

PATIENT'S MEDICAL RECORDS, PRIVACY AND COPYRIGHT IN NIGERIA: ON-GOING RESEARCH

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The documentation of patients' medical records including the diagnosis and treatment is a legal and professional requirement for medical personnel in private and government health facilities. This article discusses how patient's medical records are constituted and challenges the general perceptions of health workers and patients concerning medical records. It highlights the duty of confidentiality owed to patients by health care workers, how the rules of professional conduct of medical practitioners guide the usage of information in patient's medical records for research. It examines whether copyright subsists in the medical records of patients; the patients; medical personnel who created them; or the health facilities own the rights. It urges a change in the position in Nigeria concerning patients' access to their medical records in line with international best practices. We conclude that in the interest of copyright ownership, the copyright in medical record should be given to the health care facilities.

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I INTRODUCTION

This article was inspired by two events. The first, the mother of one of the authors who had been undergoing regular medical check-up in a private hospital was referred to a teaching hospital for further treatment. Surprisingly, despite receiving better medical care in the hospital, she opted out of treatment plan at teaching hospital because her treatment involved not only a renowned consultant, but a retinue of student doctors who all made her medical records a subject of their study. Our Octogenarian mother could not imagine why her private records should be used for research without her consent or knowledge. The second incident involved the acquisition of a medical clinic by a younger practitioner when the owner retired. Some of the patients opted to transfer to other hospitals and demanded their medical records. The request was refused, prompting the intervention of lawyers.

The medical records of patients' also known as case notes contain the medical history of patients. They are the hand-written files or computerised files that record that health practitioners compose and build up containing information about a patient. In Nigeria, where a large majority of patient records are in hard copies in the form of files, the standard practice is that patients are not authorized to look into or handle their personal record at any stage of their treatment. On the body of the 'case note' itself there is often a *caveat* precluding the patient or any other unauthorised persons within the medical institution from handling the case file. It is not unusual to see the following words or words similar thereto in large bold capital letters on the files in university teaching hospitals or other health facilities: 'NOT TO BE HANDLED BY THE PATIENT OR REMOVED FROM THE HOSPITAL'.¹ If patients cannot handle their own medical record, it is assumed that they do not have ownership in them.

This article explores a number of legal issues regarding the medical records of patients. It challenges the general perceptions of health workers and patients concerning medical records. It is divided into four parts. Part 1 discusses how records are created and maintained and the purpose of medical records. Part 2 highlights the duty of confidentiality owed to patients by health care workers and considers whether it is only medical doctors and dentists that should have access to

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¹ All medical records or case notes bear a notice similar to this.

medical records to the exclusion of nurses and paramedics. It urges to a change in the position in Nigeria concerning patients' access to their medical records in line with international best practices. It examines whether the consent of a Nigerian patient is needed before his records are used for other purposes including research. Part 3 examines whether copyright subsists in medical records and analyses the issue of ownership and exploitation of such records against the backdrop of ethical issues raised by privacy and the need to utilise such records for research. It identifies emerging issues relating to the right of patients' right to know and their medical records. Part 4 summaries the issues discussed.

A *Creation and Maintenance of Medical Records*

The general practice is that a patient's medical record in form of a file is opened on a patient's first visit to a health facility with the patient's details including his name, age, height, the receipts of payment made and the like. It often includes the patient's contact details, the clinical findings on the patient, the patient's medical history, his family medical history. Either paramedics, auxiliary staff or clerks open the file. The medical records supply other information such as the drugs and other medication prescribed or used, medical processes adopted, decisions made, actions agreed and sometimes where there is disagreement, who is taking decisions and who is agreeing to the decisions, who is recording the history. The records include the progress or lack of progress of the patient or reports from each visit, details of any telephone consultations, and any diagnosis including hand notes, computer records, any correspondence between health professionals, reports of laboratory tests, x-rays, print outs from equipment used to examine the patient. The records are kept in the health facility and cover of the files often bear words that suggest that the records are not to be handled by the patient neither are they to be removed from the health facility.

It is not unusual for medical facilities to have only paper form of medical records. Abdulkadir *et al*² showed that medical record keeping in paper form in Nigeria often have illegible handwriting, incomprehensible and confusing abbreviations 'and inappropriate request could limit the value of medical requests'. There is a low-level of archiving, protecting and keeping of patient's medical records in many of the public tertiary teaching hospitals in Nigeria. This would be disadvantageous to the patients themselves especially where a referral care is needed. Since 2003, many private hospitals in Nigeria have largely adopted one

² Adekunle Y Abdulkadir, et al, 'Medical record system in Nigeria: observations from multicentre auditing of radiographic requests and patients' information documentation practices', *Journal of Medicine and Medical Science* Vol. 2(5) pp.854-858, May 2011

form of electronic record-keeping method or the other.³ Though, majority of Nigerian medical institutions and facilities have paper based medical record keeping methods, there is a slow but steady change to computerize medical record keeping especially in private hospitals. A number of computer developers such as Ajala et al⁴ have also embarked on putting in place a culturally viable computerized electronic medical keeping record

Medical records not in electronic forms are open to abuse, misrepresentation and misinformation by those responsible for putting recording the information in the medical record in electronic form. It is most certainly not the medical doctor(s) who wrote in the medical records who will be responsible for typing the information. Usually it will be the medical doctor's secretary or Medical Record staff. This in itself leads to the fear of the patient's confidentiality being compromised in the course of putting the medical record's content in electronic form.

