

SOCIAL MEDIA TERMS OF SERVICE: A LEGAL ANALYSIS



By
Kazeem A. Oyinwola Esq.
Managing Partner,
Amofin Solicitors, Nigeria
Kazeemoyinwola@gmail.com
+2348034987270

Lecture delivered at an online event organized by Ahmad Ibrahim Kuliyyah of Law,
International Islamic University, Malaysia in collaboration with the Muslim
Lawyers Association of Nigeria (MULAN) on 20th May 2021

What is Social Media?

We know them

We can identify them

Difficult to define because of stand alone and built-in social media services



"social media is 'a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content.'"

M Kaplan and Michael Haenlein (2010)

"Social media are interactive technologies that allow the creation or share/exchange of information, ideas, career interests, and other forms of expression via virtual communities and networks."

Kietzmann, Jan H Kristopher Hermkens (2011)

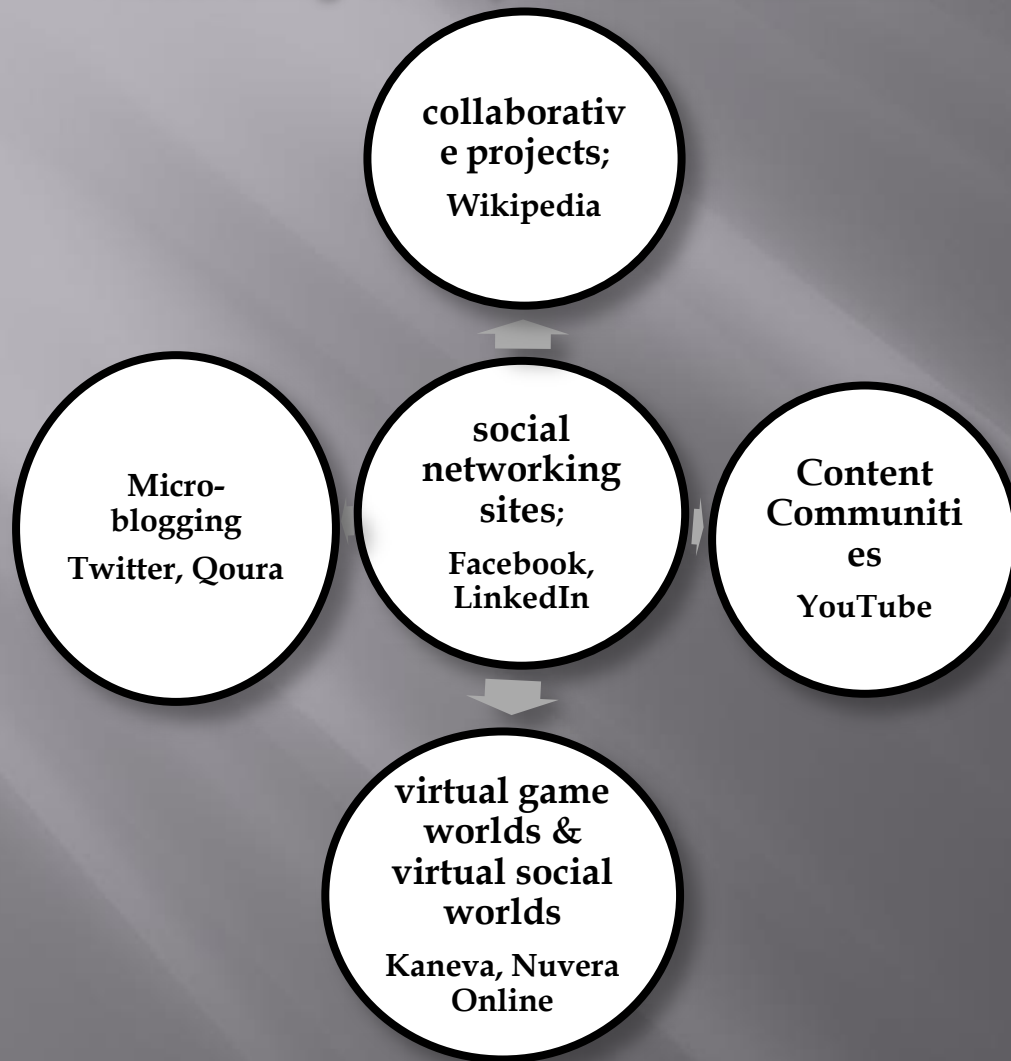
Social Media Terms of Service

Social Terms of service (known also as **Terms of Use** or **Terms and Conditions**) are regarded as the legal agreement between a social media service provider and a person who wants to use that service. The person must agree to abide by the terms of service in order to use the offered service. Here, more often than not, registering, subscribing, signing up or joining the platform constitutes an acceptance of the terms. Once accepted, the terms constitute a binding legal contract.

For the purpose of this discourse, I will adopt Terms of Service or simply “TOS”.

Categories of Social Media

According to Kaplan and Haenlein



