

REGULATION AND CONTROL OF COPYRIGHTS IN THE LAW AND PRACTICE IN NIGERIA: THE CHALLENGES AND PROSPECTS*

ABSTRACT

This paper examined the emerging challenges of intellectual property theft especially copyright infringements in the law and practice in Nigeria. This has become necessary in view of the modern approach to law and practice in the Country especially in the area of civil law and practice. The modern practice of “frontloading” has made civil law and practice seamless and less burdensome. However, it comes with its challenges, which is the ease with which the intellectual works of lawyers can be stolen by lawyers and even non-lawyers. It is in the light of the above that this paper interrogated these seeming challenges of intellectual theft and the steps/efforts that are imperative to nip this ugly situation in the bud.

1.1 Introduction

No doubt, law and practice in Nigeria is highly standardized and regulated. Only qualified and duly certified persons are allowed to engage in the practice of law in the Country. It therefore follows that legal practitioners by their training are expected or presumed to have the necessary intellectual knowledge and skills to ply their trade as well as deliver quality services to their clients. What is more, given the procedural and technical intricacies that envelope law and practice in the Country, it is expected that legal practitioners with the requisite cognate experience on the job would exhibit the highest level of professional competence and dexterity in the discharge of their functions and services to their clients. The traditional procedure/practice of pupillage by junior lawyers in the law firms of the experienced and established lawyers is ostensibly for the purpose of ensuring that the junior lawyers learn the nuances and intricacies of the profession over time and in the long run acquire the necessary skill, proficiency and experience that would make them effective in their service delivery to their clients. Clearly, having attained these professional heights, it is understandable if legal practitioners guard jealously, their intellectual works from their colleagues and non-colleagues. If the existing laws for the protection of intellectual property in the Country is not fully exploited and explored for the benefits of experienced and hardworking

legal practitioners, the result would be that the lazy and indolent ones amongst them would readily and easily “steal” the former’s works and pass them off as theirs and worst still charge even higher professional fees for such works than the original authors. It is therefore incontestable that there is the need for copyright protection of the works of lawyers in practice in the Country.

Whereas, the need for the protection of the intellectual works of lawyers can be discussed and factored alongside the works of other professionals like engineers, architects, accountants, medical doctors, photographers etc, the need for a specific focus on the intellectual works of lawyers is more imperative now. This is particularly so due to the practice of “frontloading” and its allied practice and procedure introduced under the various High Court (Civil Procedure) Rules in most states of the federation. The practice of “frontloading” and its associated nuances of written addresses at the trial court’ s level as well as brief writing at the appellate courts have made it possible for the intellectual works of legal practitioners to be easily accessible to the generality of the public.

On the other hand, intellectual property law is broad enough to protect the works legal practitioners who have invested their time and energy on research and research materials that result in such protectable works.

1.2 Intellectual Property Circumscribed

Intellectual property is the third category of property rights as distinct from personal property and real property rights. It is a chose in action because it can neither be possessed physically nor transferred physically.¹ Rather, it consists of a bundle of rights that are negative in nature and can be actualized through a legal action and process. Although, there are several attempts at a conceptual definition of intellectual property rights, Oyewunmi defines it simply as ‘legal rights conferred on those who engage in creative, inventive and promotional activities which have resulted in original, useful and other beneficial output²’. Distilled from this definition is the fact that IP rights are creative rights and can only be recognized and protected in they are original or

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¹ See J. Hughes “The Philosophy of Intellectual Property (1988) 77 GLJ 287, See also, G. Dunfield and U. Suthersanen, *Global Intellectual Property Law* 2nd ed. (Edward Edgar, 2020)

² A. Oyewunmi, *Nigerian Law of Intellectual Property* (Unilag Press, 2015)

inventive in nature³. IP rights consist of both legal and economic rights, they are premised on the notions of reward for hard work, dexterity and innovations of a person or institution.⁴ Whereas, the notion of IP rights being foundationally a natural right has been canvassed, it is its focus on the economic rights of the plaintiff that has gained more prominence.⁵

A legal framework for the protection of IP rights is imperative for any Country because, it is important to create a platform to protect those who are creative and inventive, whilst using same to discourage and where necessary punish those who are lazy, indolent and are wont to exploit the intellectual works of others.⁶

IP rights consist of the basics like copyrights, patents, trademarks, industrial designs and lately trade secrets. These genres of IP share a common thread, which is that they are choses in action and the rights attached to them, are usually asserted in the negative.