The Nigerian Medical and Dental Association (NMA) has a 'Rule of Professional Conduct for Medical and Dental Practitioners, Code on Medical Ethics in Nigeria' 1995, (hereinafter referred to as 'NMA Guideline') that guides the general conduct of medical and dental practitioners. The main Act guiding the practice and licensing of nurses and midwives in Nigeria is the Nursing and Midwifery (Registration etc.) Act, (N&MCN).⁵

B *Purpose of Medical Records*

Medical records serve many purposes; however, three of these are apposite here. First, they document the history of examination, diagnosis and treatment of a patient. This information is vital for all providers involved in a patient's care and for any subsequent new provider who assumes responsibility for the patient. The records document the history of the examination that has been conducted on the patient including the diagnosis made and the treatment offered to the patient. The health personnel attending to the patient may change. Such information is invaluable as previous and subsequent health providers need not rely on memory. A major reason for maintaining medical records is to ensure continuity of care for

³ Lagoon Hospital, in Lagos is said to be the first hospital to start using an electronic keeping record format in 2003 in Nigeria- 'Lagoon Hospitals Implement Electronic Medical Records (EMR) – 1st In Nigeria', <<http://www.hygeiahmo.com/index.php/lagoon-hospitals-implement-electronic-medical-records-emr-1st-in-nigeria/>> (17 July 2017).

⁴ Funmilola Ajala, Jiminsayo A Awokoya and Ozichi Emuoyibofarhe 'Development of an Electronic Medical Record (EMR) System for A Typical Nigerian Hospital', *Journal of Multidisciplinary Engineering Science and Technology (JMEST)*, Vol. 2 Issue 6, June – 2015.

⁵ Laws of the Federation of Nigeria (LFN), 2004.

the patient. Second, the records may also be useful for research and serve as the basis for investigating the family of the patient, which is useful for hereditary diseases or persons with similar characteristics.

Third, medical records may be required for legal purposes like the verification of health, injury, infection and similar claims. Employers, educational institutions, embassies and many organisations rely on medical records in offering employment, admission, visas and the like. Medical records also serve as a barometer for insurance companies in assessing the extent of insurance cover they can provide to a patient or the premium the patient should pay as the medical records can guide in decision-making. A patient's medical records may show that his claims that his health condition was occasioned by a road traffic accident, an injury at work and the like is incorrect as such symptoms had existed prior to the incident that forms the basis of the patient's claim to compensation. For health professionals, good medical records are vital for defending a complaint or clinical negligence claim; they provide a window on the clinical judgment being exercised at the time. In general, records that are adequate for continuity of care are also sufficiently comprehensive for legal use.

II CONFIDENTIALITY AND MEDICAL RECORDS

In Nigeria, the relationship between patient-doctor elicits the trust of confidentiality, which includes their medical records. At common law, there is a duty on medical practitioners to respect the confidentiality of their patients, including notes in medical records. This common law doctor-patient confidentiality principle is akin to that of priest-penitent relationship as stated by Browne-Wilkinson V-C in *Stephens v Avery*.⁶ In all medical institutions and facilities, patient records are extremely private and confidential such that only authorised personnel within the medical profession are authorised to be exposed to patients' medical records.

Confidential information in medical records is not limited to the information given by patients in the course of their treatment, but to all other forms of information received directly or indirectly through the patient under notice of confidentiality circumstances. The House of Lords has stated that a reasonable person ought to know that the circumstance under which such information are received are confidential even if it has not been expressly stated as such.⁷

⁶ [1988] 2 All ER 477 at 482.

⁷ *A.G. v Guardian Newspapers Ltd.* (No. 2). AC 109 3 All ER 545.

Confidentiality is therefore not only an ethical, issue it is also a legal principle which need clear guidelines for all manner of people needing access to patient's medical record for different kinds of information. The Nigerian Medical and Dental Association accepts and recognises the absolute legal dictate that patient-doctor confidentiality demands, in keeping with their Hippocratic Oath and the medical profession's guidelines⁸. Access to the record by the patient himself has to follow strict procedures, administrative logjams that suggests hospitals do not want to part with it, unless excepts relating to the clinical procedure to a fellow medical practitioner involved in the treatment of the patient.

Apart from the statutes governing health care workers, the Freedom of Information Act 2015 acknowledges that professional communication between patients and ⁹ health workers- client is privileged.¹⁰ The Act permits a public institution to deny an application for such privileged information; however, any part of the information that is not privileged must be disclosed.¹¹ This age-old principle is to encourage patients to divulge information without fear else, patients may withhold vital information if they knew that the medical doctor could divulge the information given them in confidence. For this reason, sensitive information on patients such as "criminal abortion, venereal disease, attempted suicide, concealed birth and drug dependence"¹² must not be divulged by medical doctors, but are stated in their medical records. Discretionary breach of patients' confidentiality as directed in a court by a presiding judge is only allowed 'strictly under protest'.¹³

A *Patient's Rights to Their Medical Records*

The NMA Guideline does not seem to permit a patient access to his own medical record, even in a situation where the patient wants to have a second opinion on the course of his treatment or the patient himself wants his medical records for personal use. The NMA Guideline confirms that the records are not for the patient's but only for members of the profession. It states specifically on the issue of confidentiality of patient's medical records that:

⁸ But see generally, Eric Holmboe; Elizabeth Bernabeo , "The 'special obligations' of the modern Hippocratic Oath for 21st century medicine", *Medical Education*. Jan 2014, Vol. 48 Issue 1, p87-94; Dale C. Smith, "Hippocratic Oath and Modern Medicine", *Journal of the History of Medicine and Allied Sciences*, Vol. 51, No. 4 (OCTOBER 1996), pp. 484-500; Richard Cruess; Sylvia Cruess, , "Updating the Hippocratic Oath to include medicine's social contract", *Medical Education*. Jan 2014, Vol. 48 Issue 1, page 95-100.

⁹ S S.16 LFN n 5.

¹⁰ S.16(b) LFN

¹¹ S. 18 LFN n 5.

¹² NMA Guideline Part D, Section 44.

¹³ NMA Guideline Part D, Section 44.

The medical records are strictly for the ease and sequence of continuing care of the patient and are not for the consumption of any person who is not a member of the profession. Practitioners are advised to maintain adequate records on their patients so as to be able, if such a need should arise, to prove the adequacy and propriety of the methods, which they had adopted in the management of the cases.¹⁴

It is argued later in this article, that although unlike doctors and dentists, nurses, paramedics are not members of the profession and are presumably not entitled to consume medical records, such other health care workers are contributors to the cases notes and therefore have some right to consume same.