Some Examples



However, the classification is not watertight. Any of the social media site can still be classified under more than one classifications. e.g

a. **Facebook & LinkedIn**, social networking sites, can also function as micro-blogging

b. **Twitter**, a micro-blogging also functions as a social network site,

So, it is reasonably probable that social media can be interpreted and classified differently with certain degree of overlap and even ambiguity.

COMMON FEATURES OF SOCIAL MEDIA



APR
2021

SOCIAL MEDIA USE AROUND THE WORLD

USE OF SOCIAL NETWORKS AND MESSENGER SERVICES, WITH DETAIL FOR MOBILE SOCIAL MEDIA USE

⚠ SOCIAL MEDIA USER NUMBERS MAY NOT REPRESENT UNIQUE INDIVIDUALS

TOTAL NUMBER OF
ACTIVE SOCIAL
MEDIA USERS*



we
are
social

4.33
BILLION

SOCIAL MEDIA USERS AS
A PERCENTAGE OF THE
GLOBAL POPULATION



KEPIO

55.1%

ANNUAL CHANGE IN
THE NUMBER OF GLOBAL
SOCIAL MEDIA USERS



GW

+13.7%
+521 MILLION

PERCENTAGE OF SOCIAL
MEDIA USERS ACCESSING
VIA MOBILE PHONES



GW

99.0%

AVERAGE AMOUNT
OF TIME PER DAY SPENT
USING SOCIAL MEDIA



2H 22M

55

SOURCES: KEPIOS (APR 2021), BASED ON DATA FROM: COMPANY EARNINGS ANNOUNCEMENTS; PLATFORMS' SELF-SERVICE ADVERTISING TOOLS; CNNIC; MEDIASCOPE. TIME SPENT DATA FROM GWI (Q4 2020). SEE GLOBALWEBINDEX.COM FOR MORE DETAILS. *ADVISORY: SOCIAL MEDIA USERS MAY NOT REPRESENT UNIQUE INDIVIDUALS, AND MAY EXCEED INTERNET USER NUMBERS IN SOME COUNTRIES. ♦ COMPARABILITY ADVISORY: BASE CHANGES AND HISTORICAL REVISIONS. DATA MAY NOT CORRELATE WITH FIGURES PUBLISHED IN PREVIOUS REPORTS.

