



Intermediary Liability in Nigeria

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Introduction

Intermediary liability or limitation of intermediary liability is currently not addressed in existing Nigerian laws. Considering that it was only in 2011 that amendments to *Nigeria's Evidence Act* of 2011¹ made provision for the admissibility of digital evidence and signatures in law courts; the absence of intermediary liability in Nigerian legislation does not come as a surprise. However, on-going work on various legislative bills point to the possibility of the inclusion of clauses on liability of intermediaries in laws under review or new bills. Versions of the proposed *Copyright Amendment Bill*, under debate at the time of writing, mention the role of Internet Service Providers (ISPs) in the distribution of copyrighted work. The bill requires intermediaries to be involved in enforcing and punishing copyright infringement (notably through termination of service), as well as outlines conditions under which intermediaries are protected from liability.

This paper looks at issues around intermediary liability and the legal and institutional environment in Nigeria, and draws conclusions based on these while making recommendations on how Nigeria can make the best of the on-going legislative processes that will define the liability of intermediaries.

Nigeria has had discussions around the role of intermediaries in the internet space, especially regarding cybercafés (internet cafes) and telecommunication companies. These discussions arose due to the large amounts of cybercrime activities which were mostly perpetrated in cybercafés. There were suggestions that cybercafés should be held responsible for the crimes committed through their public terminals but when internet access became available in homes and on mobile phones, the conversation lost steam. The Economic and Financial Crimes Commission directed cybercafés to register in 2006. As internet access became more available through mobile phones and Fixed Wireless Access devices in 2010, there were fewer cybercafés and less attention was paid to them. The Nigerian Communications Commission (NCC), Nigeria's telecommunications regulator, requires that cybercafés (or telecentres) obtain a Class license² for operations but the fact that only 663³ cybercafés are listed by NCC suggests that this is not strictly enforced, considering the number of cybercafés that operate across Nigeria. The required registration by the Economic and Financial Crime Commission (EFCC) also appears to not be enforced, considering the fact that the registration link on the EFCC website⁴ has now been deactivated. A journalist recently wrote a tribute⁵ to cybercafés, as a fast disappearing public access culture, and a popular news magazine featured a story on the "Dwindling Fortunes of Cybercafés"⁶.

¹ The act can be found at www.resourcedat.com/wp-content/uploads/2012/01/Evidence_Act_2011.pdf, for an overview of the relevance of the amendments see ProShare, Legal Alert - May 2012 - Admissibility of Electronic Evidence, 31 May 2012, www.proshareng.com/articles/2437/Legal-Alert--May-2012--Admissibility-of-Electronic-Evidence.

² Nigeria has a converged licensing system. A Class license is a general authorization. All class licenses have the same terms and conditions/obligations. They require only registration with the NCC. An Individual license has "terms, conditions and obligations; scope and limitations are specific service provision. Process of licensing can take the form of Auction; "First Come First Served", "Beauty Contest" or Administrative procedure, etc". A Unified Licence allows the licensee to provide a basket of services under a single license. e.g. Mobile and Fixed telephony services, National Long Distance, and Gateway services. The license can be can be Regional or National. . (http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=127&Itemid=117).

³ "Class Licence Register: Telecenter/Cybercafé Category." Nigerian Communications Commission, www2.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=257&Itemid=

⁴ www.efccnigeria.org/.

⁵ Sylvia, I. "Tribute to the Cyber Café" in Daily Times Newspaper, 5 August 2012. www.dailytimes.com.ng/opinion/tribute-cyber-caf%C3%A9

Telecommunication companies, as intermediaries, came under the spotlight due to a case involving text messages that allegedly pointed to individuals involved in a coordinated bomb explosion in the federal capital city of Abuja in October 2010. Call logs and transcripts of text messages were obtained by Nigeria's secret police, the State Security Service, from the telecom service operator to investigate the incident and as evidence in court⁷. This prompted discussions around the role of telecom service providers as intermediaries for the planning of violence and other illegal activities. Following this, Lawful Interception is being proposed through the *Telecom Facilities (Lawful Interception of Information) Bill* that is currently being considered by the House of Representatives in the Nigerian National Assembly⁸.

