CSISAC

COMMENTS TO OECD ON INFORMATION INTERMEDIARIES

Executive Summary

The Civil Society Information Society Advisory Council (CSISAC) is grateful for the opportunity to comment on the outline prepared by the OECD's Committee for Information, Computer and Communication Policy (ICCP) (the Outline) for its report on the role of Information Intermediaries (the Report), and commends the decision to supplement the OECD's substantial work on the knowledge economy with special attention to the public benefits of Internet Intermediaries for the Information Society embodied in this project. We offer these comments on proposed areas of specific focus and make suggestions for further relevant resources with the aim of supporting the public interest emphasis of the report. We welcome further exchanges on the ICCP's work as outlined in the *Principles for the Participation of Non-governmental Stakeholders in the Work of the ICCP Committee and its Working Parties*.[1]

The future growth of the Internet and its ability to reach its full potential in the economic, cultural and social spheres depends on OECD countries adopting legal regimes and regulatory frameworks that provide appropriate incentives for investment in the development of Internet technologies and widespread broadband infrastructure deployment, while safeguarding the rights of citizens. We believe that appropriately tailored frameworks for limitations on liability of Internet intermediaries are the key driver of Internet innovation and the freedom and autonomy of individuals in the Information Society.

As CSISAC stated in the Seoul Declaration, OECD Member countries should "maintain a balanced framework for intellectual property protection that is least intrusive to personal privacy, least restrictive for the development of new technologies, and that promotes creativity, innovation, and learning."[2]

In this document, we highlight civil society concerns in what we see as the three main areas of focus of the ICCP report – (1) The Scope of the Report - Categorizing Internet Intermediaries; (2) Social and Economic Benefits provided by Internet Intermediaries; and (3) Co-operative Mechanisms including Legal Approaches to Intermediary Liability.

Following is a summary of the points that are discussed in more detail below.

(1) Scope of Report - Categorizing Internet Intermediaries

- Internet intermediaries play an important role in making services from the offline world more affordable for consumers and by enabling greater consumer choice.
- A thorough analysis of the social and economic role of Internet Intermediaries requires differentiation not only by the function of the tool or service provided, but

[1] Available at http://www.oecd.org/dataoecd/38/34/42399492.pdf.
2 CSISAC, "Civil Society Declaration" available at http://csisac.org/seoul.php.

also by the technical architecture employed to do so, especially in regards to information transfer and processing.

- The role of Internet Intermediaries has evolved over time. The report should avoid a static definition and cover transmission (mere conduit) intermediaries, as well as information and tools providers whose main activity is providing tools for users to publish and retrieve information online, and financial intermediaries that facilitate online e-commerce and have been the subject of recent litigation.
- The report should include, but not be limited to, the activities protected under existing legal EU and U.S. frameworks, including the immunity provisions for online speech (section 230 of the U.S. Communications Decency Act) and the limitation of liability regimes for copyright liability (section 512 of the U.S. Copyright statute and Articles 12-15 of the EU eCommerce Directive).

(2) Economic and Social Benefits provided by Internet Intermediaries

- The Participative Web and Internet Intermediaries create externalities that positively impact the freedom and autonomy of Internet users in ways unique to peer production that cannot be accounted for in the market.
- Internet intermediaries have transformed our social and political world. They have made available new opportunities for creativity, community and access to government. Internet intermediaries have also enabled new models of Internet-based innovation and together with new ICTs such as wikis, have enabled new models of knowledge generation and publication.
- Internet intermediaries and Internet-related businesses are responsible for $300 billion of economic activity in the United States of America, generating 1.2 million jobs that did not exist two decades ago, and a further 1.9 million jobs that support those people with directly Internet-related jobs.
- The economic value of peer production and the autonomy of the individual are key to understanding the social and economic impacts of the Internet Economy.
- The ICCP report should emphasize the role of the Participative Web. Thoughtful empirical analysis will demonstrate that the social benefits of the Participative Web made possible by Internet intermediaries far outweigh any potential for technology to be used by users engaged in illicit activities.

(3) Co-operative Mechanisms and Legal Approaches to Intermediary Liability

- The current global legal environment poses a number of policy challenges both for Internet intermediaries, and those seeking to use technology to foster economic and social development. First, laws in different countries contain varying copyright exceptions and limitations and protections for freedom of expression. Second, there is little agreement and divergent case law about the application of private international law and conflicts rules to the Internet. Third, market developments have given

Internet Service Providers incentives to unfairly discriminate among providers of content, applications, and service.

