



Social Media and the Liabilities of Internet Service Providers in Nigeria: A Comparative Analysis of Jurisdictions

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Research Article

Abstract

Social media has been the vehicle for the dynamic progression of globalization. The purpose of social media encompasses many ends. Some of which allow for liabilities for third-party users, or in some circumstances, liabilities for Internet Service Providers. There are many complications in determining the liabilities of Internet Service Providers and third-party users. This paper examined the nature of Internet Service Providers (ISP), social media, and the activities of third-party users in Nigeria. It also interrogated the various instances where third party use of social media might affect ISP liability. This paper further explored the judicial and legal framework of some jurisdictions to see how they view the liabilities of internet service providers. The paper concluded that internet service providers should be held accountable for the content that is published on their platforms as it affects greatly the lives of concerned users offline.

Keywords: Social Media, Internet Service Providers, Publication, Fake News

1. Introduction

In 2015, President Muhammadu Buhari of Nigeria was sworn in for his first term in office. Earlier on in his campaign, his team had engaged social media aggressively, exploiting social media's ubiquity and ready accessibility to stay ahead in the electoral race. There was also the transparency that social media offered (Edozien, 2015). Social media has gained a lot of traction lately for its many great ways of making interactions more effective. In fact, in the public sphere,

it has enhanced democratic processes. In today's world, politics and social freedom have mostly become a virtual thing (Lalude, 2019). The internet has become a haven for social liberty and an outlet of expression. Social media has become quite an invaluable asset to the open society.

Politics the world over, has taken a new turn as social media has proven to be a veritable tool in shaping public opinion. This has become so since television has had to compete with the internet for many things. Considering the reach of the internet in the twenty-first century, it has become quite necessary to use the internet as a means to connect with other people for many reasons. The features through which social media users interact with other users has made it quite easier to consistently engage multiple numbers of users without breaching personal spaces. Social media has created what one could call, a liberation of thought.

People express themselves, and they get validation and encouragement from people who believe in the way they think. This has made social media most effective for the creation of cult followership and the incubation of dangerous ideas. There are certain ways ideas are sold on social media, one of which is through a 'viral' circulation, and then such an idea develops a life of its own. The ubiquity of social media that makes it most effective for communication has also made it quite a space that amplifies whatever use that is made of it. For instance, terrorists and cybercriminals have made use of social media to further their objectives quite effectively, in the case of terrorists, they use social media for 'radicalization, recruitment, funding, planning, and execution of terror activities' (Interpol, 2020). Cybercrime on the other hand has flourished on social media because social media allows for a level of anonymity. There was a report that showed that cybercriminals raked in 3.25 billion dollars 'from crypto-jacking and botnets for hire' (McGuire, 2019).

Since social media as an internet platform provides a safe space for free speech, there have been many occasions where tortious issues could come up as a result of the freedom that social media brings with it. With the abundance of criminal and tortious possibilities on social media, ranging from defamation to the promotion of illegal activity, it becomes quite necessary to examine the liabilities of internet service providers.

2. What are ISPs?

Internet service providers (ISP) are companies that host internet connectivity and internet related services to people and organizations. ISPs could also provide software packages (such as browsers), e-mail accounts, and a personal web site or home page. ISPs have a wide range of online content, but it remains that the extent of their control over social media content would determine how liable they are over issues that could come from third party use. ISPs are agreed to be internet access enablers. The ISP might use copper, fiber, and maybe satellite communications in providing internet connection to clients.

3. The Conceptualization of the Social Media

The concept of social media may be seen as the internet made flexible, and less impersonal. It could be seen as a range of websites and software applications that make it possible for people to

share content faster (Hudson, 2019). Another description of social media is presented in a variation of its forms by Wigmore (2019):

Social media is the collective of online communications channels dedicated to community-based input, interaction, content-sharing, and collaboration. Websites and applications dedicated to forums, microblogging, social networking, social bookmarking, social curation, and wikis are among the different types of social media.

Social media is diverse in its use and its dynamics. Human interaction is growing every day in the virtual space and the idea of globalization cannot be better explained without talking about the influence of social media in its crystallization. As the essence of law itself is to guide human interaction within society, social media itself has created virtual communities of people and it has become increasingly possible that whatever the law guides against becomes unavoidably part of what the social media has to contain. With the growing human interaction that is enhanced by social media, it then becomes important to look at the situations in which ISPs could become liable for third party use of social media.