Cybercafés and telecommunication companies played major roles in the spread of internet access in Nigeria. For a country that had only 200,000 internet users⁹ and 500,000 phone lines¹⁰ in 2000, the current landscape – 45.9 million internet users or 28 users per 100 inhabitants and 134.4 million connected phones (98.3% of which are mobile) or 81 users per 100 inhabitants – shows rapid development. The number of internet users grew by 110% between 2008 and 2011 while the cost of access continues to drop.¹¹ While the cost of 1 hour of internet access was about \$0.63 in public cafes, mobile phone owners and subscribers to various ISP plans can now enjoy continuous access for \$62.50 per month or \$2 per day. From 18 Internet Service Providers in 2000, the number has increased to 151 licensed ISPs¹², as well as 14 active Fixed Wireless Access (FWA) providers¹³ and four GSM service providers¹⁴ who also provide internet access to their subscribers.

Over the last few years, competition between providers of Fixed Wireless and Fixed telecommunication services, on one hand, and GSM service providers, on the other, has tilted in favour of the latter due to the wider coverage they provide. While ISPs experience better competition in their market segment, GSM service providers have also gained on them by becoming the preferred providers of data services. Until recently, there was no Internet Exchange Point and most heavy internet bandwidth consumers in Nigeria (ISPs, banks and telecommunication companies) relied on satellite and the SAT-3 undersea cable for their Internet connection. This explains why as much as 70% of internet traffic was cut off¹⁵ when the SAT-3 cable network had a problem in July 2009¹⁶. With the entry of private sector fibre optic cable projects such as Glo1 and MainOne, a number of telecommunication companies have migrated to the now-operational MainOne cable which went live on July 1, 2010.

⁶Chikodi, O. "Dwindling Fortunes of Cybercafés" in TELL Magazine, 17 July 2012. www.telling.com/index.php?option=com_k2&view=item&id=1602:dwindling-fortunes-of-cybercaf%C3%A9s&Itemid=124

⁷"How Okah used phone calls, SMS to plan Abuja bomb blasts" in BusinessDay newspaper, 21 October 2010. www.businessdayonline.com/NG/index.php/news/76-hot-topic/15715-how-okah-used-phone-calls-sms-to-plan-abuja-bomb-blasts-

⁸ The *Telecom Facilities (Lawful Interception of Information) Bill 2010* is listed as HB 395 by the House of Representatives on the website of the National Assembly. Available online at www.nassnig.org/nass2/legislation.php?id=684

⁹www.internetworldstats.com/af/ng.htm

¹⁰Mohammed, A. "Telecom Investment Opportunities in Nigeria" at Telecom Israel 2000. www2.ncc.gov.ng/archive/Archive%20of%20Speeches/HMCs_speech-telecom_investment_opportunities2000TelAv.pdf

¹¹ Data used for the current landscape is from the Nigerian Communications Commission (connected phones), See and International Telecommunications Union (internet users) <http://www.itu.int/ITU-D/icteye/Indicators/Indicators.aspx#>

¹²www.ncc.gov.ng/list_of_licensees/Current/Internet_Services.pdf

¹³www.ncc.gov.ng/list_of_licensees/Current/Fixed_Wireless_Access.pdf

¹⁴www.ncc.gov.ng/list_of_licensees/Current/Digital_Mobile_License.pdf

¹⁵Fripp, C. "Undersea Cable Damage Disrupts Internet Access In Nigeria" in IT News Africa. www.itnewsafrica.com/2009/07/undersea-cable-damage-disrupts-internet-access-in-nigeria/

¹⁶Nkanga, E. Emejo, J. Ochu, C. "Nigeria: Damage to Sat3 Cable Cripples Banks, Internet Services" in ThisDay Newspaper, 29 July 2009. www.allafrica.com/stories/200907290153.html

The Nigerian Internet Exchange Point (NIXP) was established in March 2007, and it now has 38 members. Even though the NIXP also provides hosting services, developers largely choose foreign hosting due to the major setback informed by lack of reliable power supply in Nigeria. The increased availability of internet access and telecommunication facilities has led to the democratisation of information, which has been further helped by the introduction of the *Freedom of Information (FoI) Act* in 2011. The FoI law is increasingly becoming a popular legal channel for public information request in a country whose *Official Secrets Act* was often used to conceal public information. Public information is increasingly available online due to the role played by social media and other sharing platforms. This was a major contributor to the flow of information that led to the public protests that followed the removal of fuel subsidies in Nigeria in January 2012.

