

# LIABILITY OF INTERNET SERVICE PROVIDERS (ISPs) FOR COPYRIGHT INFRINGEMENT IN THE NIGERIAN CONTEXT

BY

**\*OKITIKPI TORITSEJU**

## Abstract

One of the most controversial issues in the realm of cyberspace is the liability or otherwise of internet service providers (ISPs) for dissemination of third party content. ISPs have described themselves as “passive conduits” and messengers who are no different from the traditional post office, which is not liable for a defamatory letter that is posted through it or a telephone company which is not responsible for an obscene call made by a user, hence should not be liable for copyright infringement perpetrated on the internet. Conversely, others have labeled ISPs as major actors in copyright infringement via the internet. This paper examines the liability or otherwise of ISPs for copyright infringement in the United States and the Nigerian context. It concludes by proposing strategies aimed at achieving a balance in the interest of ISPs and copyright holders in Nigeria.

## Introduction

The internet age has elicited many unparalleled issues that do not find resolution in the extant legal order. One of such issues pertains to adapting extant copyright laws<sup>1</sup> to meeting the challenges of global computer networks.

In this regard, the major threat to copyright holders posed by the ease of dissemination of information on the internet is online piracy. Once material is stored in digital format, further copying results in no loss of quality. Copies can be made an infinite number of times. They can be digitally altered and manipulated.<sup>2</sup>

---

\*Okitikpi Toritseju LL.B, LL.M, BL, toju@lawyer.com.

1. Copyright law aims to balance the competing interests of both the artists and the general public by protecting artists’ works and encouraging their creativity on the one hand and on the other by allowing public access to information.

<sup>2</sup> Just, M, “Internet File-Sharing and the Liability of Intermediaries for Copyright Infringement: A Need for International Consensus”, (2001) Vol.1 *The Journal of Information, Law and Technology*. Available at <http://elj.warwick.ac.uk/jilt/03-1/just.html> (hereinafter referred to as Just, M).

Contemporary examples of this menace are expressed in MP3 file sharing programmes and copying of movies via the internet in utter and blatant disregard for the rights of the copyright owner.<sup>3</sup> Biegala notes that in January 2001 alone, 2.7 billion songs were downloaded through a file sharing programme called Napster.<sup>4</sup>

Consequently, the task for copyright holders to locate infringing material on the internet represents a great economic burden; hence the responsibility should be shifted from the copyright holders to those that allow the infringement occur.

Against the background of the foregoing premise, this paper deals with the highly controversial issue of internet service providers' (hereinafter referred to as ISPs) liability for infringement of copyright by a third party. In achieving its objective, this paper shall attempt to define an ISP and focus on the progressive response of the United States (US) legal regime to the issues. It then goes ahead to examine the current Nigerian legal order, with a view to ascertaining the existence or otherwise of ISP liability. It concludes by suggesting reforms to the Nigerian laws in order to clearly define the status, powers and limitations of intermediaries thereby creating a fair balance in the overall interest of owners of copyrights on one hand and ISPs on the other hand.

---

<sup>3</sup> Sites like [www.beemp3.com](http://www.beemp3.com), [www.youtube.com](http://www.youtube.com), [www.mp3skull.com](http://www.mp3skull.com), [www.mp3raid.com](http://www.mp3raid.com), [www.angryalien.com](http://www.angryalien.com) are epitomes of sites that provide internet file sharing programmes.

<sup>4</sup> Biegala, S., *Beyond Our Control, Confronting the Limits of Our Legal System in the Age of Cyberspace* (London: MIT Press, 2001) at 12.

## Who is an Internet Service Provider?

An Internet Service Provider (ISP) is an entity that connects people to the internet and provides other related services such as website building and hosting.<sup>5</sup>

It can also mean a company that might be performing any of a multitude of services over the Internet.<sup>6</sup> Traditional ISPs provide connection to the Internet and usually offer users email and newsgroup access.<sup>7</sup> Others offer web space for users to create their own home pages. Bulletin Board operators could also be regarded as ISPs.<sup>8</sup> ISPs could also include telecommunications infrastructure such as Cisco and local telephone companies.<sup>9</sup>

Other, more specialised, functions of ISPs include those that provide connectivity software employing a central server such as file-sharing programs or Internet Messenger services. Software that does not require a central server can be described as pure peer-to-peer networking or decentralised. It is these newer functions of ISPs that are most problematic for copyright holders.<sup>10</sup>

The Digital Millennium Copyright Act 1998 (hereinafter referred to as DMCA) has two definitions for ISPs. The first definition in section 512(k)(1)(a) provides thus:

An entity offering transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of the material of user's choice, without modification to the content of the material as sent or received.

