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Key contacts



Dr. Jude Odinkonigbo
Counsel,
Tax, Investigation, White Collar and
Compliance
jude.odinkonigbo@templars-law.com



Obi Meghoma
Associate,
Corporate & Commercial
obi.meghoma@templars-law.com



Deborah Okpiaifo
Associate,
Corporate & Commercial
deborah.okpiaifo@templars-law.com

The Challenges of Protecting Intellectual Property Rights in Nigeria in the Age of Social Media

Introduction

Social media has revolutionized the way we live and relate with each other. With just a click we can instantly access information miles away from our immediate environment, reach a wider audience, engage in conversations, and access diverse products and services – all of which were not previously available in time and space using the traditional means of communication. Considering the ubiquity and global acceptance/use of social media, it has become imperative to consider the challenges of protecting Intellectual Property (“IP”) rights in an age of digital revolution and the practical measures needed to mitigate the risks arising therefrom.

IP refers to creations of the mind such as inventions, literary and artistic works, designs, and symbols. There are different forms of IP which are affected by the extant digital revolution and each one of them needs protection. The most recognized of the IP rights are: copyrights, trademarks, patents, designs, geographical indications and trade secrets. There are various domestic and international laws which govern their protection. The earliest international legal instruments on IP protection are the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). These were followed by several other treaties currently administered by the World Intellectual Property Organization (WIPO).

In Nigeria, the regulatory regime for IP protection consists primarily of the recently enacted Copyright Act (the “Act”),¹ the Trademarks Act² and the Patents and Industrial Designs Act.³ The focus of these laws is to ensure that the creators and/or owners of IP assets are able to control the use and distribution of their assets. The Copyright Act enumerates a long, but not exhaustive, list of actions that are considered infringing. These include unauthorized use, reproduction, publication, broadcast, adaptation, importation,

¹The Copyright Act 2021 was recently signed into law by President Muhammadu Buhari on 17 March 2023. The provisions of the Act are substantially similar with the repealed Copyright Act 2004, except for minor differences.

² Cap. T13, Laws of the Federation of Nigeria 2004.

³ Cap. P2, Laws of the Federation of Nigeria 2004.

exhibition, distribution, and performance of copyrighted works.⁴

The overarching rationale for the development of laws on IP protection has been the need to strike a balance between the need for creators of protected works to be remunerated for their efforts and the need for the said works to be available to the public. Thus, IP protection incentivizes creators to push the frontiers of innovation and invest in research and development for the generation of new products and services. This rationale subsists despite the rapid advancement of technology and digital platforms. Regardless, advancement in technology has made it easy for copying and distribution of protected works and, therefore, has disrupted the qualified protection that owners of protected works enjoy(ed).

Social Media Risks for IP Brands

Perhaps the biggest threat faced by owners of protected works is the emergence of social media, which has presented different platforms for instant and ease of dissemination of information to any part of the world without physical restrictions. Unfortunately, virtual contents often exchanged between or amongst individuals/groups are not always user-generated; occasionally, they are contents of protected works that are circulated without the permission of owners of such protected works.

Generally, copyright infringement can occur from a lot of "harmless" routine social media activities such as unauthorized copying and pasting of literary works on social media sites, unauthorised use and distribution of musical works⁵ and graphics derived from online platforms without authorization.

Similarly, violation of protected trademarks is commonplace on social media. Names and logos that are registered as trademarks are sometimes used for advertising on social media without authorization. Additionally, there is a developing jurisprudence to the effect that hashtags can be properly registered as trademarks. For instance, the United States Patent and Trademark Office has stated that a mark comprising of or including the hash symbol (#) or the term 'hashtag' is registerable as a trademark of service if it functions as an identifier of the source of the applicant's goods or services.⁶ Successfully registered hashtag trademarks include #smilewithacoke, #cokecanpics by the Coca-Cola Company, and #McDstories by McDonalds.⁷ Thus, in these instances, use of any of these hashtags on social media in a manner that suggests a connection or link with a trademark owner or creates a likelihood of confusion would be construed an infringement.

