



CIRCUMSPECTIONS: LEGAL ISSUES IN SOCIAL MEDIA USAGE

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RIGHTS' INFRINGEMENTS ON SM PLATFORMS ARE OFTENTIMES UNENFORCED, THAT DOES NOT DETRACT FROM THE ENFORCEABILITY OF SUCH RIGHTS, ONCE THERE IS SUFFICIENT EVIDENCE TO PROVE INFRINGEMENT

By virtue of increased internet penetration in Nigeria, Social Media (SM) has garnered millions of users; in some cases it has become a mainstay for communication and dissemination of information to many. SM are internet based Apps such as Facebook, Instagram, YouTube, Snapchat, Pinterest, Twitter, WhatsApp, Skype, WeChat, LinkedIn, Telegram etc., that facilitates the



sharing of ideas, thoughts, and information through the building of virtual networks and communities.¹

In the fourth quarter of 2018, Facebook recorded 2.32 billion monthly active users, up from 1 billion in 2016; and Instagram 1 billion monthly active users, up from 800 million in September 2017.² However, besides being an avenue for messaging, sharing photos and videos with friends and followers, SM sites are also being used for dissemination of news; for professional networking such as LinkedIn; opinion polls; and marketing/promotion of brands and businesses.

Irrespective of its innumerable benefits, SM increases users' legal exposure to liability ranging from trademarks and copyrights infringements, privacy rights infringements, defamation etc.

Matthew Hudson, 'What is Social Media', *The Balance Small Business*, 31.12.2018: <https://www.thebalancesmb.com/what-is-social-media-2890301>; Maya Dollarhide, 'Social Media Definition', *Investopedia*, 20.02.2019; <https://www.investopedia.com/terms/s/social-media.asp> (both accessed 27.02.2019).
The Statistics Portal, 'Number of Monthly Active Instagram Users from January 2013 to June 2018 (in Millions)': <https://www.statista.com/statistics/253577/number-of-monthly-active-instagram-users/> (accessed 04.03.2019).

Although rights' infringements on SM platforms are oftentimes unenforced, that does not detract from the enforceability of such rights, once there is sufficient evidence to prove infringement. This article seeks to enlighten readers on liability issues arising out of SM use and how to navigate potential trouble spots.

Legal Precautions in Using SM

It is important that users take precautions not to breach third party rights as discussed hereafter:

Right of Privacy

Increased globalisation and diffusion of Information Communication Technology (ICT) has significantly impacted some of our fundamental rights, one of which is our right to privacy – the right to have one's personal life free from public scrutiny. It presupposes that individuals

should have an area of autonomous development, interaction, and liberty, free from intervention by other uninvited individuals.³ According to **Section 37, Constitution of the Federal Republic of Nigeria 1999 as amended (1999 Constitution)**: “The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.”

However, such constitutional right though fundamental and inalienable, is not absolute, but subject to derogations and restrictions in **Section 45 1999 Constitution**.⁴ In **MDPDT v. Okonkwo**,⁵ the Supreme Court (SC) stated that derogation from an individual right to privacy can be permitted where it impinges on the rights of others or put the welfare or public health in jeopardy. Also in **Ogunbesan & Ors**

v. Hon. Minister of Health and Social Services,⁶ the Federal High Court (FHC) held that the Applicant's decision to embark on an industrial action was properly derogated upon since it was in the interest of public health.

Invasion of privacy on SM occurs where a user posts the image or video of another user without authorisation and not in accordance with his own usage. For instance, where a Virtual Augmented Reality (VAR) studio intends to model the popular Broad Street in Lagos Island, the studio will have to obtain license from IP rights holders whose marks are visible on the street.⁷ This is equally applicable to individuals with personality rights who are randomly captured on the street.⁸ Therefore, posting images or videos of people without their consent on SM can amount to breach of their right to privacy.



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³ 'The Right to Privacy in Nigeria', Stakeholder Report Universal Periodic Review 31st Session–Nigeria, March 2018: https://privacyinternational.org/sites/default/files/2018-05/UPR_The%20Right%20to%20Privacy_Nigeria.pdf (accessed 04.03. 2019).

⁴ **Section 45(a) 1999 Constitution** provides that: “Nothing in section 37... shall invalidate any law that is reasonably justifiable in a democratic society – (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedoms of other persons.”

