

# Liability of Internet Service Providers under Nigerian Law

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## Abstract

*This paper examines the role of Internet Service Providers as bridges and intermediaries between private persons, organisations and even government arms and the internet and the liabilities placed on them by the law with regard to wrongful acts of their subscribers or clients under the laws of Nigeria. It is common knowledge that actions against ISPs are commonest with defamation and infringement of copyright. The legal framework in the US and the UK are examined to determine if there are lessons to learn for Nigeria. The Nigerian legal framework also places some responsibilities on ISPs with regard to crime prevention and prosecution. This is because private rights are not yet much of an issue in the Nigerian cyberspace. The paper points out that much of the regulation governing ISPs liability in respect of civil matters do not have legislative power but are mere guidelines and suggests that the US and UK patterns have a lot to offer Nigeria.*

## Key words:

Internet Service Providers; Nigerian laws; Civil Liability; Copyright and Defamation; Guidelines; Criminal liability; Penalty; Content Intermediary

## 1. Introduction

The internet is a giant network of networks designed to carry, host and transmit information or content. This information is distributed, hosted and located by online intermediaries whose part in the entire enterprise of the information is very vital. (Edwards, 2009) Often, content carries with it some legal liability which may be civil or criminal. For example, a document, a picture, a song or a video may be defamatory of another. Content may also be illegal or illicit and outright

violation of certain laws. The Internet is the information super highway of the world today. Virtually every person living on the globe today has one or more things to do with the internet. It has made communication, information sharing and interactions between people across territories, nations and continents easier and much more flexible. In other words, it has become the global interface among all classes of people.

The possibilities of information exchange over the internet and the wide publicity that may be attendant over a publication within a short period of time are causes for some concern over liability in some instances. The truth is that, as there are good and great uses of the internet, ill-motivated people have also found sinister purposes which are executable over the internet. Nigeria is one of the countries on the African continent that has a steady increase in Internet penetration with both positive and negative uses of the Internet on the rise. The degree of increase in internet usage in Nigeria is very healthy. With an estimated population of 170,123,740 people in 2012 from an estimated 200,000 internet users in 2000, the number jumped to 48,366,179 users by June 2012. Presently, Nigeria ranks as the 8<sup>th</sup> country (following China, India, the United States, Brazil, Indonesia, Japan and Russia) with the highest number of Internet users. With a 2017 population estimate of 191,835,936, Internet users as at June 2017 are 91,598,757 which presently amounts to a 47.7% Internet penetration.

With such development comes an expanding market with possibilities of diverse conflict and which may also be a criminal's playground. It thus becomes important to delimit the liability of each party especially that of intermediaries in the interest of developments in the information communication technology sector. A failure to do the foregoing may either encourage more infringement of copyright due to the ease of digital copying and transfer and the anonymous

nature of Internet users or hamper the growth of the Internet by placing too heavy a burden to bear on ISPs as intermediaries of information communication technology.

## 2. The Role of Internet Service Providers

Much as the internet is a free for all sphere, one needs the gateway of an intermediary to get on it. Internet service providers are companies or organisations that provide access to the internet for the ordinary user. They act as technological intermediaries by reason of their machinery and grant users to access to the internet for a fee. Because of their importance, much responsibility is placed upon their shoulders as the lack of their functionality renders the internet inaccessible to people.

Internet service providers operate the backbone networks of the Internet and each of them must interconnect with others to allow traffic from the various users to reach destination. In doing this, an ISP must have either a direct connection with its destination terminal, or interconnections with intermediary networks to allow the transmission of the message (Gringas, 2008). One may say that ISPs are necessary at every stage of an Internet transaction because the simplest Internet transaction usually involves a user's computer, an Internet service provider's access computer, a regional router, a government backbone computer, another regional router, another Internet service provider's computer and a content provider's computer. (Longe, Chiemeke et al. 2008)

