

ONLINE DEFAMATION: RETHINKING THE LIABILITY OF INTERNET INTERMEDIARIES FOR THIRD PARTY DEFAMATORY CONTENTS IN NIGERIA

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ABSTRACT

At common law, anyone involved in the publication of a defamatory statement, no matter how slight, including a newspaper vendor who may be unaware but merely sells newspapers allegedly containing offensive materials, may be liable for defamation. However, this strict application of the common law position does not appear fashionable in the 21st century because of the emergence of social media and/or digital platforms, such as Twitter, Facebook, Instagram, Amazon, Blogger, Search Engines and other modes of online expressions have created a new frontier in the law of defamation. With these digital platforms, third party internet users across the globe can express their opinions on anything by way of posting contents, such as texts, videos, or photos, on the platforms; and such contents, which are viewed across the world in matters of minutes, may infringe or defame the rights or reputation of others. People frequently ask this: who should bear responsibility for the infringing or defamatory content? Should it be the third-party author or creator of the content or the owners or operators of the digital platforms where the infringing or defamatory content is published? To put it simply, are internet intermediaries liable for the defamatory content generated on their platforms by third party users? Or should the strict common law position also apply to operators of internet digital platforms who only make such digital platforms available for netizens to express themselves? This article aims to seek answers to these questions within the context of Nigerian law, drawing inspiration from what is trending globally.

Keywords: Defamation, Internet, Digital platforms.

INTRODUCTION

As the world continues to evolve, so do human interactions and the way civil wrongs/torts are committed. In modern times, the tort of defamation is often committed in cyberspace rather than in the physical space. The digital age has brought entirely new scenarios that have expanded the concept of defamation far beyond what the law could have ever conceived a few decades ago. In times past, the ramifications and liabilities for defamation were straightforward. At common law, anyone involved in the publication of a defamatory statement, no matter how slight, including a newspaper vendor who may be unaware but merely sells newspapers allegedly containing

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offensive materials, may be liable for defamation.¹ If someone verbally defamed you, you sued them for slander. You sued them for libel if they took to the newspapers or other print media to publish the defamation. Subsequently, there came a time when the author or columnist, or the editor, and the owners of newspapers as publishers could also be joined as parties to a claim in defamation. Further still, the law was developed to allow for some conditions and exceptions for the liability of these 3rd party publishers. While the newspaper or print media has evolved structurally and concretely, the new digital platforms have brought about an intangible rapidity and fluidity to online publishing of information, which has created new legal challenges or problems for liability in defamation.

One of such new challenges or problems is the question of whether online or internet service providers ("ISPs") or owners and operators of digital platforms (collectively "Internet Intermediaries") should be liable for defamatory contents posted on their platforms by internet users, the same way the owners of newspapers and authors or publishers of books are liable? And if they are liable, in what circumstances? Thus, the objective of this article is to seek answers to these questions. In the process, it will be contended that internet intermediaries are, in general, not liable for infringing or defamatory content posted on their platforms by third parties who use their platforms, given that internet intermediaries do not ordinarily qualify as common law publishers in relation to such contents. The case will, however, be made that there are limited or exceptional circumstances in which internet intermediaries may be liable for third party infringing or defamatory contents; and that such circumstances will, essentially, depend on whether the internet intermediaries had actual knowledge of the infringing or defamatory content, and if they did, they, nevertheless, failed to take remedial steps within a reasonable time.

The article also examines the legislative efforts already made, and still being made, at both the state and national levels to ensure that internet intermediaries or ISPs and, by extension, e-commerce generally, enjoy some measure of protection from claims or lawsuits that are otherwise unreasonable, while at the same time, ensuring that ISPs remain alive to their responsibility of ensuring that contents which to their knowledge, infringe or violate the rights of others are blocked or removed without unjustifiable delay.

Quite apart from the introductory part discussed above, the article is divided into five parts. The first part examines the meaning and nature of defamation. This helps in contextualising online defamation in today's digital age. In the second part, the common law concept of the defence of innocent dissemination is examined, and in the process, the circumstances where ISPs have effectively deployed the concept as a defence in defamatory claims arising from user-generated contents, as well as in cases where the defence may be lost, are also reviewed. The third part of the article considers the application of the common law concept of innocent dissemination as a defence mechanism in Nigeria. The fourth part looks at the rationalisation or justification for the protection of internet intermediaries from third-party infringing content except for cases where such intermediaries may be aware of the content and yet, fail to act. While part five discusses the legislative efforts already in place and being made to embrace the concept on a forward-looking basis. Part six is the conclusion, which concisely summarises the authors' opinion on the strength of points made in the preceding parts of the article.