The English Court of Appeal in *R v Mid Glamorgan Family Health Services Authority and Another ex parte Martin*¹⁵ denied the applicant access to his medical record if by virtue of his training as a medical doctor, the disclosure of such information would be detrimental to the patient's health and not in his best interest. This reasoning, in a way takes autonomy from the patient, and sounds paternalistic in that a mentally stable adult should be informed and be fully aware of what medical condition his state of health is. It should not be for the medical doctor to decide for him. Mason and Laurie have suggested that one reason for the denial of patient of access to their health records stemmed from the fear that medical doctors would not be able to express their opinions frankly, if they are aware that patients can access their records.¹⁶

The paternalistic argument at Common law, which appears to be the basis of Nigeria's NMA Guideline was, reiterated a year later in Australia. The High Court of Australia in *Breene v Williams*¹⁷ stated that the patient had no right of access to his medical records, unless there is a statutory right of access such as in cases of compensation in court and insurance claims. It is the medical or health facility where the notes were created that has the right to the record. This in effect means that the medical practitioner cannot remove his patient's medical record from the hospital or health institution where he is treating the patient should he leave the health institution in future.

This common law practice is arguably applicable in Nigeria. Unfortunately, foreign statutes have altered the common law position in England, the United States of America and some other jurisdictions. In England, patients can view their medical records without making a formal application and nothing in the law

¹⁴ See Part D section 44 of the NMA Guideline.

¹⁵ [1995] 1 WLR 110.

¹⁶ J. K. Mason & G. T. Laurie, *Mason & McCall Smiths Law and Medical Ethics* (7th edition), Oxford University Press, 2006, page 289.

¹⁷ (1996) 138 ALR 259

prevents healthcare professionals from informally showing you your own records. Patients in England can make an informal request during a consultation, or by phoning the surgery or hospital to arrange a time to see their records.¹⁸ The National Health Service of England (NHS) aims that by 2018, every citizen will be able to access their full health records at the click of a button, detailing every visit to the General Practitioner (GP) and hospital, every prescription, test results, and adverse reactions and allergies.¹⁹ If you want to access a third party's medical records held by other NHS services you need to make a formal request under the Data Protection Act (1998) and apply in writing to the holder(s) of the records.²⁰ Under Access to Health Records Act (1990), you can make a request to view the records of a deceased person.²¹

Furthermore, in England and Ireland under the Access to Medical Reports Act 1988 and Access to Personal Files and Medical Reports (Northern Ireland) Order 1991, patients not only have direct access to their medical records., they can formally write that they disagree with the prognosis or what is written about them in their medical record. The patient can append their disagreement to the record; withdraw their consent to it being released. However, 'reports written by independent medical examiners are not covered by the legislation'. The British Medical Association (BMA) under the Data Protection Act 1998,²² state that patients are entitled to see their medical record and whatever is written about them in it.²³ These two legislations also allow the patient to inform the medical doctor in writing that there are some factual inaccuracies in what has been written about him that should be corrected. If the doctor disagrees and refuses to amend the report, the doctor is mandated to attach a note to the medical record stating the disagreement between them. The law further allows the patient to get a copy of the report and for the doctor to charge a reasonable fee for it.

¹⁸ http://www.nhs.uk/NHSEngland/thenhs/records/healthrecords/Pages/what_to_do.aspx accessed August 1 2017.

¹⁹ http://www.nhs.uk/NHSEngland/thenhs/records/healthrecords/Pages/what_to_do.aspx accessed July 23 2017.

²⁰ http://www.nhs.uk/NHSEngland/thenhs/records/healthrecords/Pages/what_to_do.aspx accessed July 23 2017.

²¹ http://www.nhs.uk/NHSEngland/thenhs/records/healthrecords/Pages/what_to_do.aspx accessed July 23 2017.

²² The Act was enacted in 1998 by Parliament for the United Kingdom and Ireland to protect the fundamental rights of patients., the protection of their personal data, and the control, use and access of information about themselves which includes their medical records

²³ British Medical Association (2008), *Access to health records – Guidance for health professionals in the United Kingdom*. London: BMA. www.bma.org.uk/ethics (accessed 17 August 2016).

In other parts of the world, access to patient's record by anyone is a detailed and regulated process. In a study carried out by Yarmohammadian *et al*²⁴ under the Health Insurance Portability and Accountability Act (HIPAA) titled the Privacy Rule and Public Health, guided by CDC and the US Department of Health and Human Services, the researchers show that in the United States, United Kingdom and Australia, patient have specific guidelines whereby they can have access to their medical record. Unless such disclosure will adversely affect the patient's treatment, cause him physical or mental harm, or cause harm to another person, access to medical record by patients is possible. However, the patient's physician must first give consent for the record to be released.

In the United States, when a patient wants to physically examine his record, it has to be supervised by a hospital records manager. In cases where a patient has an incurable disease, he will not be given access to his medical record. This is to protect the patient as well as the public health. This is in keeping with the new national health information privacy standards issued by the US Department of Health and Human Services (DHHS), following the Health Insurance Portability and Accountability Act of 1996 (HIPAA).²⁵ It is a shame that this facility available to patients in England and the United States of America is not available to Nigerian patients.

If a patient cannot access, or handle his own medical record, it makes sense that it is difficult for the patient to categorically state what is written about him. The NMA Guideline does not allow a patient to ask for information about his records. He cannot make any comments on what is written about him and has no opportunity to contradict or disagree with the prognosis or the content of what has been written in his medical record. This is one of the major reasons why it is practically impossible for a patient to bring a case of breach of confidentiality of medial record against any doctor in Nigeria. The patient has no access to the medical record to proof his case. It is not certain if disciplinary measures can be taken against any doctor who beaches the confidentiality clause since the confidentiality clause is not absolute. A patient would need to prove that the disclosure was actually about him from his medical records. He cannot do that without access to the records.