In Nigeria, discussions around proposed pieces of legislation are important to the subject of intermediary liability. The *Copyright Amendment Bill* mentions the role of ISPs as intermediaries. Also, the *Telecom Facilities (Lawful Interception of Information) Bill* and proposed Cybersecurity Bill by the offices of the Attorney General and National Security Adviser seek to combat the security problems faced by Nigeria, and will likely lead to discussions on the role of intermediaries of such information as may be considered useful in the pursuit of punishing or preventing acts of terrorism.

Overview of issues around intermediary liability

Discussions related to the liability of intermediaries have included the role of cybercafés in cybercrime and of telecommunication service providers (telcos) in terrorism. The proposed Copyright Amendment Bill would in its current form introduce liability to intermediaries, as well as obligations to police copyright infringement.

Cybercafés as intermediaries

Before GSM and Fixed Wireless Access companies started providing data services, most internet users in Nigeria accessed the internet from their offices or cybercafés. In the 2010 Digital Lifestyle of Connected Nigerians¹⁷ report, cybercafés (28%) and office (27%) recorded the highest number of internet users by location. Home access (17%) was just becoming popular alongside mobile phone access (13%). 12% accessed the internet from private libraries. The prominence of cybercafés in the early days of internet adoption in Nigeria, especially between 1998 and 2005, exposed them to the misfortune of serving as the operational base of cybercriminals who used their public terminals (or personal devices connected to the cybercafé's network) to launch spam attacks or scams.

In 2004, the Nigerian Cybercrime Working Group (NCWG) was launched to address cybercrime. Even though the primary task of providing cybercrime legislation – and supporting frameworks – is yet to be achieved to date, the Economic and Financial Crimes Commission (EFCC) extended the perimeters of its work to include the raid of cybercafés that were suspected as havens for cybercriminals. At the time, discussions around the role played by cybercafés touched on the relationship between the revenue of cybercafés and the patronage of cybercriminals.

¹⁷ Sesan, Gbenga "Digital Lifestyle of Connected Nigerians in Anthology of Abstracts of the 3rd International Conference on ICT for Africa", March 25-27, Yaoundé, Cameroon. Baton Rouge, LA: International Center for IT and Development, March 2010

There were suggestions of the requirement of cybercafés to register all users and be held responsible for identifying such when crimes are committed but this never happened. Looking at cybercafés for possible criminal activities also ceased to be a major policy focus when internet access became more available outside public cafes due to the democratisation of access by telecommunication service providers' provision of data services. Cybercafés were not used for crimes committed from homes and mobile phones that had become the primary sources of access, hence the natural end of discussions around their liability as intermediaries of cybercrime content.

The Copyright Amendment Bill, discussed below may also expose cybercafés to liability for copyright infringements that happen on their network, and put them at risk of disconnection of service for copyright infringements (i.e. downloads and file sharing) that occurs on their networks.

Intermediaries, terrorism and planned violence

When a bomb exploded around the venue where Nigeria's 50th anniversary was to be celebrated in October 2010, security consciousness in Nigeria was heightened. Following investigations, it was alleged that some of the individuals involved in the act exchanged text messages. For the first time in Nigeria's telecommunication history, a service provider came under the spotlight for being an intermediary of electronic messages that were allegedly central to the planning of acts of terrorism committed against the State. The telecommunication service provider complied as there was no legislation for, or against, making such information available to security agencies but there is now on-going work on legislation that will guide the lawful interception of information that may be deemed useful in the pursuit of national security.