1. *Awolowo v Kingsway Stores & Anor* [1968] 2 All 217; *Fawehinmi v Akilu* [1994] 6 NWLR (pt. 351) 387 at 455-456.

DEFAMATION AT A GLANCE

Generally speaking, defamation is the communication of a false statement about a person against whom it is made or published if such statement is calculated to lower the person in the estimation of right-thinking members of the community or to cause him to be avoided or exposed to hatred, contempt or ridicule or to disparage him in his office, profession or calling.² For a statement to be defamatory, it must be shown to have lowered its victim in the estimation of the right-thinking members of the society. That is to say, the words employed by the writer and published must be shown to have discredited the Claimant in one form or the other.³

Defamation takes one of two forms, Libel or Slander. Libel is a defamatory statement expressed in a fixed medium, especially in writing, including but not limited a picture sign or electronic broadcast.⁴ If a claimant proves that a libellous statement has been published of him without justification, his cause of action is complete⁵ and will not need to show that he has suffered any resulting actual damage or injury to his reputation before it (the action) succeeds.⁶ On the other hand, slander is a defamatory statement expressed in a transient form, especially speech.⁷ Unlike libel, slander is not actionable *per se*. In other words, the victim must prove actual or special damage suffered, except in certain limited circumstances.⁸

The above description and effect of defamation equally apply to online defamation. Defamation is said to be online if committed within cyberspace, in other words, where the defamatory words are published through social media and other online digital platforms. Since online defamatory material is necessarily written and thus shares similarities with libel,⁹ online defamation will be treated as libel in this article. Accordingly, any reference to libel or defamation in this article shall reference online defamation.

For an action in libel or online defamation to succeed, the Claimant is required to show, *inter alia*, that: (a) the publication of the offending words complained of is in writing, (b) the words are defamatory of the Claimant, (c) the words refer to theClaimant, (d) that the words were published to third parties, (e) the words were false, and (f) there are no justifiable legal grounds for the publication of the words.¹⁰

2. *Akomolafe v Nigerian Exchange Insurance Co. Ltd* [2000] FWLR (pt 27) 2016 at 2025. See also Halsbury's Law of England (4th edn 1989) 28, 9.
3. *Sketch v Ajagbemokeferi* [1989] 1 NWLR (pt 100) 678.
4. *Ogbebor v Onojakpor & Ors* [2019] LPELR-47176(CA).
5. *Oduwale & Ors v West* [2010] LPELR-2263(SC).
6. Such actual damage or injury is presumed by law. See *Oduwale v West* [2010] 10 NWLR (pt 1203) 598
7. *Okafor & Ors v Ibegbu* [2016] LPELR-40117(CA).
8. Such as: (i) Imputation of crime (ii) Imputation of certain diseases such as sexually transmitted diseases (iii) Imputation of unchastely or adultery especially of a woman (iv) Imputation affecting professional business reputation. Where any of the above is present, the slander will be actionable *per se* and damages are presumed.
9. *Sketch Publishing co. Ltd. v Ajagbemokeferi* [1989] 1 NWLR (pt 100) 678[4]-[21] and [24]-[33]. See also the relatively recent case of *Udofia & Anor v Okon & Ors* [2018] LPELR-46154(CA), where it was held that libel is generally founded on the publication of defamatory materials in written or permanent form.
10. *Mosaku & Anor v Sanyaolu & Ors* [2006] LPELR-11623(CA), *Ogbody v S.S.A. U.T.H.R.I.A.I* [2013] 3 NWLR (pt 1341).



One of the essential elements of defamation, or libel, is publication. For a defamatory claim to succeed, it must be shown that the alleged defamatory content was communicated to a third party other than the Claimant. In *Ayeni v Adesina*,¹¹ the Nigerian Court of Appeal defined publication as "the making known of the defamatory matter to some person other than the person of whom it is written. It is the reduction of a libellous material or content into writing and its delivery to any person other than the person injuriously affected by it."¹²