Classifying Internet service providers is more technical than legal. There are three main types of ISPs that are always involved in an Internet transaction: Backbone Providers (National ISP), Source Internet Service Providers (Regional Internet Service Providers) and Destination Internet Service Providers (Local ISP). The first group are those that operate mainly at the level of

transmission with no direct relationship to any of the actors at the endpoint of the transmission. The second category (Source ISP) may operate in such a way as to be able to act as a gatekeeper to maintain some order and prevent misconduct on the Internet. Longe, et al. (2008) explain that a source ISP that is providing not only access but also acting as a server on which the unlawful material resides, may be much better placed to monitor and control the activity than one that provides only access. The third category (Destination ISPs) serves the end user who request content over the Internet. ( )

## 3. Civil Liability Issues

Generally, the two broad areas where attempts are always made to make ISPs civilly liable are with regards to defamation and copyright infringement. This is largely because of the publisher's role that ISPs are cast in. The third area is with regard to posting illicit or illegal content in cyberspace which largely comes within the ambit of criminal law.

### 3.1. Defamation

The law of defamation in Nigeria follows the common law of England. Defamation in most common law jurisdictions is capable of two divisions: libel and slander. In libel, the act is expressed in permanent form such as a writing, sign, picture, cartoon or electronic broadcast. In the case of *Corabi v. Curtis Publication Co.*, the court defined libel as "a method of defamation expressed by print, writing, pictures or signs; any publication that is injurious to the reputation of another, a false and unprivileged publication in writing of a defamatory material; a malicious written or printed publication which tends to blacken a person's reputation or to expose him to public hatred or ridicule, contempt or injures him in his business or profession". On the other hand, slander is only done through utterances or spoken words. The case of *Joe OdeyAgi v. First City Monument Bank* is instructive here. Further, defamation in Nigeria may be both criminal and civil. With respect to civil liability, there is no



statutory basis for this in Nigeria, but the common law principles are clearly established.

On the other hand, criminal liability for defamation is governed by Section 373 of the Criminal Code Act which provides as follows:

“Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation.

“Such matter may be expressed in spoken words or in any audible sounds, or in words legibly marked on any substance whatever, or by any sign or object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

“It is immaterial whether at the time of the publication of the defamatory matter, the person concerning whom such matter is published is living or dead: Provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney-General of the Federation.”

Further, libel as an aspect of defamation may be done by more than one person in respect of the same publication. The question that arises therefore is to what extent an Internet service provider will be liable under Nigerian law for the defamatory act of one of its subscribers. Within the larger European framework, internet service providers are not generally liable for defamatory statements made by users of their services, liability only falls upon them when they fail to take such postings down after been properly notified by the injured party. Similarly, in the United States, the Communication Decency Act 1996 which is the legal framework governing liability for defamatory statements allows internet service providers to remove content which in their opinion is abusive. (Section 230 (c) (2)

In the United States, a defamatory expression is basically a common law tort and traditionally liability is classified as either that of the direct

expresser of the libel, or that of the publisher who exercises editorial control or that of the distributor who does not have any editorial control. (Okamura, 2001). Until the laws were amended, the courts based the liability of the parties on the foregoing classifications. However, in response to some notable court decisions like *Cubby Inc. v. CompuServe Inc.* and *Stratton Oakmont Inc. v. Prodigy Services Co* regarding the liabilities of Internet service providers in respect of publications over the Internet, the United States Congress enacted Section 230 of the Communication Decency Act.

Under both jurisdictions, an injured party in an action for defamation is not seen as a helpless victim who the state must rise to defend and obtain justice for, rather he is seen as an injured party who has a right of action against the defaming party where he is known and possibly service providers under the legal principle of secondary liability. (Akinpelu, 2016). It is interesting to note that the English and American laws have found a way to preserve the right to freedom of expression and lawful dissemination over the internet while preventing the abuse of the internet to defame others.

As technology advances in Nigeria, one may freely say the law should respond to its innovations. But presently under the common law (which is applicable in Nigeria except where statutes have changed the position), a website that facilitates the publication of defamatory content may be treated as a publisher of the libel except it comes under any of the major defences (e.g. the defence of innocent dissemination). The basic rule is that there must be publication of a defamatory statement before an action in defamation will accrue. (*Nsirim v Nsirim; Daily Times of Nigeria v. Emezuom*). Even though the owner may not be the initiator of the communications (since it is the surfer who decides to browse the site), nevertheless it has been argued that the author of a website publishes when he causes certain information to be displayed on a website. (Fatula, 2009)

### 3.2. Copyright Infringement

The law of copyright in Nigeria is largely statutory. The main legislation governing copyrights in Nigeria is the Copyright Act. The Act provides in Section 24 for both civil and criminal actions for infringement of copyright and both actions may be prosecuted simultaneously in respect of the same infringement. Copyright infringement need not be done directly or by a single act, indirect acts of causing infringement to be done by others is also infringement which is known as contributory infringement.