Intermediaries and copyright infringements

Looking at the current digital content landscape in Nigeria, many content creators are yet to become fully aware of their intellectual property rights especially as it relates to digital platforms. It is not unusual to find pirated digital copies of copyrighted music and movies on different online platforms, such as blogs, in Nigeria. Nigeria's celebrated movie industry, Nollywood (second only to Bollywood in terms of volume of annual releases), is probably the worst victim of digital piracy. Until recently, searching for many Nollywood movie titles led to full-length movies that contained no copyright information. Since YouTube's policy includes asking individuals to confirm that they have rights to materials before uploading, it was easy for users to simply assert rights they did not own to make such materials available to other users. There has been no reported case of copyright holders or the Nollywood industry submitting takedown requests to YouTube. Perhaps this reflects a need to inform copyright holders as to their rights and recourse available to them. Copyright owners can just as easily submit DMCA take-down requests to YouTube as those in other countries. Furthermore the DMCA takedown procedures are congruent with those proposed in the Copyright Amendment Bill. Google's increasing interest, and presence, in Nigeria has resulted in revenue generation for some local Nollywood companies, and thus an opportunity to use the internet to generate revenues, not just losses. Google has established an office in Lagos, launched a localised Nigerian website¹⁸ and partnered with two Nollywood content promoters – *Nollywood*

¹⁸"YouTube launches localised Nigerian site" in Memeburn, 12 July 2011. www.memeburn.com/2011/12/youtube-launches-localised-nigerian-site/

Love¹⁹ (now Iroko TV) and *Real Nolly Movies*²⁰. YouTube presents now an opportunity, as well rather than just possible threat to industry revenues.

Licensed materials are beginning to enjoy better protection owing to the efforts of internet and mobile applications that obtain licensed materials for distribution on their platforms. These include Iroko TV and Spinlet. Iroko TV, which started as a YouTube channel before it morphed into an independent website running its own servers and video software, makes full-length Nollywood movies available for free on its website. Users only need to register in order to have access to these movies, which are legally obtained for producers or related agents. Recently, Iroko TV launched a service that allows users to pay a flat fee for access to premium content – newer movies. The parent company of Iroko TV also runs a similar service for music. Spinlet also focuses on streaming legally obtained copyrighted music but it works via a mobile application which users have to download onto their mobile phones.

There are a lot of such web and mobile apps providing copyrighted material in digital format, and so the move by the Nigerian Copyright Commission to review the Nigerian Copyright Act of 2004 is seen by many rights holders as a welcome development that will help protect copyrighted work. The proposed bill will also put internet intermediaries under pressure to ensure that only legal copyrighted material is made available using their services. Intermediaries may thus need to be conscious of infringements by internet users.

Legal and institutional environment

Even though Intermediary liability is not explicitly addressed existing Nigerian laws, some existing laws are relevant to the subject. These include the *Nigerian Communications Act*²¹, *National Information Technology Development Agency Act*²² and the *Nigerian Copyright Act*²³. The *Nigerian Communications Act* became enforceable as law in 2003, when it repealed Decree 75 of 1992 which established the Nigerian Communications Commission. The act guides the operations of the telecommunication regulator (Nigerian Communications Commission) that is also responsible for guiding the operations of ISPs. Hence, if, and when, Nigeria gets legislation touching on Intermediary Liability, the Nigerian Communications Commission may be an important actor. Even though it is not stated in the enabling Act, their role in the registration of ISPs and cybercafes may make them a prominent actor.

National Information Technology Development Agency Act (2007) established the National Information Technology Development Agency which has internet governance as part of its responsibilities, alongside advising the public and private sector on all matters relating to Information Technology, including data exchange. In the future, NITDA will continue to play the

¹⁹“Youtube Partners Nigerian Start-up to Bring Nigerian Movies Online (Legally)” in WebTrends Nigeria, 21 March 2011. www.webtrendsng.com/blog/youtube-partners-nigerian-start-up-to-bring-nigerian-movies-online-legally/

²⁰Ehimuan, Juliet "From farming to films: how the web is changing Africa" in The Observer in The Guardian, 26 August 2012. www.guardian.co.uk/world/2012/aug/26/new-technology-farming-films-africa