For designs, infringement often occurs in the form of offering for and selling counterfeit products that infringe on a protected design. In these situations, counterfeiters free-ride on the reputation, brand recognition and goodwill of established brands to sell counterfeit products on social media.⁸ In 2016, a study of 750,000 Instagram sales found that twenty percent of them related to counterfeit/illicit products.⁹ Similarly, in 2020, the United Kingdom Property Office published a report that suggested that over five times more counterfeit goods were sold in invite-only groups on Facebook and Twitter than in open groups.¹⁰

⁴ Sections 6 and 15 of the Copyright Act. The Trademarks Act provides that an infringement of the rights guaranteed to the proprietor of a trademark occurs where a person other than a registered proprietor or registered user, uses a mark identical with or so nearly resembling a registered mark as to likely

The relative ease of setting up social media accounts, the availability of a ready market and the anonymity offered by social media are some of the reasons why design infringement in the form of the sale of counterfeit products is rife on social media.

Furthermore, there is a huge challenge for the recognition and enforcement of IP rights when there is a cross-territorial infringement on social media. Geographical lines do not act as restrictions to social media communication. Also, territorial restriction is not a barrier to IP infringement on social media. However, while a resident in one country can easily infringe on another's IP rights through any of the above-discussed routes, obtaining redress is not easy for IP rights holders because IP protection is notoriously limited in territory. Copyright protection, for instance is territorial.¹¹ This means that owners of Nigerian copyrighted works cannot enforce infringement against non-resident outside Nigeria.¹² For trademarks not registered under the Madrid system,¹³ patents and designs, separate registrations have to be obtained in every country for an IP holder to enjoy the benefits accruing from any country's IP regime.¹⁴ Thus, there is the problem of enforcing IP rights when infringed by persons not caught under the indigenous IP regimes and not saved by any exception. A corollary of the above is the cloak of anonymity which social media affords users. This could be problematic in that where a user infringes an IP right, it may be difficult to identify the face behind the account in order to seek redress.

Economic Cost of IP violations on Social Media

Every year, companies lose about US \$17 million to IP violations. More than 10% of these infringements were committed via social media. In 2022, popular Nigerian skit maker – Sabinus – threatened to sue Friesland Foods Wamco Nigeria Plc for the use on all its social media platform of Sabinus' trademark, 'Something Hooge'.¹⁵ The skit maker had also earlier sued UAC Foods Ltd for using a cartoon-like picture of Sabinus in the advertisement of its products on all its social media handles.¹⁶ For the

deceive or cause confusion.⁴ Similarly, the registration of an industrial design precludes any person, other than a registered owner, from reproducing a registered design in the manufacture, import, sale or utilization of any product for commercial purpose.⁴

⁵ Unauthorized use of copyrighted images on social media was the subject of the case of **Agence France-Presse v Daniel Morel** (U.S. District Court for the Southern District of New York, No. 10-02730). In the case, Morel won an infringement suit against Agence France-Presse and Getty Images for willfully violating his copyright by using the pictures Morel took of his native Haiti after the 2010 without fully attributing them to Morel. This was one of the earliest cases to address IP issues relating to how content made available on social media can be used by third parties for commercial purposes and thus liable for IP infringement. The summary of the case can be found here: <https://spicyip.com/2013/01/quest-post-copyright-in-social-media.html>

⁶ The United States Patent and Trademark Office, 'Hashtag Marks' Accessible here: <

https://tmept.uspto.gov/RDMS/TMEP/print?version=Jan2015&href=ch1200_d1ff5e_1b5ad_3bc.html>

⁷ World Intellectual Property Organization (WIPO), 'Hashtag Trademarks: What Can Be Protected?' (October 2017) <

https://www.wipo.int/wipo_magazine/en/2017/05/article_0009.html#:~:text=Guidance%20from%20the%20United%20States,the%20applicant's%20goods%20or%20services.%E2%80%9D>

⁸ World Trademark Review, 'IP Infringement on Social Networks: Landscape Analysis of Trends and Threats' (12 September 2018) <

<https://www.worldtrademarkreview.com/global-guide/the-wtr-yearbook/2019/article/ip-infringement-social-networks-landscape-analysis-of-trends-and-threats>> Accessed 9 March 2023.