Section 15 of the Copyright Act deals with 'infringement of copyright' and relevant to our discussions are subsection (1) paragraphs (a), (b), (c), (f) and (g) which provide that:

- (1) Copyright is infringed by any person who without the licence or authorization of the owner of the copyright –
- (a) does, or causes any other person to do an act, the doing of which is controlled by copyright;
  - (b) imports or causes to be imported into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy under this section of this Act;
  - (c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection;
  - (f) permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright;
  - (g) performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business, any work in which copyright subsists.

In the case of *Shapiro, Bernstein & Co. v. H. L. Green & Co.*, the United States Court of Appeals for the Second Circuit held the store owner liable for unauthorised sale of some records which

infringed on the plaintiffs' copyright. This is because, in the view of the court, the owner retained the legitimate right of supervision over conduct of record concession and the concessionaire's employees and reserved for itself a proportionate share of the proceeds from the sale of the phonograph records. This principle of recognising indirect acts of infringement as contributory infringement was enunciated in *American Motion Pictures Export Co (Nig) Ltd v Minnesota Nigeria Ltd*, where the defendant was held liable for the infringing act of its salesman committed in the course of business.

Though the possibility of online distribution of copyright works by means of technology has given more impetus to this new form of infringement, (Oyewumi, 2015) yet it neither appears that Nigerian laws have clear provisions, nor that the courts have made any definite pronouncement with respect to the liability of internet service providers for contributory infringement.

Because ISPs play a major role in the online distribution of digitised copyright works, there are questions as to whether these intermediaries should be made liable for the acts of their subscribers who use their services to access, post or download copyrighted works. (Oyewumi, 2015) Of course, it appears more profitable to go after ISPs as the various individual subscribers may be difficult to pursue and even where that is possible, there may not be much reward in the exercise. ISPs definitely fit in more into the scapegoat role as there is the certainty of higher financial dividends should their liability be established by the courts.

The danger however in making ISPs solely liable for copyright infringement by their subscribers is that it may make them unduly cautious and thus result in limiting access to information generally which is counterproductive in itself as this may further undermine the growth of the Internet in an environment such as Nigeria. The desirable middle line is to encourage the facilitation of digital works online while at the same time

maintaining the proper protection for copyrighted works by making the actual infringers solely liable.

#### **4. Legal Framework for Internet Service Providers in Nigeria**

There is no specific statutory definition of the phrase “Internet Service Provider” under Nigerian laws. As a matter of fact, Nigerian laws do not provide for Internet Service Providers in the same sense with which American or English legislations provide for them. The closest interpretations that we have under Section 157 of the Nigerian Communications Act and Section 58 of the Nigerian Cybercrime Act are the terms ‘network facilities provider’ (this means a person who is an owner of any network facilities. Network facilities on the other hand mean any element or combination of elements of physical infrastructure used principally for or in connection with the provision of services but does not include customer equipment); ‘network service provider’ (which simply means a person who provides network service. The same section construes a network service to mean a service for carrying communications by means of guided or unguided electromagnetic radiation) and ‘service provider’ which means - (i) any public or private entity that provides to users of its services the ability to communicate by means of a computer system, electronic communication devices, mobile networks; and (ii) any other entity that processes or stores computer data on behalf of such communication service or users of such service.

However, this is not to say that Internet Service Providers are not recognised under Nigerian laws. Recognising their importance in the information communication technology sector, the Nigerian Communications Commission, a statutorily created commission given the responsibility for the regulation of the communications sector in Nigeria, (Section 3 of the Nigerian Communications Act) designed a set of guidelines for their operations. This is similar to the Data Protection Guidelines released by the

Nigeria Information Technology Development Agency (Jemilohun & Akomolede, 2015). The Nigerian Communications Commission Guidelines for the Provision of Internet Service are made pursuant to the provisions of Section 70(2) of the Nigerian Communications Act and apply to all licensees providing internet access services or any other internet protocol based telecommunications.