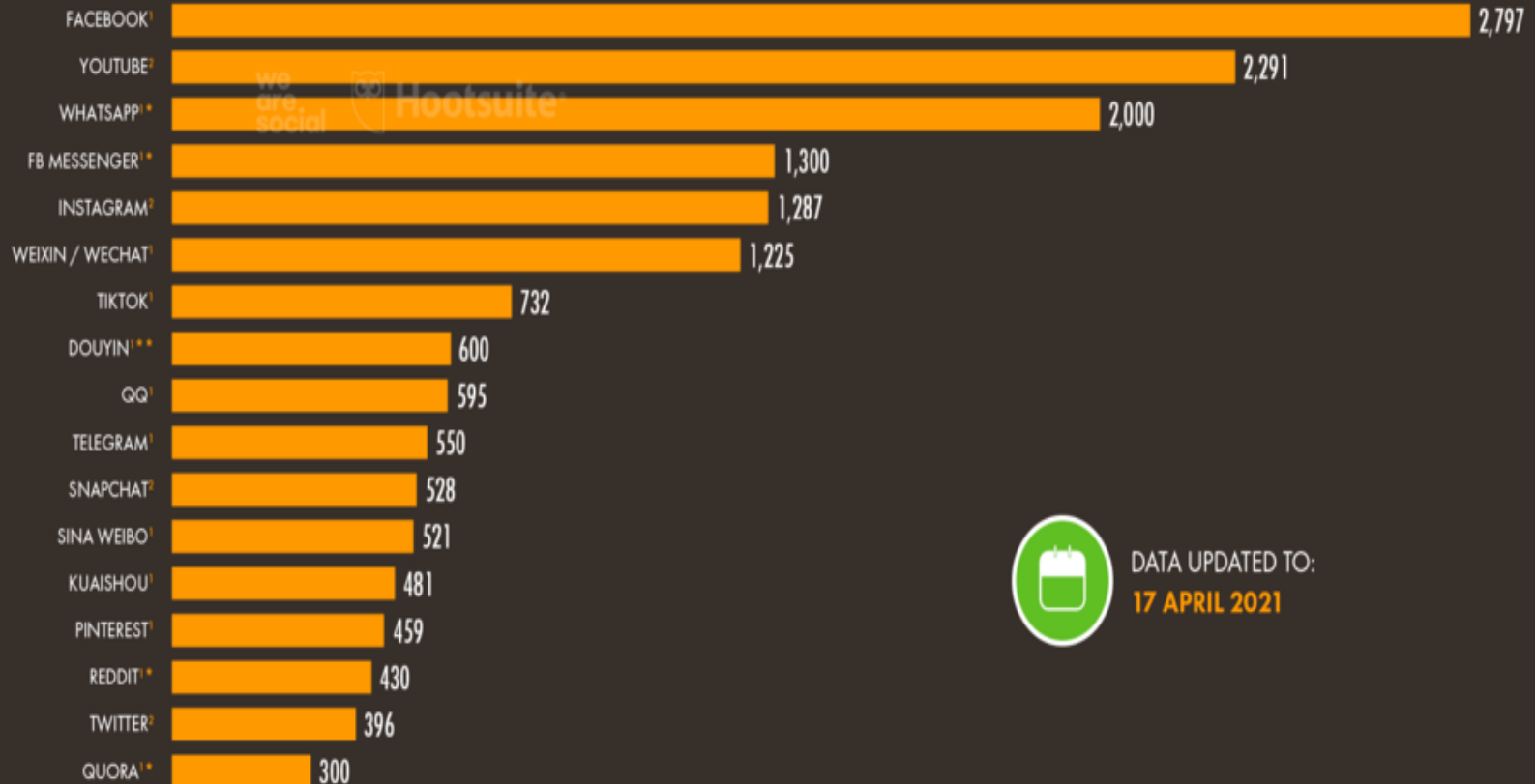
we
are
social

Hootsuite®

APR
2021

THE WORLD'S MOST-USED SOCIAL PLATFORMS

THE LATEST GLOBAL ACTIVE USER FIGURES (IN MILLIONS) FOR A SELECTION OF THE WORLD'S TOP SOCIAL MEDIA PLATFORMS*



DATA UPDATED TO:
17 APRIL 2021

59

SOURCES: KEPIOS ANALYSIS (APR 2021), BASED ON DATA PUBLISHED IN: (1) COMPANY STATEMENTS AND EARNINGS ANNOUNCEMENTS; (2) PLATFORMS' SELF-SERVICE AD TOOLS.
***NOTES:** PLATFORMS IDENTIFIED BY (*) HAVE NOT PUBLISHED UPDATED USER NUMBERS IN THE PAST 12 MONTHS, SO FIGURES WILL BE LESS RELIABLE. (**) FIGURE FOR DOUYIN USES THE REPORTED DAILY ACTIVE USER FIGURE, SO MONTHLY ACTIVE USER FIGURE IS LIKELY HIGHER.