²¹Nigerian Communications Act, 2003. Available online at www.nassnig.org/nass/includes/tng/pub/tNG_download4.php?search=Nigerian%20Communications%20Act&Submit=Search&KT_download2=4f88c061c9fe8d9be345c0669576956a

²²National Information Technology Development Agency Act, 2007. Available online at www.nassnig.org/nass/includes/tng/pub/tNG_download4.php?search=National%20Information%20Technology%20Development%20Agency%20Act&Submit=Search&KT_download2=11bc08d5c46e6350f9b38bc2b00a27c3

²³Copyright Act, Chapter C28, Laws of the Federation of Nigeria (2004). Available online at www.wipo.int/wipolex/en/text.jsp?file_id=268735

role of a development agency, providing policy advice and serving as the government ICT advocate. The *Nigerian Copyright Act (2004)* amends Copyright (Amendment) Decree of 1999 and though it doesn't have provisions for (internet) intermediaries, it is being reviewed at the moment as a 2011 bill²⁴ is now being discussed on the floor of the Senate of the Federal Republic of Nigeria. It is within the provisions of the earlier laws to extend the Copyright Commission's jurisdiction to intermediaries. For example, in section 9 of the Copyright Act, the following provision is made regarding content owner's rights to demand fair compensation from intermediaries:

(2) Notwithstanding subsection (1) of this section, where a broadcasting authority broadcasts a cinematograph film in which a musical work is incorporated, the owner of the right to broadcast the musical work shall, subject to this Act, be entitled to receive fair compensation from the broadcasting authority.

Noting that Intermediary Liability will feature in future discussions for bills that are currently under review in both chambers of the National Assembly (Senate and House of Representatives), it is also important to look at another proposed bill, the Senate's *Copyright Amendment Bill*²⁵. In addition to the bill before the Senate, sponsored by Senator Aloysius Akpan Etok and introduced in 2011, there is also a draft bill²⁶ that the Nigerian Copyright Commission is working on. The commission is currently receiving comments from stakeholders on the draft, including a personal analysis by a lawyer who posted his comments on his blog²⁷, but the commission is yet to present the document as a bill before any chamber of the Nigerian National Assembly. Hence, this report focuses on the 2011 version of the bill²⁸ that is undergoing legislative action at the Senate of the Federal Republic of Nigeria.

The *Copyright Amendment Bill* seeks to amend the Copyright Act of 2004 and focuses primarily on the role of new technologies in the infringement of copyright, with detailed provisions on Internet Service Providers' (ISPs) liability, ISP liability for storing infringing material, requirement for notice of infringement and ISP liability in caching. A review of the provisions in the bill shows that while the copyright owner is adequately protected against infringement, the burden of enforcement and proof of innocence of alleged infringers rests with ISPs. It will be interesting to see the reaction of Nigerian ISPs to these proposals, considering the increasing availability of Nigerian websites and mobile phone applications that provide copyrighted materials to internet users.

The *Copyright Amendment Bill* makes it clear that ISPs must have a termination policy for their internet service subscribers that repeatedly infringe on copyrighted work. It states, as follows, in section 3:

(1) An Internet Service Provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet Service Provider of a repeat infringer.

²⁴ A Bill For An Act To Amend The Copyright Act Cap. C28 LFN 2004 For The Purpose Of Making Provision For Technological Measures In Protecting Copyright And For Other Related Matters, 2011. Available online at www.nassnig.org/nass/legislation.php?id=1207

²⁵ Ibid.

²⁶ A Bill For An Act To Amend The Copyright Act Cap C28 Laws Of The Federation Of Nigeria 2004 To Provide For Better Protection Of Copyright In The Digital Environment, 2012.