---

<sup>5</sup> Chaubey R, *An introduction to cyber crime and cyber law*, (Kolkata: Kamal Law House, 2008).

<sup>6</sup> Just, M, *op. cit.* at 1

<sup>7</sup> Just, M, *op. cit.* at 1

<sup>8</sup> Just, M, *op. cit.* at 1

<sup>9</sup> Just, M, *op. cit.* at 1

<sup>10</sup> Just, M, *op. cit.* at 1

The second definition in section 512(k)(1)(b) identifies a ‘Service provider’ as “a provider of online services or network access, or the operator of facilities therefore’. It is submitted that the DMCA definition is broad enough to encompass all activities on the internet where companies are providing some sort of service to users or where they are providing a direct connection.

The E-Commerce Directive (EU)<sup>11</sup> provides a similarly broad definition: a ‘service provider’ is “any natural or legal person providing an information society service.”

In the Nigerian context, the extant Copyright Act 2004<sup>12</sup> proffers no definition or explanation of an ISP. Also, the Nigerian Communications Act 2004<sup>13</sup> is devoid of any definition of an ISP. The best description of an ISP in Nigeria is expressed in section 13(1) of the Advanced Fee Fraud and other Related Offence Act 2006<sup>14</sup> and it provides thus:

Notwithstanding the provisions of the Nigerian Communications Commission Act 2003 or the provisions of any other law or enactment, *any person or entity who in the normal course of business provides telecommunications or internet services* or is the owner or person in the management of any premises being used as a telephone or internet cafe or by whatever name called shall....(emphasis mine)

From the wordings of this section, it appears that an ISP could be described as any person or entity who in the normal course of business provides internet services. Be that as it may, it is submitted that this section does not explain term “internet services”.

---

<sup>11</sup> The Electronic Commerce Directive 2000/31/EC, adopted in 2000, sets up an Internal Market framework for electronic commerce in the European Union.

<sup>12</sup> Cap. C28, Laws of the Federation of Nigeria, 2004.

<sup>13</sup> Cap. N97, Laws of the Federation of Nigeria, 2004.

<sup>14</sup> 2006 Act No. 14. The marginal note of section 13(1) provides for the duties of telecommunications and *internet service providers* and internet cafes. From the wordings of this section, it appears that the Act contemplates of a situation where internet cafes are not subsumed in the description of *internet service providers*.

Suffice it to say, for the purpose of this article that an ISP is an entity that provides subscribers with services like World Wide Web, e-mail, Bulletin board system(hereinafter referred to as BBS)<sup>15</sup>, newsgroup, web site hosting and design and other additional services.

### **Arguments against liability of intermediaries**

- i. ISPs argue that they are only “passive conduits”<sup>16</sup> and some writers have described them as messengers<sup>17</sup> and are no different from a traditional post office which is not liable for a defamatory letter that is posted through it or a telephone company which is not responsible for an obscene call made by a user.<sup>18</sup> Thus in *CoStar v LoopNet*<sup>19</sup> the majority held that an ISP should not be held liable for direct infringement when its facilities are used to infringe a copyright with no intervention made by the ISP.
- ii. It is highly impracticable to expect ISPs to screen all the contents passing through their systems giving the large number of transactions taking place. Even after constant screening, 100% accuracy cannot be achieved so as to prevent every single instance of copyright infringement.
- iii. Screening contents of transactions passing through their system will inevitably lead to violation of subscribers’ privacy rights.

---

<sup>15</sup> Bulletin Board System means a computer bulletin board that offers computer users the ability to obtain information from a central source accessed through a telephone modem. See *Playboy v Hardenbaugh*, 982 F. Supp. 503, 505 (N.D Ohio 1997)

<sup>16</sup> See *Religious Technology Centre v Netcom* 907 F. Supp. 1361(N.D. Cal. 1995).

<sup>17</sup> Gavin Stutter, “Don’t Shoot the Messenger: The Evolution of Liability for Third Party Provided Content in the UK”, 17<sup>th</sup> BILETA Annual Conference, April 5<sup>th</sup> -6<sup>th</sup> 2002, Free University, Amsterdam.

