

UNDERSTANDING THE LEGAL FRAMEWORK FOR COMBATING PIRACY AND COUNTERFEIT PRODUCTS IN NIGERIA.

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ABSTRACT

This paper X-ray the legal framework for combating piracy and counterfeit products in Nigeria. Our critical analysis review among other things that, counterfeit and piracy are evil which threaten the health of the consumer and undermines the industries. In the course of this work, we adopt the doctrinal legal research methodology. The work observed that from the Nigerian perspective, there is a limit to which legal and enforcement/regulatory mechanisms can go in protecting the ultimate consumer against counterfeit and pirated goods. Furthermore, the paper recommends that The efforts of enforcement/regulatory mechanisms needs to be strengthened technically, materially to live up to expectations for the health, safety and security of consumers and for sustainable development in our societies.

KEYWORDS: piracy, counterfeit, copyright, crime

INTRODUCTION

It is truism that, the fight against counterfeiting and piracy is a battle which requires a coordinated approach on many levels. We all have an active role to play from the consumer who consciously buys fake product the brand owner who doesn't sufficiently cooperate with the authority. There is no time for compliancy, counterfeit and piracy are evil which threaten the health of the consumer and undermines our industries. Therefore, it has become imperative for a legal framework to be guided in Nigeria on Piracy and counterfeit.

Against this backdrop, this paper is set to unravel the existing legislations in Nigeria with a view to see whether the laws have served as an effective mechanism in combating the menace of piracy and counterfeiting in the country.

CONCEPTUAL ELUCIDATION

What is Counterfeit

The word counterfeit refers to a fraudulent imitation of products with the intention to deceived and mislead the ultimate consumer Babafemi, (2007). The World Health Organization (WHO) defined a counterfeit drug as "medicine or medicinal product which is deliberately and fraudulently, mislabeled with respect to identity and/or source. According to WHO, counterfeit can apply to both branded and generic products. Counterfeit products may include products with the correct or wrong ingredients, without active or insufficient active ingredients or with fake packaging. Under section

12 of the Nigerian Counterfeit and Fake Drugs Act Cap. C.34 Laws of the Federation of Nigeria (LFN) 2004, Counterfeit include;

- (a) any drug or drug product which is so colored, coated powdered or polished that the damage is concealed or which is made to proscribed manner or which label or container or anything accompanying the drug bears any misleading; or (b) any drug or drug product the container of which is so made, formed or adequate directions for use and such adequate warning against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods or duration of use; or (c) any drug or drug product which is not registered by the National Agency for Food and Drug Administration and Control (NAFDAC) in accordance with the provisions of the Food, Drugs and Related Products (Registration etc.) Act.

WHAT IS PIRACY

The term piracy refers to the unauthorized and illegal reproduction or distribution of materials protected under intellectual property law, Babafemi, (2007). In legal literature, however, 'piracy' appears to be more often associated with copyright than other rights. The term 'copyright' generally refers to the exclusive right held by the author or developer of an original work of authorship to make copies of such work and utilize them for commercial purposes.

Under sector 1-6 of the Nigerian Copyright Act, copyright means the exclusive right given to the original author or producer of an original literary, dramatic musical work to do or allow others to do or prevent others from doing certain acts in respect of such work (principally the right of broadcasting or communicating to the public or the right of reproduction from the original e.g. printing, publishing, etc). Copyright covers original artistic, literary, dramatic and musical works and recordings, film broadcast, folklore, performer's and author's right called neighboring rights. Copyright generally lasts during the lifetime of the author and for 70 years after his death. Copyright can be assigned in writing, such assignment to be properly signed by the assignor or his agent. Licenses to other persons to exercise the copyright may be granted by the copyright owner or compulsory licenses can be issued by the government where it is deemed beneficial to the society at large.

