National Telecommunications and Information Administration (NTIA) Position Paper - Daniel J. Weitzner

The United States welcomes the OECD's investigation into the role of Internet Intermediaries as part of the broader initiative on the future of the Internet economy begun with the Seoul Declaration (2008) following the principles first articulated in the Ottawa Ministerial on Global Electronic commerce in 1998.

I. Considering the role of government policy making with respect to Internet Intermediaries

When discussing Internet policy we often focus on the bright new future, what will be positive, or sometimes negative. I will start with a brief detour into the past, beginning with a view from a great 'intermediary' from history – Benjamin Franklin, printer and first postmaster of the United States. The world of communications has changed considerably since his time, but the challenges he faced were not unlike those before us today.

Printers and postmasters were the high-tech communications and information intermediaries of the day. Their role in the creation and distribution of content played a leading part in both the political and economic unification of the early United States. The post enabled the growth of an integrated, national economy. Newspapers, carried through the postal system, on a public/private system of post roads were the information backbone of the growing democracy, ensuring that citizens in far flung cities, towns and farms across the new United States had a common source of political news about the country growing up around them.

For all of these reasons, Franklin was a great supporter of developing communications infrastructure in the early United States. He initiated funding for a large network of post roads and even got them a mention in the US Constitution. As an aside, he was probably also motivated by the fact that local postmasters (he served in that position in Philadelphia before the Revolution) generally ran successful local newspapers, using their privilege to send and receive mail (including newspapers) for free all around the country. (We're not here to discuss competition policy, however, so I'll leave the discussion for another time.) Along with all of this, Franklin also loved the city of Paris and spent several years here during the course of his public career.

Addressing the subject of the obligations of intermediaries (in his case, printers) , Franklin wrote:

> *"It is unreasonable to imagine that printers approve of everything they print. It is likewise unreasonable what some assert, that printers ought not to printer anything but what they approve; since an end would thereby be put to free writing, and the world would afterwards have nothing to read but what happened to be the opinions of printers." (From the "Apology for Printers" (1731))*

Franklin was a vigorous advocate of free expression. His brother went to jail in colonial Boston for criticizing the city's government in print. Yet, he was not an absolutist, and nor should we be. But he did, as Ambassador Kornbluh suggested in her remarks, lean very much away from placing intermediaries in the position of having to control the content of others.

II. Intermediary Liability Limitation as an Internet Architecture Design Principles

Carefully defined and limited roles for Internet intermediaries has been a hallmark of both the technical and public policy frameworks that underpin the Internet's extraordinary global success. We come together today to consider what roles Internet intermediaries can and should be expected to play in satisfying broad public policy goals. When should governments consider stepping in to encourage and or require Internet Intermediaries to take on public policy obligations related to the conduct of others?

Of course, governments must assure that basic public policy goals including privacy protection, child safety, security, basic consumer rights, and intellectual property protection are met. Alongside these specific policy requirements is the general imperative to preserve and hopefully even enhance the openness and opportunity for commercial and non-commercial use of the Internet platform around the world. Our question is not whether those are important goals, but rather what are the most effective policy strategies for realizing them in the Internet environment.

Public policy makers should look to some of the basic principles of the Internet's technical architecture as a guide for determining the most effective allocation of roles for individual elements of the overall Internet environment. Consider this longstanding guidance offered to those who design protocols and software components that make up the Internet:

"Be Liberal in what you accept and Conservative in what you send"
(IETF RFC 1122)

This principle suggests that each component of the Internet should be designed to be as flexible as possible as to what it receives from other participants in the networked environment, recognizing that others may not always function in predicable or correct ways. At the same time, designers are urged to be as careful as possible to conform their behavior to technical standards as they are described. The goal of this rather political-sounding principle is two-fold. First, it encourages robustness. When each component of the system is as flexible as possible, we avoid large scale, cascading system failures resulting from the poor behavior of single elements. A system with a large number of participants (the Internet has hundreds of millions of web sites, billions of users, and tens of millions of Web pages) but is intolerant of unexpected inputs will be brittle, susceptible to failure when even a small number of the elements behave unexpectedly. Second, this design principle helps to assure interoperability by being conservative in what each node transmits. With each component trying as hard as possible to transmit standards-compliant output, there is a greater likelihood that all parts will work well together. It is this interoperability that has enabled the creation and growth of a common global marketplace and realm for the free flow of information.

To illustrate the importance of this design principle and it's application to future public policy options, consider it's application in three layers: technology, business practices and public policy frameworks.