LIABILITY FOR DEFAMATION UNDER COMMON LAW

Primarily, at common law, the party to be sued as a defendant in defamation is the person who authored or published the defamatory statement or caused it to be published. However, it also includes every person involved in the publication or republication of the defamatory content in any manner. Such persons could be jointly and severally liable for all damages caused by it.¹³ Thus, in a defamatory claim resulting from a newspaper publication for instance, the proprietor of the newspaper, the editor, printer, publisher, and vendor are potentially liable and may be sued either jointly or separately by the Claimant.¹⁴ The decision of the Nigerian Court of Appeal in *Awoniyi and Others v The Registered Trustees of the Rosicrucian Order (AMORC)*¹⁵ is very apposite in this regard. In that case, the court succinctly stated this salutary principle as follows:

... It is not necessary in all cases to prove that the libellous matter was actually brought to the notice of some third party. If it is made a matter of reasonable inference that such was the fact, a prima facie case of publication will be established. This is particularly so when a book, magazine or newspaper containing a libel is sold by the defendant. (3) A libel in any of such documents like a book, a magazine or a newspaper or a postcard (posted) is therefore prima facie evidence of publication by the proprietor, editor, printer, and publisher and any person who sells, or distributes it.

From the foregoing legal position, it is clear that even a newspaper or book vendor, who merely sells and is very unlikely to be aware of the content of the newspapers or books he or she sells, will, nevertheless, be liable for damages in defamation.¹⁶ In our scenario under reference, the Claimant will be at liberty to proceed against the "innocent" vendor either alone or jointly with the author, editor, or publisher of the magazine, newspaper/ book.

There is no doubt that this strict application of the law could render internet intermediaries, whose platforms are available for hosting and accessing information on the web, liable for defamation in respect of infringing contents disseminated through their platforms. Regrettably, this may be so even in cases where the intermediaries may not have had actual knowledge of the infringing or defamatory nature of such contents. It thus, follows that this approach will not only be unfair and

11. [2007] 7 NWLR (pt 1033) 233.
12. Publication of a defamatory content within may be presumed by law where it is shown that the content or material or platform is accessed or accessible by many people. See the case of *Nsirim v Nsirim* [1990] 3 NWLR (pt 138) 285.
13. *R v Paine* [1969] 5 Mod Rep 163 at 167.
14. See also *Fawehinmi v Akilu* [1994] 6 NWLR (pt 351) 387, 455-456; *Ugo v Okafor* [1996] 3 NWLR (pt 438) 542, 561.
15. [1990] 6 NWLR (pt 154) 42.
16. See *Awolowo v Kingsway Stores & Anor* and *Fawehinmi* (n 15).



unreasonable, but it could also have the unintended consequences of negatively (*albeit*, indirectly), impacting availability and access to information on the web. This particularly so because, the enthusiasm of the internet intermediaries to innovate and improve on making information more readily available and accessible may become low based on the floodgate of the potential lawsuits that will result from defamatory contents ascribable to third party internet users; where the strict application of the common law position is adopted.

Expectedly, and given the need to encourage seamless access to information and to promote technological innovations across the world, many countries have developed some ways of inventively creating some safety nets for internet intermediaries regarding liability that would otherwise be ascribable to them concerning infringing or defamatory third-party contents generated on their digital platforms. One of such ways is the deployment of the concept of innocent dissemination in defence of the internet intermediaries.

CONCEPT OF INNOCENT DISSEMINATION

Within the context of online defamation, where available, the concept of innocent dissemination operates to exculpate or excuse an internet intermediary from a defamatory or infringing action arising from a web content not authored or created by it, but by an independent internet user, upon satisfying certain conditions. The concept is a common law principle¹⁷ that has been innovatively applied in defence of internet intermediaries by courts in England and many other jurisdictions.¹⁸ By this principle, an internet intermediary is regarded not to be a publisher of content and cannot be held liable in respect of the content where:

- a. It is a mere passive medium of information or a technical host.
- b. It was not the author of the content or publication.
- c. It had no actual knowledge that the content was defamatory; and
- d. Its lack of knowledge did not result from any negligence on its part.

Instructive on this point is the English Court of Appeal decision in *Tamiz v Google Inc.*¹⁹ In the case, Google was sued for the publication of an alleged defamatory content posted by an independent third party on the blog hosted on Google's blogger service platform. Neither the blogger nor the author was sued. The Court of Appeal upheld the High Court's decision that Google was not liable for defamatory publication in the circumstances. In taking the view that Google is not a "common law publisher", who should ordinarily be held liable in defamation, the English Court of Appeal held, *inter alia*, that:

"... the defendant was not a primary publisher of the allegedly defamatory comments at common law since, although it facilitated publication of the blog and the comments posted on it, it had no prior knowledge of or control over the content of the blog which was written by an independent person with whom the defendant had no relationship of employment or agency..., the defendant was not a secondary publisher of the

17. Now codified in the Defamation Act of England, 1996, s 1.

18. Many other jurisdictions have conveniently, applied this defence in the protection of internet intermediaries or ISPs.