we
are
social



SOCIAL MEDIA USE

MALAYSIA

AND

NIGERIA

- ▣ 32.57 million Population at January 2021
- ▣ 28.00 million Social Media Users at January 2021 :
- ▣ Number of social media users in Malaysia increased by 2.0 million (+7.7) between 2020 and 2021.
- ▣ The number of social media users in Malaysia was equivalent to 86.0% of the total population in January 2021.

- ▣ 208.8 million Population in January 2021:
- ▣ 33.00 million Social media users at January 2021
- ▣ The number of social media users in Nig. increased by 6.0 million (+22%) between 2020 and 2021.
- ▣ The number of social media users in Nig. was equivalent to 15.8% of the total population in January 2021.

LEGAL ANALYSIS OF TOS



Contract

Data Protection

Intellectual Property

**Transfer of Risk,
Indemnity,
Jurisdiction,
Governing Law**

Contract

- ▣ TOS constitutes binding contract with inherent warranty as to capacity
- ▣ Elements of Contract: offer, acceptance and considerations
- ▣ Consideration:
 - Service Providers: Service Rendered
 - Users: Payment, fee or your Privacy and Data
- ▣ Warranty as to Capacity: Age Limit Facebook and YouTube 13+
 - ▣ The Challenge:
 - ▣ Age of Contract: Malaysia is 18 years. s. 10, 11, Contract Act 1950 & s. 2, Age of Majority Act, 1971
 - ▣ Contract Age: Nigeria 18 years. Infant Relief Act, 1874 (Received English Law which specified 21 years but now taken as modified by), s. 18 & 227 of Child Rights Act which specifies 18 years.

What is the Effect?

- ▣ A user between 13 to 16 years old on Facebook and YouTube? TOS to them is void in Nigeria see s. 8(2) Child's Right Act.
- ▣ Effect is not specified in Contract Act 1950 & Age of Majority Act 1971. In *Mohori Bibee v Dhurmodas Ghose (1903) ILR 30 Cal 536*, the Privy Council held that the combined effect of s. 9 & 10 of the Indian CA 1872 (in *pari materia* with s.10&11 Malaysian Contract Act, 1950) render such contract void for lack of capacity.
- ▣ Mohori Bibee's case was referred to & relied on in Malaysia in the case of *Tan Hee Juan v Teh Boon Keat (1934) MLJ 96*, where, the High Court, applying the Privy Council decision, agreed that contracts by minors are void.
- ▣ So such contract is void both in Nigeria and Malaysia

Any Exception? Yes!

- ▣ Contract of Necessaries in Nigeria and Malaysia. See s. 69 of the Contracts Act (Malaysia) & s. 18(2) of the Child Rights Act (Nigeria).

What constitutes necessaries is not defined in both enactments.

s.2 English Sale of Goods Act 1893 (applicable to Nigeria & Malaysia) defines necessaries as;

'goods suitable to the condition in life of such an infant and to his actual requirement at the sale and delivery.'

- ▣ Do Facebook and YouTube constitute necessaries in this regard?

Other Exceptions in Malaysia

- ▣ **Marriage** See s. 4(a) of the Age of Majority Act 1971 & *Rajeswary & Anor v Balakrishnan & Ors (1958) 3 MC 178*. See also the Islamic Family Law Enactment of each state & Islamic Family law (Federal territory) Act 1984 (IFLA 1984)
- ▣ **Contract of Employment & Apprenticeship:** See Children and Young Persons (Employment) Act 1966
- ▣ **Scholarship Agreement:** See *Malaysia v Gurcharan Singh & Ors [1971] 1 MLJ 211*: lack of capacity of minors to contract was raised in actions for breach of scholarship agreements, the high court declared the contract void. This prompted the Contract (Amendment) Act 1976. S. 4(a) Contract (Amendment) Act 1976 now provides that no scholarship agreements shall be invalidated on the ground that the person involved is not of age.
- ▣ **Contract for Insurance:** See Insurance Act 1963, a minor above the age of 10 may enter into a contract of insurance but needs parental consent to own a policy if under 16.