4. Tortious and Criminal Liability on Social Media: A Nigerian Perspective

The freedom that comes with the expression on social media has costs to it. With the advent of social media and the uncensored expression that it offers, social media posts and interactions have given rise to a plethora of defamation suits (Rolph, 2013). This is aided by the fact that social media was intended for free expression and uninhibited possibilities in social interaction. There are proliferating instances where posts made on social media have brought about petitions. It is interesting to note that since social media is quite accessible to a large number of people, it has become much harder to control defamatory publications, except a social media platform is developed enough to have algorithms that flag certain words or expressions. However, the variance in the cultural expression of language allows for a situation where even in the use of the English language, what seeks to malign could be subject to cultural nuances. For instance, the use of the English language to malign someone's character in Nigeria might not be coherent to an American speaker. This could be a limitation in the processing of social media publications for likely defamatory content.

There are quite some prolific defamation cases that have arisen as a result of the use of social media, and many of these are at different stages, with some going ahead to institute action, some threatening action, and some already have gotten judgment. The huge difference between the nature of social media and the traditional platforms is that social media raises the risk of defamatory content since unlike other media, it is not as regulated (Rolph, 2013). This lack of censorship makes it quite a ready tool in the hands of propagandists. One of the instances when social media was used to advance propaganda in Nigeria, was when Nnamdi Kanu, the leader of the Independent People of Biafra (IPOB) started to make damning posts about the government and the Nigerian state. All in a bid to instigate and incite IPOB members and any Igbo who would believe the things he said. The effect was mass recruitment into the IPOB ranks and devoted proselytization that began to bother the government of Nigeria.

There is either much indifference or ignorance in the use of social media by many users since there is so much widespread recklessness in its use which stems from the fact that unlike traditional media and the rest of the internet itself, there are no other media with features that allow for a high level of 'uninhibited participation' (Rolph. 2013). There is a ready array of judicial precedence in countries like New Zealand, Australia, and the United Kingdom that shows that there is a consideration of the defamatory propensity of the reckless use of social media.

The anonymity cloak of social media sometimes allows for an almost impossible identification of the source of the defamatory publication (Rolph. 2013). This is, even more, the case when such defamatory publication has gone 'viral'. At the point when it becomes 'viral' it is impossible to unravel the source from the many shares and re-publications that such defamatory publication might have gone through. In the developed world, there is sometimes a compulsion by the court for a disclosure of the anonymous faces behind defamatory publication on social media (Rolph, 2013). What this means is that, for social media users who exploit the anonymity cloak that social media could offer, there are ways that they could be detected.

There used to be a time when news was rigorously edited before being published. In such times, the news available left a little room for doubt or was never reported at all. The proliferation of fake news on social media has birthed new dangerous possibilities. The advent of social media brought along with it, an intermeddling form of journalism that operated without ethical considerations. Initially, fake news referred to a type of satirical information and there was a concern that young people could be taking such form of information seriously, instead of real news (Chakrabarti, Rooney and Kweon, 2019). There is a recent attribution of negativity to fake news especially now that social media has made the circulation of fake news easier.

Fake news has become central to a government discourse in Nigeria on the far-reaching implications of misinformation. For instance, there was a video that espoused the conspiracy that President Muhammadu Buhari who had been going to the United Kingdom for treatment for an undisclosed illness had been replaced by 'Jubril' of Sudan. That video was seen by several thousands of social media users. That video gained so much public attention that President Buhari had to make a public declaration when he was in Poland, that he was himself and not some other person. The circulation of fake news on social media becomes, even more, a weapon during election season (Anderson, 2019).

Fake news, deployed during election season in Nigeria has become ritualistic of a propaganda system. Both sides seem to accept it as normal until it begins to hurt more where power resides. In the 2019 elections, there was a piece of news that gained the rounds on social media which claimed that Atiku Abubakar, a presidential aspirant, and the most prominent rival of Muhammadu Buhari, had the support of the LGBT (Anderson, 2019). In a country like Nigeria, with so much homophobic intensity, that was a calculation for Atiku's rivals to get ahead of him politically. During elections in Nigeria, fake news is deliberate. The war of fake news in Nigeria is one that leaves a mark on the social and political terrain. One of such news employed by the campaign team of President Buhari for his second term bid was described by a report:

President Buhari's Special Adviser on Social Media posted a video on Twitter that showed his supporters at a big rally when in reality the images were from a religious gathering the year before. She also posted a photo of major road construction, citing it as an example of the President's public works. The public works were in Rwanda. She issued an apology, saying: "My big mistake, apologies to all, friends and wailers alike. It won't happen again."

