



ELECTRONIC FRONTIER FOUNDATION eff.org

Freedom of Expression, Indirect Censorship & Liability for Internet Intermediaries

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Key Points

- User-generated content has democratized media.
- Broad, clear legal protections of Internet intermediaries are essential to protecting free expression.
- The U.S. experience can be useful as it has utilized two broad approaches to Internet intermediary liability.
- The U.S. approach to intermediary liability in the copyright context has negatively impacted freedom of expression and unnecessarily imposed costs.
- Blanket immunity (or judicial takedown) regime:
 - reduces regulatory burden and promotes innovation
 - reduces abuse targeting legitimate uses
 - promotes freedom of expression
 - better protects privacy
 - encourages due process



Introduction

- User generated content has democratized media.
- Persons with diverse ideas can find online communities of like-minded individuals.
- Global Internet removes the limits of geographic boundaries.



Introduction

- Diverse sources of information and online communities enhance the democratic process.
 - allow better informed choices
 - allow organization with others to effect positive change
 - improve communications between government and the governed



Policies to Enhance Freedom of Expression

Internet intermediaries can:

- Facilitate communication
- Protect freedom of expression
- Provide avenues for democratic participation



Policies to Enhance Freedom of Expression

- A policy infrastructure that does not impose liability on Internet intermediaries for user actions better promotes free expression by allowing people to seek, receive, and impart information and opinions without undue interference.
- The platform is not liable for what the speaker has said or done.



Secondary Liability and Safe Harbors

- Secondary liability regimes imposing liability on intermediaries are not universal.
- Introduction of “safe harbor” provisions in the absence of existing secondary liability rules may create subsequent pressure to impose secondary liability rules.
 - 2003 Industry Functional Trade Advisory Committee Report re: U.S.-Singapore FTA pg. 19 (explicitly noting this consequence)
 - US-Peru FTA fn 28 (agreement language explicitly tempering that conclusion)
http://www.ustr.gov/webfm_send/1031



U.S. Approaches to Intermediary Liability

- U.S has two primary Internet intermediary liability protection laws.
- Section 512 of the Digital Millennium Copyright Act
 - protects ISPs against copyright claims
 - notice and takedown without judicial review
- Section 230 of the Communications Decency Act
 - protects ISPs against state laws and most federal laws
 - does not include intellectual property or federal criminal law
 - no notice and takedown regime



U.S. Intermediary Liability, Copyright

- Section 512 of the Digital Millennium Copyright Act
 - result of political process, balancing interests of the copyright industry with the telecommunications industry
 - requires ISP to register with the Copyright Office to receive safe harbor protection
 - no ex ante judicial oversight
 - copyright holders can send notice to ISP to demand a takedown
 - ISP must remove identified content for 10 to 14 days to preserve safe harbor
 - content can be restored if user counter-notices -- unless copyright holder files a lawsuit



U.S. Intermediary Liability, Copyright

- Section 512 has had unintended consequences.
 - While it has procedural safeguards, it has resulted in the removal of a significant amount of non-infringing material.
 - Expedited process tempts use for non-copyright purposes.
 - Allows for short-term censorship, without any judicial input (examples at <http://www.eff.org/takedowns>):
 - Political campaign videos (e.g., CBS News and McCain presidential campaign ad)
 - Media criticism (e.g., MSNBC receives takedown for using unreleased footage regarding national political ad campaign)
 - Personal non-commercial videos (e.g., Universal Music sends takedown targeting mother's 29 second "dancing baby" video)



U.S. Intermediary Liability, Non-Copyright

- Section 230 of the Communications Decency Act
 - Places the responsibility for user submissions solely on the person who authored the content in question.
 - Critics cannot engage in self-help and use improper notice to censor.
 - No requirement to register to be protected.
 - Allows for self-regulation.
 - If ISP chooses to set standards and edit submissions, it does not take on liability.



Intermediaries and the Value of Freedom of Expression

- Ex post review requires due process.
- Notice and takedown risks creating censorship regime.
 - lack of judicial oversight too tempting
 - even short downtime impacts freedom of expression
- Most appropriate role for intermediaries is forwarding notices of alleged infringement and then allowing the judicial system to work.
 - this includes protecting the privacy of posters



Intermediaries and the Value of Freedom of Expression

- Economics of intermediaries are dependent on scale.
- Benefit for an individual post is trivial.
- Cost to have an employee assess the legality of speech exceeds the profit from hosting that speech.



Internet Intermediary Protection Promotes Innovation

- Heavy regulation can vastly increase costs beyond the ability of startups.
- Even if large companies have technical and financial capacity to take certain actions, small startups do not.
- Administrative requirements have real costs.
 - Many smaller U.S. sites fail to register with Copyright Office and lose safe harbor protections.



Internet Intermediary Protection Promotes Innovation

- After decades of widespread use, the Internet is still home to innovation.
- Twitter - critical tool to millions, did not exist five years ago.
- Facebook - 500 million users, was dorm room project a few years ago.
- For jurisdictions that are trying to attract and develop an online industry, policy structure is even more important to consider.



Privacy and Anonymity

- Citizens must have confidence that their privacy will be protected on the service providers that host their online activities.
- Why is anonymity important?
 - criticism of political figures, corporations, bureaucrats
 - stigma or embarrassment
- Opposition parties, victims of violence, AIDS sufferers, survivors of abuse can use Internet to share sensitive and personal information anonymously without fear of embarrassment or harm.



Privacy and Anonymity

- When a user posts controversial content, third parties may want to retaliate against the user.
- User may be anonymous; to sue the user, a plaintiff must first identify the user.
- DMCA provides for pre-complaint discovery of identity of alleged infringers.
- Due process necessary to protect the identity of users from obvious avenue for abuse.



Privacy and Anonymity

- Judicial system is best suited to balance rights to anonymous speech with need to redress wrongs.
- Self-initiated pre-complaint notices (subpoenas), issued in the name of protecting copyright law, are insufficient.
- Rights holder should be required to petition a court, which can balance competing interests prior to the disclosure of identity information, in order to avoid abuse and a chilling effect on speech.



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