Secondly, the confidentiality clause under Guideline 44 of the NMA is only applicable when a doctor breaches the confidentiality of his patient while he is

²⁴ Mohammad Hossein Yarmohammadian, Ahmad Reza Raeisi,, Nahid Tavakoli,, and Leila Ghaderi Nansa, 'Medical record information disclosure laws and policies among selected countries; a comparative study', *Journal of Research in Medical Science*. 2010 May-Jun; 15(3): 140–149 at 142.

²⁵ *British Medical Association, n 23 Part D, Section 44*

acting as his doctor. What this means is that other information about the patient that is known to the doctor outside of his duty as a medical doctor is not covered by the confidentiality clause and the patient cannot make a claim since he cannot prove the breach. In this case, the doctor also technically has not committed any offence of breach of confidentiality. The best the patient can do is institute an action in tort for negligence, malpractice or breach of contract. It is only then that the court can order the disclosure of the medical record of the patient. Even then, the patient has no way of knowing that his medical record has been tampered with or vital information necessary to prove his case has not been omitted. Part C, guideline 32 of the NMA Code stipulates that it is the institution the medical doctor works for or a colleague who can bring cases of malpractice known about another colleague to the attention of the disciplinary Tribunal. It states:

It shall be the duty of medical and dental practitioners to report every case to the appropriate authorities including the Medical and Dental Council of Nigeria. Failure to report any such case may render the registered practitioner in charge of such institutions primarily liable for an infamous conduct in a professional respect.²⁶

The guideline is vague, not definitive as it does not define what 'infamous conduct in a professional respect is'. In practical terms, it is doubtful if any institution would be willing to report a colleague for improper or negligent conduct, because the institution would be vicariously liable for such misconduct. The actual doctor may pay for damages the court may award, and the doctor involved may in addition, be personally sanctioned through loss of his licence to practice. It is submitted that the NMA Guideline must be amended to accommodate the widely acceptable and modern principle of a patient's right to his medical records.

B *Research Using Medical Records and Informed Consent*

In Nigeria, when a medical practitioner has to provide information from the medical record of his patient for reasons other than for his treatment including research, the medical practitioner must obtain the informed consent of his patient. The rule is that "Disclosure of information on the patient by the doctor can only be made following an informed consent of the patient, preferably in writing".²⁷ However, a patient's consent is not required where statutory notification of a disease is discovered that can be a danger to the patient and to the community.²⁸ Apart from the mandate to get written consent from the patient; the NMA Guideline

²⁶ (RULES OF PROFESSIONAL CONDUCT FOR MEDICAL & DENTAL PRACTITIONERS CODE ON MEDICAL ETHICS IN NIGERIA, Part C, Section 32. Laws of the Federation of Nigeria, 2004.

²⁷ NMA Guidelines Part D, Section 44, n 23.

²⁸ As in the case of Patrick Sawyer, the Librarian who brought the Ebola Virus into Nigeria. The doctors treating him had a statutory mandate to report the virus which saved thousands of lives though the Dr. Adadevoh who was directly involved in his treatment contacted the virus and died as a result

also provides the following procedures when disclosure from the patient's medical record is necessary for instances such as 'education, research monitoring and epidemiology, public health surveillance, clinical audit, administration and planning'.²⁹

The medical professional must 'anonymise the data where unidentifiable data will serve the purpose, keep disclosures to the minimum necessary'. In practice, the NMA provides that the medical professional must provide:

- (c) cryptic utilization of anonymised clinical material for teaching or publication in professional journals;
- (d) maintenance of confidentiality in the process of further consultation;
- (e) clear advice to patients on the breach of confidentiality which will necessarily be attendant on their consenting to undergo medical examination for the purpose of employment, insurance, security or determination of legal competence;
- (f) discretionary breach of confidentiality to protect the patient or the community from imminent danger;
- (g) judicious balance between maintenance of confidentiality for an under-aged patient and simultaneously making available necessary information to the parent or guardian;
- (h) breach of medical confidentiality in a court of law upon being directed by the presiding judge, which must thereafter be done strictly under protest;
- (i) presentation of a patient at a scientific meeting only following informed consent of the patient and acceptance by the audience to maintain confidentiality.³⁰

From the foregoing it is observed that Nigeria also has clearly defined methods of disclosure of patient's medical record which may not be as sophisticated as those of other advanced countries but they are just as rigid and in conformity with efforts to protect patient's confidentiality and autonomy. While the regulations stipulated under the NMA guideline are comparable to other developed countries, the practicability of its working as expected is not always clear-cut.

The NMA Guideline mandates medical practitioners to give detailed disclosure to his colleague whenever a patient is being referred either voluntarily or due to conscientious objection to the treatment the patient is seeking.³¹ In instances of such transfer, the receiving doctor must ensure that the patient is not indebted to the releasing doctor for treatment he received from his colleague prior

²⁹ *NMA Guideline*, n 23.

³⁰ *NMA Guideline*, Part D, Section 42, n 23.

³¹ *NMA Guidelines* Part A Section 42(a), n 23.

to taking the treatment of patient over. Under this circumstance too, the patient is not given access to his medical record. Though not explicitly stated, the record will be given to the receiving doctor confidentially without the patient having any knowledge of the content of his medical record.

C *Confidentiality, Copyright and Medical Students*

Most of the best-equipped hospitals in Nigeria are attached to universities. They are named 'teaching hospitals'. Their aim is to use the medical records as well as the physical presence of the patients to 'teach'. In the process of teaching, the confidentiality of patient is breached through disclosure to students, colleagues. Adekeye says that the students have not taken the 'Geneva' or 'Hippocratic Oath', therefore nothing stops them from breaching the confidentiality of patients they observe during the course of learning to be medical doctors.³²

Confidentiality of patients is breached simply by the fact that the student doctors know the medical records and the identity of patients during the course of their training. The NMA guideline technically does not cover these students during the course of their learning. The students, at this stage do not also have a right of access to patients' medical records. It is arguable that since medical students are attached to an institution or hospital whatever is written in a patient medical record is the copyright of the hospital or institution even if the student has been asked to put in the record routine observations such as temperature, blood pressure, analysis of urine sample etc. If the student doctor negligently puts the wrong diagnosis in the medical record of a patient, which in turn leads to mis-diagnosis of ailment or wrong medication. The medical students are also under obligations of confidentiality owed to their medical college.

