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UNDERSTANDING THE ART OF ONLINE CONTENT CREATION AND ITS INTELLECTUAL PROPERTY RIGHTS CONCERNS

Introduction

Content creation is the process of generating ideas, concepts or topical issues that attract and captivate the attention of a target audience. It could be for different purposes such as business promotion or entertainment. In creating a content, the creator can choose the form that the content can be represented and felt, which can either be in electronic or analogue form. While the electronic form refers to digital fixation of work making it accessible through use of the internet or any particular service provider, the analogue form refers to manual fixation of a content in hard copy such as the print media.

The world is fast becoming digital dependent which has seen a geometric rise in the number of online content creators leveraging the internet services and social media platforms to create and project their contents for target audience. This is more evident in the entertainment industry where skit makers create comedy contents which often generate huge traffic through the number of views gained and in return yield revenue to the creator where the host social media account is monetized. These contents are sometimes published or shared on other social media platforms by third parties without the authority or consent of the original creators, and through that process attentions of viewers are diverted from the social media page of the original owner.

Though, one may consider the unauthorized publications of this online content by third parties as increasing the popularity of the creator albeit unsolicited, it has far-reaching effect on the earnings of the original creators and apparently constitute an infringement on the intellectual property right of such owners. It is against the backdrop of these concerns that the focal point of this paper is on online contents. This will traverse the rights enjoyed by online content creators under the copyright jurisdiction in Nigeria and the protection accorded to their works under the law.

Eligibility of Online Content for Intellectual Property Rights Protection in Nigeria

Online contents are usually in the form of short videos, memes, cartoons, music, sound recording, artistic and literary piece aimed at drawing the interest of the public and promoting the creator's idea. Generally, online contents being creation of mental ingenuity are eligible for regulation and protection within the copyright jurisprudence in Nigeria, as the Copyright Act 2022 ("the Act") exquisitely makes provisions recognizing online contents.

Being a recognizable creation within the Copyright Act, online content must meet the criteria to be eligible for protection. The Copyright Act 2022¹ provides that the categories of work eligible for protection include only the following: literary works, musical works, artistic works, audiovisual works, sound recordings and broadcasts. Notably, where such online content is a literary, artistic or musical work, the work must possess the characters of originality and fixation to be eligible for protection².

Further to the several criteria set by the Act for the eligibility of a work for copyright protection, the Act set additional criteria that must be met before any eligible online content can be conferred with copyright protection. These additional criteria are made subject to the nationality, habitual residence of the creator who is referred to as author, reference to international agreements³. As expressed in the Act, copyright is conferred on an eligible work where the author or any of the authors is an individual who is a Nigerian citizen or is habitually resident in Nigeria; or a body corporate incorporated by or under the laws of Nigeria.⁴

The Copyrights Conferred on Authors of Online Contents

Copyrights is the exclusive rights conferred on authors of works where such works meet the eligibility test for protection. Online content creators also enjoy these exclusive rights where the online content meets the required eligibility test such as originality, fixation and the additional requirements set out in Sections 5 and 6 of the Act;⁵ provided that the works do not fall within the list of works prohibited by the Act from copyright eligibility⁶. Some of the categories of works prohibited from copyright eligibility include ideas, procedures, format, concepts, principles, and mode of operation *e.t.c.*⁷

The nature of exclusive rights is such that no third party shall be entitled to exploit the online contents or deal with it in a manner that is inconsistent with the rights of the owner, without the authority of the original author. The Act has a long list of rights

¹ Section 2(1)

² Section 2(2)(a)(b)

³ Section 8(1)

⁴ Section 5

⁵ Copyright Act

⁶ Section 3

⁷ Ibid

which the authors of online contents enjoy exclusivity from third parties. Sections 9, 10(1), 11 and 12 of the Act⁸ confer the author with rights to do the following -

- (a) Reproduction of the work.
- (b) publishing the work.
- (c) performing the work in public.
- (d) producing, reproducing, performing, or publishing any translation of the work.
- (e) making any audiovisual work or a record in respect of the work, or incorporating the work in an audiovisual work, in the case of artistic work
- (f) distribution to the public, for commercial purposes, copies of the work, through sale or other transfer of ownership, provided, the work has not been subject to distribution authorized by the owner.
- (g) broadcasting the work.
- (h) communicating the work to the public.
- (i) making the work available to the public by wire or wireless means in such a way that members of the public are able to access the work from a place and at a time independently chosen by them.
- (j) doing in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work.
- (k) making any adaptation of the work; and
- (l) making a translation of the work or any part of it.

