

UNIVERSITY INTELECTUAL PROPERTY RIGHTS: LEGAL CONSIDERATIONS

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ABSTRACT

This contribution examines the level of development of intellectual property in Nigerian Universities and the effect of the concepts of authorship and ownership of intellectual property rights have affected the economic fortunes that ought to be derived by the Universities from these intellectual properties. It is our case that with the prevailing seeming insatiable needs of most Nigerian Universities and the resultant demands for more funding, there is the need to look inwards and the economic fortunes derivable from intellectual property could augment the internally generated funds of the Universities, thus relieving Government as well as private proprietors of the burden of providing more funds for the Universities.

Introduction:

Property rights are an integral aspect of the legal personality of man. Scholars of jurisprudence readily postulate that one of the attributes of legal personality is the right to own property. Thus, the concept of ownership takes a centre stage in the analysis of man. In the same vein, delineating the true nature of ownership rights is largely influenced by the nature of property in question. It is settled that although possession is 99 per cent of ownership it still falls short of ownership. The latter includes the right to possess, alienate and destroy the property owned.

Property can be categorized into three broad categories, real property, personal property (personalty) or chattels and choses-in-action. Real property is the most visible and fixated of these three and investment exp adjudge investment in land and real estate as immensely rewarding. On the flip side, personal properties or

goods are rated high due to their comparative advantage in terms of portability and durability. However, the most under rated of the lot are choses-in-action, which are conservatively rights that could only be enjoyed by a recourse to a legal action. These rights are not physical in nature and therefore cannot be possessed or transferred physically yet they could be considered more economically rewarding if well managed. Intellectual property rights fit into the description of choses-in-action but because of the ephemeral nature of intellectual property it would appear that it is often ignored by individuals and corporate investors.

Universities are corporations aggregate and have the legal status akin to natural persons. Public universities in Nigeria are established by Statutes. As legal creatures they acquire the legal status of corporations with legal personality distinct from their Management, Staff and Students.¹ Consequently, Universities can own property, namely, landed properties and real estate, personalty or chattels or intellectual property. They could invest in these three categories of properties and reap immense economic benefits.

However, experience has shown that Universities, like the ordinary citizens, are wary of investing in choses in action, preferring instead, investment in landed properties and goods. Thus, it is easy to identify the buildings and edifices of some universities, their cars, generators and other personal properties but it is not so easy to identify the quantum of money or the number of share a University has in any thriving company in Nigeria or abroad. In the same vein, it is not common place to pinpoint the investment of Nigerian Universities in intellectual property. How many Nigerian Universities are making money from copyright in

¹ See generally Ehi Oshio, *Modern Company Law in Nigeria*, Lulupath Press, Benin City, Nigeria, 1995, Chapter 4.

works authored by the University? How many have or are making money from patents and designs? Do Nigerian Universities have products in the marketing line with registered trademarks? This is the crux of the matter and it is against the background of the aforesaid that it is imperative for us to have an insight into the legal rights that Universities can exercise over intellectual property and the potential economic benefits derivable therefrom.

The Nature and Scope of Intellectual Property

Basically, intellectual property is divided into two broad categories, namely, copyright and industrial property. The latter consists of Trademarks, Patents and Designs, Trade Secrets amongst others.² Whereas copyright protects purely “intellectual” and “Literary rights” industrial property protects inventions, novelties, ingenuity and business goodwill.³ However, one basic thread running through these property rights is that they are negative rights which are aimed at preventing persons from the exploitation of the works of others. The rationale is that the hard work, labour, dexterity, ingenuity and talent of a person are not unlawfully and illegally exploited by lazy, mischievous and fraudulent persons.

Intellectual property rights have developed over the years and, it has in recent times, extended to computer generated works, internet based works, on-line materials amongst others. The level of protection of intellectual property is largely influenced by the level of awareness of these rights, the level of

² See generally F.Y Shyllon, *Studies in Copyright, Trademarks and Allied Rights* (London, Sweet and Maxwell,2007); Nwokocha, U, Nigerian Intellectual Property: Overview of Development and Practice, NIALS Journal of Intellectual Property (NJIP) 2012, 101; Ogunkeye O. Contribution of Intellectual Property to Nigerian Economy – Policies for Future Growth, 2013, Paper presented at the Intellectual Property Law Committee session of the 7th Business Law Conference of the Nigerian Bar Association, Section on Business Law on 18th June 2013; <http://www.wipo.int/about-ip/en/> accessed 19/10/14.