CONTRACT LAW BASED PROTECTION

Whenever a person enters into a consumer transaction. whether it is with the original manufacturer, producer or supplier or by an intermediary, such as a retailer, distributor, middleman or a tout, and the relevant goods or services, in own way or another fail to answer their purported description, or are defective in quality or unsuitable for the purpose intended by the consumer, the question inevitably arises to whether that consumer can recover his money in whole or in part or is entitled to some other remedies such as damages, Babafemi, (2007). This is basically what based consumer protection tries to address. Under the common law, three principal concepts militate against contract

based consumer protection, namely, the doctrine of privity of contract, caveat emptor, and freedom of contract. These represent the unsavory aspects of the 19th century laissez-faire doctrine which persist to this day. We may examine these further to ascertain their import on consumer protection.

PRIVITY OF CONTRACT CONSUMER PROTECTION

The doctrine of privity of contract asserts that only a party to a contract can take a right or assume an obligation under it and therefore, can sue and be sued on it. Consequently, if the consumer who suffered loss, injury or damage was not a party to the original contract for the supply of the goods and services in respect of which the loss, injury damage was sustained, he would not have contractual claim against the original supplier.

The doctrine of privity of contract therefore, is a severe limitation on the efficacy of consumer rights. Surely, a system that maintains that only a consumer who obtains goods or services direct from the supplier has a rights of action against the supplier in the event of such goods or services becoming a source of loss, injury or damage, most unsatisfactory.

The enforceability of a manufacturer's guarantee or warranty has long been recognized by the common law in the celebrated case of *Carlill v. Carbolic Smoke Ball Co.* The remarkable feature of the law in this respect is its ability to grant to the plaintiff consumer a right of recovery in an action for breach when there was no privity or contract between him and the defendant manufacture Babafemi,(2007),. The law has been able to achieve this by constructing a collateral contract to the original contract of sale, between the consumer and the manufacturer.

Doctrine of caveat emptor

This is an old common law maxim which, in short, exhorts the purchaser of good to beware or be on guard about what he is purchasing, requires that they should examine, test, measure, or weight the goods or do other similar acts by or for himself before purchasing. I he fails to do so, and the goods and found to be defective, he cannot complain. In its strict sense, it means that in the absence of fraud, mistake and express guarantee or warranty, the purchaser assumes the risk of any defect in the purchase. It is said that the seller or supplier is under no obligation to disclose to the purchaser any defect there may be on the goods and that no warranties would be implied as an incident of such contract.

The Doctrine held sway for centuries and no major inroad was made into it in favour of the consumer until the beginning of the nineteenth century. *Jones v. Bright*, Sir Williams Best had this to says.

it is the duty of court in administering the laws to lay down rules calculated to prevent fraud to protect persons who are necessarily ignorant of the qualities of a commodity they purchase and to make it

the interest of manufacturers and those who sell to furnish the best articles that can be supplied ... If a man sells an article, he thereby warrants that it is merchantable that is, fit for some purpose.

This decision gave birth to the doctrine of implied terms which subsequently found expression in the Sales of Goods and the Hire-Purchase Acts. As unfair practices are widespread in consumer transaction, the law founded on the doctrine of caveat emptor appears unconscionable. This is more so when marketing of goods and services is conducted on an organized basis and by trained and experienced personnel. The untrained and uninformed Nigerian consumer is no match for those whose duty it is to try and persuade the consumer to take goods or services on terms and conditions that are more favourable to their employer, the seller or supplier. The doctrine of implied terms is, therefore, a welcome development in favour of the consumer.

TORT LAW BASED PROTECTION.

In the case where the consumer has suffered injury to his person or property, he has a choice of suing either in contract or tort. More often than not, he would choose to sue in contract basically because of the absence of the need to prove fault or negligence on the part of the seller or supplier.