<sup>18</sup> Thilini K., “Liability of Internet Service Providers for Third Party Online Copyright Infringement: A study of the US and Indian laws”, (2007) *Journal of Intellectual Property rights*, Vol. 12 No. 11 553-561 at 555.

<sup>19</sup> 373 F. 3D 544 (4th Cir. 2004),

- iv. In the case of false claims from supposed copyright holders, the intermediary may be liable for breach of contract to the subscriber where it screens purported offending material.

### **Arguments for liability of intermediaries**

- i. It is difficult to find the real culprit as the internet allows users to remain anonymous, making it difficult to trace the actual perpetrators. It is not always clear from which part of the world information emanates from and it is less clearer which countries the requested information passes through to arrive at its final destination. The ISP is identifiable and locatable and sometimes situated in the same jurisdiction as the culprit, thus easier to hold them liable in terms of locating the culprits.
- ii. The ISPs are more lucrative targets for litigation than the originator of the offending information content. *Siffard* notes that ISPs are better targets for law suits as they will typically have deeper pockets than individual users.<sup>20</sup> Hence it is economically viable to hold ISPs liable.
- iii. ISPs possess the requisite apparatus to monitor activities on the internet. In this regard ISPs can close down the home page or remove an e-mail and can stop further

---

<sup>20</sup> Siffard, J. "The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology", (2002) 4, *Vand. J. Ent. L. & Prac.* 93 at 95.

infringements by closing a site. They can also deny an offending subscriber access to copyrighted material.

- iv. Another argument in favour of holding ISPs liable is that under contracts that they (ISP's) enter into with their customers, ISPs are authorised to close down websites as well as e-mail addresses in cases of infringement.<sup>21</sup>

### **Pre DMCA scenario**

In the absence of any legislation clearly defining the liability or otherwise of ISPs, the US courts were confronted with the conundrum of determining liabilities of intermediaries for copyright infringement in line with traditional legal principles.

Accordingly, in *Playboy Enterprises v Frena*<sup>22</sup>, the court was called to determine liability of a BBS operator for the acts of users who had uploaded and downloaded the plaintiff's copyrighted photographs. The contention of the defendant was that he never uploaded the photographs. In fact, he removed the photographs from the BBS when he received the complaint and had since that time monitored the BBS to prevent additional photographs from Playboy being uploaded. The court found *Frena* liable (on the principle of strict liability and therefore avoiding the knowledge requirement) as a direct infringer for violating the plaintiff's right to publicly distribute and display copies of its work.<sup>23</sup> This decision was severely criticised on the grounds

---

<sup>21</sup> Thilini K. *op. cit.* at 5.

<sup>22</sup> 839 F. Supp. 152 (M.D. Fla. 1993)

<sup>23</sup> This was the first reported case that dealt with the copyright infringement by a service provider.

that it would compel intermediaries to monitor private transmission of their users in an effort to detect potential copyright violations.<sup>24</sup>

Subsequently in *Religious Technology Centre v Netcom*<sup>25</sup> the plaintiff, Religious Technology Centre ( RTC) held copyrights in the unpublished and published works of L. Ron Hubbard, the late founder of the Church of Scientology. The defendant Dennis Erlich was a vocal critic of the Church via the Usenet newsgroup alt. religion scientology ("a.r.s."). Erlich posted portions of copyrighted works of RTC.

Erlich gained his access to the Internet through defendant Tom Klemesrud's bulletin board system ("BBS"), which had approximately 500 paying users. Klemesrud's BBS was linked to the internet through the facilities of defendant Netcom. When Erlich posted messages to Usenet, he transmitted his messages to Klemesrud's computer using a telephone and a modem, and the messages were briefly stored on Klemesrud's computer. Then the messages were automatically copied from Klemesrud's computer to Netcom's computers and other computers on the Usenet according to a prearranged pattern. Once the messages were on Netcom's computers, they were available to Netcom's customers to download. The messages were stored on Netcom's system for eleven days and Klemesrud's system for three days.

RTC failed to persuade Erlich to stop his postings, and contacted Klemesrud and Netcom. Klemesrud asked RTC to prove that it owned the copyright to the works posted by Erlich, but RTC refused. Netcom similarly refused RTC's request that Erlich not be allowed to access the internet through its system.

---

<sup>24</sup> See Farooq A., "Liability Limits of Service Providers for Copyright Infringement," (2003) *Journal of Intellectual Property rights* Vol.8 No.5 p. 181-190 at 183.

