

Intermediary Liability in South Africa

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Intermediary Liability

- OECD - “internet intermediaries bring together or facilitate transactions between third parties on the internet. They give access to, host, transmit and index content, products and services originated by third parties on the internet or provide internet based services to third parties.”
- “can arise in a number of situations, both legitimate and politicised, including for defamation, obscenity, invasion of privacy, intellectual property infringement, or because the content is critical of the government.” -Center for Democracy and Technology

Intermediaries

- intermediaries between two or more nodes on a network
 - **mere conduits** for the transmission (sending or receiving) of information/data
 - **online storage spaces / hosting**
 - **platforms for storage and sharing of user generated content**
 - **or as platforms that provides links to other internet content**
- **passive and automatic role** : not actively involved in, and do not actively initiate the transmission or storage of data; this is done automatic manner and as a component of a service, not actively involved in creating and selecting data/content, Sites are not intermediaries for content they have actively commissioned or created.

Examples

- Internet Service Provider: e.g. email or FTP provider
- Internet Access Provider
- Mobile network operator
- Internet Cafe/Cybercafe
- Web host
- Social networking platforms
- UGC Platforms / Content intermediaries
- Search Engines and Content Aggregators
- Blogs

Where does intermediary liability occur?

- “where governments or private litigants can hold technological intermediaries such awful or harmful content created by users of those services.” (CDT) Intermediary liability can thus occur in a vast array of circumstances, around a multitude of issues including: copy right infringements, digital piracy, trademark disputes, network management, spamming and phishing, “cybercrime”, defamation, hate speech, child pornography, “illegal content”, offensive but legal content, censorship, broadcasting and telecommunications laws and regulations, and privacy protection. (La Quadrature Du Net)

Should intermediaries be liable for third party content?

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Consequences of liability

- Increasingly intermediaries are policing the internet
- Negative economic consequences – internet business cannot happen with too much liability
- adverse effects on freedom of speech and freedom of association – chilling effects

Internet control

- ""One way for governments to avoid direct blame for exercising more Internet control is to delegate the task to intermediaries. At a minimum, this will involve making Internet companies that offer social-networking sites, blogging platforms, or search engines take on a larger self-policing role by holding them accountable that their users post or (in the case of search engines) index and make available.
- Being able to force companies to police the Web according to state-dictated guidelines is a dream come true for any government. The companies must bear all the costs, do all the dirty work, and absorb the user's ire. Companies are also more likely to catch unruly content, as they are more decentralized and know their own online communities better than the state's censors."
- Evgeny Morozov, "Whither Internet Control?" in *Liberation Technology: Social Media and the Struggle for Democracy*, ed. Larry Diamond and Marc F. Plattner, (Baltimore: Johns Hopkins University Press, 2012).

How are they protected?

- “Safe Harbour”
 - under certain conditions; usually that intermediaries do not actively initiate or consciously modify the transmission, are unaware of unlawful content on their networks, and that they conform with certain laws and practices – like for example responding to take-down requests. In cases where there are limitations on liability

United States

- Section 230 of the United State's Communications Decency Act of 1996 (referred to as CDA 230):
 - internet intermediaries would not be considered publishers, and would thus not be held liable for the content created by third party users of their services.²⁵ This protection from liability entails protection from most laws broken by the third parties online, except for copyright legislation
- Digital Millennium Copyright Act
 - DMCA offers protection from liability for internet intermediaries for copyright infringing content stored and transmitted through their networks under certain conditions. To qualify for this protection, internet intermediaries must: “have no knowledge of, or financial benefit from, infringing activity on its network, have a copyright policy and provide proper notification of that policy to its subscribers, list an agent to deal with copyright complaints.” Intermediaries also need to respond to take-down requests and take down copyright

EU E-commerce Directive

- afforded protection from intermediary liability for being a mere conduit for information, for caching information, or for hosting information.
- Provided that these activities are “of a mere technical, automatic and passive nature” and the intermediary “has neither knowledge of nor control over the information which is transmitted or stored.”
- In the case of being a mere conduit, or of caching, in order to be protected from liability; the intermediary must not modify transmitted information, and not collaborate with recipients of its services in order to undertake illegal activity.
- Protection from liability for hosting is conditional on the service provider having been unaware of content on its networks, and once becoming aware of illegal activity on its network, acting expeditiously to remove it.