1.3 Copyrights as IP Rights

Copyright is defined as the bundle of rights that inure to an author of a copyright work. It is an exclusive right to the exploitation of the moral and economic rights in a copyrighted work. Copyright enables an author to prevent others from reproducing, adapting, translating, transcribing, publishing, performing, distributing and/or doing any of the acts prohibited under the Act. In driving this point further, the learned authors, Copinger and Skone describes copyright as “one of the three main branches of intellectual property law which gives the owner, the exclusive right to authorize or prohibit certain use of his work by others.⁷ Accordingly, copyright contemplates the protection of the right of authors in the areas of literary works, musical works, artistic works, cinematography, sound recordings and broadcast. These are essentially

³ W. Cornish & D. Llewellyn, *Intellectual Property Law* 6th ed (Sweet & Maxwell, 2007)

⁴ H.M Spector “An Outline of a Theory Justifying Intellectual and Industrial Property Rights” (1989) 8 *European Intellectual Property Review*, 270

⁵ H.M Spector, *ibid*

⁶ G. Ghidini, *Intellectual Property & Competition Law: The Innovation Nexus*, (Cheltenham, Edward Egar, 2006) 24

⁷ K. Garnett, et al *G. Copinger & James Skone on Copyright* (15th, ed, London, Sweet & Maxwell, 2005) 1 as quoted by Oyenwunmi, *Nigerian Law of Intellectual Property*, 21

the traditional class of copyright works, although, the emergence of ancillary copyrights like performers rights and expressions of folk lore, has increased the scope of copyright.⁸ Copyright protects the expression of literary works in a definite medium, it does not protect ideas alone. In the same vein, it protects only works of “literary value”, i.e, works that are educative, informative and entertaining.⁹

Although, there is no pre-requisite of registration for the recognition and protection of copyright, the requirements of originality and fixation are mandatory before a copyright work is eligible for protection.¹⁰ Originality in the context of copyright works have been circumscribed to mean that “sufficient effort has been expended in the creation of the work to give it an original character” that the work is a product of the “sweat of the brow” of the author, or that the work exhibits a “modicum of creativity”, or that the author exhibited “skill and judgment” in the creation of the work. These reveal the various tests or criteria for determining or assessing the originality of a copyright work for the purposes of protection under the Act. However, a common thread that runs through these tests is that the work must not be a mere “copy work” or an unauthorized reproduction, adaptation, translation or distribution of the work. Thus, even when the minimum, benchmark for “originality” is used, the work must be the product of some “effort” or “hard work” of the author.

There two layers of ‘ownership’ of copyright works, there is what can be termed as the *de facto* ownership which inure to the “author” of the copyright work or what can also be termed the *de jure* ownership which is also credited to the “author” of the work, but which may ultimately reside in the person with the legal right to sue for the infringement of the copyright work.

Although, an “author” of a copyright work is not expressly defined under the Act, section 51 thereof, provides a guide as to the identification of an author with respect to the six traditional *genre* of copyright works. By the tenor of this provision, an author of any of the category of “copyright works” is determined by the nature or level of “work” or “effort” he puts at creating such

⁸ See sections 26 -33 of the Copyright Act which makes elaborate provisions for the neighbouring rights of “performers rights” and “expression of folklore”

⁹ See *University of London, Press v University Tutorials Press* (1916) 2 Ch 209, see also *McMillan v Cooper* (1923) 93 LJPC 113, *Walter v Lane* (1900) A.C 539

¹⁰ See section 1 (2) (a) & (b) of the Copyright Act

a work. Accordingly, the author of a “literary work” is the person that creates the work. This has been aptly circumscribed by the Copyright Act as the person who has expended “sufficient effort” in making a work of an original character.¹¹ In the same vein, the author of an artistic and musical works is the persons, who exert the requisite mental and physical skills in creating a work of an original character. Whereas, with respect to sound recordings, cinematographs and broadcasts, it is the person who makes the arrangement for the production of the sound recording, cinematograph film or the broadcast.