The Guidelines for the Provision of Internet Service made a fair attempt in limiting the liability of ISPs as content intermediaries. Paragraph 5 of the Guidelines mandates ISPs to ensure that users are informed of any statements of acceptable Internet use published by the Commission or any other authority including with respect to among other things, violation of intellectual property rights. The paragraph places quite a lot of responsibilities on ISPs. It states in full: ISPs must ensure that users are informed of any statements of acceptable internet use published by the Commission or any other authority, and that failure to comply with these acceptable use requirements may lead to criminal prosecution, including with respect to:

- (a) Unlawful access and fraudulent use of computer
  - (b) Identity theft, impersonation or unauthorized disclosure of access codes
  - (c) Unlawful interception, or any form of system interference
  - (d) Violation of intellectual property rights
- Any other use for unlawful purposes, including terrorism, promoting racial, religious or other hatred or any other unlawful sexual purposes

This provision somewhat makes ISPs watchdogs over Internet users to ensure that online criminality is reduced and people are more aware of the risks relating to improper conduct on the Internet. Paragraph 11 under Part III of the Guidelines deals with the liability of ISPs as content intermediaries. The rules deal with ISP liability under the following headings: acting as mere conduits, caching and hosting.

(a) *Acting as Mere Conduit*

ISPs shall not be liable for the content of any Internet service transmission by a user of the service or for providing access to such content by other users if the ISP:

- (i) has not initiated the transmission;
- (ii) has not selected the recipient(s) of the transmission;
- (iii) has not selected or modified the content contained in the transmission; and
- (iv) acts without delay to remove or disable access to the information on receipt of any takedown notice, or on becoming aware that the information at the initial source of the transmission has been removed or disabled.

(b) *Caching*

ISPs shall not be liable for the transmission in a communication system of automatic, intermediate and temporarily stored information provided by a user of the service if the ISP: (i) does not modify the information;

- (ii) does not interfere with any conditions of access applicable to the information;
- (iii) complies with any rules regarding the updating of the information;
- (iv) does not interfere with the lawful use of technology to obtain data on the use of the information; and
- (v) acts without delay to remove or disable access to the information on receipt of any takedown notice, or on becoming aware that the information at the initial source of the transmission has been removed or disabled.

(c) *Hosting*

ISPs shall not be liable for the storage of information at the request of any user of the service if the ISP:

- (i) does not modify the information;
- (ii) does not interfere with any conditions of access applicable to the information;
- (iii) does not interfere with the lawful use of technology to obtain data on the use of the information;
- (iv) does not have knowledge of illegal activity related to the information; and

(v) acts without delay to remove or disable access to the information on receipt of any takedown notice.

The above regulations attempt to fill the lacunae that should ordinarily be filled by proper legislations giving not merely responsibilities to internet service providers but also rights to the individual persons and corporate bodies and organisations in the Nigerian society. It appears that the operatives of the Nigerian Communications Commission decided to adopt the provisions of Section 230 of the United States' Communications Decency Act and Section 512 of the Digital Millennium Copyright Act in a loose form and formulate the same as guidelines for the provision of internet services.

The regulations clearly and totally excludes an ISP from liability for the content of information posted or distributed or made available through its services by another person if it has not been involved in manipulating or howsoever changing the contents of the transmission and where it acts quickly in removing or disabling access upon notification of the undesirability of keeping same alive. Thus where an ISP goes beyond being a mere conduit and modifies the content or selects the recipients of the transmission, liability falls on it.

Paragraph 11 (3) (iv) brings in the role of knowledge in determining liability. An ISP shall not be liable for storage of information at the request of a user if the ISP does not have knowledge of illegal activity related to the information. The import of the provision is that once it can be proved that the ISP knew or ought to have known that the information was illegally hosted and it failed to take same down without delay, it will not be able to avoid liability

With regards to takedown notices, paragraph 12 of the Guidelines provide that ISPs must have in place a procedure for receiving and promptly responding to content related complaints, including any notice to withdraw or disable

access to identified content issued by the Commission or other legal authority.

