

THE LEGAL FRAMEWORK APPLICABLE TO THE FACILITATION OF DIGITAL CONTENT IN NIGERIA

By

Nnanke Williams, LLM

Senior Consultant, Brooks & Knights Legal Consultants

And

Adetayo Adetuyi, LLM

Senior Consultant, Brooks & Knights Legal Consultants¹

1. Introduction

By making the world a global village, the internet has spearheaded the seamless transmission of data and digital content across jurisdictions from the comfort of homes through the use of computer systems and mobile telephones. From messaging and other forms of online communication transmissions to the sharing of media and entertainment and to the completion of transactions in the sale of goods and services, digital content is constantly being shared across countries, and Nigeria has not been left behind in the digital content boom. In November 2019, the Nigerian Communications Commission (**NCC**) reported the number of active internet users in Nigeria at almost 123 million,² which was up from about 109 million in 2018.³

Some of the types of digital content available to Nigerian users include, among others, services that facilitate user communications such as social media and messaging services,

services that facilitate the creation and delivery of amateur and professionally produced content, and digital marketing services. As the digital services market continues to grow, regulators have struggled to catch up with regulating a content space that is constantly evolving. This article will consider some of the legal and regulatory considerations that affect the provision of the digital services listed above.

In this article '*digital content provider*' and '*online platform*' may be used interchangeably to refer to creators of digital content as well as platforms through which these contents are shared and made available to users within Nigeria, each phrase may imply the meaning of the other.

¹ Brooks & Knights Legal Consultants (BKLC) is a law firm established in Lagos, Nigeria to provide bespoke legal advisory and policy consulting services to individuals, corporates, government agencies and NGOs.

² Nigeria Communications Commission, *Industry Statistics*, available at <https://www.ncc.gov.ng/stakeholder/statistics-reports/industry-overview#view-graphs-tables-5>

³ *Id.*



2. Legal Considerations Involved in the Provision of Digital Content in Nigeria

Nigerian users have access through several online platforms, to digital content shared by local and international content providers. However, for the purpose of doing business in Nigeria, providers who make these contents available to users in Nigeria may be required under the Companies and Allied Matters Act to incorporate as Nigerian companies where they intend to carry on business in Nigeria.⁴ The phrase, carry on business, was illustrated by the Court of Appeal's decision in *Edicomsa International Inc. and Associates v. Citec International Estates Ltd*,⁵ a case involving a foreign company who entered into agreements with a Nigerian company to design and build housing units in Abuja, Nigeria. When disagreements ensued concerning payments due to the foreign company, it sued in the Nigerian courts for breach of contract. The Court of Appeal defined the phrase "carrying on business" thus:

"To carry on business means to conduct, prosecute or continue a particular vocation or business as a continuous operation or permanent occupation. The repetition of acts

*may be sufficient. It also means to hold oneself out to others as engaged in the selling of goods or services"*⁶

The Court then held that a foreign company carrying on business in Nigeria without incorporation as a Nigerian entity is liable upon conviction to the fines prescribed under the Companies and Allied Matters Act and all its acts are void under the law.⁷ The prescribed fines are negligible, not very proscriptive and may not act as a deterrent to foreign companies engaging in business in Nigeria without registering as Nigerian entities.⁸

How does this apply to platforms that share digital content to Nigerian users?

A digital content provider or a platform sharing digital content may be considered to be doing business in Nigeria if it has subscribers from within Nigeria, especially if it offers paid subscription services. An online platform that sells or facilitates the sale of goods and services to consumers within Nigeria may also be considered as carrying on business in Nigeria within the *Edicomsa* definition. This would mean that it is required to incorporate as a Nigerian entity or risk its actions being voided by the Nigerian courts.

⁴ Section 54 of the Companies and Allied Matters, Chapter C20, Laws of the Federation of Nigeria (LFN) 2004.

⁵ (2005) LPELR-5584 (CA)

⁶ Per Rhodes-Vivour, J.C.A., *Edicomsa International Inc. and Associates v. Citec International Estates Ltd*, (2005) LPELR-5584 (CA) at p.17 (paragraphs A-D)

⁷ id at pp.17-19 (paragraphs A-D)

⁸ Section 55 of the Companies and Allied Matters, Chapter C20, LFN 2004 provides

that such foreign company be liable on conviction to a fine of not less than NGN2,500 (about \$7) and every complicit officer of the company be liable upon conviction to a fine of not less than NGN250 (about 7 cents) and where the offence is a continuing one a further fine of NGN25 for every day during which the default continues (less than a cent).



The potential upside for foreign digital content providers doing business in Nigeria is that payments are usually made up front before services are provided and the *Edicomsa* situation is not likely to occur in their case.