19. [2013] 1 WLR 2151.



comments since it neither knew nor ought by the exercise of reasonable care to have known that the publication was likely defamatory..., however, if it is found that the defendant had allowed defamatory material to remain on its platform after it had been notified of its presence and had a reasonable time within which to act to remove it,... it could be inferred to have become a secondary publisher of it.

Similarly, in *Bunt v Tilley*,²⁰ it was held that as a matter of law, an internet service provider that performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law in the context of legal proceedings bordering on defamation.²¹ The court further held that publication was a question of fact and dependent on the circumstances of each case; and that in determining responsibility for publication, the state of the defendant's knowledge could be an important factor.

From the above judicial insights, the actual knowledge of an infringing content by an internet service provider or intermediary is paramount in determining liability. Thus, unless and until notice of the defamatory content is brought to the attention of an intermediary and at the same time requested to either block access to it or take it down but fails to act within a reasonable period, it will be a tough sell to fix the intermediary with liability in defamation arising from the infringing content. This is more so because the internet intermediary is generally deemed not to be a primary publisher in law.

Where the Defence may be Lost

The reliance on the defence of innocent dissemination by an internet intermediary may, however, be lost where it is found that the internet intermediary was either negligent or failed to take remedial steps after being notified of the offending web content. In such a scenario, any claim to be an innocent disseminator of the allegedly infringing or defamatory content will be difficult, if not impossible, to sustain.

The English case of *Godfrey v Demon Internet Service*²² is quite instructive on this point. The facts are that on 17 January 1997, a certain Laurence Godfrey, a British lecturer, protested an alleged obscene and defamatory statement against him. The offending statement was posted on an online public forum operated by Demon Internet Limited, a UK-based ISP. Godfrey argued that an unknown internet user created the statement and fraudulently attributed its authorship to him. Godfrey contacted Demon Internet to inform them of the defamatory statement and then asked that it be deleted from Demon Internet's Usenet news server. Demon Internet, however, failed to delete the message for more than 20 days until its expiration date in the public forum, at which time it was automatically deleted along with all other old messages. Godfrey sued for libel, citing Demon's failure to remove the statement at the time of his initial complaint. The English High Court of Justice examined Section 1 of the Defamation Act of 1996 (essentially encapsulating the common law concept of the defence of innocent dissemination), which provides that: "Under section 1(1) of the Defamation Act, in defamation proceedings a person has a defence if he shows that- (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement."



20. [2006] EWHC 407 (QB); [2007] 1 WLR 1247; [2006] 3 ALL ER 336.

21. The decision in *Godfrey v Demon Internet Ltd* [2001] QB 201 was considered.

22. [2001] QB 201. See also the case of *Bunt v Tilley* [2006] EWHC 407 (QB); [2007] 1 WLR 1247; [2006] 3 ALL ER 336

The court found that the ISP knew or had reason to know that the impugned statement was defamatory since the plaintiff had notified the company that he was not the true author of the statement. The ISP, however, chose not to take it down. Accordingly, the court held that "the Defendants published the defamatory posting and, as from 17 January 1997 they knew of the defamatory content, and as such, they could not avail themselves of the protection afforded by innocent dissemination now codified in section 1 of the Defamation Act 1996.

From the above judicial decision, it follows that ISPs or internet intermediaries are not regarded as "publishers" and are generally not liable for defamation arising from content created on their platforms by third parties. They only become liable when they fail to remove infringing or potentially infringing contents within a reasonable time after being notified.²³ Thus, knowledge of the internet intermediary of the offending content is very crucial such that until the ISP is imputed with actual knowledge or simply becomes factually aware of the offending content even though same was posted on its platform, that ISP cannot be held liable in defamation of a defamatory content published on its platform by a third party.

Nigerian Position on Innocent Dissemination

The question is whether the strict application of liability under common law will apply to internet intermediaries in relation to infringing third party content posted on their platforms in Nigeria. Put differently, is the defence of innocent dissemination available in Nigeria the same way it avails internet intermediaries in England?

