property ratified in 1963, Berne Convention ratified in 1986, Patent Cooperation Treaty ratified in 2005 as well the Marrakesh Treaty, Beijing Treaty on Audiovisual Performances, World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty all ratified in 2017.

Because copyright is the intellectual property right software developers usually wield over their software, both foreign and local software developers publishing their software in Nigeria are subject to the Copyright Act, 2022. By virtue of section 8(1)(b) of the Copyright Act, 2022, copyright will be conferred on a foreign software developer where the software is first published in a country which is party to a treaty or international agreement bordering on copyright Nigeria is party to. Foreign software developers who wish to publish their software in Nigeria can also register their software with the Nigeria Copyright Commission.

3.4 Registration of Software Licence with NOTAP

NOTAP is an agency under the Federal Ministry of Science and Technology. It was originally established by Decree No. 70 of 1979 as the National Office of Industrial Property (NOIP) under the then military regime which spanned from 1976 to 1979. NOIP became NOTAP in 1992 courtesy of Decree No. 82 of 1992 under the military regime which lasted from 1985 to 1993. The Decree has since metamorphosed into an Act with the advent of civilian rule in 1999 and is now known as the NOTAP Act. Section 1(1) of the Act provides

²⁴ Other intellectual property rights include industrial design, geographical indications and plant variety rights.

²⁵ Federal Republic of Nigeria Official Gazette Number (No.) 56, Volume (Vol.) 110, Lagos, 27 March 2023.

²⁶ Cap P2 LFN 2004.

²⁷ Cap T13 LFN 2004.

for the establishment of NOTAP, a body charged with monitoring on continuing basis, the transfer of foreign technology to Nigeria and to provide for other related matters.

Section 4(d) of the Act outlined as one of the functions of NOTAP, the registration of all contracts or agreements for the transfer of foreign technology to Nigeria with NOTAP wholly or partly connected to any of these purposes:

1. The use of trademarks;
2. The right to use patented inventions;
3. The supply of technical expertise in the form of preparation of plans, diagrams, operating manuals, or any other form of technical assistance of any description whatsoever;
4. The supply of basic or detailed engineering;
5. The supply of machinery and plant; and
6. The provision of operating staff or managerial assistance and the training of personnel.

Other functions of NOTAP include:

1. Fostering easier ways for Nigerian parties to identify and select foreign technology;²⁸
2. Equipping Nigerian parties entering into contracts or agreements for the transfer of foreign technology with top-notch negotiation skills to get the best deals;²⁹
3. Offering a more effective way for adjusting to imported technology;³⁰ and
4. Continuous monitoring of the execution of any contract or agreement registered pursuant to the NOTAP Act.³¹

Software licences where there is transfer of foreign software to Nigeria for purposes stated in section 4(d) above must be registered with NOTAP. Section 5(2) of the Act provides that every such contract or agreement entered into after the commencement of the Act by any person in Nigeria with another person outside Nigeria in relation to any matter in section 4(d) is required to be registered not more than 60 days after their conclusion or execution. Every application for registration of contracts or agreements for the transfer of foreign technology is to be addressed to the Director of NOTAP.³² The Director upon receiving an application for the registration of such contract or agreement is to register such contracts only where he is satisfied that the specifications for registering them have been met and consequently, issue a certificate of registration to the applicant.³³ In line with section 5(2), software licences must be registered not more than 60 days after the execution of the agreement.

Where these agreements or contracts for the transfer of foreign technology to Nigeria are not registered with NOTAP, it does not render them void. The repercussion for non-registration is that no payment is to be made in Nigeria to the credit of anyone outside Nigeria by or on the authority of the Federal Ministry of Finance, the Central Bank of Nigeria, or any licensed

²⁸ Section 4(a), NOTAP Act.

²⁹ *ibid*, section 4(b).

³⁰ *ibid*, section 4(c).

³¹ *ibid*, section 4(e).

³² *ibid*, section 5(3).