A. Technology – the World Wide Web:

Consider the design of the World Wide Web, particularly the web browsers and web servers that are its operational foundations. In 2008 there were an estimated 2+ billion Web pages and today, just two years later there may be over 10 billion pages. The goal of the Web is to enable the easy publishing of

and access to information. It is relatively easy to write a web page, but a reasonable number of them are not perfectly compliant with the technical standard for the language, HTML, in which web pages are written. Software developers who write web browsers generally follow the liberal/conservative principle. Browsers will be liberal in displaying a web page that is not perfectly formatted, provided the software can discern something of the intent of the page designer. By the same token, software designed to help users write web pages should be conservative in the way they create the HTML code for a new page. Web software being according this principle helps make the Web robust, allowing users to have a decent change of reading the most number of pages. And by being conservative in complying with the HTML standards, software designed to write pages should be a strict as possible, enabling the most number of pages to be read. Together, these principles promote a Web that is interoperable and scalable.

B. Business/Economics – New copyright protection strategies:

Many of the successful online business models that have evolved also follow the liberal/conservative design principle. YouTube, for example, has recently developed a new content categorization system called Content ID, whose purpose is to detect the presence of copyrighted material on the videos users upload to the YouTube site. Working with content providers, the Content ID system develops an automatic fingerprint for any copyrighted work submitted by content owners, and then checks for presence of that unique fingerprint as new videos are uploaded to the YouTube site. Once the copyrighted work is detected, the system gives the rights holder the choice to either monetize (share ad revenue with YouTube), permit use of the content without ads, track the number of views, or block the video containing the copyrighted material from being uploaded at all.

In initially accepting for upload all videos (without requiring proof of license or ownership), YouTube with ContentID is liberal in what it accepts. It is also liberal in enabling any copyright holder to create fingerprint files that will enable protection of its works through the ContentID process. At the same time, YouTube is conservative in what it will post on it's site, requiring now that all uploads be screened by the ContentID system before YouTube will post (send) them. Following the liberal/conservative rule, YouTube has created a robust system that works automatically and is able to keep pace the flow of content to YouTube.

Robustness: Automated process initiated by content owner is scalable with maximum effect for content owner and minimum burden on YouTube (initial decision is made by machine – important because roughly 24 hours of video are uploaded every minute of the day) . The system is interoperable in that it enables any copyright holder to submit works for inclusion, without requiring special software or tagging.

Perhaps the most important lesson of the ContentID system is that it results in a win-win for both the intermediary (YouTube) and the endpoints (both users and copyright holders). The copyright holder sees a reduction in infringement and increased revenue. YouTube creates user satisfaction and increases revenue. Note that none of what is done here is required by US law.

C. Public Policy – US Internet Policy Foundations

United States law regarding Internet intermediary liability is structured using the same principles as those which make the Internet function well technically. The two foundations of intermediary liability law,

Section 230 of the Communications Decency Act (CDA) and the notice-and-takedown provisions of the Digital Millennium Copyright Act (DMCA) follow this same liberal/conservative design principle. Section 230 is a broad waiver of intermediary liability with a limited set of specific exceptions. This legal structure was designed in order to allow intermediaries to be liberal in what they accept. Inasmuch as Section 230 excuses intermediaries of liability arising out of content created by others, the intermediaries are able to liberally accept all content without fear of incurring liability and without the need to exercise editorial control in order to minimize their legal risk. Benjamin Franklin would understand this principle well. At the same time, with respect to that content for which ISPs may incur liability (principally in the case of copyright violations), the DMCA provides a notice-and-takedown safe harbor that creates a clearly defined, transparent procedure under which the intermediary can be expected to act. It is a conservative principle in that its scope is clearly defined (triggered by a notice) and avoids uncertainty for users, copyright holders and intermediaries.

As with the technical architectures and business models that are based on the liberal/conservative design principle, the US intermediary liability public policy framework has been an essential foundation on which Internet economy and the information society has been able to grow. The system is robust, enabling growth at an unimaginable scale, and interoperable, enabling intermediaries to create open platforms for the free flow of information, goods and services.

III. Conclusion

When we consider the role of Internet intermediaries, we are speaking of the equivalent of Ben Franklin's post roads, political fora, market squares and other early physical and social infrastructure that laid the groundwork for the then futuristic global industrial economy. Over the last fifteen years, most OECD members have followed a largely common model in defining intermediary roles: establish broad liability limitations with specific, narrowly defined exceptions. Though intermediary liability has generally been limited, this has not prevented (and in some cases has actually encouraged) them from taking voluntary efforts to do their part to advance broad social and public policy goals. This model, based on the technical design principles inherent in the architecture of the Internet, has been basis for the extraordinary success of the Internet as a platform for innovation, both social and commercial. Ben Franklin would be proud of what has been accomplished in the spirit of his early innovations.