The concept of online defamation and the attendant liability for internet intermediaries is still at its evolutionary phase in many countries, including Nigeria. In Nigeria, only very few disputes in this area get to court. Where the cases get to court, they are either resolved by way of an out-of-court settlement or caught up in a web of delays that remain one of the significant challenges facing the litigation process in Nigeria. As a result, there is a dearth of Nigerian case law on the point, and for this reason, some have expressed some skepticisms as to whether the defence of innocent dissemination as has been applied in England and other jurisdictions will apply in Nigeria.

Even so, it is interesting to note that whilst the common law concept of innocent dissemination may not have been specifically applied in the defence of internet intermediaries sued for defamation in Nigeria, the concept itself is not entirely new to Nigerian jurisprudence. A Nigerian court first applied and tested this defence in the celebrated case of *Awolowo v Kingsway Stores & Anor*²⁴ as old as 1968. Although the issue decided, in that case, did not touch on the liability of internet intermediaries for defamation, it is noteworthy that the nature and scope of the concept and the circumstances in which it will avail a defendant relying on it were explained.

In the case, the plaintiff had brought an action against the defendants jointly and severally, for damages for libel written of him on pages 234 and 235 in a book titled "The one-eyed man is King" published in England by Cassell and Company Limited but sold and distributed in Nigeria by the Defendants. The words complained of read as follows:

23. In *Tamiz v Gogle Inc*, the period of five weeks between notification and removal was held to be within the bounds of reasonable time.

24. [1968] 2 ALL 217.



"...The Apalara murder case claimed attention because the murder weapon, a sword stick, was found in the house of Obafemi Awolowo, the Prime Minister of the Western Region. The Apalara was a Yoruba cult. Most of the people were Ibos. Investigations were not easy. Awolowo was charged with complicity in the case and acquitted. A man was sentenced, and the verdict reversed on appeal. The murder unresolved..."

In response, the defendants, who were the booksellers, contended that they were booksellers and that they had sold copies of the book in the ordinary course of their business without knowing that the said book contained any words defamatory of the plaintiff and without negligence. They also contended that they had no ground for supposing that the book contained any words defamatory of the plaintiff and that immediately they received the Plaintiff's Solicitors' letter complaining that the book contained words defamatory of him, they withdrew the remaining copies in their possession.

In its decision, the court, after reviewing the old English case of *Emmens v Pottle & Ors*²⁵ on the defence of innocent dissemination, took the view that the defence of innocent dissemination did not avail the defendants as they failed to discharge the onus placed on them to show that their lack of knowledge that the book contained defamatory content did not result from their own negligence. The court then restated the following principles which underpin the defence thus:

A person who is not the author, printer or publisher of a book containing a libel who has taken a subordinate part in disseminating it is liable unless he shows (i) that he did not know that the book contained libel or (ii) that he did not know that the book was of a character likely to contain a libel and (iii) that such want of knowledge was not due to negligence on his part.

While it is admitted that the decision in *Awolowo v Kingsway Stores* related to a claim in defamation in the context of the publication of a book and the conduct of the sellers or distributors of the book, and thus, had no specific reference to internet intermediaries, it is the view of the authors, that, as a practical matter, an internet intermediary faced with online defamation before a Nigerian Court, will be able to plead and successfully rely on the defence in so far as it can prove the necessary elements of the defence, namely:

- (i) it did not create or author the offending content;
- (ii) it had no actual knowledge of the defamatory content or did not know that the content was defamatory; and
- (iii) its lack of knowledge was not due to negligence on its part.

Furthermore, it is also the authors' view that our courts will be guided and/or persuaded by the decisions in *Tamiz v Google Inc*, *Bunt v Tilley* and *Godfrey v Demon Internet Service*, where innocent dissemination was applied to protect the internet intermediaries or ISPs, in relation to infringing third party contents. This is particularly so because, first, the concept is a common law principle and Nigeria is a common law jurisdiction. Second, our courts often tend to be persuaded



25. [1185] 16 QBD. p 354.

by the decisions of superior courts of England in situations where our local laws are either silent or inadequate on a legal point.²⁶

Rationalisation or Justification for treating Internet Intermediaries as Innocent disseminators

It is important to point out that the concept of innocent dissemination, as a defence to online defamation, is hinged on the peculiar nature of the services that internet service providers, social media and other digital platforms operators provide to members of the society. Let us, as an example, peep into the service that Google provides through its search engine. When an internet user initiates a search query, Google's web search processes it automatically without real-time efforts or input of Google's employees and returns sets of search results in matter of seconds.²⁷ Each search result is displayed as a pointer to third-parties web pages where detailed information is found. Statistically, it is estimated that there are about 56.5 billion web pages that Google has indexed on the web²⁸, and this list is constantly growing. This gives a sense of the enormous size and information contained in the web and how challenging it would be for ISPs to monitor or supervise the nature of the information published on the web from across the globe daily.