Do Facebook and YouTube TOS come under the above exception?

TOS of Social Media as a Contract

- ▣ TOS is characterized by imbalance of negotiating power.
- ▣ The tech giants dictate all the terms with no input of the users, the supposed other parties to the contract.
- ▣ It is a take it or leave relationship.
- ▣ And above all it is like a David and Goliath relationship in outward manifestation.

The Relationship between User and Social Media Platforms



Intellectual Property

Copyright

There are some compatibilities and potential incompatibilities between TOS and Copyright regime.

▣ This potential incompatibility is buried deep down hyperlinks and less attention the users give the TOS coupled with the oversimplification with which the TOS approach the issue.

▣ First issue is, the conferment of ownership of contents on users. This does not necessarily accord with the copyright regime.

▣ Most TOS proceed with the assumption that contents shared on the platforms are copyright protected. Meanwhile, the content might not even be copyright protectable in the first instance.

▣ Second issue is: the compulsory licence and sub-licence. This allows the social media platform to use the instrumentality of the TOS to confer permissions on third party users of copyright material of the user of the platform and this has the potential to undermine the strict application of the doctrine of privity of contract.

FACEBOOK & TWITTER TOSE

- Facebook Statement under the heading “Sharing of Content”, this is what Facebook says;
- “For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.”

Twitter TOS under the heading “Your Right”

“You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).”

Under YouTube TOS

TOS

- YouTube TOS: users retain all ownership rights.
- The user agree to grant to YouTube an unencumbered licence to, *inter alia*, use, reproduce, distribute, prepare derivative works of, display, adapt, electronically transmit and perform his or her content.
- Content includes text, software, photographs, videos, audiovisual combinations, etc, that a user views or contributes to the site including comment on a video/content uploaded.
- Virtually all social media platforms have this provisions.
- The difference with YouTube is, being a content community, the rights of adaptation, & to prepare derivative works from the user' content, are specifically.

Under Wikipedia

- Wikimedia operates a free and complementary open licence on its platform, Wikipedia.
- A user is free to use, share and reshare contents on Wikipedia.
- Such user is also taken to have licenced Wikipedia under its free and open licence to use the user's contributions/contents.
- In essence user of Wikipedia is taken to have given a broad licence to the public to use and reuse their contribution.

▣ The challenge:

- ▣ This broad licence not only grants the SMP the rights, it also allows them the permission to further sub-licence to a third party.
- ▣ Is this consistent with doctrine of privity of contract?
- ▣ Consider this also, under its TOS the user is subsumed to have granted licence authorizing Twitter to make a user's 'tweets' available to the public and to let *others* do the same. Also, any use of a user's content by Twitter, or entities it partners with, is made with no compensation paid to such user. And 'content' here includes text, photos or 'other materials uploaded, downloaded or appearing on' Twitter.

Transfer of Risk and Indemnity

Facebook TOS

“If anyone brings a claim against us related to your actions, content or information on Facebook, you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim. Although we provide rules for user conduct, we do not control or direct users' actions on Facebook and are not responsible for the content or information users transmit or share on Facebook. We are not responsible for any offensive, inappropriate, obscene, unlawful or otherwise objectionable content or information you may encounter on Facebook. We are not responsible for the conduct, whether online or offline, or any user of Facebook.”

