

ARTICLE SERIES

**ARE SOCIAL MEDIA PLATFORMS,
AS INTERNET INTERMEDIARIES, LIABLE FOR
INTELLECTUAL PROPERTY INFRINGEMENTS?**



INTRODUCTION

The last two decades has witnessed a rise in the use of the internet in general, and social media in particular. For example, in the United States, the number of internet users has increased from about 241 million in 2011 to over 302 million in 2021 with a projection to increase to about 321 million by 2025 [1].

Similarly, internet usage in Africa has increased by about 12,795% between the years 2000 and 2021 [2].

This rise in the use of internet services can be linked to the introduction, use, and growth of social media platforms like Facebook, WhatsApp, Telegram, Instagram, Twitter, TikTok, YouTube, and a host of others [3]. Over the last decade, social media has become a viable tool through which communication is effected, entertainment is created and promoted, goods and services are advertised, and transactions are consummated. With social media, internet users can communicate with each other, regardless of where they find themselves and at the same time, share content such as pictures, images, videos, and even voice messages. Indeed, social media, keeps the world connected!

Social Media Platforms as Intermediaries

Social media platforms serve as intermediaries between the parties that access their platforms. Given their structures, users can develop content and upload such content for other users to access. These activities can be carried out due to the ease of accessibility of social media platforms.

However, one major pitfall of this ease of accessibility is the opportunity that it provides for the platforms to be used for unlawful and unscrupulous activities such as business impersonation, fraud, and intellectual property theft.

Some of these activities also involve intellectual property rights (IPRs) violations and infringements which include unlawful use and distribution of content (such as text, videos or photographs) design or patent infringement and business trademark misuse. These IPR infringements have affected several businesses that utilize social media for the promotion and advertisement of their brands, products, and content.

This has become a huge challenge for these businesses, as they are pushed to go through the rigours of enforcing their rights, where breached on social media. To compound things, very few countries have specific laws targeted at the prevention of IPR infringement on social media.

In Nigeria, save for the provisions of Section 15 of the Copyright Act [4] under which a person may be held liable for secondary copyright infringement where such person exhibits in public, any article in respect of which copyright has been infringed on, and Section 25 of the Cybercrimes Prohibition Act which penalises IPR infringement on the internet or on any other computer network, there is no standalone legislation that regulates intellectual property infringement on social media.

[1] Joseph Johnson ("United States: Number of online users 2010-2025", August 4 2021, <https://www.statista.com/statistics/325645/usa-number-of-internet-users/>)

[2] Internet World Stats ("Internet users statistics for Africa" May 20 2021, <https://www.internetworldstats.com/stats1.htm>)

[3] Facebook is currently the largest social media platform in the world, with a over 2.4 billion users.

[4] Section 15(1) (c) provides that Copyright is infringed Chapter C28 Laws of the Federation of Nigeria.

This absence of regulation suggests that owners of social media platforms are left with the authority to determine how to deal with any IPR infringement that occurs on their platforms. Instagram for example, in a bid to control and curb intellectual property infringement on its platform, has included provisions in its terms of use that prohibits content that are **“unlawful, misleading, or fraudulent or for an illegal or unauthorised purpose”** and gives Instagram the right to remove or terminate an account that displays such content [5]. TikTok [6] and Twitter have similar provisions in their terms of use.

While these provisions and steps are commendable, it is instructive to note that they do not particularly address the liability of these social media platforms, where despite provisions prohibiting their users from infringing the IPR of any person, a breach or infringement occurs.

The pertinent question at this juncture is, to what extent are these social media platforms liable for intellectual property infringements that occur on their platforms? The succeeding paragraph of this article addresses the scope and extent of their liabilities.

Liability of Social media platforms

As earlier noted, social media platforms serve as internet/online intermediaries for their users.

According to the Organization for Economic Co-operation and Development (OECD) “internet intermediaries bring together or facilitate transactions between third parties on the internet. They give access to, host, transmit and index content, products, and services originated by third parties on the internet or provide internet-based services to third parties”. This suggests that in the use of the internet, they serve a very major and profitable purpose. Hence, it can be argued that they should be held liable for unlawful activities that occur on their platforms.

There are generally three approaches to the liability of internet intermediaries for any intellectual property infringement that occurs on their platforms. These are:

- 1.The strict liability model.
- 2.The safe harbour model.
- 3.The broad immunity model.

Under the strict liability model

Under the strict liability model, the intermediaries are held totally and unconditionally liable and responsible for user-generated content. Hence, they are required to monitor content and ensure its compliance with the law.

