

EFFECT OF SERVICE PROVIDER'S CONTRACT ON ONLINE COPYRIGHT PROTECTION IN NIGERIA*

Abstract

The internet has greatly affected copyright more than any other technology in human history. It changed copyright from its traditional concept of human creativity that is expressed in physical copies of works like books, to digital and non-physical creative works that are contained in software platforms like websites, Apps and Stream. Online technology is in constant evolution, introducing new technologies that affect copyright. It has being the concern of the relevant global and regional bodies, as well as countries to formulate standard norms and laws that will adequately protect copyright in the online space. The role of the service providers who own the online platforms used in the publication, distribution and protection of these creative works is crucial in online copyright protection. The service providers, who are mainly foreign owned multi-national Tech-companies that operate from outside the shores of Nigeria, usually operate through the World Wide Web (www) in extending their services to Nigeria. In order to escape from liability arising from possible infringement of copyright, the service providers leverage on their 'Use Agreement', which the online users are compulsorily required to accept before they can sign on to use the service providers' platform. The nature of the agreement, which creates contractual relationship between the service provider and users, without allowing the users the opportunity to determine the terms, and the resultant effect on online copyright protection provisions contained in the Copyright Act, are issues of concern in ensuring effective copyright protection in the online medium. It also raises jurisdictional issues that threaten the enforceability of the Copyright Act, 2023 in matters of online copyright protection. This study simply addresses the effect of service provider's contract in relation to online copyright protection with particular reference to Nigeria.

Keywords: Service Provider's Contract, Online Copyright Protection, Intellectual Property, Nigeria

1. Introduction: Nature of Copyright

Copyright has been defined to mean 'a property right in an original work of authorship such as a literary, musical, artistic, photographic or film work fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work'.¹ The right which copyright bestows includes the right to copy a copyrighted work rightly.² Making copies of work is not limited to printed copies alone but covers both copies of work contained in digital storage devices like optical disc, flash drive, cloud and computer disc. It will also amount to copying to download and save copyrighted work available in some online applications operating within the cyberspace like YouTube, WhatsApp, Facebook (Beta), Netflix amongst others, from which the work can be sent to millions of people, by mere pressing of the send button from ones android system. The much prevalence of copyrighted contents in the internet and online technologies has carved additional niche in copyright protection known as 'online copyright' used to denote copyrighted works that are available in the online medium.

2. Digitization and Digital Rights

Digitization is perhaps the most significant of recent technological development. It connotes the conversation of works to a format in which they can be read by a machine.³ It is the ability to record works in a binary format, a sequence of ones and zeros in which they are stored and transmitted. There are different methods of digitizing works, but they all have the same result, they create a binary code that can be played back to produce the original analogue experience.⁴ Digitization therefore creates a form in which all types of subject matter can be made available to the user.⁵ Digital rights are comprised of the inalienable and fundamental human rights which an individual is entitled to enjoy in the digital space. The human rights aspect of digital rights relates to freedom of expression, example are real extension of the equal and inalienable rights laid out in the United Nations Declaration of Human Rights.⁶ The African Charter on Human and People's Rights recognizes and provides for access to information and freedom of expression as among the rights guaranteed under it.⁷ Digital Rights Management (DRM) is a system to protect high – value assets and control the distribution and usage of those digital assets.⁸ It is a broader term that can be used for both technological protection measures (TRM), such as encryption of protected material and electronic Rights Management Information (RMI).⁹ DRM is an umbrella term which includes every technology used by a copyright owner to restrict or allow access to works protected by copyright which are embodied in the media such as CDs or communicated to the public by digital means.¹⁰ RMI represents a title or other information identifying the work or performance, the name of the author or performer, the name and address of the owner of the rights, terms and condition regarding use of the rights and any matter, or code that represents above stated information but does not include any device or produce intended to identify the user. The RMI attached to a copyrighted work enables the owner of the work to track and prove any incidence of infringement of copyright.¹¹

*By Ikenga K.E. ORAEBGUNAM, PhD (Law), PhD (Phil.), PhD (Rel. & Soc.), MEd, BTh, BL, Professor of Law and Applied Jurisprudence, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, P.M.B. 5025, Awka, Anambra State, Nigeria. Email: ikengaken@gmail.com; ik.oraegbunam@unizik.edu.ng. Phone Number: +2348034711211; and

* Hilary Chinedu EZEUDE, LL.M, BL, PhD Candidate, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria.