- The future growth of the Internet and its ability to reach its full potential in the economic, cultural and social spheres depends on OECD countries adopting legal regimes and regulatory frameworks that provide appropriate incentives for investment in the development of Internet technologies, while safeguarding the rights of citizens. Appropriately tailored frameworks for limitations on liability of Internet intermediaries are the key driver of Internet innovation and the freedom and autonomy of individuals in the Information Society.
- Legal approaches to intermediary liability and limitation of liability regimes should provide a stable environment for technological innovation, but also preserve due process, civil liberties and the privacy rights of Internet users.
- Instead of focusing on the horizontal or vertical nature of limitation of liability regimes, which reflect domestic policy goals and the relative lobbying strength of different industries in the countries which have them, the ICCP Report should focus instead on identifying the particular values and social goals that should be protected.
- As more and more of our cultural and civic life is lived "online", and depends on the existence of platforms such as YouTube, Facebook, and MySpace, discussion forums, wikis and social networking communities, limitation of liability regimes need to be assessed by what types of activities they facilitate for end-users, and not simply by their direct impact on the intermediaries involved.
- The relatively stable framework for technological infrastructure that has been in existence in the U.S. and EU since 1995 and 2000 and which enabled the creation of a wide range of Internet intermediaries, is now under threat from a series of copyright-driven initiatives aimed at protecting what are increasingly perceived as obsolete business models that have not adapted to the challenges and opportunities of the digital era. These are already impeding investment in ICT research and development, and reshaping the technology innovation environment in OECD countries. In the longer term, they are likely to stifle Internet innovation and reduce the availability of ICTs that may fuel creativity, build communities, empower civil engagement, facilitate distance education, and foster economic and social development across the world.
- Internet intermediaries play a key role in facilitating citizens' online freedom of expression. There are sound policy reasons for limiting Internet intermediaries' liability or granting them immunity for comments made by third parties in order to foster free speech and the flow of information online. Overbroad notice and takedown regimes are susceptible to abuse and have imposed significant costs on Intermediaries.
- In providing its stocktake of legal regimes for Internet Intermediary liability, the ICCP report should consider the benefits of different types of regimes for meeting the needs of all Internet stakeholders and the various goals of the Seoul Declaration, including the protection of citizens' freedom of expression and personal information,

the development of innovative new Internet services and technologies, the promotion of competition and user choice, and the expansion of access to and use of the Internet infrastructure.

To develop a comprehensive understanding of the important economic and social benefits provided by Internet intermediaries and to identify the potential public policy challenges in Internet intermediaries' role in implementation of the Seoul Declaration on the Future of the Internet Economy, we recommend that the ICCP report should:[3]

- provide comparative analysis of the social and economic value attributable to the different Internet Intermediary safe harbor and limitation of liability regimes in use in OECD countries;
- provide comparative analysis of the respective impacts of immunity regimes, notice and takedown, and notice-notice regimes on protection of online speech;
- produce best practice recommendations on legal norms and policy practices for countries considering implementation of legislative limitation of liability regimes, and for entities within OECD countries that are developing policies and practices to implement such legal regimes;
- consider the importance of a non-discriminatory and open Internet for achieving the full benefits of the participative web and to level the playing field for competition that would facilitate convergence in digital networks; and
- produce best practice recommendations for legal norms that would prevent Internet Service Providers from blocking, degrading or discriminating against content, applications, or devices.

[3] See policy recommendations in section 2.2 and 4.2 of *Fueling Creativity, Ensuring Consumer and Privacy Protection, Building Confidence and Benefiting from Convergence:* Recommendations and Contributions to the OECD Ministerial Meeting of 17-18 June 2008 from Civil Society Participants in the Public Voice Coalition, available at http://thepublicvoice.org/events/seoul08/cs-paper.pdf.

1. Scope of Report - Categorization of Internet Intermediaries

A thorough analysis of the social and economic role of Internet Intermediaries requires differentiation not only by the function of the tool or service provided, but also by the technical architecture employed to do so, especially in regards to information transfer and processing.

The draft outline for the ICCP Report recognizes the drawbacks of a static view of intermediaries, and suggests categories based on function: (1) Internet technical organizations (i.e., hosting providers, Internet Service providers, Domain Name Registrars; (2) e-Commerce intermediaries (i.e., financial intermediaries, auction platforms and e-commerce actors); and (3) Application providers (i.e., search engines, participative web platforms, virtual worlds).

From the Internet user's perspective, these services, tools, and platforms perform many of the same functions as their offline counterparts. While these categories enable analysis of the types of services offered, they do not necessarily give insight into the role of the Internet Intermediary in making functions from the offline world more affordable or enabling more consumer choice, for example. Comprehensive analysis therefore requires consideration of both the type of service or tool provided and also the effects of the particular technical architecture used to provide it. In considering the social and economic role of Internet Intermediaries, the ICCP report should analyze the way that the technical architecture of the platforms, products, and services benefit society, by making information transfer and processing more efficient and/or transparent.

