

Protecting Internet Platforms for Expression and Innovation

May 3, 2010

Policy Posts are in-depth analyses on current tech policy issues from CDT experts. Sign up to receive the latest Policy Posts [here](#):

- 1) [Intermediaries Are Critical to the Success of the Internet](#)
- 2) [EU and U.S. Policies Protect Intermediaries from Liability](#)
- 3) [Intermediary Liability Inhibits Economic Activity, Innovation, and Free Expression](#)
- 4) [There Is a Global Need to Reinforce Intermediary Protections](#)

1) Intermediaries Are Critical to the Success of the Internet

Every day, millions of business people, scientists, government officials, journalists, educators, students, and ordinary citizens go online to access information, to create and disseminate content, and to participate in nearly all aspects of public and private life. For example:

- A journalist uploads a story on a natural disaster to her publication's website through an Internet service provider (ISP), and local residents add their own comments.
- A doctor makes a video in a local language using his mobile phone, posts it on YouTube, and uses SMS to send a link to health clinics so they can show the video to patients.
- A local entrepreneur sells surplus business equipment through an online auction site.
- A homemaker connects to an online community discussion site to complain about the service at a local business.

In each of these cases, and countless others, Internet users depend on one or more technological intermediaries to transmit or host information. These intermediaries include ISPs, mobile telecommunications providers, website hosting companies, online service providers (such as blog platforms, email service providers, social networking websites, and video and photo hosting sites), Internet search engines, and e-commerce platforms. They provide valuable forums for commerce, personal expression, community building, political activity, and the diffusion of knowledge.

The openness of the Internet also means, of course, that some individuals will use such intermediaries to transmit or post content that is unlawful or otherwise offensive. Clearly, anyone who creates illegal content should be subject to penalties provided by criminal or civil law. However, there is a temptation in many countries to try to control objectionable content by punishing not only the creators of content but also the intermediaries who transmit or host it. This is known as "intermediary liability." It arises where governments (or private individuals through lawsuits) can hold technological intermediaries such as ISPs and websites responsible for unlawful or harmful content created by their users and other third parties.

The history of the Internet shows that intermediary liability poses a threat to innovation and free expression. Imposing liability on intermediaries makes it difficult or impossible for them to offer free or low cost services. Protecting intermediaries against liability is vital to the future of economic activity, access to information, and communication on the Internet.

CDT has recently issued a paper examining the importance of protecting intermediaries from liability: "[Intermediary Liability: Protecting Internet Platforms for Expression and Innovation](#) [1]" (April 2010).

2) EU and U.S. Policies Protect Intermediaries from Liability

The Internet has flourished in countries that limit the civil and criminal liability of technological intermediaries. Most notably, early in the development of the Internet, both the United States and

the European Union adopted policy frameworks that protect ISPs, web hosts, and other intermediaries from liability for unlawful content transmitted over or hosted on their services by third parties.

In the United States, two separate laws embody the national policy on intermediary liability: Section 230 of the Communications Act and Section 512 of the Digital Millennium Copyright Act (DMCA). Section 230 gives intermediaries strong protection against liability for content created by third party users and has been used by interactive online services as a screen against a variety of claims, including negligence, fraud, violations of federal civil rights laws, and defamation.

U.S. copyright law takes a slightly different approach, but one that still limits intermediary liability for copyright infringement. Section 512 of the DMCA provides a “safe harbor” for online service providers. To qualify for the safe harbor, an online service must take down infringing material when notified by the copyright owner of its presence on the provider’s service.

The European Union also provides significant immunity for ISPs under the Electronic Commerce Directive. The Directive shields three categories of intermediaries:

- “Mere conduits” that transmit information;
- “Caching” services that provide temporary storage for the sole purpose of making onward transmission more efficient; and
- “Hosting” services for user-submitted content as long as the host does not have actual knowledge of illegal activity and quickly removes such content upon becoming aware of it.