¹ BA Garner, *Black's Law Dictionary* 7th ed. west Group 1999, 337.

² O Asien, *Nigeria Copyright Law and Practice*, 2nd edn. . (Abuja: Books and Gravel Ltd) 2012, 1

³ K D Thomas, 'Convergence through Digital Technology- The Effects on Copyright and Information Services' 10th Annual Conference on Intellectual Property Law and Policy, 5th April 2002, 1.

⁴ M K Stephen, 'Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management' (2001) 11 De Paul LCA *Journal of Art and Entertainment Law* I. 3-4.

⁵ C Andrew, 'Re-Conceptualizing Copyright in the Digital Era' (1995), *European Intellectual Property review*, 522 at 523.

⁶ Weforum.org/agenda/2015/11/what-are-your-digital-rights-explainer-accessed January 15, 2013.

⁷ Article 9 of the African Charter on Human and People's rights 1981

⁸ Liu, Qiong, Reihaneh Safari-Naina, and Nicholas Paul Shepperd, 'Digital Rights Management for Content Distribution', Proceedings of the Australasian Information Security Workshop Conference on ACSW frontier 2003 – volume 21, Australian Computer Society, Inc. 2003.

⁹ WIPO Survey, 'Intellectual Property on the Internet' 2002 (<http://ecommerce.wipo.int>).

¹⁰ DRM and other Implications of the Copyright (Amendment) Bill, available at www.copyright.lawmatters.in/2010/06/drm-and-other-implication-of-copyright.html.

¹¹ Ian r. Kerr, 'Technological Protection Measures, Tilting at Copyright's Windmill' *Ottawa Law Review*, Vol. 34 No. 1 2002 – 2003.

3. The Legal Regime

The Legal Framework for online Copyright protection can be treated in two segments of international approach and Nigerian statutes relevant to the subject.

International Approach

The Berne convention for the protection of Literary and Artistic Works (Berne Convention) 1886 was the earliest and most fundamental international copyright Treaty. It provides that the countries of the Union, are equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.¹² The Universal Declaration of Human Rights (UDHR) 1948 which is the foundational document of International Human Rights Law, provides the rights of everyone's freedom to be directly involved and appreciative of the arts. This is clearly connected to full development of one's own personality, and is constituted on the goals of rights to education.¹³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, provides that the state parties to the covenant recognize the right of everyone to education.¹⁴ Also, the International Covenant on Civil and Political Rights (ICCPR) 1966 recognizes the right of everyone to hold opinion without interference. Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information, and ideas, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁵ The Rome Convention for the Protection of Performers, Producers of Phonogram and Broadcasting (Rome Convention) 1952, establishes the notion of national treatment by the domestic laws of the contracting states in giving the producers of phonograms, performers and broadcasting organizations certain protections over their works within the contracting states of the convention. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1995 sets the minimum expected standard for intellectual property right protection by member states. Also members shall be free to determine the appropriate method of implementing the provisions of the Agreement within their legal systems and practice.¹⁶ It established the principles of 'national treatment' and 'most favoured nation treatment' in the protection of intellectual property rights by the member states. Universal Copyright Convention (UCC) 1952 extracts undertaking by the contracting states to provide adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writing, musical, dramatic and cinematographic works, and paintings, engraving and sculpture.¹⁷

The WIPO Copyright Treaty also known as the Internet Treaty 1996 is the most recent international effort at formulating a standard practice for protecting copyright works in the digital medium by member states. Under the WIPO Treaty, contracting parties shall provide adequate legal protection and effective legal remedies against circumvention of effective technological protection measures that are used by authors in protecting their works.¹⁸ Acts of circumvention include, destroying, breaking, neutralizing etc, of technological protection measures, decrypting (hacking) an encrypted work; descrambling a scramble work, 'cracking' software envelopes, tampering with digital watermarks etc.¹⁹ The Treaty obliges the contracting states to protect Right Management Information (RMI), by providing adequate and effective legal remedies against any person who removes or alters any electronic rights management information without authority. Also legal remedy will be provided against any person who distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