³ Shyllon ibid 26

investment by persons in acquiring these rights and the mechanism for the enforcement of the rights.

Copyright as an Intellectual Property

Copyright as a specie of intellectual property is the exclusive right of the author of an original work to control or enable the doing of certain specifically stated acts in respect of the whole or a substantial part of the work, either in its original form or in any other form recognizably derived from the original form but subject to certain statutory exceptions.⁴

The basis for the protection of copyright in Nigeria is that for a person to qualify as an author of copyright, it must be shown that he or she has expended effort in the making of the work to give it an original character. Furthermore, there should be evidence that the work is in a fixed or tangible form from which it can be perceived, reproduced or otherwise communicated to third parties with or without the aid of a mechanical device.⁵

Thus, originality in the context of copyright need not be a novelty or an out of the blues discovery or inventions. What is necessary is that the work in whatever shape or kind should be capable of educating, entertaining and informing the public. The literary nature of copyright works was aptly circumscribed by the

⁴ See generally Odion and Ogba , *Essays on Intellectual Property Law*, Ambik Press, Benin City, 2010 Chapter 1; W. Cornish and D. Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*(London, Sweet and Maxwell,2007) 842-869. See also F. Shyllon, *Studies in Industrial and Copyright Law: Intellectual Property Law In Nigeria*, Lagos, Verlag Publisher, 2003, 31

⁵ Section 1(2) (a)-(b) of Copyright Act , Cap C28 Laws of the Federation of Nigeria,2004.

House of Lords in the leading English case of ***University of London Press Ltd v. University Tutorials Press Ltd***.⁶ as follows:

*“In my view, the words “literary work” cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word “literary” seems to be used in the sense what similar to the use of the word “literature” in political or electioneering literature and refers written or printed matter.”*⁷

Clearly therefore, it is important that any person laying claim to authorship of copyright in any work must show that he or she had expended labour, time and energy in creating the work.⁸

Incidental to the issue of authorship and ownership of copyright is the ancillary issue of the rights of authors of commissioned works vis-à-vis the rights of the persons or institutions who commissioned the work. It is possible that an author could be commissioned to produce a literary work and the issue of who is the actual owner of copyright in the work will arise.

Under our law, section 10 of the Copyright Act makes a distinction between works created by a person commissioned by another person who is not his employer under a contract of service or apprenticeship and works created by persons who are not so commissioned but are made in the course of the author’s employment. By the tenor of this provision, irrespective of the circumstances the work is created, there is a presumption that the author is the owner of copyright in the

⁶ (1916) 2Ch.601

⁷ Ibid at page 608

⁸ See *Macmillan v Cooper* (1923) 40 TCR 176, *Adenuga v Ilesanmi Press and Sons Ltd* (1999) 5 NWLR (PT.189) 82

work and is therefore entitled to protection under the Act.⁹ This presumption is palpably aimed at ensuring that the author who invested his time, talent and energy in the creation of the work actually takes the benefit of copyright in the work. However, the presumption is rebuttable in cases of express assignment of copyright in the work by the employee to his employer.¹⁰

As will soon be demonstrated, this concept of authorship and ownership of works created by employees under employment as well as that created by independent contractors are relevant in determining the rights of the University over copyrights created by its employees and/or independent contractors.

Patents and Designs

The legal regime for patents and designs in Nigeria is the Patents and Designs Act.¹¹ By virtue of section 1(1) of the Act an invention is patentable:

- (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.