We agree that the ICCP Report should avoid focusing on a static view of intermediaries, and in particular, should consider, but not be limited to the types of activities facilitated by the limitation of liability and Internet Intermediary immunity regimes in existence in OECD member countries, including the Internet Service Provider safe harbor regime provisions in section 512(a-d) of the U.S. Copyright Act and limitation of liability provisions in Articles 12-15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the EU eCommerce Directive) and its implementation in the various EU Member States' national laws; and section 230 of the U.S. Communications Decency Act.

We believe that the ICCP Report should cover traditional Internet Service Providers that act as mere conduits by providing connectivity to the Internet (transmission intermediaries) including the increasing role of wireless services as providers of Internet access. In addition, the study should cover information distributors, such as search engines, hosting providers, social network sites and blogging, video and auctions platforms, whose main activity is providing tools for users to publish and retrieve information online, and other Intermediaries

that facilitate eCommerce and online activity, such as financial intermediaries, which have increasingly been targeted in intellectual property litigation in the United States.[4]

Historical Evolution of Internet Intermediaries

The ICCP report should take account of the evolving role of Internet intermediaries in order to develop principled policy recommendations that will have lasting influence. Over the years, Internet intermediaries have moved from offering basic Internet access and e-mail services to providing a wide range of Web-based tools that enable any computer user to publish anything in digital format, at little or no direct financial cost.[5]

A number of important factors have made possible the existence of intermediaries that are able to provide inexpensive Internet-related services to the world's citizens, which in turn, have spurred the development of the Information society. These include:

a) Legal frameworks providing safe harbors or limitations on liability for intermediaries for unlawful user conduct and user-generated content (discussed in further detail below.)

b) The end-to-end architecture of the Internet[6]: a network lacking a central point of control designed to route packets of data regardless of its contents facilitates the creation of intelligent tools at the "ends" of the network[7]; and

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[4] See, for instance, Perfect10 v. CCBill, Case Nos. 04-57143, 04-57207 (9th Cir., March 29, 2007); Perfect10 v. Visa International Service Association, _ F. 3d_ (9th Circ. July 3, 2007).

[5] There are many resources that detail the historical evolution of Internet services and intermediaries. See, for instance, B. M. Leiner, V. G. Cerf, D. D. Clark, R. E. Kahn, L. Kleinrock, D. C. Lynch, J. Postel, L. G. Roberts and S. Wolff, *A Brief History of the Internet*, available at http://www.isoc.org/internet/history/brief.shtml (explaining the Internet origins and its initial growth); JOHN BATTELLE, THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE, (Portfolio, 2005) (focusing on the development, importance and ubiquity of search engines and the rise and market dominance of Google); HAL ABELSON, KEN LEDEEN & HARRY LEWIS, BLOWN TO BITS: YOUR LIFE, LIBERTY AND HAPPINESS AFTER THE DIGITAL EXPLOSION (Addison-Wesley/Pearson Education, 2008), also available at http://www.bitsbook.com/wp-content/uploads/2008/12/B2B_3.pdf; KATIE HAFNER, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET (Simon & Schuster, 1998) (explaining in greater detail how the Internet came to be and its rough-consensus governance model); TIM BERNERS-LEE, WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB (Collins Business, 2000) (explaining the significance of the lack of a central authority or point in the Internet); Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software,* available at http://oreilly.com/lpt/a/6228 (explaining how new software tools have turned the Web into a platform for user participation and discussion).

[6] See Internet Architecture Board, *Architectural Principles of the Internet (Request For Comments 1958)*, March 2004, available at http://www.ietf.org/rfc/rfc1958.txt; see also Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV.Law 1974 (2006), also available at http://www.harvardlawreview.org/issues/119/may06/zittrain.pdf (arguing that the Internet is better conceptualized as a generative grid that includes both PCs and networks rather than as an open network indifferent to the configuration of its endpoints). For a technical analysis, see J. H. SALTZER, D.P. REED, AND D. D. CLARK, END-TO-END ARGUMENTS IN SYSTEM DESIGN, (Artech House, 1981), pp. 30–41, also available at http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf.

[7] Lawrence Lessig explains why this design has important consequences for innovation: a) because applications run on computers at the edge of the network, innovators with new applications need only connect their

c) The decreasing costs of hardware and software, due to technological breakthroughs in hardware development and the widespread adoption of free and open source software.

However, a number of recent copyright-driven proposals aimed at increasing Internet intermediary liability, described in more detail below, now threaten these key information infrastructure determinants.[8] Any policy recommendations for OECD members should be careful to preserve these fundamental pillars upon which the Internet has developed.

Other key factors that the ICCP report should consider are the widespread adoption of information and communication technologies for citizens' daily activity and social life, and the increasing significance of information in the knowledge economy and the corresponding importance of Internet-based information generation and retrieval tools.