Nigeria Statute

The Constitution of the Federal Republic of Nigeria 1999 (as amended) lists copyright as the 13th item in its Exclusive list. It provides that the National Assembly shall have exclusive powers to legislate on matter contained in the Exclusive list. Any enactment relating to copyright, patent, design, trade mark and passing off, industrial designs and merchandise marks, business name, commercial and industrial monopolies, combines and trash, standard of goods and industrial standard shall be under the jurisdictional adjudicatory, powers of the Federal High Court.²⁰ The Copyright Act 2022, is the primary statute for copyright protection in Nigeria. The Act provides for works that qualify for copyright protection. Under the Act, the following works are eligible for protection; literary works, musical works, artistic works, audiovisual works, sound recording and broadcasts. One major change in the copyright Act, 2023 is the substitution of cinematography film used in the Copyright Act 1998 with audiovisual works. The Act also provides exception to copyright protection in the cases of fair dealing such as private use, parody, satire, pastiche, or caricature. Also cases of non-commercial use, research and private study, others are criticism, review or the reporting of current events, subject to the condition that, if the use is public, it shall, where applicable be accompanied by an acknowledgement of the title of the work and its author except where the work is incidentally included in a broadcast.²¹ In determining what is fair dealing the courts in *Hawkes & Son (London) Ltd v. Paramount Film Services Ltd*,²² held that it cannot be argued that the mere republication of copyright work is fair dealing because it is intended for the purpose of private study. In *Johnstone v Bernard Zones Publications Ltd & Beauchamp*,²³ the court held that the determining gauge for fair dealing is whether the part of what was taken from the work is substantial, where it is not substantial, there is no infringement and the exception does not apply.

¹² The Berne Convention for the protection of Literary and Artistic works' (Paris Act, 1971) available at <http://www.wipo.int/edocs/pubdocs/en/copyright/891>, accessed 12 march 2023.

¹³ Article 26 UDHR. 1948.

¹⁴ Article 13(1) ICESCR 1966.

¹⁵ Article 19(2) ICCPR 1966.

¹⁶ Article 1 TRIPS 1995.

¹⁷ Article 1 UCC 1952.

¹⁸ Article 11 WCT 1996.

¹⁹ M Fisor 'Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights terms'; available at <http://www.wipo.int/edocs/pubdocs/en/copyright/891> 2003. 7

²⁰ CFRN s. 51 (1) (f) (as amended) 2023.

²¹ See Part II Copyright Act 2023.

²² [1934] Ch. 593.613.

²³ [1938] I Ch. 599. 603.

The Nigeria Data Protection Act²⁴ provides a legal framework for the protection of personal information and for related matters.²⁵ Part of the objectives of the Act, is to strengthen the legal foundation of the national digital economy and guarantee the participation of Nigeria in the regional and global economics through the beneficial and trusted use of personal data.²⁶ The Federal High Court Act 2004, establishes the Federal High Court as a superior court of record and shall except as otherwise provided have powers of the high court of any state of the Federation.²⁷ The Federal High Court has jurisdiction to entertain matters bordering on copyright.²⁸ The Administration of Criminal Justice Act 2015 was enacted by the Federal Government in reformation of the country's criminal justice system. The Act provides that its provisions shall apply to criminal trials for offences established by the Act of the National Assembly and other offences punishable in the Federal Capital Territory Abuja.²⁹ Offences of copyright criminal infringement are among such offences created under the Copyright Act as an Act of the National Assembly. The Evidence (amendment) Act 2023 contains very important provisions for copyright enforcement in the online medium. Some prominent amendments contained in the 2023 amendment include provisions on electronic records, digital signatures, admissibility of electronic record and more. It extends the admissibility of statements in documents to include electronic records through the amendment of sections 84 (2) (a), (c), (d), section 4 (a), (b) and section 5 (5), and substitution of section 84 (2) (b) of the 2011 Act. Furthermore, the Act expands the scope of admissibility and authentication of electric documents, and digital signatures by the introduction of new section 84 (a) – 84 (d). Also sections 109, 110 and 119 (2) of the 2011 Act was amended to allow for oath taking through audio-visual means.³⁰ The Cybercrime Act,³¹ was enacted to provide an effective, unified and comprehensive legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrime in Nigeria. Its objectives include promoting cyber security and network, electronic communications, data and computer programs, intellectual property and privacy.³² The Federal Competition and Consumer Protection Act, 2018 was enacted to develop and promote fair, efficient, and competitive markets in the Nigeria economy and to facilitate access by all citizens to safe products and secure the protection of rights for all consumers in Nigeria and for related matters. The objectives of the Act include, prohibition of restrictive or unfair business practices which prevents, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria.³³ The Act applies to all undertakings and all commercial activities within or having effect within Nigeria and this extends to the commercial relationship between the service providers and customers.³⁴