D *Nurses and Access to and use of Patient's Medical Record*

In maintaining that medical records are only for the consumption of "members of the profession", the NMA Guideline appears to exclude other healthcare practitioners from having access to medical records.³³ This is because the use of the term "medical professional" or "members of the profession" in the NMA Guideline does not refer to nurses as well. This raises the issue whether nurses can access, input and use the medical record of patients as would the medical doctor as stated in the NMA Guidelines? But it is arguable that although unlike doctors and

³² Ifedayo Adekeye, 'Practicability of Medical Confidentiality in Nigeria (II)', <http://www.medicalworldnigeria.com/2016/03/practicability-of-medical-confidentiality-in-nigeria-ii> (accessed 07 July 2017).

³³ See Part D section 44 of the NMA Guideline n 23.

dentists, nurses, paramedics and other healthcare workers are not members of the “profession” and are presumably not entitled to consume medical records, such other healthcare workers are contributors to the case notes and therefore have some right to consume same.

By the very nature of their job description, nurses are care-givers and most often come in contact more frequently with the patients than the medical doctors routinely during and after the course of their treatment. There is no specific guideline whether nurses can access and make input into patient’s medical record in the NMA Guideline. The nursing profession has become a lot more sophisticated than the Florence Nightingale³⁴ image of someone who cares. The communication, information, psychological, observatory and research abilities of nurses are so important that doctors often rely on these for specific prescriptive directive that they may wish to input in medical record that the nurse may have a better knowledge and insight of than the medical doctor because of their close bedside contact and routine care of patients. In the course of their day-to-day interactions, staff nurses in particular, learn many intimate clinical observations about the patient in their care, which can assist in the course of treatment the patient receives. The medical doctors’ contact hours with the patient is usually comparatively less than those of the nurse. In this respect, do Nigerian nurses have a right to put their administrative and clinical observations into the medical records of the patients directly in their care? This is important, since such notes will be part of the medical record of the patient. To understand the extent or limit of the nurses’ access to contribute to the medical record of patients in their care, and by extension contribute to it we look at the regulatory law guiding the nursing profession. Nigerian nurses are a part of the international global body of nurses. Therefore, their code of ethics is based on the international Council of Nurses from which the Nigerian national legislation is based.³⁵

The main Act guiding the practice and licensing of nurses and midwives in Nigeria is the Nursing and Midwifery (Registration etc) Act, (N&MCN).³⁶ The main duty of the Council is to ‘determine the standard of knowledge and skills that must be attained by persons who want to become a member of the nursing and

³⁴ Florence Nightingale is regarded as the mother of modern nursing. See Louise C. Selanders, & Patrick C. Crane, “The Voice of Florence Nightingale on Advocacy”, *The Online Journal of Issues in Nursing*, Vol 17 2012 No1 Jan 2012, <http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Vol-17-2012/No1-Jan-2012/Florence-Nightingale-on-Advocacy.html> accessed, September 7, 2016.

³⁵ Modupe Ajala, ‘Nurses’ knowledge of legal aspects of nursing practice in Ibadan, Nigeria’, *Journal of Nursing Education and Practice*, 2013, Vol. 3, No. 9

³⁶ Laws of the Federation of Nigeria, 2004.

midwifery profession, and review those standards as is appropriate from time to time depending on the prevailing circumstances'.³⁷ The standard of professional nursing practice encompasses the standard of care as well as standard of professional performance.³⁸ The expected standard of care according to Butt & Rich are, Assessment, Diagnosis, Outcome identification, Implementation, and Evaluation.

In their professional nursing practice, Nigerian nurses can contribute to the medical record of patients in their documentation of routine diagnosis, clinical assessment and judgment in their interactive connection with the patients in their care. For these reasons, it does not seem plausible that they would be denied access to medical records of patients for the purpose of contributing to the medical record routinely and for research purposes. We submit that there is a need for a more definitive legislation (or an amendment of the N&MCN) to include specific directive on whether or not they can access patient medical records and use it for clinical research. Meanwhile, there is nothing that prevents them from making some input into the medical records of patients today.

III COPYRIGHT AND MEDICAL RECORDS

Not much has been written on who owns the property in medical records. Investigations by the authors among medical doctors in University College Hospital Ibadan, and Obafemi Awolowo University, Ile-Ife, both in Nigeria show that there is a general believe that the medical record of patient is the proprietary right of the hospital the patient is being treated. In England, it has been held that it is the person who made the notes in a document or his employer who has the intellectual property in that document and not the subject of the note itself i.e. the patient.³⁹ The discussion that follows is an attempt to shed some light on how the Nigerian Copyright Act treats this issue.

Copyright can be described as a bundle of distinctively divisible rights that inure in a work vesting the owner of copyright in the work with the exclusive rights to deal with the work. Medical records either in material physical file form or in soft copy form in a computer are regarded as literary works in Nigeria. The Copyright Act defines "literary work" to "include, irrespective of literary quality, any of the following works or works similar thereto ... computer programmes,

³⁷ N&MCN (section 1(2)(a)).