2. Economic and Social Benefits Provided By Internet Intermediaries

As the OECD recognizes, as the services the Internet supports "become pervasive, ubiquitous and more essential in everyday life, the economy is increasingly the Internet economy"[9].

Internet intermediaries play a wide range of economic and social roles. The success of e-commerce, auction and classifieds platforms worldwide demonstrate the huge potential of the Internet to generate and sustain new business models[10], creating unforeseen entrepreneurship possibilities and fostering overall business transformation. The OECD has noted that "by empowering consumers through greater access to information, facilitating price comparisons, increasing competition and creating downward pressure on prices, the Internet has begun to transform the relationship between suppliers and customers, creating opportunities for new user-driven business models"[11].

Internet intermediaries have also transformed our social and political world. They have made available new opportunities for creativity, community and access to government. Platforms like YouTube have lowered the entry costs for the creation and distribution of video. This has enabled an emergent democratic culture where interactivity with the world surrounding

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computers to the network to let their applications run. No change to the computers within the network is required; b) because the design is not optimized for any particular existing application, the network is open to innovation not originally imagined. All the Internet protocol (IP) does is figure a way to package and route data; it doesn't route or process certain kinds of data better than others, and c) because the design effects a neutral platform—neutral in the sense that the network owner can't discriminate against some packets while favoring others—the network can't discriminate against a new innovator's design. If a new application threatens a dominant application, there's nothing the network can do about that. The network will remain neutral regardless of the application. See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD, (Random House, 2001), pp. 36-37, also available at http://thefutureofideas.s3.amazonaws.com/lessig_FOI.pdf.

[9] See OECD, *Shaping Policies for the Future of the Internet Economy*, p. 4, available at http://www.oecd.org/dataoecd/1/29/40821707.pdf.

[10] See, for example, C. ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (Revised and Updated Edition, Hyperion, 2008) (arguing that the Internet made possible a business model based upon the sale of small volumes of unique or obscure items to many customers, instead of the sale of large quantities of a reduced number of popular items, due to the lower costs of storage and distribution).

[11] See OECD, *Shaping Policies for the Future of the Internet Economy*, p. 7.

Internet users forms a strong bedrock for freedom of expression.[12] Internet intermediaries have also transformed our notions of culture and civic discourse, empowering ordinary citizens to be heard alongside well-funded lobbyists. Political candidates now increasingly rely on YouTube and its viral dissemination opportunities to distribute their policy statements to influence voters. In Iran, citizens have recently used blogs, Twitter and Facebook to evade state censorship and organize themselves in order to raise global pressure for regime change.[13]The ubiquity of Internet use in daily life speaks for itself.[14] Within the OECD's work on the subject, we would highlight the relevance of the following reports: *Convergence and Next Generation Networks* (2008),[15] *Internet Traffic Exchange: Market Developments and Measurement of Growth* (2006),[16] and *Participative Web: User-created content* (2007).[17]

Internet-Enabled Innovation

Apart from their transformative role in citizens' social and civic life, Internet intermediaries and Internet-related businesses are responsible for $300 billion of economic activity in the United States of America, and represent 2.1% of the total U.S. gross domestic product (GDP), generating 1.2 million jobs that did not exist two decades ago, and a further 1.9 million jobs that support those people with directly Internet-related jobs.[18]

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[12] *See generally* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. Rev. 1 (2004)

[13] Brad Stone and Noam Cohen, *Social Networks Spread Defiance Online,* N.Y. TIMES, June 15, 2009 at http://www.nytimes.com/2009/06/16/world/middleeast/16media.html?_r=1; Bob Sullivan, *Twitter 1, Censors 0: Why It's Still Working*, THE RED TAPE CHRONICLES (MSNBC Blog), June 18, 2009 at http://redtape.msnbc.com/2009/06/twitter-1-censorship-0-why-its-working.html; Mark Landler and Brian Stelter, *Washington Taps Into A Potent New Force in Diplomacy,* N.Y. TIMES, June 18, 2009 at http://www.nytimes.com/2009/06/17/world/middleeast/17media.html?_r=1; Matthew B. Stannard, *S.F. Techie Helps Stir Iranian Protests*, SAN FRANCISCO CHRONICLE, June 17, 2009, at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/06/17/MN75188C6K.DTL.

[14] Despite the digital divide in developing nations, increasingly more people have access to the Internet and new information and communication technologies via cyber cafés, free public access points, libraries and computers at the workplace.

[15] Available at http://www.oecd.org/dataoecd/25/11/40761101.pdf.

[16] Available at http://www.oecd.org/dataoecd/25/54/36462170.pdf.

