

THE TROUBLED NEXUS OF ICT AND IP LAW REFORM – THE REGULATION OF CONTENT AGGREGATION, FREEDOM OF EXPRESSION AND INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

The impact of social media as a tool for the protection of civil and political rights, particularly during periods of civil unrest, political turmoil or democratic dispute, is well established. In the African context, the role of technologically-aided, user-driven mass communication is of crucial importance in promoting the rule of law and safeguarding constitutional values.

The convergence of social media and traditional news media, by means of user-specific content aggregation, has led to an increasingly engaged and informed populace. Similarly, the ease of access to information continues to drive a need for more, faster and carefully curated information. The resultant tension between purveyors of information and their subjects has led to a number of notable cases and attempts at regulation that expose the tension between freedom of expression and the enforcement of personal and property rights.

As a result, legal developments in several African countries, including South Africa, are aimed at restricting the disruptive force of social media. At the same time, the economic value of digital content has given rise to several cases involving the restriction of disseminated content by means of intellectual property rights enforcement.

In this work, the ability of the courts to maintain an appropriate balance between proprietary and personal rights and the interests of government, on the one hand, and civil liberty in the form of freedom of expression, on the other hand, will be considered in light of selected judgements.¹

¹ The case of *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* (13/23293) [2016] ZAGPJHC 228; [2016] 4 All SA 623 (GJ) (2 September 2016) serves as the primary case study to introduce this work.

In the first instance, with reference to recent case law,² it is shown that the courts have not adequately balanced intellectual property (IP) rights, particularly copyright and trade mark rights, and constitutional rights in the case of social media and content aggregation. Two primary reasons for the imbalance are identified. Firstly, the enforcement of IP rights in the digital environment leaves very little, if any, room to consider the impact on the right to freedom of expression. Secondly, the regulation of social media has failed to consider the importance of IP rights, which leaves the courts without appropriate means to balance the rights of the parties. The interests of content providers, including the restrictions on the liability of online platform operators, the limitations of fair use and cases of plagiarism, parody and satire in illustrated and news media serve to illustrate these points.

In the second instance, with reference to proposed ICT and IP-related legislative reform,³ it is shown that the legislature has caused an unsustainable tension between the individual's rights and the public interest by placing undue restrictions on the exploitation of works protected by IP rights and imposing draconian sanctions for the contravention of ICT-related protection measures where the work is exploited in social media or aggregated content in pursuit of the right to freedom of expression. The proposed regulation of circumvention of technological protection measures and digital rights management in the absence of a general fair-dealing defence serves as the impetus for this study. Government's disregard for South Africa's international-law obligations and the proposed exceptions to IP and ICT law in pursuit of educational use and the nationalisation of IP rights, support the findings of this work.

In the third instance, it will be shown that legislative reform in South Africa on balancing IP and ICT interests, as a constitutional imperative, is notably ahead of developments in this regard in the rest of Africa. It is submitted that, despite the errors outlined in the first two parts of this work, South Africa has laid a sound foundation upon which the protection of all individual rights derived from the Constitution, including IP, ICT and freedom rights, may be built. With a specific focus on minority rights and recent developments, suggestions for legislative reform in ICT and IP rights enforcement are made that pay due regard to the value of the right to freedom of expression in the digital environment.

² *Car Find (Pty) Ltd v Car Trader (Pty) Ltd and Others* (02713/2016) [2016] ZAGPJHC 28 (12 February 2016); *Moneyweb (Pty) Limited v Media 24 Limited and Another* (31575/2013) [2016] ZAGPJHC 81; [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ) (5 May 2016).

³ With specific focus on: The Copyright Amendment Bill 2015 GG No. 39028 (27 July 2015); The Draft National Policy on Intellectual Property 2013 GG No. 36816 (4 September 2013); The Cybercrimes and Cybersecurity Bill (B-2017); The Prevention and Combating of Hate Crimes and Hate Speech Bill 2016 GG No. 40367 (24 October 2016).