³⁸ J. B. Butts, & K. L. Rich, (2005). *Nursing Ethics: Across the Curriculum and Into Practice*, p 17

³⁹ J. K. Mason & G. T. Laurie, *Mason & McCall Smiths Law and Medical Ethics* (7th edition), Oxford University Press, 2006, page 288.

histories, anthologies, letters, reports, memoranda, addresses, written tables or compilations".⁴⁰ It is the owner of copyright in the medical record that ordinarily has the exclusive right to control the doing of the following acts with respect to the medical record:

- (i) reproduce the medical record in any material form;
- (ii) publish the medical record;
- (iii) perform the medical record in public;
- (iv) produce, reproduce, perform or publish any translation of the medical record;
- (v) make any cinematograph film or a record in respect of the medical record;
- (vi) distribute to the public, for commercial purposes, copies of the medical record, by way of rental, lease, hire, loan or similar arrangement;
- (vii) broadcast or communicate the medical record to the public by a loudspeaker or any other similar device;
- (viii) make any adaptation of the medical record;
- (ix) do in relation to a translation or an adaptation of the medical record, any of the acts specified in relation to the medical record in sub-paragraphs (i) to (vii) above.⁴¹

A *Ownership of Medical Records vs Ownership of Copyright in Medical Records*

Given the notice often on the face of medical records that to the effect that the medical facility owns the medical record, it is pertinent to examine whether the ownership of the physical material⁴² in which the records are contained vests copyright in the records in the medical facility. Every tangible work subject matter of copyright has two proprietary interests, ownership of copyright in the work and ownership of the work *per se*. According to Karibi-Whyte JSC, copyright is an incorporeal property.⁴³ The purchaser of a book acquires ownership of the book *per se* by virtue of the sale. This proprietary interest entitles the purchaser to read the

⁴⁰ S.51(1) Copyright Act 1988, Cap C28, Laws of the Federation of Nigeria, 2004..

⁴¹ See section 6 of the Copyright Act n 40.

⁴² For a consideration of whether the information contained in the medical records should be property, see: Zech H (2015). Information as Property. JIPITEC, Vol. 6. (Journal of Intellectual Property, Information Technology and E-Commerce Law).

⁴³ *Plateau Publishing Co. Ltd and ors. V Chief Chuks Adophy supra*. Reference to copyright being transferable like any other movable property in section 10(1) of the 1970 & 1988 Acts implies that copyright is a property right. See also, S.M. Stewart, *International Copyright and Neighbouring Rights*, Butterworths, London, 1983, para .106, p.4.

book, or resell the book. However, this does not entitle him to reprint the book or to exercise any of the exclusive rights of the owner of copyright in the book outlined above.

Thus in *Kolade Oshinnowo v. John Holt Group Ltd.*⁴⁴ the plaintiff author, of some paintings that had been bought by the defendants, sued the defendants for copyright infringement when they reproduced his paintings in their annual reports and other documents. The defendants led evidence that they had purchased the paintings and as such, they had a right to reproduce them. The court held that purchase of an object that embodies a copyrightable matter transfers ownership in the object to the purchasers but it did not transfer copyright in the work embodied in the object to the purchaser. Such a sale did not grant the purchasers a right to reproduce the work. It is therefore safe to say that the medical facility that presumably owns the physical files of the case notes may not be the owner of copyright in the case notes.

B *Authorship: Employee vs Commissioned Persons*

The person who actually expended his effort, labour, and skill is general regarded as the author of a work.⁴⁵ The author of a patient's medical record a literary work is the creator of the work.⁴⁶ The creator is the person who put the idea in a form of expression (originates the language used) and arranged for its fixation. As has been shown above, medical records are composed of inputs by various healthcare personnel ranging from doctors and dentist to nurses, paramedics and sometimes student doctors. Medical records are therefore compilations and have different authors. It is doubtful if the various authors of what is comprised in the medical records can be referred to as joint authors as the concept of joint authors presupposes that the work is produced by the collaboration of two or more authors in which the contribution of each author is inseparable from the contribution of the other author or authors as in the case of those who create a book or song in conjunction.⁴⁷

In determining the owner of copyright, it is imperative to consider the position of the applicable law when the medical records were made. It is not necessary to consider whether the authors of the medical records are actually employees of the health facility or they are commissioned persons in that they are independent consultants invited to work at the medical facility (works for hire). As will be

⁴⁴ Unreported, suit no. FHC/L/60/86 delivered in 1991.

⁴⁵ Per Belgore J. in *Oladipo Yemitan v. Daily Times (Nig) Ltd.* n. 44.

⁴⁶ S. 51(1) *n 40t*. The 1911 & the 1970 Acts did not define 'author' of a literary work.

⁴⁷ S. 51(1) *n 40*.

shown below, the old and current Nigerian copyright statutes treat works made by employees or commissioned persons in the same manner. There is therefore no real need to distinguish whether the authors of the medical records are employees or commissioned person. The statutes give the same treatment to works made by employees sometimes referred to as contract of service and works made by commissioned persons sometimes called contract for service, works by independent contractors or works for hire.⁴⁸

C *Ownership of Copyright: When Medical Record was made*

The issue of ownership of copyright in any work subject matter of copyright including medical records has to be determined by the law in force when the medical record was made or when the transaction for the making of the medical record took place.⁴⁹ Any change thereafter in the law cannot divest the owner of copyright. This follows from section 7(1)(a)&(b) of the Interpretation Act⁵⁰ that provides that “Any repeal of an enactment shall not affect the previous operation of the enactment ...” neither shall it “affect any right, privilege ...accrued under the enactment”. The Supreme Court in interpreting section 7(1), reiterated the age old principle that unless a new law expressly so provides, there is a presumption that rights already accrued, cannot be divested by a new law,⁵¹ that is, a presumption that a change in the position of the law is not meant to take effect retrospectively in such a way as to divest anyone of vested rights.⁵² Nigeria has had at least three statutes directly in force to govern copyright, the English Copyright Act, 1911, the Copyright Act, 1970 and the Copyright Act, 1988, which is currently in force. In considering the ownership of copyright in medical records, it may be necessary to ascertain the governing copyright statute when the records were created.