[17] Available at http://www.oecd.org/dataoecd/57/14/38393115.pdf. See also A. L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW (Public Affairs, 1999)(presenting a general overview of the possibilities of Internet technologies for social change); C. SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (The Penguin Press HC, 2008) (explaining how ubiquitous online access and Web-based social tools enable the forming of impromptu groups and interaction among individuals with the same interests, regardless of physical location); D. GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE (O'Reilly Media, Inc, 2006), also available at http://oreilly.com/catalog/wemedia/book/index.csp (showing how traditional media has lost its monopoly on the news, thanks to grassroots journalists using Web-based tools); M. CASTELLS, THE RISE OF THE NETWORK SOCIETY (THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE, VOL. 1) (Wiley-Blackwell, 2nd edition, 2000) (explaining in greater detail how nearly all aspects of society have been transformed by ubiquitous computer networks) and Y. BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM, (Yale University Press, 2007), also available at http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf (showing how a networked information economy allows individuals and groups to be productive, empowers people, and promotes economic growth and freedom of expression).

[18] See John Deighton and John Quelch of the Harvard Business School, *Economic Value of the Advertising-Supported Internet Ecosystem,* a Study by the Advertising Bureau of the USA (IAB), forthcoming August 11,

Internet intermediaries have also enabled new models of Internet-based innovation. For example, the need for secure transmission of Internet traffic has created a market for encryption services. Activities such as online banking and e-commerce, to name a few, rely on encryption services that are usually provided by specialized companies.

Internet intermediaries, together with new ICTs such as wikis, have enabled new models of knowledge generation and publication, such as the world's most comprehensive online encyclopedia, Wikipedia, created by thousands of volunteers spread across the globe, and the sequencing of the Human Genome.

Other Internet intermediaries have fostered innovation by providing tools that can be reused by third parties, such as application programming interfaces (APIs). These APIs can be made available to other intermediaries or even to the general public, and then be used to create a *mashup*, defined as "a web page or application that combines data or functionality from two or more external sources to create a new service."[19] This means that the content or raw data provided by different Web sites can be aggregated and reused in different ways, generating new services and business models. One example is the combination of the Google Maps API with other Web sites, enabling people to insert map data on other online platforms for several different purposes.[20]

The Free Flow of Information and Social and Political Transformation

In addition to their economic value, Internet intermediaries also play a crucial role in the development of the Information Society. The Seoul Declaration on the Future of the Internet Economy proposes to "promote ubiquitous access to ICT networks and services enabling widespread participation in the Internet Economy,"[21] in order to "bolster the free flow of information, freedom of expression, and protection of individual liberties,"[22] which are recognized as "critical components of a democratic society and cultural diversity."[23]

The Seoul Declaration also calls on the OECD and member countries to implement policies that foster creativity in the development, use and application of the Internet[24], as well as ensure that the Internet Economy is truly global,[25] through policies that, among others, will maintain an open environment that supports the free flow of information, research, innovation, entrepreneurship and business transformation,[26] and promote the use of Internet

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2009; OECD Information Technology Outlook 2008 (Chapter 1: The IT Industry: Recent Developments and Outlook, and Chapter 5: Digital Content in Transition); OECD Communications Outlook 2009, Chapter 3: Telecommunication Market Size.

[19] See ProgrammableWeb FAQ, available at http://www.programmableweb.com/faq.

[20] See John Markoff, *Marrying Maps to Data for a New Web Service*, N.Y. TIMES, July 18, 2005, available at http://query.nytimes.com/gst/fullpage.html?res=9E05EFD81130F93BA25754C0A9639C8B63&sec=&spon=&pagewanted=print.

[21] *The Seoul Declaration for the Future of the Internet Economy*, available at http://www.oecd.org/dataoecd/49/28/40839436.pdf, p. 4.

[22] *Ibid.*

[23] *Ibid.*

[24] *Id.* at 7.

[25] *Id.* at 8.

[26] *Id*. at 7.

and related ICT networks by all communities, as well as the creation of local content and multi-language translations, in order to improve economic and social inclusion of people with different capabilities, education, and skills, and to preserve cultural and linguistic diversity.[27]

Peer Production and the Participative Web

Along the same lines, the OECD report *Shaping Policies for the Future of the Internet Economy* calls for "creating an environment that encourages infrastructure investment, higher levels of connectivity and innovative services and applications",[28] and it also acknowledges that "the largest productivity gains will come increasingly from the use, rather than the production, of networked ICTs."[29]

We believe that the ICCP report should give emphasis to the role of the Participative Web - defined in the OECD's prior work as "intelligent web services that empower the user to contribute to developing, rating, collaborating on and distributing Internet content and customizing Internet applications."[30] We believe that thoughtful empirical analysis will demonstrate that the social benefits of the Participative Web made possible by Internet intermediaries far outweigh any potential uses of the technology by users engaged in illicit activities.