It is clear from the above regulations that there is no separation between liability for defamation and liability for copyright infringement. Yet, the common law and statutory position places both differently. Much as one will want to commend the efforts of the Nigerian Communications Commission in making efforts to publish these guidelines, one cannot but say that a better approach would have been an outright amendment of the Nigerian Communications Act to include these laudable provisions within the body of the legislation so that it can have a proper normative value.

The Internet Service Providers Guidelines are just what they are: a set of guidelines with no normative authority in the real sense and as these guidelines have not yet been tested before a court of law in Nigeria, it will be difficult to determine the perspective of the courts to regulations made by an agency of the government like the Commission. The regulatory authority that initiated the guidelines (the Nigerian Communications Commission) will definitely reserve to itself power to penalize any Internet Service Provider that flouts or violate the regulations laid down in the guidelines, but it looks improbable that a private individual would have rights enforceable at law based on the guidelines.

## **5. The Legal Approach in the United States**

This Nigerian position as stated in the foregoing is different from the situation in the United States where amendments were made to the existing legislations (the Communications Decency Act 1996 and the Digital Millennium Copyright Act 1998) to accommodate the challenges of Internet service provider liabilities. Following the cases of *Cubby v CompuServe* and *Stratton Oakmont v Prodigy Internet Services*, the United States congress enacted Section 230 of the Communication Decency Act.

Congress found prior to making the amendments that:

“(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

“(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

“(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

“(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

“(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Based on the above findings, the legislation provides in Section 230 (c) that:

“(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) No provider or user of an interactive computer service shall be held liable on account of –

(a) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or  
(b) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)”

Paragraph (d) of the legislation provides that:

“(1) Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating

to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”

The law clearly excludes Internet service providers from any liability as publishers or speakers of any information provided by another information content provider. However, there are exceptions to this protection and thus where an Internet service provider fails to stay within the limits of the law, liability will fall.

One major ground on which an ISP can be liable for defamation is where it is the originator of the content alleged to have defamed. And this was the basis of the decision in *Zeran v. America Online Inc* where the court ruled that the immunity under Section 230 (c) exempts ISPs from the liability of a distributor, even if the ISP knew of the contents of the defamation.

The law imposes certain obligations on service providers to notify customers that parental control protections are commercially available that may assist in limiting the access of minors to potentially harmful material. Such a notice shall identify or provide access to information identifying current providers of such protections.

The law in paragraph (e) provides that the protection afforded to internet service providers by this present enactment does not afford any protection or limitation from criminal liability. Also, provisions of the law dealing with obscenity or relating to sexual exploitation of children are also in no way affected or impaired by Section 230. Further, nothing in the law can be construed to affect the liabilities under laws relating to intellectual property. Finally, nothing from the provisions of Section 230 can be construed in any way to limit the application of the Electronic Communications Privacy Act or any amendment made by it or similar state laws.

The other legislation providing for the freedom of ISPs from liability in relation to the contents shared by their subscribers is the United States

Digital Millennium Copyright Act. This statute settled the issues surrounding the liability of an ISP for copyright infringement.

Section 512 titled ‘Limitations on Liability relating to material online’ provides among other things the limitation of the liability of an ISP in the following cases:

- (1) Where an ISP is involved in transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for it, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections
- (2) Where there is intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider
- (3) Where information resides on systems or networks controlled or operated by or for the service provider at the direction of a user
- (4) Where the ISP refers or links users to an online location containing infringing material or infringing activity by using information location tools.

The law also provides that ISPs shall have no liability for taking down where the ISP in good faith disables access to or removes material claimed to be infringing.

## **6. Lessons from the United Kingdom**

The scope of liability of Internet service providers appears to be well laid out in the United Kingdom. With respect to defamation, Section 1 of the Defamation Act of 1996 offers some protection to Internet service providers and limits their liability by its provision that a person may not be held liable for defamation if he shows that “(a) he was not the author, editor or publisher of the statement complained of; (b) he took reasonable care in relation to its publication; and (c) he did not know, and had no reason to believe that what he did caused or contributed to the publication of a defamatory statement”. For the purposes of the Act, a publisher is one “whose





business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business”.