⁵ [2001] FWLR (Pt. 44), 542.

⁶ [1995] FHCLR (Pt. 168), 190.

⁷ This is because the marks are registered IP; using the signs without authorisation amounts to an infringement. See **Adenuga v. Ilesanmi Press** [1991] 5 NWLR (Pt. 189), 82, where the FHC held that where the Respondent publishes the Appellant's book and sells copies thereof to the public, he will be held to have infringed the copyright of the Appellant unless he can show that he has the Appellant's license to do so.

⁸ See Chuks Okoriekwe, 'Immersion: Legal Realities in Nigeria's Virtual & Augmented Reality Entertainment Sector', *LeLaw Thought Leadership Insights*, December 2018: <http://lelawlegal.com/pdf/Immersion.pdf> (accessed 24.04. 2019).



It is arguable whether the same position holds in the case of celebrities. There have been conflicting opinions on the rights of privacy of celebrities, because it is believed that they are constantly in the spotlight and virtually everything they do is in the public domain. For instance, if a story is in the public interest, a judge may rule that the celebrity's right to privacy should be limited for the greater purpose of informing the public.⁹

Another instance of right to privacy was raised in **Harvey v. Niland & Ors**,¹⁰ where the Plaintiff illegally obtained the password of the Defendant's Facebook account to obtain evidence to support his claim in Court. The High Court (HC) allowed his evidence because it was the basis for the Plaintiff's claim, even though it was illegally obtained. This position is

also similar to the provisions of **Section 14 Evidence Act 2011** (EA), which provides that improperly obtained evidence “*shall he admissible unless the court is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence...*”

On the basis of the forgoing, SM is a public platform; users have to be careful with what they post, especially when such can be seen to invade another's privacy.

Secondly, the best way to prevent one's information from getting into the wrong hands or being used by the wrong people is not post at all. This is because though you have exclusive rights to original contents you post online, users viewing it can use it in a manner you might not approve off.

Defamation

A legal claim of defamation can arise from SM use. Defamation is as an act of communicating false statements about a person to a third party, which injures the person's reputation or prevents further association with the person.¹² Defamation can either be in form of slander or libel. Libel is communicating a defamatory statement made in writing,¹³ while slander is a verbal defamation.¹⁴

Initiating and posting false information about anyone on SM, commenting, or using emoticons, may expose users to defamation.¹⁵ In **McAlpine v. Bercow**,¹⁶ wrong assumptions were made by the general public, accusing the Plaintiff of being a paedophile, based on a British Broadcasting Corporation (BBC) report of a politician involved in such act. Consequently, many took to SM and let their assumptions go viral via tweets and posts on Facebook, linking this news to the Plaintiff, one of which was the Defendant, a fellow politician took part and tweeted: “*Why is Lord McAlpine trending? *Innocent face*[.]*” Many of her followers re-tweeted, vastly expanding the number of individuals who read the statement. It was later confirmed that the allegations against the Plaintiff were unfounded.

The Plaintiff threatened to sue everyone who insinuated he was a paedophile, including the Twitter users. This led to various settlements, but the Defendant refused to settle and was sued for defamation. The England and Wales High Court (EWHC) held

⁹ **Rhiannon Jackson**, 'Do Celebrities have a Right to Privacy', 07.02. 2018: <https://rightsinfo.org/celebrities-right-privacy/> (accessed 29.04 2019).

¹⁰ **2016 (2) SA 436 (ECG)**.

¹¹ **Cap. E14, LFN 2004**.

¹² A.O.N Ezeani and R.U. Ezeani, 'Law of Torts', (1st ed., 2014) p. 498.

¹³ See **Chief Rotimi Williams v. The West African Pilot [1961] ANLR 866**, where the High Court (HC) held the Defendant guilty for libellous publications against the Plaintiff through the use of cartoon in the Defendant's Newspaper.

¹⁴ Marianne Bonner, 'Defamation, Libel and Slander', *The Balance Small Business*, 29.02.2019: <https://www.thebalancesmb.com/defamation-libel-and-slander-462650> (accessed 29.04 2019).

¹⁵ Also users who repost/ retweet/reshare will be equally liable for defamation because they have communicated the false statement and further helped in circulating to third parties and consequently causing more injury.