However, the decision of the English of Lords in *Donoghue v. Stevenson* has subsequently become the watershed of the law of tort as it has encouraged vigorous development and the use of the protection actions. The case was a climax of cases establishing that under certain circumstances, a person may owe a duty of care to another even though there is no privity of contract between them. The House of Lords, in that case, held that the manufacturer or producer of an article or food, medicine or the like, sold by him to a ultimate purchaser or consumer from discovering, by ordinary inspection, any defect there may be, is under a legal duty to the ultimate purchaser or consumer, to take reasonable care that the article is free from defects likely to cause injury to health. This principle has been adopted and applied in a number of Nigerian cases, one of which is *Osembor v, Niger Biscuit Co. Ltd*, which has facts similar to those in *Donoghue's* case.

An advantage of this procedure is that it provides compensation for injury, loss or damage for a consumer who has no contractual relationship with the manufacture or producer. Thus it has possible to widen the category of permissible plaintiff to include not only the actual purchaser, but also a sub-purchaser, gratuitous donee, borrower and casual user. Secondary, the permissible defendants have also been widened to include not only the actual manufactures or producers but also assemblers, repairs, supplier of drinking water, builders, erectors, and installers. The meaning of "product" has also been widened to include food and drink, underwear, hair dye wills, kiosks, lift, motor cars, and tombstone. On the other hand, the doctrine has not so far been extended to cover producers and consumers of services. Besides, in more recent times, these advantages have been curtailed by attempts to incorporate into its operational limits, unnecessary substantive, procedural, and evidential obstacles.

CRIMINAL LAW BASED PROTECTION

Hitherto, we have been considering the liabilities of manufacturers of producers and seller or supplier of goods and services to the consumer founded in civil law. The consumer's civil law remedies can often be illusory for the may be ignorant of his legal rights or may lack the initiative or confidence to seek out and obtain his proper remedies. Even when he is aware of them, he may lack the time or money to seek and obtain proper legal advice and institute legal proceedings with all the attendant delays and risks. In some circumstances therefore, the government and other public authorities have offered better prospects for the protection of the consumer in general. This has been achieved significantly through the instrumentality of the penal or criminal law and process.

In the contract law based protection, the emphasis is essential on the quality and status of the goods and services sold or supplied to the consumer. In the criminal law based protection, this is more clearly on the safety and health of the consumer. The law has significantly achieved this by dealing with the safety and health of the consumer in relation to particular goods or services in relation to the manufacture, possession and distribution of certain defined articles or commodities. In doing so, it has laid down safety standards and procedures and provided punishment for infringement of these. We may now examine some of the provisions of these statutes.

FOOD AND DRUGS ACT 1974 (NOW CAP F32 LFN 2004)

This Federal statute makes provision for the regulation of the manufacture, sale and advertisement of food, drugs, cosmetic and medical devices, and repeals existing state laws on those matters. It creates five main classes of offences relating to the manufacture, labeling, advertisement, importation, storage and distribution of those articles. It empowers the Minister of Health, Inter alia, on the recommendation of the Food and Drugs Council set up under the Act to designate person as inspecting officers or analysis. An inspecting officer or analyst so designated has wide powers of entry, examination and seizure of suspected or offending articles in any person's possession for the purpose of or preparation for sale.

WEIGHT AND MEASURES ACT 1974 (NOW CAP W3 LFN 2004)

The Act repealed and re-enacted the 1962 Act which itself repealed and re-enacted that of 1917. The underlying policy of the Act is to maintain a Nigerian primary, secondary and tertiary unit standards of length, areas, capacity, volume, and mass or weight. The penal injections enacted under the act are premised on the reasoning that huge complex technology usually went into the testing of these standards and units. But, since the Nigerian consumer would not have the capacity to test them, he is entitled to assume that any weight or measure ascribed to them is reasonable and accurate. Thus, for example, he would be able to test the petrol pump with which he fills the fuel tank of his car, the content of the bottle of beer or soft drink or tin of milk or baby feed sold to him, the weighting machine with machine which measure the quantity of pre-packed articles sold to him.