⁹ The study can be found here: https://www.washingtonpost.com/blogs/the-switch/files/2016/05/IG_A2016_ST2.pdf

¹⁰ The report is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994529/Counterfeit-Goods-research.pdf

¹¹ By virtue of sections 2 and 3 of the Copyright Act, copyright protection in Nigeria is afforded author(s) who are citizens of, or domiciled in Nigeria and to works, other than broadcasts, that were first published in Nigeria.

¹² This is except the infringer is resident in a country that Nigeria has IP treaties with or is a citizen or resident of a country signatory to an IP treaty that Nigeria is a signatory to also. (See section 61 of the Copyright Act.)

¹³ This is a centrally administered trademark registration system for obtaining trademark protection in multiple countries around the world which are part of the system.

¹⁴ The exception of a mutually subscribed international treaty also applies. For trademarks, there is the principle of "well-known marks" enshrined in the Trade Related Aspects of Intellectual Property (TRIPS) Agreement, which gives an original proprietor of a trademark the liberty to prevent the registration of an identical or similar mark in a different country on the grounds that the registered trademark has garnered sufficient global notoriety for the proprietor.

¹⁵ Oreoritse Tariemi, "Skit Maker Sabinus Sues Peak for Using Trademark 'Something Hooge'" (The Guardian, 2022) < <https://guardian.ng/life/skit-maker-sabinus-sues-peak-for-using-trademark-something-hooge/> > Accessed 9 March 2023

¹⁶ Supra

companies involved in these infringements, their goodwills were negatively impacted due to threats unleashed on the companies through various social media apps. The threats also affected the value of their shareholdings which reflected in the drastic drop in the prices of their shares.¹⁷

In addition, IP violation impacts negatively on the innovative strength of individuals, brands and entities in a country. This position is correct, not because there are no laws providing for recovery of damages where there is an infringement of IP rights in Nigeria, but because the resultant effect of an IP violation cannot be completely soothed by damages awarded by a Court of law. IP violation on social media results in loss of revenues, customers, goodwill as well as competitive advantage in their relevant markets. These drawbacks could discourage the development of creative ideas and/or inventions. It also discourages investments in IP creation and protection.

The Copyright Act and Social Media Infringement

The Copyright Act is innovative in the changes it introduced to the Nigerian copyright landscape. Though the Act does not go as far as regulating copyright infringement on social media, it makes copious provisions regarding online protection of copyright. The broad definition of the online space could contemplate and indeed include social media. In this way, the Act provides remedies for copyright infringements.

Specifically, the Act grants authors or copyright holders the exclusive right of making their works available to the public via wire, wireless or online means in such a way that members of the public can access the works from a place and at a time individually chosen by them.¹⁸ To this end, the Act protects copyrighted works from online threats by expressly providing that no person shall knowingly circumvent by avoiding, bypassing, removing, deactivating, decrypting or otherwise impairing a technological protection measure that effectively protects a copyright work.¹⁹ In the event of an online breach of copyright, the Act provides liabilities to the tune of One Million Naira (N1,000,000) only or a term of imprisonment not less than 5 (five) years or liability to both a fine and a term of imprisonment for anyone convicted.²⁰

Additionally, the Act also empowers authors or copyright holders to issue a notice of infringement in writing to relevant Internet Service Providers requesting a take down or deactivation of a link to any infringing content hosted on its systems or network. Sequel to notifying the subscriber responsible for the infringement, the service provider is obliged to take down the infringing content after 48 hours of the notice.²¹ The service provider is also mandated to notify the Nigerian Copyright Commission (the "Commission") of such takedown. Further, the Act empowers the Commission (by itself or with the assistance of any other person) to block or disable access to any content, link or website hosted on a system or network, which it reasonably believes to infringe copyright.²²

¹⁷ Supra

¹⁸ Sections 6(1) (a) (ix), 7(d), 8(c), 9(8) and 38(1) (f) of the Copyright Act.