It is with respect to patents that novelty and ingenuity is paramount. Therefore, researchers, scientist and industrialist who expend time and energy in creating inventive works are protected if they register the works as patent. Thus,

⁹ See *Stevenson Jordan & Harrison v Mcdonell & Evans*. (1952) 69 RPC 10, See also *Gentil v Tabansi Agencies Limited* (1977) 1 ALR.Comm 344. *Noah v Shuba* (1991) FSR 622, *Beloff v Pressdram* (1973) 1 All.er 241

¹⁰ This is patently the position in respect of independent contractors who are commissioned to create works on behalf of their employer. See section 11(1)-(5) of the Copyright Act. See also *Ikhuoria v Campaign Services Limited* (1986)1 FHCLR 308, *Adenuga v Ilesanmi Press and Sons Ltd* (supra).

¹¹ Patents and Designs Act, Cap.P2 Laws of the Federation of Nigeria 2004

registration is the pre-condition for the recognition and protection of patent.¹² Registration of an invention as a patent is not automatic, the patentee or applicant must first of all establish a right to be so registered and thereafter comply with the procedure for the registration of the patent as laid down under the Act.¹³

A patentee of an invention acquires some measure of monopoly in the manufacture, production, sale and marketing of products that result from such an invention.¹⁴ The rights conferred on a patentee are circumscribed under the Act.¹⁵ These rights were further emphasized in *P.E Ventures (Nigeria) Ltd v Gazassoner Industries Limited*¹⁶. In this case, the appellant was given the franchise by a firm in Hong-Kong to manufacture and sell a brand of hurricane lamps "275". After several years of successful test run of the product, the company took steps to protect its industrial property in the product. It registered the trade mark and design and thereafter sought to register the patent. Having discovered that the respondent were infringing on these rights, it commenced this action. However, the action in respect of the patent failed on the grounds that product which was the subject matter of the application for patent was already in the market and easily available to the public for purchase long before the said application for patent.

¹² See sections 2,3 and 4 of the Patent Act

¹³ See section 2(1)-(4) of the Act

¹⁴ See section 3 (1) (b) of the Act

¹⁵ See section 6 (1) (a) and (b) of the Act

¹⁶ (1998) 6 NWLR (Pt.865) 619

As it is with copyright, infringement of patent is actionable and it is the person vested with the right to patent that has the right to sue to enforce it.¹⁷ In ***Arewa Textiles Plc. V Finetex Ltd***¹⁸, the respondent successfully maintained an action for damages arising from the respondent's infringement of its registered patent and design in respect of a design process for a special brand of textile fabric.

Designs are registrable intellectual property in respect of the shape, design, colours, and any other insignia associated with a product in the marketing line. An industrial design must be original and related to a product before it is registrable and protected.¹⁹

A registered user of a design has the right to enforce his right to the design by an action to restrain the alleged infringer as well as getting necessary compensatory damages.²⁰

University Intellectual Property Rights: The Crux of the Matter

As observed earlier, the University as a corporate entity and an artificial person has the right to intellectual property. It also has the right to ensure that its property rights in copyrights, patents, trademarks and designs are not infringed upon by unauthorized persons. However, it is how the University acquires ownership rights over intellectual property that is crucial to this issue.

¹⁷ See section 6(1) of the Act. See also *Agbonrofo v Grain Haulage and Transport Ltd* (1998) 1 FHCLR 236

¹⁸ (2003)7 NWLR (PT.819) 322

¹⁹ See section 13 (1)-(5) of the Patents and Designs Act

²⁰ See section 19 (1)-(3) of the Act

The University and Employees

The University is an employer of labour. Its employees are engaged in a contract of service that is documented and embodied in the letter of employment. There are two distinct categories of employees in the University, the Academic staff and the Non-Academic Staff. In the same vein, the class of employees is further subdivided into Senior Staff and Junior Staff. However, irrespective of the status of the University employee it is expected that questions of ownership rights over intellectual property created by employees of the University can be resolved within the framework of the law on intellectual property.

An employee of the University, subject to the regulations guiding his employment, is expected to devote his time and energy to the discharge of his duty. He has job schedules which define and circumscribe his scope of authority. It is therefore expected that such an employee will not have time for private practice or business to the detriment of his job. In fact, it is wrong for a public officer like a University employee to be engaged in the running and management of a private business.²¹ What then happens if an employee of the University creates a work subject to intellectual property in the course of his employment? Can the University be subrogated to the right of the employee since the employer has employed him to work within a time frame and a job schedule?