The OECD has addressed some aspects of these issues in its previous report *Participative Web: User-Created Content.*[31] This key focus area of the OECD's work captures some of the most important developments in the ways people have forged novel means of economic production and created new forms of democratic culture in the digitally networked environment. It is particularly significant to take into account the ways in which these networked relationships produce positive social and economic externalities outside of the traditional context of economic analysis of the market. The social benefits offered by the phenomena of knowledge production such as Wikipedia, where the Internet public has produced an encyclopedia of a magnitude never imagined and in a governance structure hitherto impossible. Distributed computing platforms such as the World Community Grid,[32] that use a decentralized aggregation of individual screen-saver computing power to process huge amounts of data to find cures for neglected diseases, is unique to the excess informational capacity of the knowledge economy and the democratic culture of the Information Society.

A great deal has been written for more than a decade on the profound importance of the commons for the knowledge economy and the commons-based peer production that it enables. Key to these developments is the role of Internet Intermediaries as enabling the networks connecting people with each other. Yochai Benkler, in his groundbreaking work *The Wealth of Networks* examines the paradigm shifting nature of these developments:

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[27] *Id.* at 8-9.
[28] Available at http://www.oecd.org/dataoecd/1/29/40821707.pdf, p. 6.
[29] *Id.* at 4. Noting the need for a policy shift from providing technology in countries with nearly universal basic computer access to ensuring that it is used effectively. *Id.* at 11.
[30] Available at http://www.oecd.org/dataoecd/57/14/38393115.pdf.
[31] Available at http://www.oecd.org/dataoecd/57/14/38393115.pdf.
[32] See http://www.worldcommunitygrid.org/.

> *"… [U]biquitous low-cost processors, storage media, and networked connectivity have made it practically feasible for individuals, alone and in cooperation with others, to create and exchange information, knowledge, and culture in patterns of social reciprocity, redistribution, and sharing, rather than proprietary, market-based production. The basic material capital requirements of information production are now in the hands of a billion people around the globe who are connected to each other more or less seamlessly. These material conditions have given individuals a new practical freedom of action. If a person or group wishes to start an information-production project for any reason, that group or person need not raise significant funds to acquire the necessary capital."*[33]

From the perspective of Civil Society, OECD work on the Participative Web is also at the crux of the freedom embodied in the Information Society, too often overlooked in policy-making. The freedom that preserves the autonomy of individuals to speak politically, participate in culture, and act in the community is due in large part to the role of Internet Intermediaries as connecting people rather than regulating their behavior. Benkler explains the centrality of this architectural freedom is to the individual in that "the emergence of the networked information economy (…) allows us to do more for and by ourselves."[34] The creation of sources of information and communication facilities that no one owns or exclusively controls "(…) removes some of the most basic opportunities for manipulation of those who depend on information and communication by the owners of the basic means of communications and the producers of the core cultural forms"[35] and "removes the structural constraints that make it impossible to communicate at all without being subject to such action by others."[36]

The economic value of peer production and the autonomy of the individual are key to understanding the social and economic impacts of the Internet Economy. The Participative Web and its non-market productivity is what enables people to share information and draw attention to matters that would otherwise be ignored. For example, repressive regimes can no longer escape the attention of the international community; no matter what restrictions they try to impose on their own media or communications platforms.[37] Social tools such as YouTube, Twitter, social networking sites and free blog platforms provide venues for uncensored speech, allowing events to be watched and discussed in real time. Tech-savvy users can use open proxy servers and several other tools[38] to browse and publish content on

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[33] See Y. BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM, n.17, supra. also available at http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf, p. 462.
[34] *Id.* at 464.
[35] *Id.* at 465.
[36] *Ibid.*
[37] See generally S. KALATHIL AND T. C. BOAS, OPEN NETWORKS, CLOSED REGIMES: THE IMPACT OF THE INTERNET ON AUTHORITARIAN RULE, (Carnegie Endowment for International Peace, 2003); and R. DELBERT ET AL., ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (The MIT Press, 2008), also available at http://opennet.net/accessdenied.
[38] See, for example, The Tor Project, available at http://www.torproject.org/; Freenet Project, available at http://freenetproject.org/; Privoxy, available at http://www.privoxy.org/, and I2P Anonymous Network, available at http://www.i2p2.de/.

the Internet anonymously and, in most cases, are also able to circumvent blocking or filtering mechanisms imposed by the government on their local ISPs, as recent episodes have demonstrated.[39]

3. Co-operative Mechanisms Including Legal Approaches to Intermediary Liability

The current global legal environment poses a number of policy challenges both for Internet intermediaries, and those seeking to use technology to foster economic and social development. First, laws in different countries contain varying copyright exceptions and limitations and protections for freedom of expression. Second, there is little agreement and divergent case law about the application of private international law and conflicts rules to the Internet. This makes it difficult to assess the potential legal liability Internet intermediaries may face in offering innovative cross-border services, and reduces the availability of technologies in countries that could use it most optimally. Third, market developments have given Internet service providers incentives to discriminate among providers of content, applications, and service.