²⁷ Izuogu, Chukwuyere "In The Matter Of A Bill For An Act To Amend The Copyright Act Cap C28 Laws Of The Federation Of Nigeria 2004 To Provide For Better Protection Of Copyright In The Digital Environment" in Perspectives from the Nigerian ICT Sector Blog, June 19, 2012. www.perspectivefromthenigerianictsector.blogspot.de/2012/06/in-matter-of-bill-for-act-to-amend.html

²⁸ A Bill For An Act To Amend The Copyright Act Cap. C28 LFN 2004 For The Purpose Of Making Provision For Technological Measures In Protecting Copyright And For Other Related Matters, 2011. Available online at www.nassnig.org/nass/legislation.php?id=1207

(2) *This provision applies if a person infringes the copyright in a work by using one or more of the Internet services of an Internet Services Provider to do a restricted act without the consent of the Copyright owner.*

The bill defines a “repeat infringer” as “a person who repeatedly infringes the copyright in a work by using one or more of the Internet Services of the Internet Service Provider to do a restricted act without the consent by the copyright owner.” The bill does not specify how many times a user would have to infringe on copyrighted work without being tagged a repeat infringer. There is some form of protection for ISPs against being accused of authorising infringement or subjected to civil remedy (or criminal action); as long as the ISPs can prove that the infringer is not a repeat infringer.²⁹

However, a final clause in section 3 of the *Copyright Amendment Bill* allows copyright owners to make a case against ISPs in spite of the earlier provisions.³⁰

The *Copyright Amendment Bill* also holds ISPs liable if they store infringing material. According to provisions in the bill, ISPs are liable if they know that the material infringed copyright and do not prevent access to such as soon as they become aware of the infringing material. Also, if it can be proved that the ISP user is storing infringing material on behalf of, or at the direction of, the ISP, the bill makes a case against such ISPs. However, a clause in the bill (section 4) requires that a *Notice of Infringement* be received by ISPs before action can be sought against them.³¹

As further explained in section 5 of the bill, the notice of infringement must be signed by the copyright owner or their agent. Users must also be immediately notified if the ISP deletes their material, or prevents access, due to infringement.³²

According to section 6(1) of the *Copyright Amendment Bill* as long as ISPs do not modify material when they store temporarily for the purpose of allowing faster access by users, they are not liable.³³

ISPs can however be liable if they do not delete temporarily stored material or prevent access to the same after it has been deleted from its original source or access has been prevented at source, or following a violated court order.³⁴

²⁹ “(3) If a person merely uses the Internet service of the Internet Service Provider in infringing the Copyright, the Internet Service Provider, without more-
(a) Does not infringe the copyright in the work;
(b) Must not be taken to have authorized the user’s infringement of copyright in the work;
(c) Subject to Subsection
(4) the Internet Service Provider must not be subject to any civil remedy or criminal sanction.”

³⁰ “(4) However, nothing in this section limits the right of the copyright owner to injunctive relief in relation to the user’s infringement or any infringement by the Internet Service Provider.”

³¹ “4 (3) a court, in determining whether, for the purposes of subsection (2), an Internet Service Provider knows or has reason to believe that material infringes copyright in a work, must take account of all relevant matters, including whether the Internet Service Provider has received a notice of infringement in relation to the infringement.”

³² “(4) An Internet Service Provider who deletes a user’s material or prevents access to it because the Internet Service Provider knows or has reason to believe that it infringes copyright in a work must as soon as possible, give notice to the user that the material has been deleted or access to it prevented”.

³³ “6.-(1) An Internet Service Provider does not infringe copyright in a work by caching material if the Internet Service Provider-

(a) Does not modify the material; and
(b) Complies with any conditions imposed by the copyright owner of the material for access to that material; and

(c) Does not interfere with the lawful use of technology to obtain data on the use of the material; and
(d) Updates the material in accordance with reasonable industry practice.”

³⁴ “(2) However, an Internet Service Provider does infringe copyright in a work by caching material if the Internet Service Provider does not delete the material or prevent access to it by users as soon as possible after

While there is no institution responsible for Intermediary Liability at the moment, provisions in the *Copyright Amendment Bill* show that the Nigerian Copyright Commission may have a major role to play should the bill, as proposed, become law. Considering the role of the Nigerian Communications Commission in the regulation of ISPs, which are central to the concept of Intermediary Liability, the telecommunications/ISP regulator may also play a major role in Intermediary Liability in Nigeria.