The 1911 Act, the 1970 Act and the 1988 Act identify four categories of authors in relation to works: employees, commissioned persons (otherwise known in American jurisprudence as “works made for hire”), works made under the direction or control of the government and works made by all other persons. Whilst

⁴⁸ For a consideration of tests to ascertain the difference, see *Short v. Henderson*, (1946) 62 T.L.R. 427. *Smith v General Motor Cab Co. Ltd* [1911] AC 188; *Cooke J. in Market Investigation Ltd. v Minister of Social Security* *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, [1969] 2 WLR 1, [1968] 3 All ER 732 []; *Stevenson Jordan & Harrison Ltd. v Macdonald & Evans* [1952] 1 TLR 101 at 111. see also *Beloff v Pressdram Ltd* [1973] RPC 765. *Gentl v Tabansi* 1977 NCLR 344; *Esso W.A. Inc. v. Alli* [1968] NCLR 119 at 131; *Dola John* (1973) 1 N. N. L. R. 58; *Atedoghu v. Alade* (1957) W.N.L.R. 184; *Sodipo v. Kuti* 1971 (1) NCLR 303.

⁴⁹ *Smith v General Motor Cab Co. Ltd* n 48.

⁵⁰ No. 1, 1964 Laws of the Federation of Nigeria.

⁵¹ *Afolabi v Gov. of Oyo State* [1985] 2 NWLR 734. *Ojokolobo v Alamu* [1987] 3 NWLR Pt. 61 p. 391.

⁵² *Lauri v Renad* [1892] 3 Ch. 402 is also instructive on this point.

the 1988 and its predecessors are consistent in the rules for ascertaining the initial owner of copyright the statutes differ in the treatment of works made by commissioned authors or authors under employment. The 1970 and 1988 Acts vest ownership of copyright initially in the author of the work⁵³ unless the work was made by or under the direction or control of the government or a prescribed international body⁵⁴ in which case copyright vests initially in the government or prescribed international body.⁵⁵ The tenor of the statutes is to identify ownership of copyright from the first author of the work. The general rule is that the author is the first owner of copyright in the work. If the author of the medical record owns the medical facility, then he owns the copyright in the medical records. Most copyright statutes differ on the treatment of ownership where the author is an employee, a commissioned person or a government worker.

D *Nigerian Copyright Statutes and Employee/ Commissioned/ "Government" Works*

The 1911 Act, the 1970 Act and the 1988 Act identify four categories of authors in relation to works: employees, commissioned persons (otherwise known in American jurisprudence as "works made for hire"), works made under the direction or control of the government and works made by all other persons. The 1911, 1970 and the 1988 Acts differ in the treatment of the ownership of works these four categories of authors.

Under the 1911 Act,⁵⁶ copyright in works made authors whose works were either prepared or published by or under the direction or control of the government initially vested in the employer unless there was any agreement to the contrary between the parties.⁵⁷ Under the 1911 Act, copyright in works made by authors which such works are made in course of their employment initially vests in their employer unless there is contrary agreement between the parties.⁵⁸ The agreement does not have to be in writing.⁵⁹ Consequently, if the medical records were created by employees of a medical facility or made under the direction or control of government before the 24th of December 1970 when the 1970 Act came into force repealing the 1911 Act, copyright will vest in the medical facility.

⁵³ S 10(1), 1988 Acts. See also s 6(1) (b) 1988 Act.

⁵⁴ S 10(4) 1988 Act, s 10(3) 1988 Act, s 20 1988 Act.

⁵⁵ See n 48.

⁵⁶ Those made before 24 December 1970 when the 1970 Act came into force repealing the 1911 Act.

⁵⁷ S 20, 1911 Copyright Act.

⁵⁸ S 6(1)(b), 1911 Copyright Act.

⁵⁹ The use of the phrase "no contrary agreement" in s 6(1)(b) means that an oral or implied agreement will suffice. See also, *Massine v De Basil* [1936-45] Macg, Cop. Cas 223.

Under the 1970 Act, where the work is made by an author under the direction or control of the Federal or State government or prescribed international body⁶⁰ copyright is vested initially in the employer.⁶¹ Copyright in works made by authors who are employees other than those employed by the government or a prescribed international body is initially vested in the employees. However, the copyright is deemed to be automatically transferred by operation of law to the employer on two conditions;⁶² if the work was made in the course of the employment and if there is no contrary agreement limiting such a transfer.⁶³ Under the 1970 Act, where any work is commissioned by a person who is not the author's employer under a contract of service or apprenticeship copyright is deemed⁶⁴ to be transferred automatically by operation of law from the author who is the initial owner to the commissioner unless there is an agreement to the contrary.⁶⁵ Consequently, if the medical records were created before the 19th of December 1988 when the 1988 Act came into force repealing the 1970 Act, copyright in medical records made by employees of medical facilities, or persons commissioned by medical facilities and those made under the direction and control of government, arguably the government teaching hospitals belong to the medical facilities unless there was an agreement to the contrary transferring to the author.

Under the 1988 Act,⁶⁶ copyright in works made by authors under the direction or control of the federal government, state government or a prescribed international body are initially vested in the federal or state government⁶⁷ or the international body concerned.⁶⁸ Thus, copyright in medical records made under the direction and

⁶⁰ Unfortunately, no such body has been prescribed. It is suggested, however, that all international bodies recognized by the Nigeria Government will fall into this category.

⁶¹ S 10(2) 1970 Copyright Act.

⁶² See *Gentil v Tabansi Agencies Ltd* 1977 NCLR 344; *Joseph Ikhuoria v Campaign Services Ltd.* (1977-89) 2 IPLR 316; *Yusufu Ladan v. Sha Kallo Pub. Co. Ltd.*, 1972 NCLR 424. Care should be taken in relying on these authorities, as there was reference to wrong statute in *Yusufu Ladan* whilst *Joseph Ikhuoria* relied on English authorities with different statutory provisions from those of Nigeria.

⁶³ S 10(1)(b) 1970 Copyright Act. On the meaning of the word 'deemed', Oputa JSC had this to say in *Akeredolu v Akinremi* (1986) 2 NWLR (Pt 25) 710, 734, 'sometimes the word 'deemed' is used to impose for the purpose of statute, an artificial construction of a word or a phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense impossible. In *Savannah Bank v Ajilo* (1989) 1 NWLR (Pt 97) 305, 348, "In ordinary language which is reflected in legislation, when a thing is deemed to be..., it is an admission that is not that other thing but should be regarded as that thing". This means that the 1970 Act itself transferred copyright to the employer or the commissioner.