4. Role of Internet Service Providers

The internet remains one of the most import technological innovation of the Twentieth Century. That enhances prompt, accurate and inexpensive distribution of digital information means that practically anyone can receive or disseminate text, images, sound, software or data at the touch of a button.³⁵ The Court in *Reno v. American Civil Liberties Union*³⁶, in describing the development and operation of the internet held that, the internet is a large networking linked computers whose operator³⁷s cooperate to allow information to pass among them. The nature of internet is such that content owners of works which are copyrighted use the internet to disseminate their works. These works are sometimes accessed and used in unauthorized manner that make the content owners seek redress and compensation from the copyright infringers. In considering who are the infringers and parties to an act of infringement committed on the internet and online, the position of the internet service providers (ISPs) is crucial. This study uses the term "Internet Service Provider" to describe any person or entity in law that supplies internet users' access to the internet. Such user access to the internet consists of email, hosting of a web page, and the ability to 'surf' the internet. Also services like web page authoring, uploading and downloading of files.

5. Internet Service Provider Liability

The theory and argument in support of internet service provider's liability in copyright infringements committed by the service providers' subscribers and customer is that the risk of infringement is a natural by-product of internet service,³⁸ therefore indicate that internet service providers should internalize losses resulting from that risks as a cost of doing business.³⁹ It is the argument of the supporters of internet service provider liability, that internet service provider liability will force internet service provider to deter copyright infringement, raise compensation for copyright infringement that occur, and spread cost throughout the internet-user community.⁴⁰ The supporters and promoters of internet service provider liability have advanced three copyright doctrines in support for the concept of internet service provider liability. First, the internet service provider owns the equipment that sores, makes, and transmits copies of copyright works. The internet service provider's ownership of the equipment and control of the equipment that manages copyrighted materials should be enough to make internet service provider directly liable as copyright infringers with or without the users liability. Secondly, the internet service provider may be vicariously liable where the relationship between the internet service provider and its customers may be close enough to make the internet service provider to be vicariously liable. The third realm of liability of the internet

²⁴ Nigeria Data Protection Act (as amended) 2023 (NDPA).

²⁵ NDPA s. I.

²⁶ NDPA s. 2 (1) & (2).

²⁷ Federal High Court Act Cap F12 LFN 2004. S..1(3).

²⁸ FHA s. 7.

²⁹ Administration of Criminal Justice Act (ACJA) 2015 s.2.

³⁰ Evidence (amendment) Act 2023 s .6, s.7.

³¹ Cybercrime (prohibition, Prevention, etc) Act, 2015.

³² Cybercrime Act s. 1 (c).

³³ Federal Competition and Consumer Protection, Act 2018 s1 (d).

³⁴ Federal Consumer Protection Act s. 2 (1).

³⁵ Yen, Alfred Chueh-Chin, 'Internet Service Provider Liability for subscribers Copyright Infringement, Enterprise Liability and the First Amendment'. Boston College Law School Research paper No. 2000-03, Available at <SSRN: <https://ssrn.com/abstract=236478> or <http://dx.doi.org/10.2139/ssrn.236478>>

³⁶ 521 U.S. 844, 849-51 (1997). See also *Religious Tech. Ctr. V. Netcom On-Line Communication Servs. Inc.*, 907F. Supp. 1365 (N.D. Cal. 1995).