South Africa

- The Ministry of Communications and the legislature recognized that internet service providers:
 - “play an important role in the provision and availability of internet services to the public at large”
 - “the application of the rules relating to publishers such as newspapers, journals and even radio and television, did not quite seem fit in respect in respect of parties such as [ISPs] who technically were publishing information, but had very little control over the content which they published on behalf of others.”
 - “the potential for delictual and criminal liability under the provisions of the South African common and statutory law was huge and potentially very dangerous for the continued existence of ISPs and the effective functioning of the internet.”
 - (Department of Communications, “Guidelines for the Recognition of Industry Representative Bodies of Information Systems Service Providers”, Government Notice No 1283, 14 December 2006.)

Electronic Communications and Transactions Act (Act 25 of 2002)

- Chapter XI certain intermediaries classified as “service providers” are provided with limited liability under certain conditions:
 - member of a industry representative body recognised by the Minister of Communications (ISPA)
 - conduct their operations in an automatic manner
 - adhere to the industry representative body's code of conduct
 - respond to court orders and take-down requests
- Not liable for:
 - Mere conduit, hosting, caching, info location tool

Loooong road to safe harbour

- ascension of the ECT Act into law in May 2002
- “Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers” - December 2006
- 2008, ISPA code of conduct revised in order to comply with the guidelines.
- 2009 ISPA recognised as IRB

Conditions

- exempt from liability when transmitting, caching and storing, or hosting, and linking or referring to unlawful content.
- PROVIDED:
 - not aware of the content, were not active in creating the content and did not select the receiver or modify the content.
 - ISPs need to participate in ‘notice and take-down’ procedures outlined in Section 77 of the ECT Act.

Notice and takedown

- ISPs required to respond to “take-down notices”
 - written notifications by complainant
- generally assign ISPA as their designated agent to receive take-down request
- requests are then forwarded by ISPA to the ISP.
- ISP makes decision of whether to take down

Weaknesses

- if an intermediary decides the request is not valid, as it is not a violation, or it is in bad faith, then the burden of proof falls on the intermediary, which may have to prove this in court. There is little thus incentive for an intermediary, or ISPA to contest a take-down request.
- No appeals procedure
- The take-down procedure negatively affects the freedom of expression and the third party's rights to due process." Under the ECTA, content can be removed "on the basis of a mere allegation without any notification to the third party either before or after removal.
- "the third party is not provided the opportunity to defend himself and is reliant on the ISP to defend his interests." - Neil Dominic Obrien

Proposed amendment

- proposed amendment has been described as replacing the “notice and takedown” system with a “notice and notice and takedown system”
- complainant is required to write a first takedown notice to the service provider or designated agent, for which the service provider is given 10 working days to respond, after which another takedown notice will be sent, to which the service provider must comply or face liability.
- Andre Rens, “Notice and Take Down or Notice and Notice and Take Down?”
- <http://aliquidnovi.org/notice-and-take-down-or-notice-and-notice-and-take-down/> .

Who is not afforded safe harbour?

- ONLY ISPA
- ISPA
- does not represent internet application providers, wireless application providers, online publishers, all e-commerce providers, as well as smaller scale intermediaries, like blog owners.

Recommendations

- All intermediaries that conduct their activities according to conditions under Chapter XI of the ECTA act, need to be afforded conditional protection from liability for unlawful content by third parties
- Chapter XI limitations on liability needs to be extended to non-ISPA members as well as to other types of intermediaries.
- Smaller intermediaries also need protection
- a need for an appeals procedure for takedown notices that addresses the concerns of all stakeholders, including content creators.
- Copyright concerns need to be balanced by human rights concerns, reform of legislation in the interests of enforcing copyright should not infringe on human rights.