Clearly, the fall out of these is that there are several layers of authority and control over copyright works, but the starting point remains with the authors as described aforesaid. However, the legal right to sue for the infringement of copyright works is vested on the owner of such a work.¹² Although, there is the presumption that the author of a copyright work is the owner of such a work, the incidences of express and/or implied assignment of ownership rights over copyrights can whittle down or out rightly extinguish the “ownership” rights of an author in appropriate circumstance.¹³

Where there is an unauthorized reproduction, copying, adaptation, distribution or any other act that constitute an infringement of copyright, an owner can sue and get the requisite remedies from the Court. The Court with the requisite jurisdiction is the Federal High Court.¹⁴ Where a plaintiff succeeds in his claim for infringement, he is entitled to sundry remedies ranging from injunctive reliefs and monetary reliefs by way of damages. One of the most potent remedy in the hands of a claimant for copyright infringement is the injunctive remedy of *anton piller*¹⁵.

¹¹ See section 1(2) (a)& (b) of the Copyright Act

¹² See sections 15 & 16 of the Copyright Act

¹³ See sections 10 (1)-(3) and 11 of the Copyright Act. See also the following cases: *Stevenson Jordan & Harrison v Mc Donnell & Evans Ltd* (1952) 69 RPC 10, *Gentil v Tabansi Agencies Ltd* (1977) 1 ALR COMM 344, *Joseph Ikhuoria v Campaign Services Ltd* (1986) 1 FHCLR 308

¹⁴ See section 252 (1) (P-S) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

1.4 Infringement of Copyright Works

As revealed earlier, once a work satisfies the minimum criteria for recognition and protection as a copyright work, the author is automatically imbued with the legal right to prevent others from its unauthorized exploitation in any form and by whatever means.¹⁶ The implication is that any unauthorized copying, reproduction, adaptation or usage of the work, especially for financial gains becomes actionable as a copyright infringement.¹⁷ Although, the Act makes profuse provisions for both civil and criminal liability for the infringement of copyright, it is the civil liability for copyright infringement that suffused in the existing literature on copyright litigations¹⁸.

However, liability for copyright infringement is not automatic, neither are the remedies granted as a matter of course, rather, a plaintiff in a claim for the infringement of copyright has both the legal and evidential burden to prove the acts of the defendant that constitutes infringement. In discharging this burden of proof, the plaintiff is expected to establish the similarity between his work and that of the defendant. In *Mag Jewelry Co Inc v Target Corporation Style Accessories & Anor v Robert Margolis*¹⁹, the Claimant brought an action against the Defendant for an alleged infringement of the copyright in their jewelry design. The design in question was a unique artistic work tagged “Angel Design”. Expectedly, the Defendants denied liability and claimed that their design was original being a product of a contracted third party effort. In dismissing the claim, the Court held that the plaintiff failed to establish the similarity between the defendants design and theirs and that since the evidence on record showed that defendant’s design was independently created; the claim for infringement ought to fail. Accordingly, in proving this incidence of similarity, the plaintiff is expected to establish that the defendant was engaged in a ‘substantial copying’ of his work. Available literature reveals that “substantial copying” is not determined by the volume or quantum of the plaintiff’s work that is lifted by the defendant but rather by the quality and effect of the portion of the work so copied. Accordingly, it has been

¹⁵ See *Harman Pictures NY v Osborne* (1967)2 ALL ER 324, *Director General of Fair Trading v Smith’s Concrete* (1991)4 ALL ER 150 CA, *Oladipo Yemitan v the Daily Times of Nigeria Ltd* (1980) 1 FHCLR 196

¹⁶ See *Feist Publications Inc v Rural Telecoms Services Corporation* 499 US 340. 346 (1991)

¹⁷ See generally, sections 15 and 16 of the Copyright Act, Cap C28 LFN 2004

¹⁸ See sections 20-21 of the Copyright Act

¹⁹ (2005) EWHC 2352

established that where a small but very impactful portion of a work is copied, so much that members of the public would on reading or assessing the defendant's work, may feel no need to read or assess the plaintiff's work, then a case of substantial copying has been established. In *Hawkes & Sons (London) Ltd v Paramount Film Service Ltd*²⁰, the defendant's use of a twenty second portion of a four minute musical work was adjudged to amount to a substantial copying. Accordingly, it is when this incidence of "substantial copying" is established that a "causal link" is established between the plaintiff's work and that of the defendant for the purposes of establishing the similarity between both works²¹. Therefore, the plaintiff being the first in time to publish the work in question, i.e being the first to express same in a definite medium, (publication), he is entitled to succeed in his claim for copyright infringement.