³⁸ Yen, A. Chueh-Chin *op.cit* . 4.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

service provider is in contributory liability of the internet service provider where the internet service provider knowingly provides internet service to a subscriber who is committing infringement.⁴¹

Against the argument and theory in support of internet service provider liability for infringement of copyright in the internet and online medium, is the theory on non-liability of internet service provider in copyright infringement in the internet. The Internet Service Provider non-liability theorists, propagates that internet service providers are not responsible for their subscribers behaviour. In general terms internet service on itself does not necessarily imply copyright infringement and the decision for any use in any unwanted way and manner by the user should attract liability to the user and not the internet service provider. Another limb of argument against internet service provider liability is that such extension of internet service provider liability would give the internet service provider the powerful necessity to protect their economic interest by removing subscribers materials from the internet, even where there may not be good case for copyright infringement of such subscribers materials posted on the internet service provider's internet platforms. This system will result in indiscriminate censorship of information and will be a very high price to pay for the protection of copyright.

Internet Service Provider's Direct Liability in Copyright

An internet service provider could be held liable in law for its subscriber's misconduct where the court concludes that the internet service provider has committed direct infringement by providing internet service to an infringer subscriber to the internet service provider's network or platform. Internet Service Provider direct liability in copyright results from the nature and operation of the internet, which makes the internet service provider to automatically and routinely reproduce and distribute copyrighted material in response to subscribers request. In the case of *Playboy Enterprises Inc. v. Frena*⁴², the Court upheld the direct liability of the internet service provider. In the case, Frena, the defendant, operated a subscription computer bulletin board service (BBS). Its subscribers hooked up to the BBS and could browse collections of photographers that were stored on Frena's computers. Subscribers were also enabled to upload and download contents to and from the BBS. Playboy who had the copyright on some pictures uploaded in the BBS brought action in Court against Frena for copyright infringement. Frena in defence contended that he did not personally upload the infringing pictures and that he removed the photographs from the BBS as soon as he became aware of them. The Court held that the BBS computer's automatic copying, storage and distribution of Playboy's images infringed Playboy's exclusive copyright. On Frena's contention that he did not upload the images himself and did not know that the images are uploaded in the BBS, the Court held that intent or knowledge is not an element of infringement and that an innocent infringer can still be liable in copyright infringement. It is argued that if the decision in Frena's case is strictly followed, it means that the internet service provider who reproduces or distributes work, even when copying is due to passive execution of subscriber instruction will be held liable. This will result in unlimited scope of liability, since internet operation is based on passive reproduction and distribution of works, that most time involves different computers.

In *Religious Technology Center v. Netcom On-line Communications Services, Inc.*⁴³, the Court found the position held in Frena's case extreme and refused to follow it. The United States of America Court of the Northern District of California, considered, direct internet service provider liability of Netcom an internet service provider for duplicating and disseminating infringing materials posted in the internet by Dennis Erlich, a BBS user. In the case, the Court specifically considered and rejected the Frena decision, and held that to follow Frena's principles would lead to unreasonable liability. The court further held that Frena's principle will further implicate a Usenet server that carries copyrighted work to other servers even without any human intervention beyond the original setting up of the system. This will cast liability on every single Usenet server in the world link of computers transmitting the work to every other computer. These parties held liable under the Frena's theory, do no more than operate or implement a system that is necessary of Usenet contents are to be widely distributed. The court in conclusion held that there is no need to construe the copyright Act of the United States of America, to make all the parties involved infringer. Also, though copyright is a strict liability statute, there should be certain element of volition or causation which if lacking of the defendant's system is merely used to create a copy for a third party.

Internet Service Providers Vicarious Liability in Copyright

Even though many copyright laws do not provide for vicarious liability, the courts have consistently imposed vicariously liability under two circumstances. These are where there are in existence, the right and ability to supervise the primary infringer and where there is dried financial interest in the exploitation of copyrighted works. Following the above principle and rule for determining vicarious liability in copyright, in *Shapiro Bernstein & Co. v. H. L. Green Co.*⁴⁴, the court held department store vicariously liable for copyright infringement of record sales concessionaire. In *Fonovisa Inc. v. Cherry Auction Inc.*⁴⁵ the court held an operator of swap meet vicariously liable for copyright infringement of booth renters. The vicarious liability of internet service providers for subscriber copyright infringement depends upon the interpretation given to the requirements of supervision and direct financial interest.⁴⁶ Using the Netcom case as a case point in determining the requirement of supervision and direct financial interest, the court in Netcom case analyzed Netcom's potential vicarious liability by assuming that the postings were copyright infringements. The trial issues of fact before the court in Netcom's case are whether Netcom has the ability to supervise the postings made and whether it has financial interest in the infringements. Netcom argued that it will be burdensome to supervise and screen messages for infringement.

