



ONLINE INTERMEDIARY PROTECTIONS

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Intermediaries such as telecommunications and online service providers perform essential functions in promoting the Internet economy. Exposing these service providers to legal liability for the actions of users inhibits investment, retards growth, and raises the cost of service.

The desire to hold businesses responsible when Internet users post inappropriate content must be balanced against the economic value that unencumbered communications add to the knowledge-based economy. Service provider protections must be a component of U.S. domestic and foreign policy if the Internet economy is to continue growing.

Background: The modern, networked economy depends on intermediaries that provide functionality relating to communications networks, such as broadband Internet access providers (IAPs), websites, and online services that relay third party information. These services are often broadly described as “ISPs” – Internet service providers.

ISPs have enabled Internet-enabled commerce to become a vital component of the U.S. and global economies, providing a unique opportunity to leverage American innovation in the international marketplace. According to a recent Boston Consulting Group study, the Internet accounted for 4.7% of U.S. gross domestic product (GDP) in 2010.¹ The U.S. Internet industry leads the world, dominating audience metrics throughout industrialized nations.

While powering the information economy, service providers must instantaneously reproduce and transmit vast amounts of data without knowledge of its content. Estimates indicate that the number of unique web pages passed 1 trillion as early as 2008, and major service providers are known to process many petabytes of data on a daily basis.² YouTube reports that 100 hours of

¹ David Dean *et al.*, *The Internet Economy in the G-20: The \$4.2 Trillion Growth Opportunity* (Boston Consulting Group, March 2012), available at https://www.bcgperspectives.com/content/articles/media_entertainment_strategic_planning_4_2_trillion_opportunity_internet_economy_g20.

² One petabyte is equivalent to approximately 68 billion pages of Word documents, or 100 billion pages of email.

video are uploaded *every minute*; Twitter reports more than 500 million tweets *per day*; Facebook sees more than 7.5 billion photos uploaded *every month*.

As a result, various special interests demand that ISPs police and censor third party speech (for example, defamatory postings, copyright infringement, or adult content) or face potentially ruinous liability. However, these service providers often lack control over content, either because it is hosted elsewhere online or due to the extraordinary volume of communications that a service provider handles. Since the 1996 Telecommunications Act, Congress has recognized that holding Internet and e-commerce businesses liable for the conduct of their users would unreasonably burden service providers and the online communications that they facilitate.

U.S. Legal Framework: Presently, two statutes mediate the liability of online intermediaries for user actions. The first, § 230 of the Communications Decency Act (CDA), protects intermediaries from liability for a variety of user actions (excluding matters such as federal criminal law and intellectual property). This allows Internet companies to review and remove undesirable or potentially illegal content without fear that investigating complaints will lead to additional liability. The second, § 512 of the Digital Millennium Copyright Act (DMCA), limits remedies available against online intermediaries whose users are implicated in copyright infringement, provided that the intermediary complies with a ‘notice and takedown’ system specified by statute.

Growing Foreign Liability: Overseas, online intermediaries are also threatened by expanding liability risks.³ Technology companies have been hauled before domestic courts to answer for the actions of Internet users, regardless of whether policing content is even possible. In several cases these have been actions expressly permitted by U.S. law. In both developed and developing countries, online services have faced civil and in some cases criminal penalties for content uploaded by third parties. These rulings would force upon online services the impossible task of policing and regulating online speech, at the risk of sacrificing the very nature of the Internet.

Providing online intermediaries the necessary statutory protections from liability for user misconduct takes on a heightened importance due to the current trajectory of innovation in the computer industry. The foundation of “cloud computing,” the phenomenon involving IT platforms and services moving from the user’s premises to remote data centers, is the third party storage of user data. As more and more data moves online, it becomes more difficult for a host to preemptively screen it. If protections for ISPs erode, the rapid innovation and economic growth that has characterized the Internet sector will grind to a halt.

³ See generally Ali Sternburg & Matt Schruers, *Modernizing Liability Rules to Promote Internet Trade*, CCIA (September 2013), available at <http://www.cciainet.org/wp-content/uploads/2013/09/CCIA-Liability-Rules-Paper1.pdf> (discussing examples).

CCIA's Position: Making intermediaries liable for transmitting particular content in the ordinary course of business inhibits investment, retards growth, raises the cost of service, and hinders deployment of new and innovative products and services online. While U.S. law has largely achieved this objective, many foreign jurisdictions have not. Given the extraordinary volume of Internet communication, foreign courts that insist upon *ex ante* review of content by U.S. service providers effectively erect impenetrable trade barriers to Internet commerce.

Efforts to make service providers responsible for the nature of third party content must be balanced against the economic value that unencumbered communications add to the knowledge-based economy. U.S. trade policy should make intermediary protections a requirement in trade negotiations, including before the World Trade Organization and in the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (T-TIP) presently under negotiation.