Unlike the provisions in a similar draft bill, the Cybercrime Bill, that may have an impact on internet freedom in Nigeria, the suggestions in the draft *Copyright Amendment Bill* do not make provision for an appeal by people who are accused of infringement. This leaves internet users whose right to access is terminated with no clear opportunity to appeal such decisions within the context of the copyright law.

Based on the experience of internet users in Spain and France, where termination is also recommended for repeat infringers, the provision of access termination by ISPs may have a negative impact on internet Freedom in Nigeria. Spain's *Sinde Law* which the Inquirer reporting "netted almost 80 victims in just its first month,³⁵" was described as setting a "dangerous precedent."³⁶ France's HADOPI law mandates that internet users caught downloading copyrighted material three times be disconnected and placed on blacklist barring them access to other ISPs. The law also mandated a special agency to be responsible for enforcement. It has recently been criticised by the French Minister of Culture, Aurielle Fillipetti who stated that "€12 million per year and 60 officials; that's an expensive way to send 1 million emails." She also stated that "[T]he suspension of Internet access seems to be a disproportionate penalty given the intended goal", and has called for it to be disbanded. Nigeria could possibly integrate some of the lessons learned from this experience into discussions on the Copyright Bill.³⁷

the Internet Service Provider became aware that-

(a) The material has been deleted from its original source; or

(b) Access to the material at its original source has been prevented; or

(c) A court has ordered that the material be deleted from its original source or that access to the material at its original source, be prevented."

³⁵"Spanish *Sinde* law leads to 79 takedown requests" in *The Inquirer*, 4 April 2012.

www.theinquirer.net/inquirer/news/2166016/spanish-sinde-law-leads-79-takedown-requests

³⁶ "Anti-internet piracy law adopted by Spanish government" in *BBC News*, 3 January 2012.

www.bbc.com/news/technology-16391727

³⁷ Rainey Reitman, *Repealing French Three Strikes Law is the Next Step to Safeguarding Free Expression*, 8 August, Electronic Frontier Foundation, www.eff.org/deeplinks/2012/08/repeal-french-three-strikes-law.

Conclusion

The Nigerian legislative landscape is littered with bills that expire with the transition between sessions of the National Assembly, after new elections are conducted to return or replace Senators or House of Representatives' members. For example, various versions of cybercrime bills were retired after the 2007 and 2011 elections, when new (or returning) elected officials resumed a new session of the National Assembly. Considering the fact that the *Copyright Amendment Bill* is the only legal instrument that speaks directly to the issue of Intermediary Liability, there are fears that a much-needed legal interpretation of Intermediary Liability scenarios may not become law in Nigeria anytime soon. This, however, is not the only concern. Even if the bill is passed by the Senate, will the provisions remain fair to internet intermediaries when the House of Representatives resumes work on the bill?

There is also the concern that Intermediary Liability clauses in Nigerian law may provide an opportunity for the political party in power to sanction businesses owned by members of the opposition by either targeting content for takedown or harassing intermediaries owned by opposition members. No such act has been proved but there have been media reports of legal sanctions that lead to the closure of companies owned by political opponents of policy makers. For example, the Economic and Financial Crimes Commission has been in the news for accusations of being used to witch-hunt individuals or companies that are sympathetic to the opposition. This has been reported in national newspapers such as Vanguard³⁸, Punch³⁹ and The Guardian⁴⁰, and on the website of a prominent law firm⁴¹.

Coming from about thirty years of military rule⁴², Nigerian government officials almost got used to the abuse of citizens' rights. Even with the new democratic dispensation that commenced in 1999, there have been abuses of citizen rights based on provisions in some of Nigeria's archaic laws such as sedition. Even though the law was abrogated in 1983, there have been recent threats to, and arrests of, journalists who are considered to be very critical of government. Thus, the fear expressed about the use of Intermediary Liability against select companies may not be out of place, especially in a nation struggling with a new form of terrorist attacks. Could a telecommunication or internet service provider's license be revoked for serving as intermediary for a message that allegedly threatens national security? In a nation where government often selects which court orders to comply with, such fear may not be misplaced.