Under this model, where any unlawful activity occurs, the intermediaries are held liable for same and would not be granted any form of exception whatsoever [7]

[5]<https://help.instagram.com/581066165581870>

[6] Tiktok (“Intellectual Property Policy, June 7 2021 <https://www.tiktok.com/legal/copyright-policy?lang=en>)

[7] Anjana Viswanath (India: Intermediary Liability For Intellectual Property Infringement, 3rd March 2020, <https://www.mondaq.com/india/trademark/899230/intermediary-liability-for-intellectual-property-infringement>)

Under the Safe Harbour Model

Here, the social media platforms as intermediaries, are granted conditional immunity. This is, however, provided that they comply with certain requirements specified by law.

Instructively, this model includes “notice-and-takedown” procedures to be put in place by the intermediaries. The intermediaries may also be required to have content filters. This is to prevent the hosting or transmitting of unlawful content [8].

Under the Broad Immunity Model

Under this model, the intermediaries are accorded a broad, but sometimes conditional, immunity from liability for user-generated content. Here, a social media platform as an intermediary is not required to observe or monitor user-generated data for unlawful content.

Currently, it appears that the broad immunity model is the most commonly used model. This is because, in the absence of any regulation, social media platforms regulate their interactions with their users. Some of them go as far as providing for exclusion clauses that excludes them from any liability, where something wrong occurs, or where an unlawful activity is carried out. Notwithstanding, it is important to note that irrespective of the liability model adopted, social media platforms,

acting as intermediaries, may be mandated to remove unlawful content when instructed to do so through lawful procedures.

CONCLUSION

In Nigeria, the Broad Immunity Model is the most common model applied by these internet intermediaries/social media platforms. This is largely because, as earlier noted, the prevalent intellectual property laws in Nigeria does not regulate the activities of internet intermediaries. However, it is instructive to note that the Copyright (Repeal) Bill 2015 (“the Bill”) makes provisions governing infringement of IPR online [9] and provides for Take Down orders/requests in the case of infringement online. Though it does not specifically provide for the extent of the liability of internet intermediaries, as against the extant Copyright Act, the Bill requires internet intermediaries to heed to take down orders or requests made by persons whose IPR(s) are being infringed upon, on their platforms.

The Bill also makes provisions for the suspension of the accounts of consistent offenders/infringers. While these are notable developments, it is pertinent to note that this Bill was drafted in 2015 and it is yet to be passed into law. The government must understand that this Bill is now more than ever, required to be passed into an Act, and even updated, given recent technological and media evolution that has seen a lot of IPR infringements on the internet.

[8] It is also instructive to note that this model is followed by the EU e-commerce directive, US Digital Millennium Copyright Act.

[9] The Nigerian Copyright Commission (“The Draft Copyright Bill 2015”, http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER-2015.pdf)

ÆLEX



Davidson Oturu



Raphael Irenen

For further information, please contact:



Davidson Oturu
(doturu@aelex.com)



Frances Obiago
(fobiago@aelex.com)



Tiwalola Osazuwa
(tosazuwa@aelex.com)

ÆLEX is a full-service commercial and dispute resolution firm. It is one of the largest law firms in West Africa with offices in Lagos, Port Harcourt and Abuja in Nigeria and Accra, Ghana. A profile of our firm can be viewed [here](#). You can also visit our website at www.aelex.com to learn more about our firm and its services.'

COPYRIGHT: All rights reserved. No part of the publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means without the prior permission in writing of ÆLEX or as expressly permitted by law.

DISCLAIMER: This publication is not intended to provide legal advice but to provide information on the matter covered in the publication. No reader should act on the matters covered in this publication without first seeking specific legal advice.

CONTACT DETAILS

LAGOS, NIGERIA

4th Floor,
Marble House
1, Kingsway Road, Falomo
P. O. Box 52901, Ikoyi
Lagos, Nigeria

Telephone: (+ 234 1) 2793367; 2793368
4736296, 4617321-3;

E-mail: lagos@aelex.com

PORT HARCOURT, NIGERIA

2nd Floor,
Right Wing UPDC Building
26, Aba Road
P.O. Box 12636, Port Harcourt
Rivers State, Nigeria

Telephone: (+234 84) 464514, 464515
574628, 574636

E-mail: portharcourt@aelex.com

ABUJA, NIGERIA

4th Floor,
Adamawa Plaza
1st Avenue, Off Shehu Shagari Way
Central Business Area
FCT Abuja, Nigeria

Telephone: (+234 9) 8704187, 6723568,
07098808416

E-mail: abuja@aelex.com

ACCRA, GHANA

7th Floor, Suite B701
The Octagon
Accra Central, Accra
P.M.B 72, Cantonment Accra, Ghana

Telephone: (+233-302) 224828, 224845-6

E-mail: accra@aelex.com