Similarly, over 500 hours of fresh videos are uploaded to YouTube every minute²⁹ and over 720,000 hours of new content per day.³⁰ By the same token, more than 250 billion photos have been uploaded to Facebook, which amounts to 350 million images per day.³¹

Given the size of the web, the volume of searches and the speed with which the web search engine does the searches, the volume of videos uploaded to YouTube daily, and the fact that the processes are automated and have no real-time human involvement, it becomes practically difficult, if not impossible for internet intermediaries to monitor or ascertain the nature of contents that appear on their platforms; and whether such content is defamatory or infringing. This consideration undoubtedly explains why for an internet service provider or intermediary to be liable for online defamation, the alleged defamatory or offending content must be brought to its attention for necessary action. To require otherwise will undoubtedly result in untold hardship on internet service providers and other digital platforms operators.

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26. The Nigerian legal system derived from the Received English laws. See *Caribbean Trading Co & Fidelity Corporation v NNPC* [1992] 7 NWLR (pt 252) 161, 179. Also, section 14 of the Supreme Court Ordinance of 1914 provides that, "Subject to the terms of these or any ordinance, the common law, the doctrine of equity and statutes of general application which were in force within the jurisdiction of the court in England on 1 January 1914, shall be in force within the jurisdiction of those courts..."
 27. Google, 'How Google Search Works' <<https://www.google.com/search/howsearchworks/>> accessed 30 July 2021.
 28. G Deyan, 'How Many Websites Are there in 2021' (*Techjury* 5 August 2021) <[techjury.net/blog/how-many-websites-are-there/#:~:text=4.%,There%20are%2056.5%20billion%20web%20pages%20indexed%20through%20Google,.\(Source%3A%20World%20Wide->](https://techjury.net/blog/how-many-websites-are-there/#:~:text=4.%,There%20are%2056.5%20billion%20web%20pages%20indexed%20through%20Google,.(Source%3A%20World%20Wide->)> accessed 11 August 2021.
 29. James Hale 'More than 500 Hours of Content Are Now Being Uploaded to Youtube Every Minute' (*Tube Filter*, 5 July 2019) <<https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute/>> accessed 30 July 2021.
 30. *ibid.*
 31. Kit Smith, '53 Incredible Facebook Statistics and Facts' (*Brandwatch*, 1 June 2019) > accessed 30 July 2021.



Perhaps, the most compelling case made for the justification of the defence of innocent dissemination regarding internet intermediaries is the illuminating decision of Mr Justice Eady in *Metropolitan International Schools Limited v Designtecnica Corporation & 2 Ors*,³² where the question of whether Google as operator of a web search engine, qualifies as a publisher was who may be liable for defamatory publication regarding snippets of a search result, was lucidly resolved. In resolving the issue, Mr. Justice Eady, held that a search engine operator, who has no role or input and has no actual knowledge of the search results, cannot be liable for the infringing or defamatory content.

As justification for the above, Mr. Justice Eady, handed down the following rules or principles:

- a. for an internet intermediary or a defendant to be fixed with responsibility for publishing defamatory words, it is important to take cognisance of the knowledge of the defendant; what he did or failed to do in the chain of communication. Such that where a defendant knowingly permits another to communicate information which is defamatory, where he had an opportunity to prevent the publication, such a defendant should be held liable.
- b. it is not enough that a person merely plays a passive instrumental role in the process, so that where the defendant or internet intermediary only a technical host or only provides a platform or acts as a mere facilitator, without more by way of being aware or encouragement or acquiescence, there may be no liability.
- c. search engines function automatically without human inputs. Hence when a snippet is thrown up in response to a search by users, the search engine has no role to play in formulating the search terms. Therefore, a search engine cannot be characterised as a publisher at common law, but it merely played the role of a facilitator.
- d. someone hosting a website will generally be able to remove material that is legally objectionable. If this is not done, then there may be a liability on the basis of authorisation or acquiescence.