³³ *ibid*, section 6(1).

bank in Nigeria in respect of any payments due under such contract or agreement.³⁴ This was the court's position in the case of *Stanbic IBTC v. FRCN & Anor.*³⁵ Stanbic IBTC (the Appellant) had procured banking software from outside Nigeria, modified it and sold it to its South African parent company, Standard Bank of South Africa Ltd. Subsequently, the appellant and its parent company entered into a software licence agreement to allow the former utilise the software upon payment of a yearly charge. The agreement was never registered with NOTAP. The Financial Reporting Council of Nigeria (FRCN) in the course of investigating the Appellant's audited financial statements spanning from 2013 to 2014 discovered that the software licence was not registered with NOTAP and contended that the agreement was void. Consequently, FRCN fined the appellant, suspended key officials of the appellant and publicised these sanctions. The appellants initiated an action against the FRCN and NOTAP challenging the sanctions. The court of first instance (Federal High Court) found for the respondents, upholding the contention that failure to register the agreement with NOTAP rendered the agreement void. Upon appeal, the Court of Appeal held that failure to register such agreements only hindered payment to the credit of anyone outside Nigeria in respect of any payments due under such contract or agreement. The court further held that NOTAP's regulatory purview regarding registration does not cover the transfer of technology agreements from Nigeria to foreign parties as was done in this case.

The Director of NOTAP has been empowered to cancel the registration of transfer of technology agreements where such agreement has been modified or amended in contravention of the provisions of the Act but this can only be done upon giving notice in writing to the parties concerned of his intention to cancel the certificate of registration and giving the parties opportunity to lodge an appeal against the decision.³⁶ Where no appeal is lodged, the Director with the approval of the Governing Council can cancel the certificate.³⁷ Any aggrieved party who wishes to challenge the cancellation of the registration is to lodge an appeal with the Governing Council and where such appeal is allowed, the Director is to issue a certificate of registration in that regard.³⁸ Where the appeal is disallowed, the aggrieved party can further appeal to the Federal High Court.³⁹

In 2018, NOTAP published the Revised Guidelines for Registration and Monitoring of Technology Transfer Agreements in Nigeria.⁴⁰ Software licence was identified as one of the transfer of technology agreements to be registered with NOTAP in the Guidelines. The Guidelines describe a software licence thus:

“a type of agreement that involves the deployment and/or resale of software products in any desired sector of the economy which can be entered into between an end-user and OEM or between the end-user and local representative of the OEM.”⁴¹

³⁴ *ibid*, section 7.

³⁵ (2018) LPELR-46507 (CA).

³⁶ Section 8(1), NOTAP Act.

³⁷ *ibid*, section 8(2).

³⁸ *ibid*, section 9 (1-3).

³⁹ *ibid*, section 9(4).

⁴⁰ Hereinafter referred to as the Guidelines.

⁴¹ Section 2.2.6 of the Guidelines.

It further provides that when the agreement is between the regional representative of the OEM and a local vendor, such agreement would be a reseller agreement.

According to the Guidelines, the approval of an application for registration of software licence is hinged on applicants presenting the following to NOTAP:

1. Submission of the reseller agreement, if applicable, or the software licence.
2. Where a reseller agreement is involved, the provision of proof of the appointment of a local software company (vendor) or an authorised reseller.
3. In the event of a reseller arrangement, the distributor's authorization letter must be submitted.
4. Proof that a local vendor has been appointed (where there is an agreement between the OEM or a regional OEM agent and the end user).
5. Required payment invoices.
6. Proof of an end-user's contract offer.