Remedies Available to Online Content Creators in the Event of Infringement of their Copyright in Relation to an Online Content

The spirit of the law is geared towards ensuring that rights created in law are given protection from unlawful violations. This birthed the principle which is to the effect that where there is a right, there is a remedy as aptly captured in the Latin Maxim "*Ubi jus ibi remedium.*" The Act having vested ample rights on online content creators for their exclusive use, also makes provisions for remedies available to these creators where any of the rights is infringed. The remedies include Notice to take down, suspension of subscriber's account by a service provider, liability of service provider for failing to act, and they shall hereunder be discussed individually.

a. Notice to a Service Provider to Take Down:

Discussions surrounding online content creation and the intellectual property rights concerns thereto cannot be complete without bringing to the picture the role of service providers. The service providers provide internet service which grants access to the

⁸ Ibid

contents, while social media provide the platform through which the content is felt in order to enjoy the character of fixation. In other words, where such content is being exploited by an unauthorized user, it becomes the responsibility of the service provider to act and stop the continued infringement, upon notification by the original author.

The owner of copyright in an online content, in respect of which copyright has been infringed, may issue notice of the infringement to the relevant service provider requesting the service provider to take down or disable access to any infringing content or link to the content, hosted on its system or network⁹. The notice shall be in writing and may be transmitted electronically, or by any other means, to the service provider or his designated agent and shall include —

- (a) a physical or electronic signature of a person authorized to act on behalf of the owner of the right allegedly infringed.
- (b) identification of each work claimed to have been infringed.
- (c) identification of the infringing material or the subject of infringing activity that is to be removed or access to which is to be disabled, including information sufficient to enable the service provider to locate the material.
- (d) information sufficient to enable the service provider to contact the complaining party, such as an electronic mail address, telephone number, or a location address at which the complaining party may be contacted.
- (e) a declaration on oath that the complainant believes that the use of the material in the manner complained of is not authorized by the owner of copyright, his agent or the law; and
- (f) a statement that the information in the notification is accurate and that the complainant is authorized to act on behalf of the owner of the right allegedly infringed.

Section 55(1) Upon receiving notice of infringement from a copyright owner of the online content, the service provider is obligated to promptly notify the person allegedly responsible for the content for which the notice relates, informing him of the content of the notice and shall expeditiously take down or disable access to the infringing content or links to such content hosted on its system or network and, thereafter, notify the owner of the copyright accordingly.¹⁰ However, the service provider may restore access to the content or a link that has been removed, if he —

- (a) receives a written counter notice from the alleged infringer and forwarded same to the owner of copyright in the online content immediately on receipt; and
- (b) did not receive, within **seven (7) days** after forwarding the counter notice, a response from the owner of copyright in the online content, indicating that no authorization has been granted for the alleged infringer to make the content available.¹¹

⁹ Section 54

¹⁰ Section 55(1)

¹¹ Section 55(2)

Pertinently, a service provider is obligated under **Section 55(3)** to take effective steps, in accordance with high industry standards, to prevent any infringing content already taken down or removed under the provisions of this Act from being reloaded onto its system or network.¹²

Notwithstanding, any person who is dissatisfied with a determination or action by the service provider or owner of copyright in the online content under this section may refer the matter to the Nigerian Copyright Commission for determination.¹³

b. Suspension of Subscriber's Account by Service Provider:

Although the Act has made provisions for notice to takedown infringing contents, it is worthy of note that there are situations where the infringer can be unrepentant and unyielding. This is notorious among non-creative people seeking social media visibility. Their pages are often sustained using the online contents of other authors without the authorization to so do, and by so doing divert traffic from the original owner. The Act requires that the infringing social media pages be reported to the service provider for their necessary action. The Act however envisages the tendency of recurrent infringement and accordingly made copious provision for suspension of such subscriber's account by a service provider. The Act¹⁴ obligates a service provider, upon receiving repeated notifications of infringements for a particular account, to –

- (a) promptly send a warning to the subscriber that has been identified, informing him that another notification will lead to suspension of the account and requiring the subscriber/infringer to confirm the receipt of the warning; and
- (b) after a second notification relating to the same account, where no challenge is pending by way of counter-notice within 10 days, to suspend the account for a period of not less than one month.