Furthermore, a person cannot be said to be the author, editor or publisher of a statement if he is only involved: “(a) in printing, producing, distributing or selling printed material containing the statement; (c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form; (e) as the operator of or provider of access to a communications system by means of which the system is transmitted or made available, by a person over whom he has no effective control.”

But the above provisions did not avail in the landmark case of *Godfrey v Demon Ltd* where the main issue before the court was whether the defendant had a good defence against the defamation action. The plaintiff had complained to the defendant ISP about a defamatory post and requested that the defendant take the post down but the defendant did not until the post expired some days later. The plaintiff thereupon sued for defamation. The court held that even though the defendant was not a publisher within the meaning of Section 1(2) and 1(3), the defendant knew or had reasons to know that its acts caused or contributed to the publication of the defamatory statement. Thus, knowledge was shown as a major determinant of liability.

The UK Defamation Act 2013 appears to have improved on the earlier statute by creating a specific section (Section 5) for website operators in actions for defamation and giving more protection. Under the new law, it is a defence for a website operator to show that it was not the one who posted the statement on the website. However this defence has limitations as the defence will fail where the claimant cannot identify the person who posted the statement, where the claimant gave the operator a notice of

complaint with regards to the statement, and the operator failed to respond appropriately to the notice of complaint.

With regards to liability for copyright infringements by internet service providers in the UK, the Copyright Designs and Patents Act of 1988 appears to have provided for this under Sections 22 – 26. The courts in the cases of *Twentieth Century Fox Film Corporation & 5 Ors v. Newzbin Ltd* and *Twentieth Century Fox Film Corporation v. British Telecommunications Plc* gave effect to Section 20 of the Copyright Designs and Patents Act and ruled that a service provider could be ordered by the court to block a website that is infringing on copyright.

In the first case, the defendant was found guilty of infringement, an injunction was granted to restrain further infringement and the website was accordingly shut down. The defendant thereupon created another site known as Newzbin2 and operated from the same location but the server used to host the new website was located in Sweden and the domain name was registered to a company outside the shores of the UK and continued to infringe the copyright of certain filmmakers. The applicants asked the court to order that the defendant shall prevent its services being used by users and operators of the website known as NEWZBIN and NEWZBIN2 to infringe copyright. The court granted the order.

The United Kingdom courts applied the same principle of intermediary liability in the case of *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* where a group of Swiss fashion companies brought an application to the court asking that orders be made against internet service providers requiring them to block access to about six websites which advertise and sell counterfeit goods. The court held that it had jurisdiction from a domestic interpretation of Section 37(1) of the Senior Courts Act, 1981 or alternatively under the Marleasing principle in light of Article 11 of the Enforcement Directive, and gave some conditions for exercising same:

- i) That the respondent is an intermediary

- ii) That the operators of the target websites infringed the claimants' trade marks
- iii) That the operators use the services of the internet service providers to infringe
- iv) That the internet service providers had actual knowledge of the infringing use of their services

The court held that the conditions in the instance case were satisfied and that the orders were proportionate because there were no other measures available that showed a better balance of efficacy and burden to the parties. However, the court stated two safeguards: (a) that the orders should expressly permit third parties such as subscribers and affected website operators to apply for a discharge or variation of the orders, and (b) a sunset clause should be included to ensure that the order is not indefinite.

It is not known if any Nigerian court has had the opportunity yet of being asked by any copyright or trademark owner to request internet service providers to block a website or filter its contents, but there is every possibility that the persuasive authority of UK cases in Nigerian courts may guide our courts if such matters come before them pending the enactment of appropriate and encompassing legislation.

### **7. Criminal Liability of Service Providers**

Beyond the areas of civil liability highlighted above, the Cybercrime (Prohibition, Prevention Etc) Act 2015 appears to place some other responsibility on Internet Service Providers in Nigeria. These duties are more in line with the prohibition, prevention, detection, prosecution and punishment of cybercrimes which the Act set out to accomplish. Suffice to say that in Nigeria, the spate of finance-based criminal activities on the Internet in recent times far outweighed civil wrongs taking place on the web.