In these circumstances, the government, through the Act established the primary, secondary and tertiary Nigerian standards and tested and approved the equipment to be used in trade or business for weighting and measuring articles and commodities sold or supplied to consumers. Section 8 of the Act provides for units of weight and measurement lawful for use for trade and business, while section 32 states that any sales by weight of measurement prohibited by the Act is void. It proceeds to create various offences including illegal repair and adjustment of marks; sale of weight with forged stamp; illegal repair and adjustment and measurements; forgery or counterfeiting of stamp and marks; sale of weight with forged stamp; misrepresentation; sales of bread, meat or fish not by net weight; use false or unjust weight or measure or measuring instrument not stamped or marked; importation of unjust weight or measure; and refusal to weight or measure goods delivered to customers.

Although lofty and far reaching, the provisions of this Act are simply not being enforced by the authorities. This is due mainly to widespread illiteracy and ignorance about their use among the populace and the non-availability of the relevant materials. Even where they are available, their cost is so prohibitive and out of the reach of the ordinary or common trader or businessman. As a result, the scale of measure in Nigerian local markets and other such places remain strictly by cups, pans, tins, bushels and bottles of varying sizes and volumes; loaves of bread, cakes, and similar regard to uniformity; many manufactured goods still fail to bear their minimum weight, the constituent elements of the compound, conditions of use, storage and on some cases, expiry dates; and without reference to their weight. These and their non-enforcement renders these well-meaning provisions nugatory and of little importance as a tool of the protection of consumer interest.

COUNTERFEIT FAKE DRUGS AND UNWHOLESOME PROCESSED FOOD (MISCELLANEOUS PROVISIONS ACT (CAP C3 LFN 2004))

The Government of Nigeria by this Act stepped up the crusade against the sale and distribution of counterfeit, adulterated banned and fake drugs and poisons without license or registration. It also makes provisions for the establishment of federal and state task forces charged with the responsibility for the seizure of any drug or poison illegally displayed for sale in any unlicensed or unregistered premises. Mohammed T. L.(2008), To strengthen its efficacy, the Act grants to the Federal and state task forces in section 6 and 8, power of entry, at any time, to premises suspected by them to be used in contravening the records found in such premises, and of seizure of any drug or poison which is prohibited under the Act. Any drug or poisons so seized is forfeited to the federal government.

TRADE PRACTICES (MISCELLANEOUS OFFENCES) ACT NO. 67.1992 (NOW CAP T12 LFN 2004)

This Decree was promulgated to create certain offences in relation to widespread trade malpractices, even in the face of the weight and measures Act 1974. Section 1 of the Decree provides that any person who commits an offence under it is liable on conviction to a fine of fifty thousand naira

(N50,000.00). It proceeds to set up Special Trade Malpractice Investigation Panels to investigate such offences. Section 2 provides that any person who performs any of the eight listed acts contravene the Decree. Phillips, & Firth, (1990), The listed acts comprise: (a) false and misleading labels, packages or advertisement in respect of any product offered for sale; (b) false and unjust use of possession for use in relation to any sale or other dealings; (c) use or having possession for use any unmarked or unstamped weight, measure or weighting or measuring instrument in connection with any sale or dealing; (d) refusal to weight or measure any product delivered to the purchaser pursuant to an sale of offer sale; (e) alteration of any weight, measure or under than sold under a contract; (g) any misrepresentation of anything for sale calculated to mislead; and (h)_ advertising or offering for sale non-existent product or project.

Any customer affected by any of the listen acts may lay a complaint to one of the investigation panels set up under the Decree. The Panel, after its investigation, is required to make a report to the Federal Attorney-General who, after considering the report may institute proceedings against the accused person or the corporate body or anybody corporate itself is liable for the offence. Although the provisions of this Decree are well thought out, they remain ineffective and inefficient in protecting the interest of the consumer. There is, for example, wide spread abuse in the adjustment of petrol pumps or weights or scales, or in the use of containers, such as, 'olodos', pan, tins, and 'mudus'. Or crops used in most Nigerian markets for measuring cereals.