However, the plaintiff's expert declared in evidence that easy software modifications would allow Netcom to identify postings that came from particular people or contain certain works. The court also noted that Netcom has suspended some subscribers who engaged in commercial advertising, posting of obscene materials and 'off-topic postings'. The court therefore held that Netcom might have the ability to supervise the works posted but had no direct financial interest. It therefore held that Netcom could not be vicariously held liable for copyright infringement. In *Marobie – FL, Inc. v. National Association of Fire Equipment Distributors*, the American Court of the Northern District of Illinois reached the same result as Netcom, though on slightly different facts. In the case, the plaintiff Marobie

⁴¹ Ibid.

⁴² 839 F. Supp. 1552 (M.D. Fla. 1993).

⁴³ 907 F. Supp. 1361 (N.D. Cal. 1996).

⁴⁴ 316 F. 2d 304, 307 (2d Cir. 1994)

⁴⁵ 76 F. 3d 259, 261-64 (9th Cir. 1996)

⁴⁶ Yen, Alfred Chueh-Chin *op.cit* p. 11

was the owner of copyright in Clipart developed for fire service industry. The defendant, National Association of Fire Equipment Distributors (NAFED), had a web-page linked to the server belonging to the internet service provider, Northwest Nexus, Inc. NAFED through its agent copied Marrobie's copyrighted images on NAFED's website; which enable users who accused NAFED's web page to view and downloaded those images. Consequently, Marrobie sued NAFED for direct copyright infringement and Northwest for direct, vicarious and contributory infringement. The parties moved for summary judgment. The court in its ruling, chose to follow Netcom closely, and made on its finding that a trial issue of fact existed concerning supervision. The court also held that the flat fee paid by NAFED to Northwest made a finding of direct financial interest impossible.

6. Service Providers Liability under the Nigeria Copyright Act

The Copyright Act defines service provider (SP) to mean a provider of online services or network access, including operators of such facilities, and any entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user of material of the user's choosing without modification to the content of the material as sent or received⁴⁷.

Except as otherwise provided in the Act, a service provider shall not be liable for monetary relief for infringement of copyright or other subject matter by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider: -

- a. does not have actual knowledge that the material or an activity using the material on the system or network is infringing or in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent or upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to the material;
- b. does not receive a financial benefit directly or indirectly attributable to the infringing activity, where the service provider has the right and ability to control such activity;
- c. on notification of infringement as provided in section 54 of the Act, responds expeditiously to remove or disable access to the material that is claimed to be infringing or to be the subject of infringing activity; and
- d. complies on the procedure for suspension of accounts of repeat infringers as provided under section 54 of the Act.⁴⁸

Also service provider shall not be liable to any person for any action taken under section 55 in good faith in taking down of infringing content.⁴⁹ Where the SP fails to comply with the provisions of section 55(1) & (2) by promptly notifying a subscriber responsible for infringing content of which notice of infringement has been issued and take down the content, or fails to resume access to or restore the content where applicable, it shall be responsible to the extent as the person responsible for placing the content on the system.⁵⁰

The above cited provisions of section 55(5) & (6) are akin to contributory liability of the SP. Here the SP is both aware of the infringement via notice issued by the content owner and contributed to the persistence of the infringement by his failure to act accordingly. In *Gershim Publ Corp v Columbia Artists Management Inc.*,⁵¹ the court held that one who with the knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributor infringer. Also the court in the case of *Fonovisa Inc. v Cherry Anction Inc.*,⁵² held that knowing provision of facilities necessary for the distribution of infringing work is 'material contribution' to another's copyright infringement. A Service Provider who acted in good faith in suspending the account of a subscriber, relying on the information contained in a notification referred to in subsection 56(2) shall not be liable to any person for any claim based on the suspension.⁵³ Section 56(2) deals with the steps which a subscriber who receives a warning notice of suspensions should take where he challenges the notice on the grounds of mistake or misidentification, and where the matter remains unresolved, it will be referred to Nigeria Copyright Commission (NCC) to determine the validity of the challenge.