In answering these questions, it is important to reflect on the position at common law before the legislative intervention by the relevant laws in Nigeria. The relationship between an employer and the employee in respect of copyright in

²¹ See Paragraph 2(b) of the 5th Schedule of the Constitution of the Federal Republic of Nigeria 1999(as amended) dealing with the Code of Conduct for Public Officers.

works created by the employee was a moot point. Some were of the view that the employee being the author of the work should have the first ownership of copyright in the work. However, others held the contrary opinion in favour of the employer that having paid for the skill, experience, time and energy of the employee, whatever work was created by the employee in the course of his employment and within the scope of his duty belonged to the employer. This was the argument canvassed by the employers in **Noah v Shuba** (supra) and **Byrne v. Statist**²². Although, this argument failed in these cases and the employees were adjudged the first owners of the copyright in the work so created, this was not the case in **Missing Link Software v Magee**²³ where it was held that the employee- a software engineer who designed and developed a software in the course of his employment could not lay claim to copyright in the work because he was trained and employed to create the software in the first place. This case epitomizes the policy of compensating an employer who employs a worker, invest its money in the training of the employer and the employees uses its time and materials to create the work.²⁴

Incidentally, in the celebrated case of **University of London Press v University Tutorial Press** (supra), where the Appellants who were University professors compiled and published into a book past university examination questions and the sample answers proffered . The University press published these questions into a book and the professors sued for infringement of their copyright in the questions and answers. Whereas, the crucial issue in the case was the originality

²² (1914) 1 KB 622

²³ (1989) FSR 361

²⁴ See also *Cala Homes(South) v Alfred Mcquine Homes East* (1995) FRS 818, where the employer was held to be a joint author in the work created by the employee.

and the literary content of the book containing the questions and answers, the ancillary issue was whether the University Professors as employees of the University could lay claim to the copyright in the said questions and answers against their employer, the University. The English House of Lords resolved that the copyright belonged to the Professors.

This position of ascribing the first copyright to the authors and in the case of employees of the University who create intellectual works finds statutory support in the Copyright Act. By virtue of section 10(1) and (2) examined earlier, the first ownership in any literary or intellectual property created by a university employee belongs to him in the absence of any express assignment of the right by the employee to the University. Therefore, it is arguable that a Professor of Biochemistry who in the course of his clinical research discovers the cure for HIV Aids can have copyright in the drug to the exclusion of the University. In the same vein, a University lecturer can claim copyright in his lecture notes and /or books written in furtherance of his research and teaching in the University. It is equally arguable that works created by students in the course of their studies will belong to them and not the University.

In the face of all these, how can the University acquire copyright or intellectual property in works created by its employees and students? It is submitted that the way out of this hurdle is to devise a means of making such employees or students to expressly assign copyright or the intellectual property rights in the works to the University. Through this scheme, the University can rebut the presumption of

author-owner as envisaged under the Act.²⁵ Interestingly, many standard form employment contracts in the University and, indeed, other employers, contain express provisions “*compelling*” employees to assign the intellectual property in works created by them to the University. Whilst, some may tag this as modern slavery or contracts in restraint of trade, it nevertheless satisfies the requirement of the University to tap into the intellectual prowess of its students and employers.

However, what is important is that the University should ensure that it supports its employees with the resources: economic, material and infrastructural to create the works in question. Where the research is in the field of science, it is expected that the University should endeavor to provide the research facilities like laboratory, chemicals, reagents and other materials to carry out the research successfully. It is only when the University has done this that it can morally and legally lay claim to ownership or co-ownership of the intellectual property in the resultant invention. Thus, it is advisable for the University to invest in research, training and sponsorship of its staff to create works on intellectual property. In this way it can reap the immense economic benefits derivable from the property.

The University and Commissioned Works

The University as a citadel of learning and research may, in appropriate circumstance, employ the services of persons and/or institutions to create works for it. These persons so commissioned may or may not be employees of the University. The University may commission a contractor to design and build its

²⁵ See section 11 (1)-(5) of the Act See also *Ikhuoria v Campaign Services Ltd(supra)*, where this express assignment was embedded in the contract of employment.