However, on the part of the defendant, he is availed some statutory and common law defences to claims of infringement of copyright. One of the most potent of these defences is that of "fair usage" or "fair dealing". For example, section 6(2) of the Copyright Act of the U.K 1962 provides thus:

No fair dealing with a literary, dramatic or musical work shall constitute an infringement of copyright in the work, if it is for purposes of criticism or review, whether of that work or another work, and is accompanied by a sufficient acknowledgment

Therefore, as the name suggests, this defence is invoked when the defendant shows that he has not used the work for any improper purposes or he has not exploited same for his pecuniary gains. Although, the literature on what amounts to a "fair usage" remains fluid and somewhat controversial, the bottom line is that the defendant must show that he was acting in good faith at all material times and that the use of the work was solely for altruistic purposes and in the interest of the general public. This is why the use of copyright works for educational purposes, for charitable purposes, fair criticism of the work amongst other such uses are readily accommodated under "fair usage". In *Hubbard v Vosper*²², the Court laid down the parameters for determining when "fair dealing" can be imputed to the conduct of a

²⁰ (1934) 1 Ch. 593

²¹ See *CBS Inc & Ors v Intermagnetic Co Ltd & Anor* (1977-1989) 2 IPLR 351

²² (1972)2 QB 84

defendant in the way and manner he uses the copyright work of another person. It was held that the quality of work lifted is an indicium as to whether the defendant had used the work fairly and altruistically or otherwise. It was further held that ‘fair dealing’ as a defence would fail if both the plaintiff and the defendant were in the same line of profession, business or trade and thus potential competitors. Thus, if third parties would rather patronize or use the work of the defendant to the exclusion of the plaintiff than “fair dealing” as a defence should and ought to fail.²³ In the words of the Court:

It is impossible to define what is “fair dealing”. It must be a question of degree. You must consider first the number and extent of quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair, but, short extracts and long may be fair.....

Clearly, from the aforesaid, it behooves on legal practitioners and third parties to be wary of how they copy, download, reproduce or adapt the works of their colleagues in order to avoid liability for infringement of copyright.

1.5 Infringement of Copyright Works in the Legal Profession

As revealed above, the acts of unauthorized copying, reproduction, adaptation, modification etc of an existing copyright work amounts to an infringement of the protected work.²⁴ Accordingly, the doing of any of these acts to the work of a legal practitioner without his/his consent amounts to an infringement of his copyright in the work. It is therefore proposed in this segment to isolate and comment on the plethora of ways/means that the copyright of legal practitioners can or have been infringed upon by either their professional colleagues and/or third parties

²³ See also *Bentley v Sherman (2009) EWHC 2755 (Ch)*

²⁴ See section 15 of the Copyright Act, Cap C28 LFN 2004

(i) Works Created by Pupil/Junior Lawyers in Chambers

It is customary that as a pupil/junior lawyer in Chambers, a legal practitioner can author or create a work in his name but under the instruction and supervision of a senior colleague or the principal in chambers. In some extreme cases, the pupil/junior lawyer may not even be given the honour of appending his name on the legal process or document he has prepared or authored. In most cases, the name of the principal or another senior in chambers may be appended on the process and the credit of authorship is ascribed to that person. This is irrespective of the fact that it is the junior lawyer that went through the rigours of the research and industry that culminated in the creation of the work. Accordingly, it is common place for a lawyer to settle pleadings from letter A to Z, but the senior or principal in chambers will sign same as his work. Similarly, a lawyer may settle Briefs of Arguments for the appellate courts, but some other person would affix his/her name and sign same as his/her work. This trend is even more pervasive now due to the requirements for the conferment of the prestigious status of Senior Advocates of Nigeria (SAN) on deserving legal practitioners in the Country. Even, in extreme cases, it is the same lawyer that had little or no impute in the “authorship” of the Brief of Argument that would go to the Appellate Court to adopt/argue same. Similarly, in solicitor ship works, it is common place for junior lawyers to draft Deeds, Wills, and other legal/corporate documents, yet they would not be duly recognized and acknowledged as the authors of such works.