The Guidelines require that software licence fees be paid to NOTAP and these fees vary depending on the contents the software licence and international best practices. The fees are:

1. A software licence fee which depends on the kind of software, the quantity of end users and the going rates for comparable items made by the same licensor in the sector in which the software will be utilised.
2. An implementation fee which is based on the licensor's duties, such as whether customization, updating, training or other services are required for the implementation or not.
3. An annual fee for technical support and upgrades that is typically between 15% and 23% of the software licence price, payable after the agreement's first year of implementation. Proof of payment to a local vendor involved in the implementation of the software license is also required.
4. Federal Ministries, Departments and Agencies in Nigeria desirous of acquiring foreign software products are required to provide evidence of clearance from the National Information Technology Development Agency (NITDA).⁴²

It is noteworthy that asides NOTAP, the Federal Competition and Consumer Protection Commission (FCCPC) empowered by the Federal Competition and Consumer Protection Act, 2018, also oversees technology transfer agreements.⁴³ Technology transfer agreements are examined by the FCCPC to make sure they don't foster monopoly or anti-competitive practices. These agreements are also examined by the FCCPC to ensure that the rights of consumers (software users in this case) are protected. NITDA empowered by the NITDA Act, 2007 also oversees information technology practices in Nigeria.⁴⁴

⁴² NITDA is a federal agency created by NITDA Act to regulate the development of Information Technology in Nigeria.

⁴³ Federal Republic of Nigeria Official Gazette No. 18, Vol. 106, Lagos, 1 February 2019.

⁴⁴ Federal Republic of Nigeria Official Gazette No. 99, Vol. 94, Lagos, 5 October 2007.

4.0 FACTORS LIMITING NOTAP'S REGISTRATION OF TRANSFER OF TECHNOLOGY AGREEMENTS

1. **Bureaucratic Hurdles:** As is common with government institutions, applicants for registration of transfer of technology agreements are required to adhere strictly to the rules and standards of NOTAP. Applicants face bureaucratic challenges like cumbersome documentation as they are required to present a plethora of documents to NOTAP.⁴⁵ Another bureaucratic challenge is applicants having to wait for up to weeks or months to get their transfer of technology agreements registered.⁴⁶ These challenges can delay the implementation of the agreement.
2. **High Evaluation Standard:** NOTAP's standard for evaluating transfer of technology Agreements is quite high as the transfer of technology agreements are required to be of legal, economic and technical benefits to Nigeria. In other words, it must be in national interests to register these agreements else, the agreements will not be registered. Furthermore, officials of NOTAP responsible for evaluating such agreements must have the requisite skills and knowledge to examine not just the agreements but the software covered by such agreements.
3. **Limited Regulatory Scope:** NOTAP seeks to monitor the transfer of technology. Unfortunately, its scope is restricted to transfer of foreign technology to Nigeria. In other words, it caters only to technology importation and not its exportation. In line with NOTAP's regulatory scope, the agency has no powers to require the registration of technology exportation agreements, a position that has been reinforced in the case of *Stanbic IBTC* supra.

5.0 CONCLUSION AND RECOMMENDATIONS

Software licences where there is transfer of foreign software to Nigeria for purposes stated in section 4(d) are registrable under the NOTAP Act. However, failure to register such agreements does not render them void, but instead, no payment is to be made in Nigeria to the credit of anyone outside Nigeria by or on the authority of the Federal Ministry of Finance, the Central Bank of Nigeria or any licensed bank in Nigeria in respect of any payments due under such contract or agreement.

NOTAP's goal is the monitoring on a continuing basis of the transfer of foreign technology to Nigeria. It clearly does not regulate the transfer of Nigerian technology to foreign parties. If the development of indigenous technology is going to be encouraged in Nigeria, Nigerian laws need to reflect this. It is hereby recommended that the NOTAP Act be amended to empower NOTAP to regulate the transfer of Nigerian technology to foreign countries. This way, the issue of NOTAP not regulating the transfer of Nigerian technology to foreign countries as was seen in *Stanbic IBTC* supra would not arise.

⁴⁵ Some of these documents include certificate of incorporation, draft copy of the transfer of technology agreement, annual report, tax clearance certificate and completed application form.

⁴⁶ The registration process period is hinged on factors like how quickly NOTAP is able to assess the technology agreement and ascertain if other required documents and fees are in order.