Central Administrative Building. It may commission its lecturers in the Departments of Biochemistry and Pharmacy to carry out research for the discovery of important drugs for the Health sector. It may commission lecturers in the Department of Theatre Arts to write and stage convocation drama. The list is seemingly endless.

Crucial questions may arise as to the ownership of intellectual property in the works created by these persons commissioned by the University. There may be issues between the University and the Contractor as to the ownership of copyright in the Architectural drawings of the Building. There may be issues as to who can claim the right to the patent in the drug if eventually discovered. Similarly, there may also be issues of copyright in the play after its performance at the convocation.

Unless the University is able to harness the intellectual property in the works listed above as well as so many other works created at its instance, it will not be able to tap into the immense economic benefits of intellectual property. If the employees or commissionees are allowed to assert ownership rights over these works, the University will turn out as the loser since most of these works may be created by these employees whilst using the time, money and resources of the University.

If the University were to rely on the legal regime under the extant intellectual property laws, it cannot successfully lay claim to the ownership. This is because as noted earlier, under these laws the first ownership of these works are ascribed to

the authors, inventors or creators.²⁶ If this legal position were to be applied strictly, it will act as a disincentive to the University to encourage its employees to engage in research and create works. It may also discourage it from investing human capacity, money and materials on the creation and invention of works. Accordingly, a practical approach that allows the University to benefit from the express assignment of intellectual property rights in these works is preferable. Thus, it is possible that the University can negotiate with these persons so commissioned to willingly and expressly assign their intellectual property in the works to it.²⁷

However, the position of the University in respect of creations or inventions by its employees is much more straightforward as the Act recognizes the ownership rights of the University as an employer. Section 2(4) (a) (i)- (ii) and (b) of the Patents and Designs Act provides as follows:

“Where an invention is made in the course of employment or in the execution of a contract for the performance of specified work, the right to patent in the invention is vested in the employer or as the case may be, the person who commissioned the work:

Provided that where an inventor is an employee then:

- (a) If*
 - (i) his contract of employment does not require him to exercise any inventive activity but has in making the invention used data or means that the employment has put at his disposal or*
 - (ii) the invention is of exceptional importance , he is entitled to a fair remuneration taking into account his salary and the importance of the invention and*

²⁶ See section 10 (1) and 2 (a) and (b) of the Copyright Act. See also section 2(1)-(5) of the Patent and Designs Act.

²⁷ See section 11 (1)-(3) of the Copyright Act and section 2(4) of the Patents and Designs Act.

(b) the entitlement in question is not modifiable by contract and may be enforced by civil proceedings

Clearly, it appears that because of the importance attached to inventive works and discovery and coupled with the huge economic cost of sponsoring inventions, the employer, unlike the case with copyright, is given the right of first ownership of inventive works created by his employees or independent contractors.

The National Office of Technology Acquisition and Promotion (NOTAP) and Intellectual Property in Universities

This agency was established and entrusted with the responsibility of registering and regulating agreements in respect of all categories of intellectual property.²⁸

According to information available at the official website of this organization, it is revealed that it has so far established branches in fifteen Universities in the Country²⁹ These branches are called Intellectual Property Technology Transfer Offices (IPTTOS) and they are established with the specific mandate of promoting and strengthening the relationship between the organization and the University/Research Institutions and industries. As part of the blue print for effectiveness, the Universities were mandated to appoint from amongst its staff a head of the IPTTO office, who should be a person of acclaimed research impute and inventive skills. Some Universities have adhered to this requirement and have

²⁸ See generally, the National Office of Technology Acquisition and Promottion Establishment Act Cap N62, Laws of the Federation of Nigeria 2004.