Legal rules for imposition of liability must take account of the level of control (if any) that an Internet intermediary exercises over user conduct and unlawful material, but this consideration should not be mistaken with a mandate to redesign the service or product.. Rules must be based on actual ability to control, and not the mere assertion of an obligation to control.

There is a key distinction between two types of services provided by intermediaries:

a) transmission intermediaries or *mere conduits*, such as backbone providers and access providers, whose main activity is Internet connectivity; and

b) *information distributors*, such as search engines, hosting providers, social network sites and blogging, video and auctions platforms, whose main activity is providing tools for users to publish and retrieve information online. The latter category of intermediaries may, in some circumstances, have a greater level of control over their users' activity, but will not be able to exercise control in the absence of specific knowledge of infringing or unlawful behaviour.

Legal regulations governing the behavior of intermediaries that act as mere conduits must consider the incentives these providers have to discriminate based on content, applications, and services. For example, these intermediaries are also often owners of copyrighted content and may have an incentive to discriminate against other content providers.

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[39] See James C. McKinley Jr., *Cyber-Rebels in Cuba Defy State's Limits*, N.Y. TIMES, March 6, 2008, available at http://www.nytimes.com/2008/03/06/world/americas/06cuba.html?_r=1&pagewanted=print (presenting how an underground network of young Cuban citizens using computer memory sticks, digital cameras and clandestine Internet hookups has been spreading news that the official Cuban state media try to suppress), and Andrew LaVallee, *Web Users in Iran Reach Overseas for Proxies*, DIGITS: TECHNOLOGY NEWS AND INSIGHTS (WALL STREET JOURNAL BLOG), June 15, 2009, available at http://blogs.wsj.com/digits/2009/06/15/web-users-in-iran-reach-overseas-for-proxies/ (reporting how Twitter is playing a major role in the wake of the Iranian election riots and how users from all over the world have configured their own computers to act as open proxy servers for Iranian citizens).

Importance of Internet Intermediary Liability Limitations

From 1995 to 2000, many OECD countries adopted special legal regimes for Internet Service Providers and other Internet intermediaries, limiting their potential legal liability for copyright infringement, and defamation. These rules were adopted in recognition of the social importance of fostering Internet connectivity and networked communications. Now, as more and more of our cultural and civic life is lived "online", and depends on the existence of platforms such as YouTube, Facebook, and MySpace, discussion forums, wikis and social networking communities, limitation of liability regimes need to be assessed by what types of activities they facilitate for end-users, and not simply by their direct impact on the intermediaries involved. Simply put, peer production and user generated content would not be possible if not for the existence of limitation of liability regimes. It is no accident that the user generated content hosting platforms YouTube, MySpace and Facebook were created and have flourished in a country that has a well-established safe harbor regime protecting hosting platforms from otherwise potentially boundless copyright infringement liability, and robust protection for freedom of expression.

Instead of focusing on the horizontal or vertical nature of the limitation of liability regime, which reflect domestic values and policy goals and the relative lobbying strength of different industries in the countries which have them, we recommend that the ICCP Report focus instead on the particular values and social goals that should be preserved, and then investigate the comparative usefulness of various countries' mechanisms that have been adopted to achieve those ends.

Copyright Liability and Notice and Takedown Regimes

The U.S. Copyright Act contains four "safe harbors" for Internet intermediaries' routine activities: acting as a conduit of Internet communications, caching of material, hosting of user created content, and provision of information location tools and search engines (17 U.S.C. §512). European Community law contains a similar set of limitation of liability provisions for information society services and providers which provide connectivity, cache content, and host user created content (EU eCommerce Directive, Articles 12-15).

These regimes created a relatively stable environment for innovation. That, in turn, facilitated the development of robust hosting platforms such as YouTube, and wikis, which have made possible a comprehensive and free worldwide encyclopedia (Wikipedia) and a rich world of user created content, global economic enterprises (eBay) and powerful search tools (Google, Yahoo!).

However, that environment is now under threat from various sources. First, since 1996 there has been a movement towards characterizing temporary and transient reproductions of digital copyrighted material, such as that in computer memory, as copyright infringement. This view was adopted, somewhat controversially, in the U.S. National Information Infrastructure Taskforce's landmark 1995 White Paper, which recommended that ISPs be held directly liable for copyright infringement for their role in passing communications across their networks. Since communications on the Internet involve serial reproduction and distribution of digital material, this would have translated into potentially unmanageable liability for ISPs

and Internet intermediaries. Although it is clear that there is no international consensus on this point, and despite a recent U.S. appellate decision confirming that temporary and transient reproductions should not be treated as copyright infringement under U.S. copyright law[40], the last 10 U.S. bilateral trade agreements have required trading partners to treat transient and temporary copies as actionable copyright infringement. This has increased the potential scope of direct copyright liability for Internet intermediaries across the globe, and stifled technological development and investment in countries where there are no countervailing limitation principles (such as the U.S. fair use doctrine) or copyright exceptions for intermediaries.