⁶⁴ See footnotes 63 for the meaning of 'deemed'.

⁶⁵ S. 10(2)(a) 1970, n 44.

⁶⁶ Those made as from 19 December 1988 when the 1988 Act came into force repealing the 1970 Act.

⁶⁷ S. 10(4) of the 1988 Act. Copyright in such works are held by the Minister of Culture or anybody he may designate (presumably it will be the Nigerian Copyright Commission), and the state authority on behalf of the federal and state governments respectively. See the arguments raised in *Kayode Anibaba & ors v Hakeem Badejo* (2012) LPELR-7976(CA).

⁶⁸ No such body has been prescribed at the time of going to press. However, we suggest that all

control of government, arguably the government teaching hospitals belong to the medical facilities.

Under the 1988 Act, copyright in works of authors who are employees and made in the course of their employment is initially vested in the author/employee, unless there is a written contract to the contrary. Copyright in works commissioned under the 1988 Act by a person who is not the author's employer under a contract or service or apprenticeship is initially vested and remains vested in the author of the work unless otherwise stipulated in writing under the contract.⁶⁹ Consequently, if the medical records were created after the 19th of December 1988 when the 1988 Act came into force repealing the 1970 Act, such medical records made by employees of medical facilities, or persons commissioned by medical facilities belong to the authors of the medical records and not the medical facilities unless there is a written agreement to the contrary transferring to the medical facility.⁷⁰ Thus, if the employer or the medical facility commissioning the authors of the medical records want the copyright they need to state this in writing as there is no automatic transfer clause in favour of the employer or commissioner.

In order to own copyright in the medical records of its patients, the safest thing for any health care facility to do is to insert a clause transferring copyright to the medical facilities in the contracts for full time or visiting health care personnel. That way, such health care facility is able to assign or licence the various bundle of right known as copyright in the medical records to third parties.

E *Australian Decision on Ownership of Copyright in Medical Records*

The possible fall out of ownership of copyright in medical records can partly be illustrated by the recent decision on the issue in the Australian case of *Primary Health Care Limited v Commissioner of Taxation*.⁷¹ The case involved Primary Health Care Limited, which is a company listed in the Australian Stock Exchange that purchased 12 health care facilities. Primary Health Care (PHC) sought clarification from the court if it was qualified to seek for tax reduction on the basis of its purchase of 12 medical practices with all the records of the patients. PHC sought to see if the purchase of the practice conferred on them copyright in the

international organizations recognized by the Nigerian government will fall into this category. It may be argued that works made by such organizations are not susceptible to copyright protection until an Order is made prescribing the organizations.

⁶⁹ S 10(2) (a) 1988 Copyright Act.

⁷⁰ S 10(2), (a) n 69.

⁷¹ [2010] FCA 419.

records such that it entitles them to tax reduction. In other words, does a contract of sale confer copyright in the purchaser of the article purchased? Justice Stone said *'by virtue of the Copyright Act, copyright subsists in original literary and artistic works. In accordance with the Act the work must be 'an original literary ...work that is unpublished and of which the author was a qualified person'. A qualified person is an Australian citizen, a protected person or a resident in Australia'*.⁷²

Stone J particularly referred to the judgment of French CJ, Crennan and Kiefel JJ in the High Court case of *Ice TV Pty Ltd v Nine Network Australia Pty Ltd*⁷³, in which it was said:

Copyright does not protect facts or information. Copyright protects the particular form of expression of the information, namely the words, figures and symbols in which the pieces of information are expressed, and the selection and arrangement of that information. That facts are not protected is a crucial part of the balancing of competing policy considerations in copyright legislation. The information/expression dichotomy, in copyright law, is rooted in considerations of social utility. Copyright, being an exception to the law's general abhorrence of monopolies, does not confer a monopoly on facts or information because to do so would impede the reading public's access to and use of facts and information. Copyright is not given to reward work distinct from the production of a particular form of expression.⁷⁴

Mair, said from her analysis of the judgment of Stone J, the purchase of the medical facilities only confers use of the record to obtain assessable income, since consideration was given in the purchase. It does not confer copyright of the medical records in the purchaser merely because of the sale. The purchaser does not have to have a copyright in the patient's record to have the use of it provided it is for him (the purchaser) to have obtained assessable income. Copyright of the record still reside in the original maker of the medical records, which is the medical doctor/medical facility that produced the records initially.⁷⁵

IV CONCLUSION

This article has raised and discussed the some legal issues regarding the medical records of patients. It outlined how patients' medical records are constituted by various health care workers ranging from doctors, to dentists, to nurses and paramedics and argued that they all have access, albeit limited input or

⁷² Judith Mair, Who owns the information in the medical record? Copyright issues, *Health Information Management Journal* Vol 40 No 3 2011 ISSN 1833-3583 (PRINT) ISSN 1833-3575 (ONLINE), page 31.

⁷³ [2009] HCA 14.

⁷⁴ [2009] HCA 14.

⁷⁵ [2009] HCA 14, pages 35-36.

usage of the records. We argued that the regulations must be amended in Nigeria to permit patients to have access to their medical records in line with international best practices. We highlighted the rules of professional conduct of medical practitioners and nurses on confidentiality of the records of patients and how these guide the usage of information in patient's medical records for research. It highlights the duty of confidentiality owed to patients by health care workers. This article demonstrates that in order to determine ownership of copyright in the medical records, we have to ascertain who the authors of the records are and when the records were created as the 1911, the 1970 and the 1988 Copyright Acts differ in the manner they vest copyright in employee/employers and commissioned persons /commissioner. The article concludes that it is safer for health care facilities to insert a clause transferring copyright to the medical facilities in the contracts for full time or visiting health care personnel.