¹⁶ **[2013] EWHC (QB) 1342**.

that her tweet could be reasonably understood as the finger of blame, because the reasonable Twitter user would have interpreted the emoji as ironic and asking an hypocritical question. In the end she was ordered to pay damages in the sum of US\$15,000.

Also, recently it was reported that a Nigerian actor recently sued a popular female influencer on Instagram for asserting in a video she made for her followers that the actor was gay.¹⁷ The matter is still pending in court. These cases shows the growing influence SM has on defamation and the need for users to be circumspect with their online publications.

Currently, there are no existing Nigerian laws for SM offences, but the judiciary will presumably use the principles of defamation in dealing with any matter likely to injure one's character.¹⁸

Also, bloggers whose jobs require publishing news, celebrity gossip, a writer's opinion and thoughts about places, products, services



etc., should verify facts before publication. This is because erroneous facts or innocent mistake does not constitute valid defence to defamation; and the injured party will be entitled to damages.¹⁹

Recently, a popular blogger reported that a certain individual was behind the unknown face of one of the most popular Nigerian blogs on Instagram. As a result this certain individual sued this popular blogger for libel and the matter is still pending in court. In defending a defamation action, the Defendant must be able to prove one or more of: justification,²⁰ fair comment,²¹ and consent.

Copyright Protection

Intellectual Property Rights (IPRs) is at the heart of SM, given that once original contents are shared online it qualifies the Content Owners (COs) to earn recognition or financial benefit from what they have invented or created.²² Copyright empowers the CO to determine the conditions under which the original work can be used by others.²³ Copyright protection therefore involves protecting original photos, original written contents, original videos etc. of individuals from being reposted or re-used without proper authorisation. Thus to re-use someone else's content would require permission or authorisation from the CO, which also applies to use on SM.

¹⁷ Also, see *AvePoint Inc. v. Power Tools, Inc.*, 981 F. Supp. 2d 496, where a Federal District Court found a user liable for posting a tweet that defamed a competing business' reputation.

¹⁸ Different approaches exist in dealing with defamatory contents posted on SM. For instance, the court will consider how a reasonable user would interpret an allegedly defamatory statement; the context of the statement; the purpose of the post – whether was to joke, or relay facts, etc. To successfully maintain an action for defamation, you must prove that: the information complained off is false; it refers to the Claimant; and the false information was published i.e. communicated to another person. See Ezeani and Ezeani, (*supra*), p. 499; *Zenith Plastics Industries Ltd v. Samotech Ltd.* [2007] 16 NWLR (Pt. 1060), 315 CA. The proper party to bring an action for defamation is the person who was actually defamed: *Rotimi Williams v. West African Pilot* [1961] ANLR 866.

¹⁹ See Titilade Adelekun Ilesanmi, 'Introspections: Legal Realities of Blogging in Nigeria', *LeLaw Thought Leadership*, BD Legal Business, 11.01.2018, pp. 21-22; also available at: http://www.lelawlegal.com/pdf/Introspection_Legal%20issues%20of%20blogging.pdf (accessed 30.04. 2019). Also see generally, Oluwatofarati Adewole, 'Optics: Legal Issues in Brands' Exposure to Corporate Defamation', *LeLaw Thought Leadership Insights*, March 2019: <http://www.lelawlegal.com/blog.php>.

²⁰ This defence will succeed if the Defendant proves that the statements are truthful.

²¹ A fair comment defence will succeed if the Defendant can correctly state the facts; show that his comments are a fair criticism and of his honest opinion; and that same is a matter of public interest: *African Newspaper of Nigeria Ltd v. Coker* [1973] 5 SC 257; *Akomolafe v. Guardian Press Ltd & Ors.* [2004] 1 NWLR (Pt. 853), 1, CA.

²² See Frank Okeke, 'Horizons: Utilising IP as Security for Financing Transactions in Nigeria', *LeLaw Thought Leadership*, BD Legal Business, 22. 02.2018, p. 20) http://lelawlegal.com/pdf/New_Horizons_Frank.pdf (accessed 13.03 2019).

²³ For instance, copyright in images rests with the person who takes the picture and in a writer for written contents, without the need for registration. 80 N.Y.S. 2d 575.