Tax Considerations for Digital Content Providers Offering Services to Consumers in Nigeria

Both Nigerian and Foreign registered companies may be subject to income tax under Nigerian law, upon their profits that accrue in, are derived from, are brought into or are received in Nigeria.⁹ Non-incorporation as Nigerian entities of foreign companies who do business in Nigeria does not exempt them from liability to tax.

Furthermore, the incomes of foreign digital service providers who offer services in Nigeria have been specifically addressed for tax under the newly enacted Finance Act of 2020. The law amends the section of the Companies Income Tax Act that subjects foreign companies to tax liability in Nigeria, by including the following:

"the profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria if it transmits emits, or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity including electronic commerce, application store, high frequency trading, electronic data storage, online adverts participative network platform, online

⁹ Section 9 of the Companies Income Tax Act, Chapter C20 LFN 2004.

*payments and so on to the extent that the company has significant economic presence in Nigeria and profit can be attributable to such activity."*¹⁰

Licenses Applicable to Digital Content Providers Offering Services to Consumers in Nigeria

Digital content providers may be subject to licensing depending on the service being supplied. There are no Nigerian licensing requirements for an online platform that facilitates communications between users in Nigeria. However, as will be discussed in section 3 below, providers delivering professionally produced and amateur content in video format will be subject to the licensing requirements of the Nigerian Broadcasting Commission.

3. Laws Applicable to Digital Content Providers in Nigeria

This section will consider the laws and regulations applicable to digital content providers who provide services to facilitate user communications such as social media and messaging services, services that facilitate the creation and delivery of amateur and professionally produced content, and digital marketing services. It will also consider the data privacy rules applicable in Nigeria.

Platforms That Facilitate User Communication

¹⁰ Section 3, Finance Act of 2020.

There are 3 (three) primary laws and regulations applicable to platforms that facilitate internet-based communications for users in Nigeria, whether in text, picture or video format, and these laws cover issues of privacy, data protection and security. These laws aim to protect the privacy rights of Nigerian consumers and govern how online platforms handle the data of their Nigerian users. These laws are: the Constitution of the Federal Republic of Nigeria, 1999 as amended (**Constitution**), the National Information Technology Development Agency (**NITDA**) Act, 2007, and the Nigeria Data Protection Regulations 2019 (**NDPR**).

a. The Constitution

The Constitution is the overarching law and the basis upon which law and government is organized in Nigeria. It aims to promote the good government and welfare of all persons in Nigeria on the principles of freedom, equality and justice. The Constitution guarantees the privacy of every Nigerian citizen as a fundamental human right. It provides that *“the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.”*¹¹

Nigerian users are therefore entitled to their privacy in their communications and online platforms must consider privacy issues when sharing user data.

b. NITDA Act, 2007

NITDA Act establishes NITDA as the regulating agency for all information technology matters in Nigeria.¹² NITDA is the principal regulatory agency in Nigeria for online platforms that facilitate consumers sending communications to each other via the internet in text, picture or video format. It is the agency responsible for regulating online platforms that enable the creation and sharing of amateur and professionally produced content. NITDA is empowered under the Act to make regulations and issue guidelines for the development, monitoring, evaluation and regulation of information technology practices, activities and systems in Nigeria and all matters related to and for that purpose.¹³ It is also empowered to develop guidelines for electronic governance and to monitor the use of electronic data interchange and other forms of electronic communication transactions.¹⁴

c. NDPR, 2019

Further to its powers under the Act, NITDA issued the NDPR in 2019. The objectives of the NDPR are to safeguard the rights of natural persons to data privacy, to foster safe conduct for transactions involving the exchange of Personal Data and to prevent manipulation of Personal Data.¹⁵

NDPR defines Personal Data thus:

“any information relating to an identified or identifiable natural person (“Data Subject. An identifiable natural person is one who can be identified, directly or indirectly, in particular by

¹¹ Section 37 of the Constitution

¹² Sections 1 and 6 NITDA Act, 2007.

¹³ Section 6(a) NITDA Act, 2007.

¹⁴ Section 6(c) NITDA Act, 2007.