Except as otherwise provided in the Act, an Service Provider (SP) shall not be liable for monetary relief for infringement of copyright or other subject matter by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the Service Provider: -

- a. does not have actual knowledge that the material or activity is infringing, or in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent or upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the material;
- b. does not receive, financial benefit directly attributable to the infringing activity, where the Service Provider has the right and ability to control such activity; and
- c. on notification of infringement under sections 54 of the Act, responds expeditiously to remove or disable access to the material that is claimed to be infringing or to be the subject of infringing activity.⁵⁴

The courts have imposed liability on the SP in circumstances that are similar to the provisions of section⁵⁵ 59(b) of the Act, where the SP has the duty to supervise the primary infringer and has received some financial interest from the infringing act. Thus in *Shapiro, Bernstein & Co. v. H.L Green Co.* the court held departmental store vicariously liable for copyright infringement of record sales concessionaire. The limitations to SP liability under Part VII of the Act shall apply to the neutral, automatic and passive activities of a service provider who does not take an active role, intervene or participate in the making available of content. There will be limitation to

⁴⁷ Copyright Act (CA) s. 108.

⁴⁸ CA s. 58.

⁴⁹CA s. 55(5).

⁵⁰ CA s. 55(6).

⁵¹443 F.2d 1159, 1162 (2nd Cir. 1971).

⁵² 76 f.3d 259, 261-64 (9th Cir. 1996).

⁵³ S. 55(3).

⁵⁴ S. 59(a) – (c).

⁵⁵ 316 F. 2d 304.

SP liability where the SP designates an agent or an address, on their website to receive notice under Part VII of the Copyright Act.⁵⁶ This provision creates safe harbor in the Act, and exonerates the SP of liability where it serves as 'mere conduct' like where the SP does not initiate the transmission, select the receiver of the transmission and does not select or modify the information or content contained in the transmission.

7. Internet Service Provider's Contract

Service provider's contract is a major tool used by the service provider in the online copyright system. It is the agreement between the service provider and user of the service provider's online services. It is by the industry practice, prepared by the service provider solely and in a unilateral basis. The term is usually spelt out by the ISP, while the user has the option of either accepting the terms, to use the online platform or refuse and be denied access to the use of the platform. Examples of these service providers' online agreement are the Twitter Online Service Agreement,⁵⁷ Netflix Online Service Agreement,⁵⁸ and Facebook (Meta) Online Service Agreement.⁵⁹ Twitter terms of service states that Twitter shall not be liable for any indirect, incidental, special, consequential or punitive damages, or any loss of profit or revenues, whether incurred directly or indirectly, or any loss of data, use, goodwill or other intangible losses resulting from, (i) your access to or use of or inability to access or use the services; (ii) any conduct or content of any third parties on the services, including without limitation of any defamation, offensive or illegal conduct of other users, or third parties; (iii) any content obtained from the services; (iv) unauthorized access use or alteration of your transmission or content. Also, the Twitter terms of use, states that the U.S courts in California will have the jurisdiction to entertain suit in actions involving Twitter over the use of its online service. Even though, this issue cannot be confirmed to have been canvassed and ruled on by the Nigeria courts, the Supreme Court of British Columbia, in Canada had given a ruling on the court's territorial jurisdiction to entertain civil action arising from the use of Twitter Online Service in *Giustra v. Twitter Inc.*⁶⁰ Netflix terms of use Agreement,⁶¹ contains a clause which states that 'Netflix entitles are free to use any comments, information, ideas, concepts, reviews, or technique or any other material contained in any communication you send to Netflix including responses to questionnaires or through postings on the shop, worldwide and in perpetuity without further compensation, acknowledgment or payment to you for any purpose and creating, modifying or improving the shop. In addition, you agree not to enforce any 'moral right' in and to any materials you may provide to us and/or a Netflix entity, to the extent permitted by applicable law'. The above captured term in the Netflix terms of service clearly seek to restrain the author or owner of content uploaded in its online platform from earning and pursuing adequate economic benefits and royalties, as well as moral rights accruable from the use of his content by the users. Also, Netflix terms of use agreement, provides an arbitration clause that allows Netflix to predetermine the condition and rules of the arbitration sitting. Under the arbitration provision, the U.S Federal Arbitration Act governs the interpretation and enforcement of the provision. Also the users wave their right to a trial by jury or to participate in a class action,⁶² the above provision clearly gives Netflix obvious advantage over the users, in dispute resolution.