There are many ethical issues to the engagement of fake news on social media especially by government officials in Nigeria, looking for a second term in office when they deploy it to gain an upper hand in the electoral race. Another instance of the engagement of fake news during the race for the 2019 presidential elections in Nigeria was the tweet which came with pictures that showed Atiku Abubakar sharing food and money on his campaign and which had tagged to it: "Keep them in poverty, then give them handouts. Atiku in Sokoto yesterday." The use of fake news in demoralizing political rivals using social media has become quite a norm in the Nigerian political culture. In the 2015 elections, it was engaged heavily and aggressively.

Social media would have been quite great for effective news reporting, but the social media reality of fake news has made many people disparage social media as a source of genuine news. The criminal liability for the circulation of fake news can hardly be determined except through the intention behind its circulation. Sometimes the intention behind the circulation of fake news on social media is to achieve a terrorist objective, to create fear, or to generate murderous sentiments. The consistent publication of different inciting content by the leader of the IPOB on social media, especially the news that Muhammadu Buhari had died and had been replaced by a Sudanese named Jubril, were seditious according to S. 50 (2) of the Criminal Code, which provides that a "seditious intention" is an intention-

- (a) To bring into hatred or contempt or excite disaffection against the person of the President or of the Governor of a State or the Government of the Federation; or
- (b) to excite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established; or
- (c) To raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or
- (d) To promote feelings of ill-will and hostility between different classes of the population of Nigeria (Criminal Code Act, 1990).

5. Liabilities of Internet Service Providers

Although legal remedy on defamation through the use of social media remains quite uncertain in Nigeria, it would be instructive to look at the position in other jurisdictions. The complicity of ISPs in tortious matters like defamation on social media has been quite a complicated one (Chung, 2014). The complication within which, it has become hard to determine the liability of ISPs stems from the anonymity that social media could confer on users and which makes it even harder for courts of developing countries since they might have to compel the social media company to unravel the identities behind the malicious content. This is a country like Nigeria is legally not possible since most of these operators are outside jurisdiction. However, ISPs could still be joined to actions as defendants, concerning defamatory content on social media (Chung, 2014).

The liability of ISPs becomes defined considering what they do in different countries and how they are classified, either as content providers, access providers, or host providers (Kleinschmidt, 2010). The liabilities of ISPs as host providers are not well-defined, this is because the host service provider mostly provides domains and web hosting services. On the other hand, content providers are invested in the process of internet content and could also be responsible and liable for the defamatory publication (Chung, 2014). Access providers have a primary function that absolves them from liability, which is to link internet users to the internet. In Nigeria, the internet service providers to wit; MTN, GLO, and AIRTEL are all-access providers and cannot be liable for defamatory or other tortious matters that might occur as a result of third party access. Host providers only make possible, the publishing of web pages and the visibility of content on such web pages. Host providers include social media sites, like Nairaland, Facebook, Youtube, and then Tianya, a well-known internet forum in China, with over 85,000,000 registered users (Tianya, 2011).

There are new developments in Nigeria that might change the way internet access is defined. Recently in Nigeria, a bill which was long-titled 'Protection from Internet Falsehoods and Manipulation and Other Related Matters Bill' has become quite popular amongst social media users, amidst public virtual outrage, firstly because the bill has passed the second legislative reading and is headed for the third after which it becomes a law, secondly, the bill is inconsistent with the trajectory of Nigeria's wavering democratic standing.

Unfortunately, the bill is a plagiarized version of existing Singaporean legislation that was passed into law on the 8 of March 2019. The Nigerian version of that Singaporean law, which many know as the 'Hate-Speech Bill' proves to be a deadly weapon in the hands of powerful political forces that aspire to reign in social media critics. The Protection from Online Falsehoods and Manipulation Act (POFMA) which was passed into law in Singapore bears much semblance to the Nigerian bill in the works. The liability of ISPs under the Hate Speech Bill regarding false publication is addressed by the provision of access blocking order under Regulation 12 of the Hate Speech Bill. Regulation 12 and its sub-regulations provide that if there is a false declaration that has been transmitted, and which other internet users could access, then the police could ask the Nigerian Communications Commission (NCC) to request the access service provider, in what was referred to as the 'access blocking order' by the Hate Speech Bill, to take steps to discontinue access to that online location. Failure of the access provider could attract a fine of not more than 10 million Naira, to a total of five million Naira for every day that the order is not followed (Protection from Internet Falsehoods and Manipulation and Other Related Matters Bill, 2019).

