Don't Shoot the Messenger: Speech on Intermediary Liability at 22nd SCCR of WIPO

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This is a speech made by Pranesh Prakash at an side-event co-organized by the World Intellectual Property Organization and the Internet Society on intermediary liability, to coincide with the release of Prof. Lillian Edwards's WIPO-commissioned report on 'Role and Responsibility of the Internet Intermediaries in the Field of Copyright'.

Good afternoon. I've been asked to provide a user's perspective to the question of intermediary liability. "In what cases should an Internet intermediary—a messenger—be held liable for the doings of a third party?" is the broad question. I believe that in answering that question we can be guided by two simple principles: As long as intermediaries don't exercise direct editorial control, they should not be held liable; and as long as they don't instigate or encourage the illegal activity, they should not be held liable. In all other cases, attacking Internet intermediaries generally a sign of 'shooting the messenger'. General intermediary liability and intermediary liability for copyright infringement share a common philosophical foundation, and so I will talk about general intermediary liability first.

While going about holding intermediaries liable, we must remember that what is at stake here is the fact that intermediaries are a necessary component of ensuring freedom of speech and self-expression on the World Wide Web. In this regard, we must keep in mind the joint declaration issued by four freedom of expression rapporteurs under the aegis of the Organization of American States on June 1, 2011:

> Intermediary Liability
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> a. No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle').

b. Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a). At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extra-judicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).

It is useful to keep in mind what the kind of liability we affix on offline intermediaries: Would we hold a library responsible for unlawful material that a user has placed on its shelves without its encouragement?

Ensuring a balanced system of intermediary liability is also very important in preserving the forms of innovations we have seen online. Ensuring that intermediaries aren't always held liable for what third parties do is an essential component of encouraging new models of participation, such as Wikipedia. While Wikipedia has community-set standards with regard to copyright, obscenity, and other such issues, holding the Wikimedia Foundation (which has only around 30-40 people) itself responsible for what millions of users write on Wikipedia will hamper such new models of peer-production. This point, unfortunately, has not prevented the Wikimedia Foundation being sued a great number of times in India, a large percentage of which take the form of SLAPP ('strategic lawsuit against public participation') cases, since if the real intention had been to remove the offending content, editing Wikipedia is an easy enough way of achieving that.

While searching for these balanced solutions, we need to look beyond Europe, and look at how countries like Chile, Brazil, India and others are looking at these issues. Unfortunately, this being Geneva, most of the people I see represented in this room are from the developed world as are the examples we are discussing (France and Spain).

In India, for instance, the Internet Service Providers Association made it clear in 2006 (when there was an outcry over censorship of blogging platforms) that they do not want to be responsible for deciding whether something about which they have received a complaint is unlawful or not.

With respect to copyright and the Internet, while the Internet allows for copyright infringement to be conducted more easily, it also allows for copyright infringement to be spotted more easily. Earlier, if someone copied, it would be difficult to find out. Now that is not so. So, that balance is already ingrained, and while many in the industry focus on the fact of easier infringement and thus ask for increased legal protection, such increase in legal protection is not required since the same technological factors that enable increased infringement also enable increased ability to know about that infringement.

On the Internet, intermediaries sometimes engage in primary infringement due to the very nature of digital technology. In the digital sphere, everything is a copy. Thus, whenever you're working on a computer, copies of the copyrighted that show up on your screen are automatically copied to your computer's RAM. Whenever you download anything from the Internet, copies of it are created en route to your computer. (That is the main reason that exceptions in the copyright laws of most countries that allow you to re-sell a book you own don't apply to electronic books.) In such a case, intermediaries must be specially protected.

Additionally, online activities that we take for granted, for instance search technologies, violate the copyright law of most countries. For online search technology to be reasonably fast (instead of taking hours for each search), the searching has to be done on a copies (cache) of actual websites instead of the actual websites. For image searching, it would be unreasonable to expect search companies to take licences for all the images they allow you to search through. Yet, not doing so might violate the copyright laws of many countries. No one, or so one would think, would argue that search engines should be made illegal, but in some countries copyright law is being used to attack intermediaries.

As noted above, intermediaries are a necessary part of online free speech. Current methods of regulating copyright infringement by users via intermediaries online may well fall afoul of internationally accepted standards of human rights. Frank La Rue, the UN Special Rapporteur on Freedom of Opinion and Expression in his recent report to the UN Human Rights Council stated:

> While blocking and filtering measures deny access to certain content on the Internet, States have also taken measures to cut off access to the Internet entirely.
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> The Special Rapporteur is deeply concerned by discussions regarding a centralized "on/off" control over Internet traffic. In addition, he is alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights. This also includes legislation based on the concept of "graduated response", which imposes a series of penalties on copyright infringers that could lead to suspension of Internet service, such as the so-called "three-strikes law" in France and the Digital Economy Act 2010 of the United Kingdom.
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> Beyond the national level, the Anti-Counterfeiting Trade Agreement (ACTA) has been proposed as a multilateral agreement to establish international standards on intellectual property rights enforcement. While the provisions to disconnect individuals from Internet access for violating the treaty have been removed from the final text of December 2010, the Special Rapporteur remains watchful about the treaty's eventual implications for intermediary liability and the right to freedom of expression.

With respect to graduated response, there is very little that one can add to Prof. Edwards's presentation. I would like to add one further suggestion that Prof. Ed Felten originally put forward as a 'modest proposal': Corporations which make or facilitate three wrongful accusations should face the same penalty as the users who are accused thrice. The recent US strategy of seizing websites even before trial has been sufficiently criticised, so I shall not spend my time on it.

I still have not seen any good evidence as to why for other kinds of primary or secondary liability incurred by online intermediaries the procedure for offline copyright infringement should not apply, since they are usually crafted taking into account principles of natural justice.

The only 'international' and slightly troublesome issue that a resolution is needed to is that of problems relating to different jurisdiction's laws applying on a single global network. However, this question is much larger one that of copyright and a copyright-specific solution cannot be found. Thus WIPO is not the right forum for the redress of that problem.