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ABSTRACT

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ONLINE INTERMEDIARY PROTECTIONS

May 2010

- *Intermediaries such as telecommunications and online service providers perform essential functions in promoting e-commerce and ensuring the continued operation of the Internet.*
- *Exposing service providers to legal liability for user activity inhibits investment, retards growth, and raises the cost of service.*
- *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. Service provider protections must be a component of U.S. domestic and foreign policy.*

Background: The modern, networked economy depends on intermediaries that provide functionality relating to communications networks, such as broadband Internet access providers (IAPs), certain websites, and online services that relay third party information. Service providers may be a mere conduit for information, they may cache or host it, or they may provide platforms and forums for user generated content. IAPs, websites, and online services are broadly considered “ISPs” – Internet service providers – as they offer various services related to the Internet.

These ISPs have enabled e-commerce to become a vital component of the U.S. and global economies, providing a unique opportunity to leverage American innovation in the global marketplace. According to the White House, estimates indicate that the Internet adds \$2 trillion to annual GDP – over \$6,500 per person.¹ Internet retail sales alone reached \$178 billion in 2008.² U.S. Internet companies lead 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 in 2008, and major service providers are known to process many petabytes of data on a daily basis.³ The popular online video site YouTube reports that 24 hours of video are uploaded *every minute*.

As a side effect of this economically vital role, service providers are subjected to demands by various interests to bar problematic third party content – for example, defamatory postings,

¹ Exec. Ofc. of the President, Nat'l Econ. Council/OSTP, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs*, Sept. 2009, at 5, available online at <<http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation>>.

² Brief of Internet Retailers, *Bilski v. Kappos* (S.Ct. 08-964), Oct. 1, 2009 (citing Mark Brohan, “Online Retailing Weathered the Storm in 2008 and Finished as the Retail Market’s Only Growth Driver,” *Internet Retailer* (June 2009), at 35.

³ One petabyte is the equivalent of approximately 68 billion pages of Word documents or 100 billion pages of email.

copyright infringement, or adult content – or face potentially ruinous liability for actions by users. However, these service providers lack the control that brick-and-mortar businesses have over specific products due to the extraordinary volume of communications that they enable, as well as users’ expectations of nondiscrimination and privacy. 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.

Growing Foreign Liability: Overseas, online intermediaries are also threatened by expanding liability risks. American companies have been hauled before European courts for user actions, and in several cases these have been actions expressly permitted by U.S. law. In France, eBay has been fined over \$60 million for the sale of legitimate used luxury goods on its U.S.-facing site to French consumers who prefer to shop the American service instead of French merchants.

Some technologically unsophisticated foreign courts seek to hold service providers responsible for each and every byte to cross their networks, regardless of whether policing content is even possible. For example, an Italian court recently imposed *criminal* liability upon Google executives after Italian schoolchildren posted a video to YouTube of them bullying a child with disabilities, notwithstanding the fact that when notified YouTube promptly removed the video and assisted in apprehending the perpetrators.

U.S. Legal Framework: Presently, two statutes mediate the liability of online intermediaries for user actions. The first, § 230 of the Communications Decency Act, 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, 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.

Providing online intermediaries the necessary statutory protections from their users’ actions takes on a heightened importance due to the current trajectory of innovation in the computer industry. The foundation of “cloud computing,” the recent 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, the harder it is for a host to preemptively screen it. If adequate protections for ISPs and hosting companies are eroded, rapid innovation and economic growth in this sector will grind to a halt.

CCIA’s Position: Making intermediaries liable for transmitting particular content in the ordinary course of business will inhibit investment, retard growth, raise the cost of service, and hinder deployment of new and innovative products and services. Due to 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.

Nor is it good public policy to establish Orwellian legal regimes in which ISPs police all Internet communication. Just as we do not require commercial shippers to open packages that they carry, online intermediaries must not be obligated to invade users’ privacy and “read their mail.” 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. Policymakers must resist domestic and international efforts to impose liability on the intermediaries that sustain a large sector of the American economy.

Current Status: The intermediary protections that have allowed the Internet to flourish are subjected to persistent threats. Proliferating copyright litigation threatens to undermine the already-narrow DMCA safe harbors. For example, retailer-supported legislation introduced in Congress threatens to impose unique burdens upon online marketplaces to investigate all users, in a manner that would place them at a competitive disadvantage to brick-and-mortar retailers.

The proposed Anti-Counterfeiting Trade Agreement (ACTA) will worsen the current landscape by ratcheting up penalties for IP infringement without mandating appropriate limitations on ISP liability.

Given the increasingly hostile application of domestic law to U.S. companies overseas, U.S. trade negotiators must make intermediary protections a requirement in trade negotiations.