Admittedly, it would be convenient for the senior lawyers/principals to contend that the “junior/pupil” lawyers are their employees or in the strict sense, their ‘apprentices’ who are undergoing “pupilage” or “apprenticeship”. However, the crucial question is, are “employees” or “apprentices” precluded from owning the copyright in the works they have created or authored? The answer is a resounding No!!! It is settled law now that unlike the position at common law, presently an employee or apprentice owns the copyright in any work he creates in the course of his employment or apprenticeship. It is immaterial whether such a work was created in the course of his employment or the very work created is as a result of his/her performing his/her assigned duty (scope of duty). Specifically, section 10 (1) & (2) of the Copyright Act underscores this position thus:

Notwithstanding subsection (6) of section 10 of this Act, where a work:

- (a) is commissioned by a person who is not the author's employer under a contract of service or apprenticeship;
or
- (b) not having been so commissioned is made in the course of the author's employment,

The copyright shall belong in the first instance to the author, unless otherwise stipulated in writing under the contract.

Accordingly, by virtue of this specific and express provision of the Act, the copyright in such works as listed above belong to the pupil/junior lawyer. It is immaterial if the legal process or document was created/authored on the instruction or supervision of the senior lawyer. It is equally immaterial that the junior lawyer used the avalanche of law reports, precedent books and or statutes stored in the senior/principal's off line and online libraries. It is also irrelevant that the writing or authorship of these legal processes or documents is part of the job schedule of the junior lawyer in question. What is material is that the resultant work is the product of the intellectual effort and dexterity of the junior lawyer in question. In *Noah v Shuba*²⁵, the plaintiff (Dr. Noah) claimed for copyright infringement against his former employers in respect of a book he had written while working as a consultant epidemiologist with the defendant. The book, entitled "*A Guide to Hygienic Skin Piercing*," became a big success within the medical community. It turned out in evidence that the plaintiff wrote the book in the course of service. In the course of that, he discussed the work with his colleagues and above all, he used his employer's materials in the production of this work. However, it was evident that a substantial part of the work was written by Dr. Noah at his spare time while on holidays. Accordingly, the trial court held that the work was not created in the course of service and that the copyright therein belonged to him and not his employers. Certainly, this decision is in synch with section 10(2) (a) and (b) of the Nigerian Copyright Act under reference. The failure or inability of Dr. Noah's employers to rebut the presumption of first ownership in his favour is the reason for their loss at the trial of the suit.

²⁵ [1991] FSR 14.

However, before this groundbreaking decision, the much earlier English cases of *Byrne v Statist*²⁶ and *Belloff v Pressdram*²⁷ had created some element of confusion on this issue. In *Byrne v Statist*,²⁸ a journalist who undertook a piece of translation and editing of a work into Portuguese language outside his usual scope of work and outside his normal working hours, was held to have the copyright in the translated work. However, in *Belloff v Pressdram*,²⁹ the journalist in question was denied copyright ownership in the internal memorandum he generated and distributed to his colleagues while in the employment of the defendant³⁰.

Therefore, if the senior /principal lawyer takes no step to ensure or convince the pupil/junior lawyer to assign the copyright in the work to him, he cannot use same as if it were his work, if he does that, he may be liable for infringement of the copyright in the work. Specifically, section 11 of the Act gives such a senior/principal the leverage to negotiate and obtain the consent of the junior lawyer to use such works. This section provides as follows:

Sub-section (1)

Subject to the provisions of this section, copyright shall be transmissible by assignments, by testamentary disposition or by operation of law, as a movable property

Sub-section (2)

an assignment or testamentary disposition of copyright may be limited as to apply to only some of acts which the owner of the copyright has exclusive right to control, or to a part only of the period of the copyright, or to a specified country or geographical area

²⁶ [1914] 1 KB 622.

²⁷ [1973] 1 All ER 241.

³⁰ (1914) 1 KB 622.

²⁹ [1973] 1 All ER 241

³⁰ See also *Stevenson Jordan v McDonald* [1952] 68 RPC 10, 22

Sub-section (3)

No assignment of copyright and no exclusive licence to do an act, the doing of which is controlled by copyright shall have effect unless it is in writing

Accordingly, it is expected that such a senior or principal in chambers would have taken steps to extract this clause for the assignment of the ownership in the work or the licence to use same in the employment letter of the pupil/junior lawyer. If the latter accepts the employment on such a term and condition, then he/she is bound and cannot subsequently resile from it. assigned his right in the work to the commissioner unless there is an express assignment in writing. This was precisely what happened in *Ikhouria v Campaign Services Limited and Anor*.³¹ Here, the plaintiff was held to have expressly assigned his copyright in the photograph he took on behalf his employer because there was a clause in his employment letter making provision for such an assignment.