The legislative instrument that will most likely address the issue of Intermediary Liability, the *Copyright Amendment Bill*, is still in its early days and this provides an advantage for intermediaries, content owners and other stakeholders to take part in debate and advocacy which will determine the final form of the bill. For example, an earlier version of a cybercrime bill allowed

³⁸ Olatunji, Daud "Amosun using EFCC to witch-hunt me – Kawonise," in Vanguard Newspaper, 7 March 2012. www.vanguardngr.com/2012/03/amosun-using-efcc-to-witch-hunt-me-kawonise/

³⁹ Adesomoju, Ade "HURIWA, others warn EFCC against witch-hunt," Punch, 20 February 2012. www.punchng.com/news/huriwa-others-warn-efcc-against-witch-hunt/

⁴⁰ Garba, Ali "Bauchi: 'EFCC Should Screen, But Not Witch-hunt'," The Guardian, 27 February 2011. www.guardiannewsngr.com/index.php?option=com_content&view=article&id=39839:-bauchi-efcc-should-screen-but-not-witch-hunt&catid=104:sunday-magazine&Itemid=567

⁴¹ Etomi, George (Interview). "EFCC should guard against being used." www.geplaw.com/pages/posts/efcc-should-guard-against-being-used-10.php?phpMyAdmin=17c4d67d23et18bb5773r72bc

⁴² Olayiwola, Abegunrin "Nigerian Foreign Policy Under Military Rule, 1966-1999." California, USA: Greenwood Publishing Group, 2003

any security agent to seize electronic equipment based on reasonable suspicion of cybercrime – or the intent to commit cybercrime. Following stakeholder intervention, the clause has been reviewed to include the need for such security agent to obtain a court injunction before acting on suspicion.

Recommendations

There has been little discussion on the subject of Intermediary Liability in Nigeria, even though incidents have pointed to this. Recommendations that will help address this need while also preparing Nigerian stakeholders – legislators, law enforcement officers, intermediaries, copyright owners, advocacy groups, etc – for the administration of Intermediary Liability law include hosting public debates on the subject and providing training for stakeholders. It is also important to empower subject experts towards supporting such debates, training activities and advocacy work that will be required.

An earlier attempt by the Nigerian Copyright Commission to present a revised draft bill to the National Assembly saw diverse contributions including one featured on the *Perspectives from the Nigerian ICT Sector Blog*⁴³. In partnership with the British Council and Law Allianz, the Copyright Commission also sent out eMail invitations⁴⁴ to stakeholders in May 2012, but the proposed event was not held. It is important to return to the discussions, and for the Copyright Commission to invite various stakeholders including civil society, internet intermediaries and government agencies (such as the National Information Technology Development Agency) It is also recommended that the proposed 2012 draft bill should be harmonised with the 2011 version that is already being considered by the Senate of the Federal republic of Nigeria.

The limitation on liability, under the Copyright Amendment Bill, which appears to be similar to the safe harbour provisions of the DMCA and the EU E-Commerce Law, would serve to protect intermediaries from being liable for infringing content on their networks that they are not aware of. These clauses need to be kept in the bill, and lessons learned from the safe harbour provisions in the US, EU and South Africa need to be incorporated.

Discussions about the human rights implications of termination policies under the Copyright Amendment Bill are important. Lessons can perhaps be drawn from studying the SINDE and HADOPI laws in Spain and France respectively, their implementation and human rights critiques of these bills.

Further discussions are also needed on how the termination clauses of the bill would affect cybercafés and how cybercafés will be able to deal with the cost and infrastructure implications of the bill, which would require them to actively prevent piracy in order to avoid disconnection.

⁴³Izuogu, Chukwuyere "In The Matter Of A Bill For An Act To Amend The Copyright Act Cap C28 Laws Of The Federation Of Nigeria 2004 To Provide For Better Protection Of Copyright In The Digital Environment" in *Perspectives from the Nigerian ICT Sector Blog*, 19 June 2012.

www.perspectivefromthenigerianictsector.blogspot.de/2012/06/in-matter-of-bill-for-act-to-amend.html

⁴⁴ The author of this report received an eMail invitation about a planned stakeholders' forum in June, but the event date did not hold