

Intermediary Liability: Balancing creativity, ICT development, and the free flow of information with other policy objectives – Susan Morgan

International law enshrines core human rights principles and forms the basis of the Principles of the Global Network Initiative (GNI). It is the view of the GNI that imposing legal liability on intermediaries for content created or sent by third party users will limit the social, economic, and human rights benefits these technologies promote.

Where governments have sought growth in the expressive and commercial capabilities of these technologies they have enacted protections from damages claims and limited civil and criminal liability where intermediaries have not developed and posted content, but provided the technological means to make it publicly available.

Policies creating liability for intermediaries on the basis of content sent or created by users encourage intermediaries to restrict the use of their services for content that could be considered controversial, or to restrict the pseudonymous use of these services. This impetus is particularly strong where definitions of illegal content are vague and over-broad, encouraging self-censorship and restrictions on user speech to limit legal and financial risk.

Information and communication technology (ICT) companies (including wired and wireless telecommunications carriers, web hosting companies, online service providers and device manufacturers) enable the worldwide scale and availability of information by automatically transmitting or storing words, pictures and videos created by individuals—often at no cost and requiring little technical knowledge. There are countless examples of individuals finding creative ways to use technologies in ways not originally envisioned. Maximising the social and economic benefits of ICT requires policy-makers to facilitate this type of innovation.

Governments are appropriately concerned about the use of communications networks for illicit purposes or in ways that endanger national security or the well-being of children. Online privacy, child abuse images, hate speech and copyright infringement are all examples of issues that are driving government policy in relation to intermediaries around the world. To address these concerns, governments have adopted a variety of approaches, which may include various forms of self-regulation, co-regulation and legislation. There are also voluntary steps that intermediaries can, and do, take to help address these legitimate policy concerns including measures such as offering users tools and guidance for content management, responding promptly to notices of illegal content, and collaborating with law enforcement on child abuse content.

In some countries, however, governments may also pursue policies that subject intermediaries to legal penalties for the knowing (or even unknowing) abuse of their services for purposes the government deems harmful. Many of these policies oblige intermediaries, directly or indirectly, to proactively monitor and police the information and ideas they transmit. In some countries governments may even use this policy to, in effect, delegate censorship to the private sector. Operating in such environments whilst also respecting fundamental rights can be particularly

challenging. Where companies choose to operate in such markets, GNI recommends that companies pursue measures that help ensure respect for basic rights to freedom of expression and privacy. These include the development of risk assessment and mitigation strategies when entering markets where freedom of expression and privacy may not meet internationally recognised standards; seeking clarification or modification from authorised officials where government restrictions appear over broad; acknowledging the importance of proportionate initiatives to prevent access to illegal online activity such as child exploitation and critically, being transparent with customers, the general public and users about their rights and responsibilities and the requirements placed on companies.

About the GNI

The GNI is a multi stakeholder initiative formed to help promote respect for the rights of freedom of expression and privacy and, in particular, fashion operational guidance for companies and foster collaboration on public policy. It is comprised of companies, NGO's, investors, and academics. Find out more at www.globalnetworkinitiative.org.