¹⁹ Section 26 (1) & (2) of the Copyright Act.

²⁰ Section 20(7) of the Copyright Act.

²¹ Section 29(1) & 30 of the Copyright Act.

²² Section 36 of the Copyright Act.

The Act has further expanded the category of acts which constitute an infringement. Under the Act, copyright infringement encompasses the following forms:

- (a) the making of a copyrighted work available to the public via wire, wireless or online means without the consent of the owner and for commercial purposes;
- (b) refusing or omitting to pay upon demand, any royalty by virtue of a right of remuneration or agreement; and
- (c) aiding or procuring another person to commit an act which constitutes an infringement under the Act.²³

Indeed, these amendments are commendable for attempting to fill up the gaps created by technology and innovations. In particular, this sets the stage for effective management and mitigation of online infringement of copyright. However, it is unfortunate that the provisions are not robust enough to regulate social media. The Act is not specific in addressing issues of online infringement of copy. Rather, it merely prohibited online infringement in general terms without addressing issues arising from the use and/or abuse of social media in copyright infringements.

Regardless of the above shortcomings in the Copyrights Act, it must be acknowledged that there is an attempt to fill a gap in that substrata of IP rights protection in Nigeria. Therefore, it is advised that the entire legislative instruments protecting IP rights in all the IP regimes should be amended to take care of the challenges posed by the use of social media.

Mitigation of Social Media Threats/Violation of IP Rights

Given the IP threats occasioned by social media in today's world, there is need for realistic practical solutions that can be implemented to forestall and/or mitigate the effects of these risks. The remedies suggested below are not territorially circumscribed. Their efficacy can be tested in generally all jurisdictions where social media facilitates the violation and/or threats of IP rights.

1. Creative Use of IP Infringement Detection Tools:

IP asset owners can pre-empt violations on social media by implementing mechanisms to proactively identify risk factors that give rise to infringements. That way, IP threats can be nipped in the bud. Vigilance in this respect can be aided by location-based tools that allow entities to regularly scour the internet to detect unauthorized use of IP assets. Some social media platforms have these tools built into their software. Facebook, for instance, has tools²⁴ that allow brand owners to search for their registered IP assets in advertisements, Facebook Marketplace, and shops, as well as Instagram.

2. Vigorous Enforcement of IP Violations:

Seeking redress for IP violations encompasses "soft" measures such as the issuance of cease-and-desist requests and take-down notices. Where these do not yield the desired compliance, they could be followed by specific enforcement mechanisms using the national judicial or quasi-judicial systems as provided under various IP

²³ Section 20 (7-9) of the Copyright Act.

²⁴ These tools can be found here;

<https://www.facebook.com/business/help/611786833293457#:~:text=Rights%20holders%20who%20want%20to, and%20the%20IP%20Reporting%20API.>

regimes. The merit of readiness to pursue IP infringement is deterrence. Ostensibly, violators will be less incentivized to infringe IP rights of entities that display a dexterity and willingness to pursue infractions, obtain redress and penalize defaulters.

3. Development of an All-encompassing Social Media Policy

Control measures such as a water-tight social media policy can be an excellent means of curbing the emergence of internal IP threats within organizations. These social media policies should be drafted to outline a brand's permitted social media interaction frameworks, including what the brand considers confidential information, permitted use of protected assets by employees and the modes of handling any suspected IP infringement from social media. The policy would serve as vital education to an organization's employees on identifying and eliminating IP threats, especially those arising from employee inadvertence.

Conclusion

The key takeaway from this discourse is that despite the benefits accruing from the use of social media, it will continue to pose serious challenges to the protection of IP rights. It is argued that Nigeria, just like other countries desirous of protecting IP rights in their jurisdictions, must take the necessary steps – some of them recommended in this piece – to ensure that IP owners enjoy reasonable and/or adequate protections of their works.