Interestingly the Act does not mention the term ISP in its frame but uses the phrase 'service provider' which arguably covers ISPs because the

interpretation section (Section 58) defines service provider to mean:

- (i) any public or private entity that provides to users of its services the ability to communicate by means of a computer system, electronic communication devices, mobile networks; and
- (ii) any other entity that processes or stores computer data on behalf of such communication service or users of such service.

Section 38 of the Act mandates a service provider to keep traffic data and subscriber information as may be prescribed for two years, and at the request of any relevant authority or law enforcement agency preserve, hold or retain such traffic data, subscriber information, non-content information and content data and it shall be the duty of the service provider to release such information when requested.

The section further provides that any data retained, processed or retrieved by the service provider shall not be utilized except for legitimate purposes as may be provided for under the Act, other legislation or by the order of a court of competent jurisdiction. Also, anyone carrying out any function by reason of this provision is to have due regard to the right of individuals to privacy under the Nigerian Constitution and take appropriate measures to safeguard the confidentiality of the data in use. Contravention of these provisions makes the offender liable upon conviction to imprisonment for a term of not more than three years or a fine of not more than N7million naira.

Further to the foregoing, the Act in Section 39, empowers a judge to order a service provider to intercept, collect, record content data and/or traffic data associated with specified communications transmitted by means of a computer system.

But by far the most direct provision of the Act dealing with the liability of service providers under the Act is the provision of section 40 which

mandates a service provider comply with all the provisions of the Act and to disclose information requested by any law enforcement agency or otherwise render assistance howsoever in any inquiry or proceeding under this Act and to provide assistance towards:

- (a) the identification, apprehension and prosecution of offenders
- (b) the identification, tracking and tracing of proceeds of any offence or any property, equipment or device used in the commission of any offence
- (c) the freezing, removal, erasure or cancellation of the services of the offender which enables the offender to either commit the offence, hide or preserve the proceeds of any offence or any property, equipment or device used in the commission of the offence.

Where a service provider contravenes the above provisions, it commits an offence and is liable on conviction to a fine of not more than N10million. In addition to this, each officer of the service provider shall be liable to imprisonment for a term of not more than 3 years or a fine of not more than N7million or to both such fine and imprisonment.

The import of the foregoing is that service providers do not just have civil liabilities where their subscribers violate the rights of others, but now have certain duties similar to law enforcement and where there is any lapse on their part, criminal liability results.

However, there has been no known prosecution of an internet service provider for any breach of the provisions of the Act or of any other criminal enactment till date. It is possible that Nigerian internet service providers will wake up some day and lobby for the enactment of clear-cut legislation limiting their liability in unmistakable terms similar to the UK or US models. But until then, the law remains as it is now.

## 8. Conclusions

It is clear from the foregoing that the legislative basis for ISPs liability or immunity under

Nigerian law is not as strong as it should be. This may be traceable to the commitment of the Nigerian government to the deployment of information communications technology in the commercial sector. In the opinion of this writer, the Guidelines for the provision of Internet service published by the Nigerian Communications Commission remains what it is – just a set of Guidelines which may be revised at any time and which may be replaced at the discretion of the Nigerian Communications Commission.

In an age where individual nations and regional blocks are striving to ensure that legislations are up to date with regards to technology and its advances, this lack of clear legislative authority does not seem to be the best. There is a definite lack of certainty in this matter. Worse still is that the statute establishing the Nigerian Communications Commission does not seem to have Internet service providers distinctly in mind.

Nigeria still has a long way to go in legislating for matters functioning in Cyberspace. (Jemilohun & Akomolede, 2015) The legislative organs in Nigeria do not appear to have woken to the developments and possibilities in the information communications technology sector. Internet service providers play such an important role in the ICT sector that their legal basis of liability even in civil matters should be clearly spelt out and definitely established.

Like the European ISPs argued against the burden of full liability, Nigerian ISPs too may need to be saved from the hammer by direct legislative intervention. The promotion of e-commerce and the development of the information society in Nigeria will continue to depend on a stable and expanding internet infrastructure. This will definitely necessitate a broad based immunity as the absence of this might render the ISP industry uneconomic and keep them outside Nigeria. Overall, our legislations should be proactive in addressing things in the ICT sector.

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