This practice is in synch with the practice in the U.S.A and Canada where the concept of “work for hire” is adopted by employers in similar position with our senior/principal in chambers in our analysis above. In the United States, commissioned works are described as “Work for Hire” often referred to as “WFH”. This is used to describe works created by employees as part of their job or work created on behalf of a client where all the parties agree in writing to a WFH agreement. The WFH agreement is an express exception to the presumption that copyright in works created by employees in the course of their employment belongs to the employees.³² With this arrangement the employer is not only vested with ownership of the copyright so created, he is equally deemed to be the author under what is now termed “corporate authorship.”³³

³¹ (1986) 1 FHCR 308.

³² This represents an ingenious means of clearing the haze surrounding the controversy as to ownership of copyright in works authored in commissioned situations, in the absence of any clear express agreement that delineates ownership rights in such works, between the commissioner and the commissioned party.

³³ See section 17 United States Copyright Act 1976. See also, J.M. Garon, “The Work Made for Hire Doctrine Revisited: Startup and Technology Employees and the Use of Contracts in a Hiring Relationship,” *Minnesota Journal of Law and Science* 12, no. 2 (2011): 489.

Under a WFH agreement, the actual author is precluded from publicly acclaiming his right of authorship. Thus, he is not only denied the legal right of ownership that is anchored on authorship, he is equally divested of the moral right to claim ownership. However, in view of the far reaching effect of this transaction, the courts often give a restrictive interpretation to the enabling provision of the Act, which provides that copyright in a work prepared by an employee within the scope of his or her employment or work specially ordered or commissioned for use as a contribution to a collective work shall belong to the commissioner, if the parties expressly agree in a written instrument signed by both of them that the work shall be considered a work made for hire.³⁴

This statutory provision has been subject to judicial interpretation by the courts in the United States. In *Creative Non-Violence v Reid*,³⁵ the US Supreme Court, in interpreting this provision held that in the first scenario contemplated under the Act, the creator of the work will be regarded as an employee, whereas in the other scenario, he will be treated as an independent contractor. Thus, the court approved of the common law analogy of agency and trusteeship in conferring ownership of copyright in such works on the commissioner and not the commissioned party, even in cases where the commissioned party is an independent contractor. What is, however, consolatory is that this analogy is only applicable to contracts of Work for Hire which is similar to the traditional concept of assignment of copyright work by an employee creator to his employer.³⁶

1.6 Works Directly Infringed upon by Legal Practitioners/Third Parties

Whereas, issues of authorship and ownership of copyright in works produced by employee lawyers vis-à-vis their employers can be rationalized, what is difficult to understand is the clear incidences of intellectual theft in the legal profession and practice. Although, incidences of copyright infringement in the profession is not yet in the public space, it must be noted that with the introduction of the “frontloading” system in our practice, this ugly trend is seriously incubating and may soon explode. No doubt, the usual commraederie that pervades the profession allows for the constant exchange of ideas and

³⁴ See section 17 of the US Copyright Act.

³⁵ 490 US 730 (1989).

³⁶ See section 11 of the UK Copyright, Designs and Patents Act of 1988 as amended in 2005 for similar provisions encapsulating this agency analogy.

“precedents” by colleagues in the profession, it is also true that some legal practitioners and third parties directly “steal” the intellectual works of lawyers.

However, it must be noted that legal works and precedents are copyrightable works which ought to be protected by the Courts. It has been argued that lawyers being the masters and the custodian of the law, they ought to avoid or refrain from any form of intellectual theft in whatever guise. As observed by Birch³⁷, whilst quoting Professor Nimmer:

There appears to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other documents should not be protected under the law. Section 113(b) of the 1976 Act suggests this conclusion by negative implication by limiting the scope of “copyright” to “useful articles” connotes that it is inapplicable to a book containing legal forms such a book does not portray a “useful guide”³⁸

Although, it is firmly settled that no copyright can be extended to compilations of purely law, over the years, some rights have been granted to compilers and commentators of cases and statutes in deserving cases.³⁹