Within the ecosystem of social media profiles and pages, there is little control over the publication process. Despite that there are social media regulations, host providers take action against offensive content on social media after it has received a report about the offensive content. This is hinged on an earlier point that identifying offensive content is mostly a duty of an affected individual since what is offensive is defined subjectively, especially when it is strictly cultural. Host providers have extensive control over the published content on their social media platforms and can take down published content. There is however a major difference between a hosting

provider and other ISPs, 'host providers are not as active as content providers, but neither are they as passive as access providers – they are not authors, yet not mere conduits'(Chung, 2014). It is important to see social media operators as ISPs with certain responsibilities. In *Delfi AS v. Estonia* (2013), the European Court of Human Rights decided that an internet news provider was liable regarding the publication of a comment by a user, notwithstanding that the internet news provider had taken down the offensive comment when it had been notified by the claimant.

There is no doubt that the position of the court was strictly idiosyncratic as it was quite unusual. The judgment of the court had been termed 'controversial' and it had laid quite a precedence (Cheung, 2014). In *Oriental Press Group Ltd. vs. Featworks Solutions Ltd* (2013), The Court of Final Appeal (the highest court in Hong Kong) upheld the judgment of the lower courts, confirming the liability of a hosting provider concerning defamatory content that was published by a third-party user. The court further held that when a service provider has been informed about offensive content by the affected person, there was a duty on the service provider to take down the offending content within a reasonable time.

In the United States, the laws are developed to the extent where they specifically address the liability of an ISP. However, there is the protection of internet service providers from civil action in court, provided by Section 230 of the Communication Decency Act (CDA) which has stumped the success of many actions against ISPs. This legal impediment to making ISPs accountable has been exploited to the point where terrorists now use social media to further their objectives effectively. The true intention of the law was to endow social media with the openness and freedom it currently has (Tsisis, 2017).

Unlike in Europe and Hong Kong where there is supportive jurisprudence on the liabilities of an ISP concerning the content, the United States has not been able to hold social media accounts. The Cambridge Analytica scandal that Facebook was embroiled in had the data of 87 million people leaked to a researcher that was with Cambridge Analytica, a consulting firm that was contracted to work with Donald Trump's campaign team (Chang, 2018). The resultant effect was that of public outrage and many insinuations as to data security considerations, and Facebook had to pay over half a million dollars as a fine.

6. The dilemma of ISPs in the Sharing of Liabilities with Third-Party Users

Should ISPs be liable for third party use of social media? This question is a valid one in the face of the jurisprudential polarization between jurisdictions that make it possible for courts to hold ISPs liable for what was published by third parties on social media, and for those jurisdictions like the United States where the ISPs are protected from liability. However in copyright issues, there are possibilities that the Digital Millennium Copyright Act (DMCA) (1998) brought with it, that could heighten the likelihood of ISPs liabilities under American law. Under American jurisprudence, ISPs could be liable in two ways, despite that a copyright infringement was carried out by a third-party user. One of the ways is through 'contributory infringement' this is when a party makes another to perpetrate copyright infringement or supports the copyright infringement literally (Teran, 1999). Therefore where an ISP is involved in 'contributory infringement' it would be liable. The second way in which an ISP can be liable is to be liable vicariously, this must contain

three components which involve that 'an infringement exists, a person has the right and ability to control or supervise the infringing activity, and the person profits from the infringing activity' (Teran, 1999). In Nigeria before the Hate Speech Bill, ISPs were not engaged with liabilities connected with offensive publications on social media. Individuals have always been held responsible for whatever they posted. Another reason why ISP liabilities on offensive internet publications in Nigeria have not been considered was that internet access in Nigeria has been low in earlier years (Comninos, 2012). With the Hate Speech Bill in motion, if it gets passed into law it would redefine the role and liabilities of ISPs concerning third-party use of social media and offensive publications in Nigeria.

7. Conclusion

ISPs must be held accountable for the content that they support, especially when each case is determined on the ground of negligence on the part of the ISP. In Nigeria, the jurisprudence has not expanded enough to accommodate the liabilities of ISPs and social media users except within the new bill on hate speech and false information. This is partly because ISPs in Nigeria are majorly access providers. The liabilities of ISPs regarding criminal and tortious acts of third party users have to be well defined within the jurisprudence of legal systems. This is because social media is becoming quite a world of its own and the possibilities that it has to offer are expanding and exposing it to several issues that could affect the lives of users offline.

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