<sup>25</sup> 907 F. Supp. 1361(N.D. Cal. 1995)

When the matter came before the court, Netcom argued that it was a passive conduit. The court noted that even though copyright is a strict liability offence, there should be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party. The court further observed that when the subscriber is directly liable, it is senseless to hold other parties (whose involvement is merely providing internet facilities) liable for actions of the subscriber. The court held that a service provider could be liable as a contributory infringer if it knew or ought to have known that infringement was taking place in its system and if simple steps to prevent it were not.

Also in *Sega Enterprises Ltd v Maphia*<sup>26</sup> the BBS was apparently established specifically to permit the uploading and downloading of videogames. The defendant in this case knew what its approximately 400 users were doing, and what they were paying their monthly fee for.

The defendant claimed that such copying was a fair use because it was for home use only. The court held that since the defendant had not uploaded or downloaded the software, it could not be liable for direct infringement. However, the court ruled that since the defendant knew of the infringing activities and substantially participated in them by inducing, causing or materially contributing to the infringing conduct, the defendant was liable for contributory infringement.

### **Digital Millennium Copyright Act 1998**

The Digital Millennium Copyright Act (DMCA) of 1998 endeavours to balance the interests of internet service providers and copyright owners when copyright infringement occurs in the digital environment. The DMCA protects internet service providers from liability for copyright

---

<sup>26</sup> 948 F. Supp. 923, 932 (N.D. Cal. 1996)

infringement by their users, if the internet service provider meets certain statutory requirements which are referred to as “safe harbours”.<sup>27</sup> To fall within the protection of the DMCA, an internet service provider must, among other things, take certain steps when it receives notice that infringing material resides on its network; adopt and implement a policy that provides for termination in appropriate circumstances of users who are repeat infringers; and accommodate standard technical measures that are used by copyright owners to identify and protect copyrighted works.<sup>28</sup> It is the observation of the present writer that the DMCA protects only the internet service provider, and not the users of its system who infringe copyright.

One notable case after the enactment of the DMCA is *A&M Records, Inc. v. Napster, Inc.*, popularly referred to as the *Napster*<sup>29</sup> case. According to Matthew Just, it brings together issues of contributory infringement, vicarious infringement, the DMCA safe harbours, and fair use defences such as those in *Diamond Multimedia*.<sup>30</sup> Napster provided a free file-sharing program that allowed users to share MP3 files. The users registered anonymously and therefore finding individual infringers would have been particularly difficult. The Napster program worked by creating a list of all music shared and matching that music with Internet addresses of particular users. A user could search for a particular song or an artist’s name and be presented with hundreds of songs matching the search criteria on computers around the world. The Napster server held a centralised list but did not store any MP3 files on its servers. When users initiated a download from other computers, the MP3s did not travel through the Napster server to reach its destination. Therefore, Napster had no direct contact with any potentially infringing material.

---

<sup>27</sup> See section 512.

<sup>28</sup> See section 512(c) (1) that provides for the procedure of notice and take-down.

<sup>29</sup> 239 F.3d 1004 (2001)

<sup>30</sup> Just, M, *op. cit.* at 1

Action was brought against the company and the courts had to consider to what extent an ISP should be liable when it enables its customers to swap unauthorised digital copies of copyrighted music. Napster argued that its users were engaging in fair use because they were sampling, space-shifting, and some artists (particularly new ones) were allowing free distribution of recordings. Also Napster argued that it was saved from liability as it fell under one of the safe harbours of the DMCA, being an information location tool.

The Court of Appeal found Napster liable for both contributory and vicarious infringement. It found that Napster had actual knowledge of infringement and contributed to that infringement. Also it was able to control actions of users (by blocking them) and gained a financial benefit from the infringement. The financial benefit did not come from users as it was a free service. However Napster did attract around \$15 million in investment and was building a large customer base that could have been moved to a subscription service.

Sampling was found to never be a valid fair use as this was a highly regulated practice in the music industry. Also users were able to download entire albums. The court noted that sampling constitutes a commercial use even if the music traded is eventually purchased by the user. The *Diamond Multimedia* precedent of space-shifting was distinguished.<sup>31</sup> In the former case, only the original owner was exposed to the transferred music. However, in Napster any one could acquire the music. Also it was held to be not personal use as the users were anonymous.

On the issue of the safe harbour defence, the court hinted that the balance tipped in favour of the Plaintiffs. This is a landmark ruling and was intended to be a clear signal to file-sharers that their

---

<sup>31</sup> See *Recording Indus. Ass'n of Am. v Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 51 U.S.P.Q.2d (BNA) 1115 (9th Cir. 1999),

activities were infringing on copyright holders' interests. However, this signal has not translated into a decline of sharing as present trend illustrates.