¹⁵ Paragraph 1.1 of the NDPR.



reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. It can be anything from a name, address, a photo, an email address, bank details, posts on social networking websites, medical information, and other unique identifier such as but not limited to MAC address, IP address, IMEI number, IMSI number, SIM, Personal Identifiable Information (PII) and others.”¹⁶

The NDPR applies to all transactions intended for the processing of Personal Data, and to the processing of Personal Data irrespective of the means by which the data processing is being conducted or intended to be conducted in respect of natural persons¹⁷ in Nigeria.¹⁸ It also applies to natural persons residing in Nigeria or those residing outside Nigeria who are citizens of Nigeria.¹⁹ However, the NDPR does not operate to deny any Nigerian or any natural person the privacy rights he is entitled to under any law, regulation, policy, contract for the time being in force in Nigeria or in any foreign jurisdiction.²⁰

The NDPR provides that online platforms facilitating internet-based communication may only collect and process Personal Data in accordance with a specific legitimate and lawful purpose consented to by the Data Subject.²¹ A Data Subject is defined to refer to any person who can be identified directly or

indirectly by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

A Data Subject’s consent may not be sought, given or accepted in any circumstance that may engender the direct or indirect propagation of atrocities, hate, child rights violation, criminal acts and anti-social conducts.²² Any such online platform through which Personal Data is collected or processed must display a simple and conspicuous privacy policy that the class of Data Subject being targeted can understand.²³ In interpreting this provision it is our opinion that this privacy policy must be in the English Language, despite the multilingual nature of Nigerian society, as English is the official language of Nigeria, and the language of its laws, its government and its courts. This policy must however be prepared in simple, plain and easily intelligible form to the Data Subject.

Where online platforms are involved in data processing or the control of data, they must develop security measures to protect such data, *“including but not limited to protecting their systems from hackers, setting up firewalls, storing data securely with access to specific authorized individuals, employing data encryption technologies, developing organizational policy for handling Personal Data.”²⁴*

¹⁶ Paragraph 1.3 of the NDPR.

¹⁷ A human being. See Bryan A. Garner, Black’s Law Dictionary, 9th Ed. Pp. 1257

¹⁸ Paragraph 1.2(a) of the NDPR.

¹⁹ Paragraph 1.2(b) of the NDPR.

²⁰ Paragraph 1.2(c) of the NDPR.

²¹ Paragraph 2.1 of the NDPR.

²² Paragraph 2.4 of the NDPR.

²³ Paragraph 2.5 of the NDPR.

²⁴ Paragraph 2.6 of the NDPR.



The NDPR safeguards the right of a Data Subject to object to the processing of his data.²⁵ The privacy policies for many online platforms provide for a Data Subject's right to object to the use or processing of its information by either deleting the information, disabling a feature or by contacting the online platform. This may form a sufficient protection of the Data Subject's right to object under the NDPR.

The NDPR also provides that the privacy right of a Data Subject shall be interpreted for the purpose of advancing and never for restricting the safeguards that the Data Subject is entitled to under any data protection instrument made in furtherance of fundamental rights and the Nigerian laws.²⁶

Where an online platform is found to be in breach of the data privacy rights of a Data Subject, it shall be liable in addition to any other criminal liability to:

- a. in the case of a Data Controller dealing with more than 10,000 (ten thousand) Data Subjects, payment of a fine of 2% of the Annual Gross Revenue of the preceding year or payment of the sum of NGN10 million, whichever is greater; or
- b. in the case of a Data Controller dealing with less than 10,000 (ten thousand) Data Subjects, payment of a fine of 1% of the Annual Gross Revenue of the preceding year or payment of the sum

of NGN2 million, whichever is greater.²⁷

A Data Controller is a person who either alone, jointly alone with other person or in common with other person or a statutory body determines the purposes for and the manner in which the Personal Data is processed or is to be processed.

The NDPR also governs the storing and hosting of communications data in real time or in local data centers for online platforms in Nigeria. It provides for how data collected should be processed, stored and secured to ensure that a Data Subject's right to privacy is protected.

In this regard, the NDPR provides that any medium through which Personal Data is collected or processed shall display a simple and conspicuous privacy policy that the class of Data Subject being targeted can understand. Such privacy policy shall contain, among other things, information on the technical methods used to collect and store personal information, cookies, JWT, web tokens, etc.²⁸ Any such online platform which stores or hosts data is mandated, when processing such data to develop security measures to protect the data, including but not limited to protecting systems from hackers, setting up firewalls, storing the data securely with access to specific authorized individuals, employing data encryption technologies, developing organizational policy for handling Personal Data.²⁹

²⁵ Paragraph 2.8 of the NDPR.

²⁶ Paragraph 2.9 of the NDPR.

²⁷ Paragraph 2.10 of the NDPR.

²⁸ Paragraph 2.5 of the NDPR.

²⁹ Paragraph 2.6 of the NDPR.