1.7 Specifics Acts/Omissions that Constitute Infringement of Legal Copyright Works

(i) Mis-Use/Abuse of Legal Precedents

No doubt, as practitioners, we are used to precedents, especially legal and judicial precedents. However, the focus here is on legal precedents and this straddles between practice precedents in the realm of litigation and solicitorship. Practice precedents include precedents in civil and criminal practice. In the realm of criminal law practice, the usual precedents will include those of charges, criminal information, written addresses, notices of criminal appeals and briefs of arguments in such appeals amongst others. In the realm of civil practice, it is clear that the usual precedents would include pleadings (Statement of Claim, Statement of Defence etc),

³⁷ Stanley F. Birch, “Copyright Protection for Attorney Work Product: Practical and Ethical Considerations (2003) *J. Intel Property Law*:255

³⁸ See also Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (2002);218

³⁹ See *Mathew Bender & Co v West Publishing Co Ltd* 41 U.S.P.Q 1321, See also: L.R Patterson & Craig Joyce, ‘Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Works’ (1989) 36 *UCLA Law Review*: 719

written statements on oath, interlocutory applications, written addresses, notice of appeal and brief of arguments in civil appeals etc. in the realm of solicitorship, the usual precedents will include Deeds of Assignments/Conveyance in real estate contracts, Wills in probate issues, Standard Form Contracts in specialized sectors/industries like the oil sector, insurance, aviation, maritime sector, corporate agreements in company law and practice, banking, arbitration clauses etc.

Certainly, practice and precedent books form the bedrock of the legal profession. As far back as the law school studies, the student is exposed to and tutored with practice and precedent books⁴⁰. As, practitioners, we have used some of these practice and precedent books successfully and the documents and processes prepared using these precedents are now also precedents for others.

Certainly, the use of precedents with the consent of the original “drafter” of such a precedent does not amount to an infringement of the copyright of the “drafter” or author. Similarly, it is arguable that even an unauthorized usage of a practice precedent, but with a due acknowledgment to the original author is not actionable as an infringement⁴¹. However, it is the brazen reproduction, adaptation and copy of existing precedents without recourse to the rights of the original author that is patently actionable as infringement. It is in this light that it must be asserted that lawyers that visit business centers to “copy” and “paste” precedents drafted by their colleagues and typed at such business centers by colleagues are not only liable for infringement of the copyright of their colleagues that are also liable in complicity with the owners/operators of such business centers. Similarly, colleagues that collude with court registrars, clerks and others to copy and/or reproduce the processes prepared and filed by their colleagues are equally liable. It must be stressed that the fact that the original document/process was not copied totally or that a substantial portion was not copied does not suffice as a valid defence. The principle of ‘substantial

⁴⁰ Practice Books like Kelly’s Draftsman, Odgers on Pleadings, and Mellows on Wills etc were usually recommended for students before ‘local’ variants authored by Nigerian authors flooded the market.

copying” as espoused earlier makes such defences ridiculous.⁴² Whilst, these processes or documents prepared by colleagues may serve as veritable “precedents”, they ought to be used only with the consent of the original authors of such precedents⁴³.

(ii) Online/Internet Infringement of Legal Works

The impact of the internet on the degree of infringement of copyright works is almost now legendary. Available literature suggests that the speed and the seamless nature of the internet have made the volume of infringement so monumental that its positives appear to have been overshadowed⁴⁴. Through, downloading of files, files sharing, streaming amongst other channels for the use of the internet, legal works and precedents authored by legal practitioners may become susceptible to unauthorized usage and ultimately actionable infringement. Furthermore, computer technology makes it easy to share digital files between users. A file is a block of information stored on a magnetic media, such as on a hard disk, a tape, or a flash drive; examples of files are computer programs, documents, music, and movies. The practice of sharing files illegally exploded when a format for audio compression produced a type of file known as an MP3 file. This audio compression was important because it significantly reduced the amount of data that needed to be sent over computer networks, but did not affect the perceived quality of the sound or image being transmitted. For example, the MP3 format can reduce the digital recording of a song by a ratio of up to 12 to 1⁴⁵.

