

An evidence based intermediary liability policy framework

The Centre for Internet and Society, India and Centre for Internet and Society, Stanford Law School, USA, strongly appreciate the Multistakeholder Governance dimension of the Internet Governance Forum 2014.

CIS India has co-organized workshops on '**Open Standards: A Rights-Based Framework**' at the 4th IGF at Sharm el-Sheikh and on '**Freedom of Expression or Access to Knowledge: Are We Taking the Necessary Steps Towards an Open and Inclusive Internet?**' at the 7th IGF at Nairobi.

During 2014 IGF, we would like to continue researching human rights related topics in Internet Governance to analyse the role of intermediary platforms in relation to freedom of expression, freedom of information and freedom of association. The aim of the workshop is to highlight the increasing importance of digital rights and broad legal protections of stakeholders in an increasingly knowledge-based economy. The workshop will discuss public policy issues associated with Internet intermediaries, in particular their roles, legal responsibilities and related liability limitations in context of the evolving nature and role of intermediaries in the Internet ecosystem.

Online Intermediaries: Setting the context

The Internet has facilitated unprecedented access to information and amplified avenues for expression and engagement by removing the limits of geographic boundaries and enabling diverse sources of information and online communities to coexist. Against the backdrop of a broadening base of users, the role of intermediaries that enable economic, social and political interactions between users in a global networked communication is ubiquitous. Intermediaries are essential to the functioning of the Internet as many producers and consumers of content on the internet rely on the action of some third party—the so called intermediary. Such intermediation ranges from the mere provision of connectivity, to more advanced services such as providing online storage spaces for data, acting as platforms for storage and sharing of user generated content (UGC), or platforms that provides links to other internet content.

Online intermediaries enhance economic activity by reducing costs, inducing competition by lowering the barriers for participation in the knowledge economy and fuelling innovation through their contribution to the wider ICT sector as well as through their key role in operating and maintaining Internet infrastructure to meet the network capacity demands of new applications and of an expanding base of users.

Intermediary platforms also provide social benefits, by empowering users and improving choice through social and participative networks, or web services that enable creativity and collaboration amongst individuals. By enabling platforms for self-expression and cooperation, intermediaries also play a critical role in establishing digital trust, protection of human rights such as freedom of speech and expression, privacy and upholding fundamental values such as freedom and democracy.

However, the economic and social benefits of online intermediaries are conditional to a framework for protection of intermediaries against legal liability for the communication and distribution of content which they enable.

Intermediary Liability

Over the last decade, right holders, service providers and Internet users have been locked in a debate on the potential liability of online intermediaries. The debate has raised global concerns on issues such as, the extent to which Internet intermediaries should be held responsible for content produced by third parties using their Internet infrastructure and how the resultant liability would affect online innovation and the free flow of knowledge in the information economy?

Given the impact of their services on communications, intermediaries find themselves as either directly liable for their actions, or indirectly (or “secondarily”) liable for the actions of their users. Requiring intermediaries to monitor the legality of the online content poses an insurmountable task. Even if monitoring the legality of content by intermediaries against all applicable legislations were possible, the costs of doing so would be prohibitively high. Therefore, placing liability on intermediaries can deter their willingness and ability to provide services, hindering the development of the internet itself.

Economics of intermediaries are dependent on scale and evaluating the legality of an individual post exceeds the profit from hosting the speech, and in the absence of judicial oversight can lead to a private censorship regime. Intermediaries that are liable for content or face legal exposure, have powerful incentives, to police content and limit user activity to protect themselves. The result is curtailing of legitimate expression especially where obligations related to and definition of illegal content is vague. Content policing mandates impose significant compliance costs limiting the innovation and competitiveness of such platforms.

More importantly, placing liability on intermediaries has a chilling effect on freedom of expression online. Gate keeping obligations by service providers threaten democratic participation and expression of views online, limiting the potential of individuals and restricting freedoms. Imposing liability can also indirectly lead to the death of anonymity and pseudonymity, pervasive surveillance of users' activities, extensive collection of users' data and ultimately would undermine the digital trust between stakeholders.

Thus effectively, imposing liability for intermediaries creates a chilling effect on Internet activity and speech, create new barriers to innovation and stifles the Internet's potential to promote broader economic and social gains. To avoid these issues, legislators have defined 'safe harbours', limiting the liability of intermediaries under specific circumstances.

Online intermediaries do not have direct control of what information is or information are exchanged via their platform and might not be aware of illegal content per se. A key framework for online intermediaries, such limited liability regimes provide exceptions for third party intermediaries from liability rules to address this asymmetry of information that exists between content producers and intermediaries.