The Act¹⁵ also provides that a subscriber/alleged infringer who receives a warning notice may challenge the notice on the grounds of mistake or misidentification. Notably, a service provider acting in good faith in suspending the account of a subscriber/alleged infringer, relying on the information contained in a notification given by a Complainant, will not be held liable to any person for any claim based on the suspension.¹⁶

c. Blocking/Disabling Access to any Link Hosting an Infringing Material:

In addition to the remedies of takedown and suspension of the account, the Act provides that the Nigerian Copyright Commission may directly or with the assistance of any other person block or disable access to any content, link or website hosted on a system or network, which it reasonably believes to infringe copyright under this Act.¹⁷

¹² Section 55(3)

¹³ Section 55(4)

¹⁴ Section 56(1)

¹⁵ Section 56(2)

¹⁶ Section 56(3)

¹⁷ Section 61

d. **Disclosure of Identity of an Infringer by Service Provider and Application to Court if Need be**

The owner of copyright in an online content or his agent can make an application to the court for an order to a service provider to identify an alleged infringer upon a sworn declaration to the effect that the purpose for which the order is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this Act.¹⁸

In this situation, the court may issue an order to the service provider to expeditiously disclose to the owner of copyright in the online content or a person authorized by the owner, information sufficient to identify the alleged infringer of the material described in the notification to the extent that the information is available to the service provider.¹⁹

Exceptions to Copyright and Voidability of any Contract Preventing a Permitted Act/Use

Amid the plethora of rights conferred on online content creators precluding all third parties from dealing with their works in the manner that is inconsistent with the rights of the original creator, just as the authors of other copyright eligible works, the Act created exceptions to when and how the online contents can be used without the necessity of the owner's authorization. Such is permissible if the use of the online content qualifies as fair dealing.²⁰ Some of the usages that qualify as fair dealing include: private use, parody, satire, pastiche, or caricature, non-commercial research and private study, criticism, review or the reporting of current events, subject to the condition that, if the use is public, it shall, where practicable, be accompanied by an acknowledgment of the title of the work and its author, except where the work is incidentally included in a broadcast, etc.

Pertinently, in determining whether the use of a work in any particular manner qualifies as fair dealing, the factors to be considered shall include purpose and character of its usage, nature of the work, the amount and substantiality of the portion used in relation to the work as a whole and the effect of the use upon the potential market or value of the original work.

The Consequences of False Infringement Allegation and the Remedy for Misrepresentation

As it is said that when the purpose of a thing is not known, abuse will be inevitable, the law is not oblivious of the tendency of abuse of the reporting mechanisms for copyright infringement of online contents. In this regard, the law has made a provision for remedy in the event of misrepresentation leading to wrongful takedown or suspension of a person's account. It provides that a person who knowingly misrepresents that a material or activity is infringing, or material or activity was

¹⁸ Section 60(1)

¹⁹ Section 60(3)

²⁰ Section 20(1)

removed or disabled by mistake or misidentification, is liable in damages for injuries suffered by the person as a result of the service provider relying on such misrepresentation.²¹

Liability of a Service Provider for Failing to Act When Necessary

Ordinarily, service providers are not liable to any person for any action taken in good faith in discharge of their obligations under the Act.²² Meanwhile, where a service provider fails to act as obligated under the Act, he shall be liable for such failure as a breach of statutory duty and for infringement of the content which is the subject matter of the notice under section 54 to the same extent as the person responsible for placing the content on the system or network.²³

Conclusion

Online contents are creations made out of the ingenuity of the authors. They often possess the character of originality distinguishing them from those of others. As such, they are entitled to protection as accorded under the Copyright Act. Prior to enactment of the Act, there were no recognizable remedies available to online content creators within Nigerian jurisdiction in relation to infringement of their contents. This had over the years left room for the question as to whether the works of online content creators are considered as *bona vacantia* that can be exploited without restriction.

Now that the Copyright jurisprudence has acknowledged the place of online content creation which is currently a thriving art in the digital world providing market for exhibition of individual talents and crafts, adequate provisions have been made to protect the author's ingenuity and additionally placed obligations on the service providers who are considered as key players in giving effect to the intent of the Act.

The implication of the foregoing is that every unauthorized publication, adaptation or distribution of online contents for the purpose of gaining increased followership, viewership or validations constitute infringement of the copyright of the original creator. It is immaterial that the person who shared, broadcast, published, distributed is a fan or supporter of the original owner. It is also time for online creators to wake up to their rights and take benefit of the protections available to them under the Copyright Act and restrict ambulance chasers from ripping them of the fruit of their labour.

²¹ Section 57

²² Section 55(5)

²³ Section 55(6)