The ease with which copyright works are infringed upon through the internet has brought to the fore the issue of who to hold liable for this infraction on the proprietary rights of the authors. It becomes even more germane when the authors involved are lawyers who ordinarily ought to

⁴² See *CBS Inc & Ors v Intermagnetic Co Ltd & Anor (1977-1989) 2 IPLR 351*

⁴³ See *Mathew Bender & Co v West Publishing Co Ltd (supra)*

⁴⁴ H MacQueen ‘Copyright and the Internet’ in L Edwards and C Waelde *Law and the Internet Regulating Cyberspace* (Hart, Oxford 1997) pg 93. See also, Odion, J.O. & Ijomah Great “The Challenges of the Internet and its Related Materials to the Protection of Copyrights in Nigeria” in Badaiki, A.D (eds) ‘*Sowing Seeds of Justice and Legal Development*’ in Essays in Honour of Hon. Justice Esohe Francis Ikpomwen, Chief-Judge of Edo State (Lagos, University Law Publications, 2019): 322-341

⁴⁵ See Alex Colangelo ‘Copyright Infringement in the Internet Era: The Challenge of MP3 (2002) 39(4) *Alberta Law Review*: 891-913.

protect the rights of liberal authors but should now necessarily start with protecting themselves. Although, available literature indicates that the Internet Service Providers (ISP) or the Online Service Providers (OSP) are the best held accountable for such infringements, it remains to be seen how the existing legal framework has been effective in that regard⁴⁶. However, it must be added that the existing legislation in the United Kingdom and the U.S.A now premised on the ISPs or OSPs being more proactive in taking down infringing materials in the internet as well as protecting the rights of the authors of such works service agreement mechanisms.

1.8 Conclusion and Recommendations

We have in the course of this paper examined the thorny issue of the infringement of copyright works in Nigeria. We revealed that although not much attention was given to the incidence of the infringement of works by authors in the Country, the consciousness and awareness has increased significantly over the years. It was discovered that the extant Copyright Act makes profuse provisions for the rights of authors of copyright works to be protected, provided they satisfy the minimum benchmarks of originality and fixation. We equally interrogated the problem of the dichotomy (if any) between an author of a copyright work and an owner of such a work in the light of the provisions of sections 15 and 16 of the Copyright Act. It was revealed that this problem ruminates through employment copyright works as well as commissioned works. However, in all these analyses the focus was on literary works in contradistinction to the other categories of copyright works.

Having exposed the existing literature of the copyright of literary works, the focus thereafter shifted to the protection of the copyright works of legal practitioners in the Country. It was in this stead, that we revealed that just like other authors of literary works, a lawyer can have copyright in the works he creates in the course of his professional engagements. Accordingly, his pleadings, deeds of agreements etc are covered by copyright, so long as the minimum threshold of originality is satisfied. We thereafter revealed that the infringement of the copyright works of lawyers can come from within the profession itself or from 3rd parties. However, we posited that whichever way

⁴⁶ See Kaman Mittal: 'Online Copyright Infringement: Liability of Internet Service Providers' 4-6 (2004) *Journal of Indian Law Institute*:288-321

it comes, the infringement of the legal works of a professional is serious and should not be readily excused through the defences of fair dealing amongst other defences. The infringement of the copyright works of lawyers by lawyers themselves is patently a gross intellectual theft and it bothers on issue of professional ethics. Therefore, whilst the internal self -regulatory and remedial measures can be undertaken to address this malaise in the profession, especially amongst the young lawyers, the legal route of the enforcement of copyright claims by victims of such infringement remains a veritable option.

Therefore, it is in the light of the above that we recommend that the Legal Practitioners Act and the extant Rules of Professional Conduct for lawyers 2007 be reviewed to make the incidence of copyright/plagiarism of legal works amongst lawyers a serious infraction. Having done that, it becomes imperative that administrative and quasi-legal measures be put in place by the Nigerian Bar Association to protect the works of lawyers from both internal and external acts of infringement. With regards to lawyers, the theft of intellectual works should be viewed seriously and attract the same preventive and penal measures like the theft of legal briefs.

Furthermore, to stem the tide of infringement of legal works by younger lawyers, especially in the usual guise of “precedents”, it is proposed that the regulatory institutions in the profession urgently re-visit the issue of compulsory pupillage by young lawyers before they can veer off into their personalized private practice. This will make them acquire the necessary skills and experience that would make them more competent and been able to originate their legal works with little use of acceptable legal precedents, instead of the current practice of the outright plagiarizing the works of their more senior and experienced colleagues.

Finally, it is proposed that the legal and institutional measures for the protection of copyright works and the enforcement of the rights of authors of copyright works in Nigeria be improved upon, in order to engender a seamless but effective mechanism for redressing the incidences of infringement of copyright works in the Country.