However, it is important to note, that significant differences exist concerning the subjects of these limitations, their scope of provisions and procedures and modes of operation. The 'notice and takedown' procedures are at the heart of the safe harbour model and can be subdivided into two approaches:

- a. Vertical approach where liability regime applies to specific types of content exemplified in the US Digital Copyright Millennium Act
- b. Horizontal approach based on the E-Commerce Directive (ECD) where different levels of immunity are granted depending on the type of activity at issue

Current framework

Globally, three broad but distinct models of liability for intermediaries have emerged within the Internet ecosystem:

1. Strict liability model under which intermediaries are liable for third party content used in countries such as China and Thailand
2. Safe harbour model granting intermediaries immunity, provided their compliance on certain requirements
3. Broad immunity model that grants intermediaries broad or conditional immunity from liability for third party content and exempts them from any general requirement to monitor content.

While the models described above can provide useful guidance for the drafting or the improvement of the current legislation, they are limited in their scope and application as they fail to account for the different roles and functions of intermediaries. Legislators and courts are facing increasing difficulties, in interpreting these regulations and adapting them to a new economic and technical landscape that involves unprecedented levels user generated content and new kinds of and online intermediaries.

The nature and role of intermediaries change considerably across jurisdictions, and in relation to the social, economic and technical contexts. In addition to the dynamic nature of intermediaries the different categories of Internet intermediaries' are frequently not clear-cut, with actors often playing more than one intermediation role. Several of these intermediaries offer a variety of products and services and may have number of roles, and conversely, several of these intermediaries perform the same function. For example , blogs, video services and social media platforms are considered to be 'hosts'. Search engine providers have been treated as 'hosts' and 'technical providers'.

This limitations of existing models in recognising that different types of intermediaries perform different functions or roles and therefore should have different liability, poses an interesting area for research and global deliberation. Establishing classification of intermediaries, will also help analyse existing patterns of influence in relation to content for example when the removal of content by upstream intermediaries results in undue over-blocking.

Distinguishing intermediaries on the basis of their roles and functions in the Internet ecosystem is critical to ensuring a balanced system of liability and addressing concerns for freedom of expression. Rather than the highly abstracted view of intermediaries as providing a single unified service of connecting third parties, the definition of intermediaries must expand to include the specific role and function they have in relation to users' rights. A successful intermediary liability regime must balance the needs of producers, consumers, affected parties and law enforcement, address the risk

of abuses for political or commercial purposes, safeguard human rights and contribute to the evolution of uniform principles and safeguards.

Towards an evidence based intermediary liability policy framework

This workshop aims to bring together leading representatives from a broad spectrum of stakeholder groups to discuss liability related issues and ways to enhance Internet users' trust.

Questions to address at the panel include:

1. What are the varying definitions of intermediaries across jurisdictions?
2. What are the specific roles and functions that allow for classification of intermediaries?
3. How can we ensure the legal framework keeps pace with technological advances and the changing roles of intermediaries?
4. What are the gaps in existing models in balancing innovation, economic growth and human rights?
5. What could be the respective role of law and industry self-regulation in enhancing trust?
6. How can we enhance multi-stakeholder cooperation in this space?

Centre for Internet and Society, India

The Centre for Internet and Society is a non-profit research organization that works towards pluralistic, participatory, inclusive, equitable, and democratic rights and governance at the intersection of Internet and Society. CIS's work on Internet Governance aims at ensuring that human rights such as freedom of expression, association, movement, and the rights to security, privacy, and equality are reflected in Indian and international governance mechanisms and principles. CIS also documents changes in socio-techno-legal policy, as precipitated by changes in technology, in societal values, and in laws, optimization of telecom policy and regulation in India in order to ensure greater broadband/internet adoption, with greater emphasis in the rural areas, knowledge networks . MacArthur Foundation is funding CIS for a project on Free Speech and Expression and Internet Governance. The project aims to research the restrictions placed on freedom of expression online by the Indian government and contribute to studies, reports and policy briefs to feed into the ongoing internet governance debates at the national and international level. You may find out more about CIS' work here: <http://cis-india.org/>

Centre for Internet and Society, Stanford Law School, USA

The Center for Internet and Society (CIS) is a public interest technology law and policy program at Stanford Law School and a part of Law, Science and Technology Program at Stanford Law School. CIS brings together scholars, academics, legislators, students, programmers, security researchers, and scientists to study the interaction of new technologies and the law and to examine how the synergy between the two can either promote or harm public goods like free speech, innovation, privacy, public commons, diversity, and scientific inquiry. The CIS at Stanford Law School has recently

launched a new focus area specifically dedicated to intermediary liability. You may review the core mission of this new focus area of the Center at <https://cyberlaw.stanford.edu/focus-areas/intermediary-liability>.