This judgment aptly elaborately captures the rationale for excusing internet intermediaries from liability for third-party infringing or defamatory contents, particularly where there is no evidence of involvement or acquiescence. In the authors' opinion, this is sound judgment. Internet intermediaries only play a passive role in the dissemination of alleged defamatory words. To be liable, it must be shown that they permitted the alleged defamatory words to remain after they have been notified of their existence.

STATUTORY INTERVENTION/PROTECTION OF INTERNET INTERMEDIARIES

Quite apart from the above common law approach in Nigeria, there has been some legislative efforts to provide safety nets or protection, at sub-national levels, to internet intermediaries and ISPs in relation to the liability they would have ordinarily been exposed.



32. [2009] EWHC 1765 (QB) [48]-[55].

Defamation Law of Lagos State

In this regard, the Lagos State Defamation Law³³ ("*LSDL*" or "*the law*") is very apt. By the provision of this Law, an intermediary or ISP against whom a claim in defamation is brought on account of content posted on its platform, will be excused from liability if it is able to demonstrate that it did not author the infringing post or content. However, the defence may be lost if a claimant can show that it notified the ISP or operator of infringing content³⁴. Still, the ISP or operator failed to respond to the complaint or take remedial steps.³⁵

The defence may also be lost where a claimant can show that it was not possible to identify or obtain sufficient information to bring proceedings against the creator or author of the defamatory statement³⁶. This is particularly noteworthy. Cases abound where victims of false and disparaging online statements or content may not be able to find the real author of the statement or content on a digital platform; and then approach the ISP or operator of the platform. Where the ISP fails to disclose the identity of the creator or author of the content, it may not be able to validly seek the protection afforded under this provision.

It should be noted that statutory defence conferred on ISPs or internet intermediaries under the LSDL is only available in Lagos State and does not extend to other states in Nigeria. Thus, while it is acknowledged that websites and the internet or digital platforms may be extraterritorial in their reach or applications, the law on jurisdiction over internet defamation is localised so that it is the courts in the location where the offending content is accessed and downloaded, that may in reality, exercise jurisdiction over the resulting defamation.³⁷

Consequently, a Nigerian court will assume jurisdiction to hear a case of defamation published on the internet if it is shown that the words were accessed or downloaded within its territorial jurisdiction. Accordingly, the statutory defence available to ISPs under the LSDL will only avail ISPs in cases where the cause of action arose in Lagos State.

National Communication Commission Guidelines

Another possible shield for internet intermediaries from defamation are hosting safe harbour provisions. Safe harbour can be described as a legal defence which protects internet intermediaries or ISPs from liability for claims arising from their hosting of infringing material, subject to certain conditions.

In Nigeria, the Nigerian Communication Commission's ("NCC") Guidelines for the Provision of Internet Service (the "ISP Guidelines") apply to all Licensees³⁸ providing Internet access services or any other Internet protocol-based telecommunications services ("ISPs") in Nigeria. Paragraph 11(c) of the ISP Guidelines provides the requirements for hosting safe harbours for ISPs. The paragraph provides that an ISP shall not be liable for the storage of information for any users of its services if the ISP:

33. Cap D1 Laws of Lagos State 2015.

34. Defamation Law of Lagos State, s 12(2)(b).

35. Defamation Law of Lagos State, s 12(2)(c).

36. Defamation Law of Lagos State, s 12(4).

37. See the English case of *King v Lewis* [2004] EWCA Civ 1329. This decision was followed by a Nigerian Court in the unreported case of *Miss Amadin Owie & Anor v Google Inc. and Youtube LLC* (Unreported Suit No: B/364/OS/2011).

38. Holders of a licence granted by the NCC to provide internet access, or any other Internet Protocol based telecommunications services in Nigeria.



- a. Does not modify the information;
- b. Does not interfere with any conditions of access applicable to the information;
- c. Does not interfere with the lawful use of technology to obtain data on the use of the information;
- d. Does not have knowledge of illegal activity related to the information; and
- e. Acts without delay to remove or disable access to the information on receipt of any takedown notice.

Paragraph 12 of the ISP Guidelines further imposes an obligation on the ISP to have laid down procedures in place to receive and promptly respond to content-related complaints, including any notice to withdraw or disable access to identified content issued by the NCC or other legal authority. This provision aligns with the standing policies and operational procedures of most of the multinational internet intermediaries, as many of them have as part of their operational procedures, mechanisms for treating complaints bordering on infringing content and takedown notices.³⁹

The challenge, however, for intermediaries seeking to rely on this defence in Nigeria is that the scope of the safe harbour provisions provided in the NCC Guidelines is significantly limited to the provision of internet access or Internet Protocol-based telecommunications services in Nigeria by persons/organisations that are holders of NCC ISP licenses.