²⁹ See generally <http://www.notap.gov.ng> accessed on 17/10/2014

appointed competent coordinators to head these offices and effectively liaise with the central office of NOTAP³⁰

In view of the utilitarian values of this agency, it has branches in most of the campuses of the federal universities in the country. It has an office at the University of Benin. Its presence in these campuses, it is expected will encourage University Administrators to encourage researchers and inventors to create and invent more work. This will encourage the Universities to invest their time, money and resources in the creation of these inventions knowing fully well that with the presence and the regulatory role of NOTAP, favorable bargains can be struck and properly documented.

Plagiarism in the University and Intellectual Property

One other area in which the relevance of intellectual property rights can best be appreciated in the Universities is with respect to plagiarism. Plagiarism is an act of infringement of copyright. It is defined by the Blacklaw's Dictionary as "the deliberate and knowing presentation of another person's original ideas or creative expression as one's own"³¹ Clearly, the very fact that the copying or reproduction of the work is done without the author's authority or consent makes plagiarism a serious intellectual theft.

The Universities are citadels of learning and research and degrees and certificates are earned as a result of learning and research. Students are expected to observe the rules and regulations of the University prohibiting copying and other vestiges

³⁰ This was done in the University of Benin where a Professor of Engineering is the Head of the IPTTO.

³¹, Blacklaw Dictionary,(ed.) Bryan. A. Garner, 9th edition,2004

of examination malpractices. Staff, especially Academic staff, who are promoted on the basis of academic degrees earned and the volume of research undertaken are equally expected to adhere to the rules prohibiting plagiarism and other academic fraud. In the University of Benin, the existing Senior Staff Regulations make specific provision on plagiarism and the penalty for this vice.³² Whereas, the unauthorized copying and or reproduction of works of academic staff of the university by his/her colleagues is a basis for a civil claim for infringement of copyright, it is first and foremost a misconduct which the university must deal with. The civil right of the aggrieved party is most often relegated to the background and the university authorities, just like the State in respect of criminal wrongs become the chief complainant. Some academic staff have lost their jobs because of their involvement in acts of plagiarism.

The University of Ibadan, in recognition of the negative backlash that might result from internal wrangling amongst its staff over authorship and ownership of intellectual property, evolved a Comprehensive policy guidelines on the authorship and ownership of intellectual property. The Guidelines which were adopted in 2009 focus on the benchmarks for determining authorship, co-authorship and other incidents of authorship and ownership of copyright. Article 5.1 of the Guidelines defines authorship in respect of academic works produced in the University. It provides that to qualify as an author, the person must show evidence of scholarship, namely, contribute significantly to the conception, design, execution and/or analysis and interpretation of data. The person must

³² See Chapter XII of the Regulations which encapsulate the classes of misconduct and gross misconduct by senior staff of the university; see also generally, Omotayo A. Intellectual Property Rights Protection and the Challenge of avoiding the Trap of Plagiarism, 2014, Third

also participate in the drafting, reviewing and/or revising the manuscript of the work.³³ In addition, the Guidelines circumscribed the status of persons who contributed to the creation of intellectual works especially literary works. These persons include lead authors, supervisors amongst others. Whilst some may enjoy the status of authors and owners of the intellectual property others may only be acknowledged as contributors to the success of the work.

In all, these Guidelines clearly articulate the delicate issues that could lead to internal wrangling amongst staff of the university over ownership of intellectual property. This is commendable as an internal dispute resolution mechanism built into the Guidelines will ensure that employees of the University do not end up washing their “dirty linens” in public. To underscore the readiness of the university to deal with incidences of plagiarism and other infringement of intellectual property, Article 14 thereof define these acts as serious research misconduct.

This commendable template ought to be emulated by other universities and other academic and research institutions in the country.

Conclusion

No doubt intellectual property and the protection of the rights of owners of the variant forms of intellectual property have taken a center stage in recent times. Nigerian Universities as the citadel of learning and research are ably positioned to take benefit of the immense potentials inherent in intellectual property.

³³ See University of Ibadan Policy on Authorship and Scholarly Publications available at <http://www.ui.edu.ng/content> accessed on 17/10/14.

It is our view that Nigerian universities must evolve internal control and regulatory mechanism for the protection of intellectual property within and outside the frontiers of the university. This we believe the Universities can take the benefit of the growing market for intellectual property in the country.