- ▣ **Almost, all social media platforms have the above provision. The clause is drafted very broad enough, in terms of scope, circumstances they can apply to, and the number of parties contemplated (ie, users of such sites or other third parties).**

Governing Law and Jurisdiction

- Facebook TOS provides;
“You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.”
- Twitter provides;
“These Terms and any action related thereto will be governed by the laws of the State of California without regard to or application of its conflict of law provisions or your state or country of residence. All claims, legal proceedings or litigation arising in connection with the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to the jurisdiction of and venue in such courts and waive any objection as to inconvenient forum.”
- LinkedIn has similar provision (although LinkedIn also has virtual or written arbitration provision for dispute over claim less than \$10,000).
- YouTube even made users agree under its TOS that the service is deemed ‘solely based in California’.
- Is the exclusion of conflict of law rule/private international law in virtually all social media TOS deliberate? Most likely certain!!!

Likely Effect of the Governing law and Jurisdiction

- ❑ Copyright and its territorial nature:
- ❑ Originality threshold: Nigeria and Malaysia have similar originality threshold. See NCA, LFN 2004 and MCA 1987.
- ❑ Originality and Fixation requirement is a challenge on Twitter with limits 140 characters and 3,200 tweet retrieval system. Also WhatsApp status with word limits of 700 characters and disappearance within 24 hours
- ❑ Differences in originality threshold: is it “sweat of the brow” or “industrious collection”. The dichotomy common law and civil law jurisdiction in relation to objective and subjective tests. For instanc, US has higher originality threshold. Thus, what may pass originality test in a country may not pass the test in California.
- ❑ The right of the SMP to further license a third party. Does this accord with privity of contract? Doesn't seem so. See *Agence France Presse v Morel*. The court held that the unencumbered copyright licence granted to Twitter under the Twitter Terms did not extend to benefit third party Users.

Conflict of Law/Private International law

- ❑ Let's take a UK citizen as an example. Brussels I Regulation, gives parties (EU) the autonomy to determine the court having jurisdiction, *albeit* to a limited extent.
- ❑ The SMP are online platforms and under the Brussels regime TOS will be considered as consumer contracts and that the US-incorporated companies will be taken as having directed their activities to the UK where the user resides.
- ❑ Under home court rules under arts 16(1),(2), proceedings against the user can only be brought in a court of the UK, even though such a user has the option of bringing proceedings either in the US or in the UK.
- ❑ Meanwhile, the TOS already specifies California as the venue! Even where the user does not exercise his or her right to sue the US company in a court of the UK, it has been averred that a European court will refuse to enforce a judgment if a user from a member state within the EU was summoned to a court in a distant forum such as the US for litigation.
- ❑ Final, the question to be considered again will be what will be the applicable copyright legislation that will apply? US, in view of the choice of law or that of the user?

TOS and Data Protection

Information collected by social networking sites

- ▣ Your Account Information.
- ▣ Your Messages
- ▣ Your Connections,
- ▣ Customer Support
- ▣ Usage and Log Information
- ▣ Transactional Information.
- ▣ Device and Connection Information
- ▣ Cookies.
- ▣ Status Information.
- ▣ Information Others Provide About You.

They are used "to help us operate, provide, improve, understand, customize, support, and market our Services."

Social Media Terms of Service: A Legal Analysis by Kazeem A. Oyinwola Esq

Data subject

- The individual who is the subject of the personal data

Data Controller /User

- He individual who has controls of the data or determine

Data Processors

The individual or entity which processes the data

Personal Data & Its Principles

Personal Data

Personal Data:

First Name Last Name Address
IC No. Bank Account No. Phone
No. Employee Information
▪ ✓ Name ✓ IC Numbers,
Passport Numbers ✓ Driver's
License, Birth Certificate
✓ Bank Account Numbers
✓ Home Address, Personal
Phone No.

• Sensitive Personal

Data:

✓ Race, Religion, Health,
Political Opinion, Offence
Records Individual Customer
Information

Data Protection Principles

GENERAL: adequate, relevant and not excessive. Processed with consent and for a lawful purpose
CHOICE: Inform data subject the purposes collection, processing & collected.

DISCLOSURE: impermissible to disclose without consent except according to law

SECURITY responsibility to protect from loss, misuse, or unauthorized access, etc.