Both the U.S. and the EU recognized the benefits of immunizing intermediaries, and early adoption of these policies encouraged innovation and expanded opportunities for online commerce and free expression, promoting broader use of information and communications technologies (ICTs).

[Section 230 of the Communications Act](#) [2]

[Section 512 of the DMCA](#) [3]

[EU E-commerce Directive](#) [4]

3) Intermediary Liability Inhibits Economic Activity, Innovation, and Free Expression

The problem with making intermediaries liable for content created by others is that, for several reasons, such policies are likely to lead to the curtailment of legitimate speech. First, holding intermediaries liable for user content greatly inhibits their willingness to host any content created by others. Indeed, liability may make it impossible for certain services to exist at all. YouTube, for example, could not exist if it had to pre-screen every video before it was uploaded.

Second, intermediary liability creates an incentive to over-block content. The safest course will always be to reject the content. If a government official or a private litigant demands that a company take down content, intermediaries commonly comply with the request rather than challenge or defend against the order in court. This incentive is especially strong where definitions of illegal content are vague and overbroad, or where it is not easy to determine whether the disputed content is unlawful. Because intermediaries have little incentive to challenge a removal request, intermediary liability also leaves room for abuse on the part of the government or private litigant seeking to take down content for unscrupulous reasons.

Finally, intermediary liability also creates disincentives for innovation in ICTs. Without protection from liability, companies are less likely to develop new ICT products and services that offer platforms for user-generated content. The threat of liability may thereby further entrench existing companies, who will be less driven to innovate or improve upon existing business models.

4) There Is a Global Need to Reinforce Intermediary Protections

In recent years, as governments have grappled with a range of policy challenges – from child protection to national security and copyright enforcement – some have proposed or adopted laws that impose legal liability on intermediaries as a way to control online content or activity.

This trend is not limited to authoritarian or “Internet-restricting” countries. In February 2010, an Italian court convicted three Google executives for a video posted by a user on the (now defunct) Google Video service, even though the video was taken down within hours of notification by Italian law enforcement. Also emerging from Italy is a proposal that may impose broadcast-style regulations on video hosting sites, including a potential liability regime – precisely the kind of mandate that would make it impossible for video-hosting sites to operate. And France recently passed the [HADOPI law](#) [5], which targets unlawful Internet file sharing by enlisting ISPs in copyright enforcement.

Private actors can also threaten expression and innovation online if they can bring civil lawsuits against the intermediaries that host or disseminate material that the private parties seek to suppress. Thus, it is important to consider laws of civil liability that define the ability of litigants to seek private damages against intermediaries for content posted by others (for example, in defamation or privacy actions).

Protecting intermediaries from liability is critical for preserving the Internet as a space for free expression, access to information, and innovation. User-generated content sites in particular have become vital forums for all manner of expression, from economic and political participation to forging new communities and interacting with family and friends. If liability concerns force intermediaries to close down these forums, then the expressive and economic potential of ICTs will be diminished.

As governments all around the world struggle with how to best address unlawful behavior online, increased and sustained advocacy is needed by human rights groups, Internet policy advocates, and industry actors alike, in support of policies that protect intermediaries as critical actors in promoting innovation, creativity, and human development.

Copyright © 2013 by Center for Democracy & Technology. CDT can be freely copied and used as long as you make no substantive changes and clearly give us credit. [Details](#).

Source URL: <https://www.cdt.org/policy/protecting-internet-platforms-expression-and-innovation>

Links:

[1] <http://www.cdt.org/paper/intermediary-liability-protecting-internet-platforms-expression-and-innovation>

[2] <http://www.law.cornell.edu/uscode/47/230.html>

[3] <http://www4.law.cornell.edu/uscode/17/512.html>

[4] http://ec.europa.eu/internal_market/e-commerce/index_en.htm

[5] <http://arstechnica.com/tech-policy/news/2009/09/france-passes-harsh-anti-p2p-three-strikes-law-again.ars>