CRIMINAL AND PENAL CODE PROVISIONS

In addition to the above mentioned statutory provisions, the criminal Code, Cap. C38 and the penal Code Cap. P.3 respectively of the Laws of the Federation of Nigeria (LFN) 1990, also contain enabling provisions which in their application tend to enhance consumer protection. In the criminal code, section 243 (1) and (2) respectively punish a supplier who exposes for sale, things unfit for food or drink or adulterates food or drink intended for sale. Section 244 punishes a person who knowingly slaughter or sells any animals intended for the food of man, the whole or any part of the carcass, which has died of any diseases or is diseases when slaughtered.

The penal code also punishes similar acts and others relating to food, drinks, drugs, medicines, poisons and other substances. These include (a) adulteration of food or drink intended for sale corresponding to the description, punishable under section 185. Section 186 and 187 punish (a) and (b), (c) the sales of adulterated food or drinks, (d) sale of noxious food or drink respectively adulteration of drugs or medical preparations is dealt with under section 188 and (f) sale of drugs as different drugs or preparation is punishable under section 189 .

The extent to which these provisions have, in practice enhanced consumer protection is debated. What is clear, however, is that the police have not been up and doing and efficient in prosecuting the offences. Diseases food, meat, and adulterated food, drinks, drugs, medical preparations, etc, and still for sale in the market, 'motor parks' and street kiosks.

GOVERNMENT AGENCIES AND BODIES

The federal government has also set up a number of agencies and bodies charged with specific responsibilities in specific areas of consumer protection. Although the Nigerian Law Reform commission was established and mandated to ensure that laws are kept up to date and adequate, this has not happened with regards to consumer protection law. This is basically because there is not specific injunction in the enabling legislation to consider the interest of consumer in initiating proposals for law reform. On the other hand, two important federal government agencies have featured in the area of consumer protection. These are the standard Organization of Nigeria (SON) and the National Agency for Food and Drug Administration and Control (NAFDAC). To these have recently been added the consumer protection council, whose effort is yet to be seriously felt, we many consider the responsibilities and efficacy of these agencies.

PIRACY VIA THE INTERNET (CYBER PIRACY) AND COPYRIGHT PROTECTION

The Nigerian Copyright Act under section 51 includes computer programme in the list of those works that qualify, irrespective of quality or style, for protection as literary works. The Act defines a computer programme as a set of statements or instructions to be directly or indirectly in a computer in order to bring about a certain result. Thus computer programmes are perceived to involve writing, which under the Berne Convention generally qualify as literary works. Incidentally, this categorization has been maintained under the TRIPS Agreement and the more recent World Intellectual Property Organization (WIPO) copyright treaty. Phillips, & Firth,(1990),

Under the same section 51 of the Act, Though Not mentioning database and furnishes no definition for it, yet makes provisions for the protection of ‘written table or compilations’ as literary works. However, the Act does not define what amounts to ‘compilations’ as literary works. Mohammed (2008), This leaves that provision very terse and subject to ambiguity. Perhaps the legislation could have borrowed from the provision of the USA Copyright Act of 1976 which defined a compilation as a work formed by the collection and assembling of pre-existing materials or data that are selected, co-ordinated, or arranged in such a way that the resulting work as a whole constitutes an original work authorship.

Going by the above American definition, a database is essentially a compilation and therefore protected as a literary work under the Nigerian Act.

The rationale for bringing database under the category of literary work is not very clear on the face of the law. This is even more so given the fact that the Nigerian Copyright Act has not defined specifically what a literary work is. It simply listed those things it considers should be literary works albeit with a rider that the protection irrespective of their literary quality. So many materials, such as choreographic works and computer programmes which do not appeal to commonsense as literary works are merely listed. The English copyright. Design and Patent Act is a bit clearer in its provision

which defines 'literary work' to mean any work, other than a dramatic or musical work which is written, spoken or sung, and accordingly includes tables or compilations and computer programmes. Another hard nut to crack is whether the defence of innocence can avail an internet operator in a manner relating to copyright infringement through the internet. It has been contended that innocence is not defence for the infringement of copyright. A defendant who successfully established the defence of innocent infringement shall not be liable damages to the plaintiff. Instead, he shall be liable for an account of profit, under section 16 of the Nigerian Copyright Act. Even where innocent infringement is established it cannot avail a manager of website or internet service provider. This is because the defence of innocence only protects the author of an infringement work. In the case of Plateau Publishing Co. Ltd. v. Chief Chuks Adophy, the supreme court of Nigeria affirms that the defence of innocence protects the author of the infringing work and not the publisher of the infringing work. Cornish, & Llyewelyn, (1996),