RETENTION: not kept longer than necessary.

ACCESS: the right to access personal data.

Rights of Data Subject

- The right to be informed of the actual or intended Processing activities.
- The right to have the Personal Data rectified.

Right of Data Subject

- The right to object to certain Processing activities;
- The right to have the Personal Data deleted;

Right of Data Subject

- The right to request the restriction of the Processing;
- The right to portability of the Personal Data

Right of Data Subject

Cross Border Transfer of Data in Malaysia

- ❑ Nigeria and Malaysia have comprehensive Data Protection Legislation.
- ❑ Malaysia PDPA 2010 is a principal enactment while NDPR 2019 is a subsidiary legislation pursuant to NITDA Act.
- ❑ S. 129 PDPA 2010 provides;

A data user shall not transfer any personal data of a data subject to a place outside Malaysia unless to such place as specified by the Minister, upon the recommendation of the Commissioner, by notification published in the Gazette.

The Commissioner published a draft Personal Data Protection (Transfer of Personal Data to Places Outside Malaysia) Order 2017 and yet to be approved as at December 15, 2020.

- ❑ However, pursuant to PC01/2020, the Commissioner considered the potential barrier of a white-list provision poses for cross border transfer of data and is now considering streamlining the provision of s.129 on cross border transfers to remove the whitelist provision

Cross Border Transfer of Data in Nigeria

- ❑ **Challenge:** with NDPR is the vertical and horizontal Separation of Powers.
- ❑ Vertical and Horizontal breach of NDPR by state-actors.
- ❑ **Transfer of Data**
- ❑ S. 2.11 provides that transfer of data shall only take place in accordance with the provisions of NDPR and the supervision of the HAGF.
- ❑ Implementation Framework, 2020, Malaysia is listed in No.35 as a country Nig. Data can be transferred to while the United State is listed in No. 31.
- ❑ The basis for Malaysia is PDPA 2010. The basis for US is Swiss-US Privacy Shield Frameworks State laws such as California Consumer Privacy Act International Trade Administration (ITA) within the U.S. Department of Commerce.
- ❑ Swiss-US Privacy Shield was designed by the U.S. Department of Commerce and the Swiss Administration “to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from Switzerland to the US in support of transatlantic commerce.

Cross Border Transfer of Data

- ❑ On January 12, 2017, the Swiss Government approved the Swiss-U.S. Privacy Shield Framework.
- ❑ However, in **On September 8, 2020 the Federal Data Protection and Information Commissioner (FDPIC) of Switzerland issued an opinion concluding that the Swiss-U.S. Privacy Shield Framework does not provide an adequate level of protection for data transfers from Switzerland to the United States pursuant to Switzerland's Federal Act on Data Protection (FADP).**
- ❑ **Ironically**, this is the basis of cross border transfer of data from Nigeria to the United States in the NITDA 2020 Implementation Framework for NDPR.

Conclusion

- ▣ Social media has become an every day use tool for communications, interactions and even transaction and it is such a tool that can no longer be ignored.
- ▣ The TOS constitutes a binding agreement between the social media platforms and the users.
- ▣ The TOS regulates relationship between the users and the social media on areas such as data protection, copyright, jurisdiction, choice of law, transfer of risk and indemnity etc.
- ▣ While there are compatibilities between TOS and these legal issues raised, there are still many areas of incompatibilities obscured by oversimplification of the TOS and the less attention users give the TOS.
- ▣ These areas of incompatibilities require serious attention and review.

Recommendation

- ▣ Regulatory agencies should be alive to their duties and hold these tech giants accountable.
- ▣ Users need to be more conscious of the TOS of social media platforms they join.
- ▣ NGOs should beam their searchlight of advocacy on digital rights with focus on online platforms/social media
- ▣ Advocacy, awareness, enlightenment

THANK YOU

Social Media Terms of Service: A Legal
Analysis by Kazeem A. Oyinwola Esq