Equally worthy of consideration is the English case of *Hoover Plc. v George Hulme Ltd*<sup>32</sup> where the court gave strong support to the theory that actual knowledge of an infringement is required. Five years later in *Columbia Picture Industries v Robinson*<sup>33</sup>, it was held that a general knowledge that some copies may be infringing did not constitute sufficient knowledge for secondary copyright infringement.

### **The Nigerian context**

In the Nigerian context, the liability of ISPs is not clearly defined in any piece of legislation unlike the position in United States under the DMCA. Also, there appears to be no reported judicial decision with respect to ISP liability. However, ISP liability can be deduced from some extant legislative enactments.

#### *Copyright Act*

The Copyright Act does not expressly address the issue of liability of intermediaries with regard to copyright infringement of third party content downloaded by its subscribers. The obvious reason for this is that the Act was promulgated before the advent of the internet. Moreover the drafters in their wisdom could not possibly have contemplated such.

---

<sup>32</sup> (1982) FSR 565.

<sup>33</sup> (1987) Ch.D 38

Despite the above observation, it should be stressed that certain provisions of the Copyright Act could accommodate the issue of ISP liability. In this vein, Section 15 (1) of the Copyright Act provides thus:

Copyright is infringed by any person who without the licence or authorisation of the owner of the copyright-

*(a) does, or causes any other person to do an act, the doing of which is controlled by copyright (Emphasis mine)*

The word “causes” connotes making something happen.<sup>34</sup> Thus where an ISP without licence or authorisation of the copyright holder brings about copyright infringement by authorising, permitting, consenting or allowing its subscribers to download MP3 files of a copyrighted song or providing/facilitating the enabling conditions rife for copyright infringement, it could be held liable for copyright infringement under this section as he would have *caused* its subscribers (*any other person*) to do an act the doing of which is controlled by copyright.<sup>35</sup> However it is the present writer’s observation that this section does not take into account the requisite intention of such person or ISP as the case may be that will bring same under the provisions of Section 15 (1)(a). Also, under the section, it is not clear whether the person (ISP) causing another to do the infringing act ought to have benefitted from the infringing act or not.<sup>36</sup>

Furthermore, section 15(1)(c) provides thus:

Copyright is infringed by any person who without the licence or authorisation of the owner of the copyright-

*exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection.*

---

<sup>34</sup> See the Oxford Advanced Learners Dictionary 8<sup>th</sup> edition 2010.

<sup>35</sup> See *Sega Enterprises Ltd v Maphia(supra)*.

<sup>36</sup> See the Indian Copyright Act 1999 which emphasises that the secondary offender (ISP) must have been engaged in same for profit.

The word “exhibit” is synonymous with the word “display”, thus where an ISP displays or permits/allows the display of copyrighted photographs on its site for interested subscribers to download, it could be held liable under the provisions of this section.<sup>37</sup> However, the word “public” is subject to judicial construction.

Equally important is the provision of Section 15 (1)(d) of the Copyright Act which provides thus:

Copyright is infringed by any person who without the licence or authorisation of the owner of the copyright-

(d) distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed under paragraph (a) of this subsection

In this regard a commercial entity in the course of its business/contractual relationship with its subscribers and in exchange for a fee provides access to the subscribers to download copyrighted works without the licence or authorisation of the owner of the copyright will come under this section as ISP’s allow their servers and other facilities for storing and transmitting users’ material and could be held to have distributed such infringing material. Also the act of giving access to subscribers in exchange for a fee, qualifies same as a trade/offer for sale, Furthermore, the word “distributes” is synonymous with the phrase “give out” hence giving access to subscribers to download for a fee will qualify as “giving out”. Such act will no doubt be prejudicial to the owner of the copyrighted movie.

Conversely, section 16 (3) provides thus:

Where, in an action for infringement of copyright, it is proved or admitted that an infringement was committed but that at the time

---

<sup>37</sup> See *frena’s* case.

of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits, whether or not any other relief is granted under this section.