In cases where the CO is unknown, it would be wise to opt for contents in the public domain to be on the safe side. In *Shostakovich v. Twentieth Century-Fox Film Corp*,²⁴ all of the music used for a 1948 motion picture was in the public domain. As a result, the New York SC refused to prohibit the use of the names of the composers and music because it had no copyright protection. Contrarily, a popular American model, was recently sued for allegedly posting a photo of herself taken by a photographer to her personal Instagram account because she allegedly did not seek permission from the photographer.²⁵

Also, written news texts disseminated to the general public on SM must be original and creative and if it needs to be reposted or retweeted or re-shared, attribution has to be given. It is also advisable that businesses on SM educate their staff regarding protecting and monitoring infringement of the firm's IPR, whilst maintaining the principles of openness and sharing of information. For example: they must know how to obtain permission; exceptions that may

allow use of non-original contents; cost (financial and reputational) of violating IP laws, etc.²⁶

In instances where the CO is unknown, which is very common, the best way to dealing with this is including a disclaimer in your content.²⁷ This would show your intent to give attribution and inability to do so, is due to not knowing the CO.

How Copyright works with SM Sites

SM sites have different terms of service guiding their usage. Facebook for instance in their 'Terms of Service' provides *inter alia* as follows: "you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)". This means that by signing up on Facebook, Facebook is automatically allowed to reuse the subscriber's content without permission and payment; and for such to be viewed by other users,²⁸ with the exclusive right still resting on the Copyright owner. However, Facebook gives certain powers as to how the subscriber's contents are shared,²⁹ and when he

leaves Facebook all contents are deleted.³⁰

Nevertheless, as users it is advisable to give attribution and obtain authorisation where necessary, because of CO's right to sue for infringements. Also, because of the difficulty in tracking down unauthorised users and fully protecting ones contents online, It is advisable that COs put watermarks on photos/ videos or place disclaimers on contents.

Conclusion

SM has taken the world by storm and its popularity has given rise to 'new' legal issues. The trend is likely to continue with even more new legal issues in the times ahead. Therefore in order to control and mitigate SM related infractions, there needs to be an up to date cum enduring framework that creates awareness for the rights and liabilities of users. This will provide a clear picture on laws governing the collection and use of information that is considered personal, private or confidential. Instructively, it is generally the individual users that are held liable and not the platforms because the platforms would have already disclaimed liability³¹

²⁴ 80 N.Y.S. 2d 575.

²⁵ Kellie Ell, 'Gigi Hadid Sued for Posting Instagram Photo without Permission-Again', WWD- Fashion. Beauty. Business, 19.01.2019: <https://www.wwd.com/business-news/legal/gigi-hadid-copyright-infringement-case-1202991468/> (accessed 13.03.2019).

²⁶ Gideon Dionne, 'Social Media Legal Issues: (Post Number 5): Copyright, Trademark, and other Intellectual Property (IP) issues', The Canal Street Blog, <https://www.invigorlaw.com/social-media-legal-issues-post-number-5-copyright-trademark-and-other-intellectual-property-ip-issues/> (accessed 24.04.2019).

²⁷ For example, disclaimer that "Photo(s) remain the IP of the tagged/original owners..."

²⁸ Jean Murray, 'How Copyright Works with Social Media (Fair Use and Licensing)', The Balance Small Business, 31.01.2019: <https://www.thebalancesmb.com/copyrights-and-social-media-issues-397821> (accessed 26.04.2019).

²⁹ You can control all contents and information you post and how it is shared, through your privacy and application settings available on SM sites.

³⁰ Jean Murray, 'How Copyright Works with Social Media (Fair Use and Licensing)', The Balance Small Business, 31.01.2019: <https://www.thebalancesmb.com/copyrights-and-social-media-issues-397821> (accessed 26.04.2019).

³¹ For instance Twitter's 'Terms of Service' provides *inter alia* that: "To the maximum extent permitted by applicable law, the Twitter entities shall not be liable for any indirect, incidental, special, consequential or punitive damages, or any loss of profits or revenues, whether incurred directly or indirectly, or any loss of data, use, goodwill, or other intangible losses, resulting from... (ii) any conduct or content of any third party on the services, including without limitation, any defamatory, offensive or illegal conduct of other users or third parties." Paragraph 5 (Limits on Liability) Twitter Terms of Service.

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