Even though, the Nigeria Copyright Commission (NCC) under the Copyright Act,⁶³ may constitute a dispute resolution panel to resolve any dispute arising from payment of royalties, terms of license or any matter in respect of which a determination by NCC is required under the Act, the provision appears to serve the purpose of dispute between indigenous service providers and right owners better. It is doubtful whether the provision will regulate foreign owned service provider because of the failure of the Act to specifically grant the Federal High Court, jurisdiction to deal on online copyright matters involving the foreign owned service providers and their Nigeria users. This obviously leaves a jurisdictional gap in the protection of copyright with respect to copyright infringements involving a service provider, who is not resident in Nigeria but extend its services to Nigeria through the internet. Facebook (meta) online terms of use agreement, states that under no circumstance will it be liable to the users for lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to those terms.⁶⁴ Again, it is clear that Meta terms of use absolve it from liability to the fullest extent permitted by applicable law.⁶⁵ There is also no provision in the Act invalidating any term contained in the service provider's terms of use which undermines the right of the owners of work to claim adequate economic gains and moral rights of the owner of copyrighted work. Leaving the authors and owners of work at the mercy of the service providers as showcased by the exemplified service provider's contract, cannot guarantee the much needed protection of the copyrights of the authors and owners in the online medium. A pertinent question from the above provision in the Facebook (Meta) terms of you, is which law is the applicable law? Even when the copyright Act 2022, has made some laudable provisions, prohibition circumvention of technological protection measures (TPMs). These provisions cannot be harnessed if the application of the Act is ousted on the grounds of lack of jurisdiction of Nigeria court to adjudicate over such online copyright dispute. It is trite law that the place of jurisdiction mostly determines the applicable law. Even though, the Act provides that any contractual term which purports to restrict or prevent the doing of any act permitted under the Act shall be void.⁶⁶ It is argued that such nice provision in the Act mainly protects the right of use of copyrighted works and not the author's rights which copyright also seek to protect. Also the provision of section 20(3) will not yield the required effect, where the terms of use agreement upholds the U.S law as the applicable law, in the event of dispute, or ascribes jurisdiction to another country other than Nigeria.

8. Conclusion

The Copyright Act 2022, for the first time provides the legal framework for online copyright protection in Nigeria. Even though the Act makes some crucial provision in defining the scope and extent of the online service provider's liability in Nigeria, such effort does not

⁵⁶ Copyright Act s. 62.

⁵⁷ Available at twitter.com/en/tos last accessed 21 September 2023.

⁵⁸ Available at Netflix. [Shop/pages/terms-conditions](https://www.netflix.com/Shop/pages/terms-conditions) accessed 14 September 2023.

⁵⁹ Available at [Facebook.com/legal/terms](https://www.facebook.com/legal/terms). accessed 15 September 2023.

⁶⁰ (2021) BCSC 54.

⁶¹ Information available at [Netflix.shop/pages/terms-conditions](https://www.netflix.com/Shop/pages/terms-conditions).

⁶² *Ibid.*

⁶³ Copyright Act, 2023 s.90 (1).

⁶⁴ Available at [facebook.com/legal/terms](https://www.facebook.com/legal/terms).

⁶⁵ *Ibid.*

⁶⁶ Copyright Act 2022 s.20 (3).

adequately regulate the service provider's use agreement between the service provider and the users of its services. The Copyright Act, 2022 does not also resolve the challenges posed by jurisdiction in online copyright dispute. These gaps still pose serious threat to effective online copyright protection in Nigeria. There is need for the NCC to activate its regulatory powers in ensuring that the service providers do not abuse their dominant position by forcing unfavorable contractual terms on their online users. Also the Federal Competition and Consumer Protection Commission established by the Federal Competition and Consumer Protection Act, 2018 should ensure that service providers do not unfairly treat the owners and users of copyrighted works available in their online platforms.