From the wordings of section 16 (3), a defence avails an ISP who was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates. It is submitted that this section is analogous to the US position earlier discussed. However, in contrast to the US position, the ISP is liable to give account to the plaintiff with respect to profits relating to the infringement, although the plaintiff is not entitled to damages.<sup>38</sup>

Another provision of the Copyright Act which is worthy of consideration is section 20 which deals with criminal liability pertaining to copyright infringement. Section 20(1) provides thus

*any person who makes or causes to be made for sale, hire, or for the purposes of trade or business any infringing copy of a work in which copyright subsists...(emphasis mine)*

is unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work... guilty of an offence under this Act and liable on conviction to a fine of an amount not exceeding ₦1000 for every copy dealt with in contravention of this section, or to a term of imprisonment not exceeding five years or to both such fine and imprisonment.

In this regard, a scenario is contemplated where an entity named Mackintosh, operates a file sharing programme where subscribers can upload and download movies. Then an infringing copy of a copyrighted movie yet to be released was uploaded into the Mackintosh file sharing

---

<sup>38</sup> It should be emphasized that section 15 and 16 of the copyright Act contemplates a civil rather than criminal liability.

programme by an anonymous subscriber. Another subscriber, Mr. John Doe who owns a business enterprise engaged in the sales and rentals of movies gains access to the Mackintosh file sharing programmes, downloads the movie and burns them into DVD's for sale/rentals to the general public. There is no doubt that under this scenario, Mackintosh will be caught by the provisions of section 20(1) as he would have caused to be made for sale, hire, or for the purposes of trade or business an infringing copy of a work in which copyright subsists. This is because Mackintosh has made it possible for John Doe to make further infringing copies for sale, rental thereby furthering his (John Doe) trade/ business interest.

On the contrary, where Mackintosh can prove to the satisfaction of the Court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, he would escape liability.<sup>39</sup>

#### *Economic and Financial Crimes Commission Act*

Furthermore, the Economic and Financial Crimes Commission Act<sup>40</sup> in its definition of "Economic and Financial Crimes" under the interpretation section includes theft of intellectual property. It is submitted that in certain instances, copyright infringement will qualify as intellectual property theft. In such instances an ISP who participates and facilitates ought to be liable as perhaps a secondary offender under the Economic and Financial Crimes Commission Act. However it is doubtful whether an ISP would be held liable under the provisions of section 18 of the Act<sup>41</sup> going by the wordings.

---

<sup>39</sup> See also Section 20 (2) of the Copyright Act 2004.

<sup>40</sup> Economic and Financial Crimes Commission Act (Establishment) Act, CAP E1 LFN 2004.

<sup>41</sup> Section 18 deals with 'offences in relation to economic and financial crimes and penalties'

### *The Advance Fee Fraud and other Fraud Related Offences Act*

The advanced fee fraud and other fraud related offences Act<sup>42</sup> merely describes an ISP as the provider of internet services. It provides in section 13 (3) that an ISP amongst others shall exercise the duty of care to ensure that his services and facilities are not utilised for unlawful activities.

There is no gainsaying the fact that copyright infringement amounts to an unlawful activity, however it is the observation of the present writer that this section is bereft of the quantum or measure of care an ISP ought to exercise to escape liability under this section.<sup>43</sup>

From the foregoing, it is evident that in the Nigerian milieu, the liabilities of an internet service provider exist under the present legal regime and it is similar to the US position, in that an ISP would not be held liable where it is unaware of the infringing act. Although the Nigerian provision of ISP liability is not as pronounced and articulate as its American counterpart.

Hence, in order to balance the competing interest of copyright holders and intermediaries, it is the present writer's submission that the powers, limitations and duties of ISPs be clearly spelt out.

### **Recommendation and Conclusion**

By way of reforms the present writer submits that the extant Copyright Act be amended to provide expressly and extensively for the duties, powers and liabilities of an ISP. In this regard the DMCA could serve as a model. Secondly, rather than prohibiting the system of file sharing,

---

<sup>42</sup> The Advance Fee Fraud and other Fraud Related Offences Act, 2006 Act No. 14.

<sup>43</sup> See section 13(4) which provides a defence.

the present writer suggests that subscribers should be made to pay a fee for accessing copyrighted works on the internet with the revenue going to the owners of the copyright. Also ISPs should not be under a duty to monitor subscribers as this would infringe substantially on the privacy rights of the subscribers.

The targeting of direct infringers is difficult due to the nature of the internet. Although targeting intermediaries could decrease infringement this must be done carefully. ISPs should only be liable for the actions of their users where they have been made aware of the infringing material and were able to control the material but failed to take action. This would follow the US and European initiatives. It is hoped that in this way a compromise between Copyright holders and ISPs would be attained.