Upon the expiration of copyright by effusion of time, the work goes into public domain. The consequences therefore, it that the constitute infringement of copyright enforceable by law. With the aid of internet, works that have ceased to be subject to copyright in one jurisdiction via the internet may place the person in violation of the law of the host country. This phenomenal trend may be likened to 'cyber piracy', By section 15 of Nigerian copyright Act, copyright is infringed by any person who without the consent of the right owner imports or cause to be imported into Nigeria copies of such work.

It rather disturbing to note that existing legal framework is grossly inadequate to cope with the challenge posed by contemporary digital technology in the 21st century. It was in recognition of these lacunae that WIPO on December 20, 1996 adopted two treaties, namely WIPO Copyright treaty and the WIPO performance and phornograms treaty, Mohammed (2008),. These treaties provide the watershed for the protection of copyright and neighbouring rights in cyberspace. Copyright of protected works in any form whether for web-casting or any other purpose whatsoever, without the consent of the right owner, is prohibited.

PRE-SHIPMENT INSPECTOR OF EXPORT/IMPORT GOODS/ENFORCEMENT OF PRODUCT EXPORT STANDARDIZATION/EXPORT FREE ZONE IN NIGERIA.

The legal regime in Nigeria also provides for the inspection of goods in Nigeria prior to their shipment to a place in Nigeria with a view of ensuring their quality, quantity and price comparison. The pre-shipment inspection of export Act, like the pre-shipment inspection of import Act, which equally renders liable for all imported goods to be subjected to mandatory pre-shipment inspection, provided for issuance of clean reports of findings and export/duty reports. They both provide for penalties for unlawful exportation in violation of the laws.

Further, the Nigerian Produce (Enforcement of Export Standards) Act provides for the inspection of commodities for export from Nigerian at port of shipment, for the purpose of enforcement of grades

and standards of quality in respect of such commodities, and matters incidental to the execution of the powers conferred by this Act. Mohammed (2008),

Under the Oil and Gas Export Free Zones Act, Nigeria established an authority to manage the affairs of the designated Export Free Zones (Onne/Ikpori area of Rivers State) and to ensure the prohibition of import and export of goods from the zones, grant licenses, prohibit retails trade, storage of ammunitions and explosives within the zones, regulate work permits, provide incentives, and ensure the supervision and coordination of the work of all law enforcement and para-military bodies in the zones for a safer and more secured environment.

Finally, the Customs and Excise Management Act empowers the Nigerian customs service to regulate the management and collection of duties of customs and excise on imported goods and to ensure that the prohibition or restriction on the importation exportation or carriage coastwise of good imposed by or under this or any law are observed.

CONCLUSION

It is evident from the above analysis that combating counterfeit and pirated goods is a collective global responsibility needed effective institutional collaboration and cooperation, information sharing on best practices and analysis of impact current trends, issues challenges and viable options. It is obvious that from the Nigerian perspective, there is a limit to which legal and enforcement/regulatory mechanisms can go in protecting the ultimate consumer against counterfeit and pirated goods. This is partly because the legal regimes have the reputation of lagging behind the 21st century ICT age and obviously the laws, though quite ambitious in anti-piracy and counterfeit products or devices, remain slow or weak and inadequate.

The efforts of enforcement/regulatory mechanisms needs to be strengthened technically, materially to live up to expectations for the health, safety and security of consumers and for sustainable development, of our societies.

Finally, consumer education need to be aggressively pursued to raise effective awareness about consumer rights and responsibilities.

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