EMERGING LEGISLATIVE EFFORTS

Outside the common law concept of the innocent dissemination defence and the defence for operators of websites captured in the LSDL discussed above, it is interesting to note that Nigeria is beginning to catch up with emerging trends in the electronic and e-commerce environment. In this regard, the Copyright Bill, a draft legislation that is currently before the Nigerian National Assembly,⁴⁰ is of note, because of provisions in the draft legislation that tend to reflect the protection or defence available to internet intermediaries in relation to potential liability for infringing content claims under common law.

The Copyright Bill seeks to amend or repeal the Copyright Act 1988⁴¹ to align with current trends and developments. Sections 29 and 30 of the Bill make provisions for a notice and takedown regime. By these provisions, any person who complains that the activity of an intermediary or ISP infringes his copyright is required to give takedown notice to the intermediary or ISP, and upon receiving the notice, the ISP is required to take down the infringing content within 48hrs. With respect to the above takedown procedures, a service provider will not be liable for any action it takes in good faith. This is an improvement on the extant law, which is silent on such notice, should the draft bill scale legislative hurdles and eventually becomes law. In that case, there will be some level of clarity in the law in the context of innocent infringer or disseminator in relation to internet intermediaries or ISPs, as it happens in other jurisdictions.



39. For example, Google LLC's has a content removal policy which can be found at policies.google.com/terms#toc-removing accessed 30 July 2021.

40. The National Assembly is the Nigerian Parliament or Congress at the National level.

41. Cap C28 Laws of the Federation of Nigeria 2004.

CONCLUSION

There is no doubt that human society is in a constant state of flux, and the law, due to its dynamism, strives to catch up with developments and emerging trends constantly. The same is true of the tort of defamation. As demonstrated in this article, the application of the strict common law position on liability for claims arising from infringing or defamatory statements may not be in tune with online defamation, with particular regard to internet intermediaries or ISPs. This is because in the digital age that we live in, and the role the internet intermediaries play in making information available and accessible to all globally, and in a very swift and speedy fashion, it will be unreasonable (except in limited circumstances where they are notified or found to be negligent), to penalise internet intermediaries for offending contents shared by third parties on their platforms.

As such, the deployment of the common law concept of the defence of innocent dissemination, as highlighted in this article, becomes very pertinent. The authors believe that the rationale for this defence is sensible and accords with justice. This is because but for the defence, internet intermediaries would have been fixed with liabilities for infringing contents of third-party internet users, which they had no actual knowledge of.

But even so, it should be stressed that while the defence of innocent dissemination generally shields internet intermediaries from liability in respect of third party infringing or defamatory contents, the defence is not available in all cases, as it may be lost where the internet intermediaries are found to be negligent or aware of the offending nature of the content, and yet, failed to take remedial steps within a reasonable time. In such a situation, the intermediary will be held liable for the offending content, as if it were the original author or publisher. That way, internet intermediaries are held accountable by ensuring that they constantly take steps or measures that will ensure that while carrying out their role of providing information and assisting e-commerce, contents shared on their platforms do not infringe on the rights of others.

Although Nigerian jurisprudence in the context of rules applicable to online transactions as well as liability in relation to internet intermediaries arising from defamatory or infringing third party contents is still at the evolutionary stage, there is no doubt that with the increased level of technological awareness in the country, we may soon see a lot of judicial decisions in this emerging area.⁴² But even then, it is very gratifying to see that the concept is fast gaining traction in Nigeria. Thus, while it seems to be the case that the common law concept of the defence of innocent dissemination has only been applied in one decision, the authors are confident that with the decision, a complete judicial recognition of the application of the concept in Nigeria is foreseeable. This position is further strengthened by the increasing rate of the legislative embrace that the concept has received in recent times. In any case, being a common law concept, it is submitted that it forms part of Nigerian law, as common law is one of the sources of the Nigerian jurisprudence as a matter of Nigeria's historical affinity with England.

Accordingly, there is no doubt that a Nigerian court before whom an internet intermediary is brought over an online claim in defamation, will apply the defence of innocent dissemination when it is appropriately raised and satisfactorily proved.

42. At the moment, the number of litigation claims, arising from infringing contents, against multinational tech companies is on the increase.