Prior to collecting Personal Data from a Data Subject, the Data Controller for any such online platform is mandated under the NDPR to provide the Data Subject with information which includes the period for which the Personal Data will be stored, or where not possible, the criteria used to determine that period.³⁰

Platforms that Deliver Professionally Produced or Amateur Content

The major laws that govern online platforms that deliver professionally produced and amateur content concern issues of broadcasting and intellectual property. These laws include the Nigerian Broadcasting Commission (NBC) Act,³¹ the 6th Edition of the Nigerian Broadcasting Code (NBC Code) and the Copyright Act.³²

a. The NBC Act and the NBC Code

The NBC Act establishes the National Broadcasting Commission (NBC) which regulates and controls the broadcasting industry.³³ The NBC is the primary regulator for online platforms that deliver professionally produced editorial content to consumers in video and picture format. The NBC, pursuant to its rulemaking powers under the NBC Act,

issued the NBC Code³⁴ which describes broadcasting as a creative medium, characterized by professionalism, choice and innovation and which utilizes audio and video technology to serve the interest of the general public and enable individuals to share in and contribute to the world around him.³⁵ Internet Broadcasting (radio and television) is a type of broadcasting which is categorized by the NBC Code.³⁶

The NBC Code mandates that all internet radio and television broadcasting streaming signals from and into Nigeria shall be licensed by the NBC.³⁷ It also provides that all subscription internet radio and TV that seeks subscribers in Nigeria be licensed by the NBC.³⁸ Therefore, online platforms that deliver professionally produced editorial content to consumers in Nigeria in video format must be licensed by the NBC. Such platform will also be subject to all other laws and regulations governing news, programmes, advertising and sponsorship.³⁹

b. The Copyright Act

The Copyright Act governs copyright issues in Nigeria. According to section 1 of the Copyright Act, copyright eligible works include literary works, musical works, artistic works, cinematograph films, sound

³⁰ Paragraph 3.1 of the NDPR.

³¹ Chapter N11 LFN, 2004.

³² Chapter C28, LFN 2004.

³³ Section 1 of the National Broadcasting Commission Act, N11 LFN 2004.

³⁴ Nigeria Broadcasting Code, 5th Edition, 2012. A 6th Edition of the Nigerian Broadcasting Code was recently issued; however, it is not yet in circulation.

³⁵ Paragraph 0.1.1.1 of the Nigeria Broadcasting Code, 5th Edition, 2012.

³⁶ Paragraph 2.2.7 of the Nigeria Broadcasting Code, 5th Edition, 2012.

³⁷ Paragraph 11.8(a) of the Nigeria Broadcasting Code, 5th Edition, 2012.

³⁸ Paragraph 11.8(e) of the Nigeria Broadcasting Code, 5th Edition, 2012.

³⁹ Paragraph 11.8(b) of the Nigeria Broadcasting Code, 5th Edition, 2012.



recordings, and broadcasts.⁴⁰ Professionally produced editorial content in video and picture format may be categorized as copyright-eligible artistic works, cinematograph films, and broadcasts. In such cases, copyright concerns will arise.

The Copyright Act confers copyright on eligible works where the author(s) is at the time when the work is made, a qualified person, i.e. an individual who is a citizen of, or is domiciled in Nigeria; or a body corporate incorporated by or under the laws of Nigeria.⁴¹ Copyright is also conferred on any eligible artistic work or cinematograph film that is first published in Nigeria, where such work is otherwise not eligible to copyright. Copyright is also conferred on every work that on the date of its first publication:

- a. at least one of the authors is a citizen of or domiciled in; or a body corporate established under the laws of; a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party; or
- b. the work is first published in a country which is party to an obligation in a treaty or other international agreement to which Nigeria is a party; or it is published by the UN or any of its specialised agencies; or by the Organization of African Unity or by the Economic Community of West African States.⁴²

Copyright generally protects against copying or reproducing the work as well as any unlawful public use of the work. Copyright infringement incurs both civil and criminal liability under the law.⁴³

The Copyright Act also governs the sharing of amateur content by affording its author copyright protections where it is an eligible work first published in Nigeria or published by a Nigerian citizen or a Nigerian resident. An online platform may also have copyright infringement claims instituted against it where it infringes on the copyright of an author by using or otherwise broadcasting the work in an unauthorized manner.

4. Conclusion

Digital content providers and online platforms that facilitate access to digital content to Nigerian users may consider these issues as they navigate the Nigerian business and regulatory space.

⁴⁰ Section 1(1) of the Copyright Act, C28 LFN 2004.

⁴¹ Section 2 of the Copyright Act, C28 LFN 2004.

⁴² Section 5 of the Copyright Act, C28 LFN 2004.

⁴³ Section 6 of the Copyright Act, C28 LFN 2004.