Second, copyright owner industry groups have attempted to overturn the balance struck in the existing copyright safe harbor and limitation of liability regimes, in efforts to clamp down on perceived widespread online copyright infringement by Internet users. These efforts endanger fundamental privacy rights of Internet users and threaten the end-to-end principle that is central to the Internet's open architecture. The U.S. safe harbor regime specifically states that ISPs and OSPs are not required to monitor nor affirmatively search for evidence of potential infringement on their networks (17 USC §512(m)). Similarly, Article 15 of the EU eCommerce Directive states that information society service providers have no general obligation to monitor communications on their network.[41]

Despite this, major film and music copyright industry groups in Europe have recently advocated for a suite of proposals that seem to jeopardize the spirit of that framework principle. If adopted, these proposals are likely to radically alter the current nature of the Internet. ISPs and Internet intermediaries will be obliged to monitor their networks in an unprecedented manner. This makes it more likely that ISPs will be deemed to have constructive knowledge of online copyright infringement taking place on their networks, thus disqualifying them from the safe harbors that have previously safeguarded their businesses. It is not at all clear that adopting such filtering measures will be technologically effective because encrypting communications can currently defeat them. However, in response to these copyright holder initiatives, efforts are now underway to develop and require the use of more persistent and invasive monitoring technologies, such as deep packet inspection, the blocking

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[40] The Cartoon Network LP, LLP et al. v. CSC Holdings, Inc. and Cablevision Systems Corporation, (2nd Cir., August 4, 2008), *cert. denied*, available at http://www.eff.org/files/filenode/studios_v_cablevision/cablevision-decision.pdf.

[41] Article 15(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market states:
"Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."
But see SABAM v. Scarlet, District Court of Brussels, No. 04/8975/A, June 20, 2007 (Currently on appeal, where the Court ordered Belgian ISP Scarlet (Tiscali) to filter communications passing through its network with Audible Magic for potentially copyright infringing material.)

of all communications transmitted by particular protocols such as Bit Torrent,[42] and technologies that can respond to, and break, encryption.

In the United States, well-established principles of copyright law that balanced the needs of new innovators with those of rightsholders are under challenge. In a series of cases against developers of peer to peer software, rightsholders have asked courts for orders requiring the redesign of multiple purpose technologies and a veto power over particular features. U.S. courts have made clear that that the burden of copyright enforcement falls on rightsholders, not the providers of new ICTs. As the Ninth Circuit Court of Appeal recently affirmed: "The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright."[43] Despite that, major copyright owner industry groups that are not satisfied with the balance struck in the U.S. safe harbor legal regime , have begun litigation against Internet search engines and user created content hosting platforms, such as Google's YouTube, Veoh, MyMP3Tunes.com, and iMeem, challenging the validity of the safe harbor regime in an effort to protect what are increasingly perceived as obsolete business models that have not adapted to the challenges and opportunities of the digital era.[44]

These copyright-driven initiatives are already impeding investment in ICT research and development, and reshaping the technology innovation environment in OECD countries. In the longer term, they are likely to stifle Internet innovation and reduce the availability of ICTs that may fuel creativity, build communities, empower civil engagement, facilitate distance education, and foster economic and social development across the world.

Mere Conduit Intermediaries and the Graduated Response

France has adopted legislation for a "Graduated Response" requiring ISPs to terminate the Internet access of customers on the basis of a rightsholder allegation of repeat copyright infringement, and to create lists of "blacklisted" Internet users to whom Internet service cannot be provided. Although the French high court, the Conseil Constitutionnel, recently invalidated some of the key provisions in the French Act[45], including those that would have given the new administrative authority, HADOPI, the ability to issue termination and sanctions orders to ISPs, similar policies have been adopted by agreement of ISPs in South

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[42] *EFF tests agree with AP: Comcast is forging packets to interfere with user traffic,* ELECTRONIC FRONTIER FOUNDATION DEEPLINKS BLOG, October 19, 2007 at http://www.eff.org/deeplinks/2007/10/eff-tests-agree-ap-comcast-forging-packets-to-interfere; EFF Report *Packet Forgery By ISPs: A Report on the Comcast Affair*, November 2007, at http://www.eff.org/files/eff_comcast_report2.pdf.

[43] See Perfect10 v. CCBill, Case Nos. 04-57143, 04-57207 (9th Cir. March 29, 2007).

[44] Viacom International, Inc. et al. v. YouTube, Inc., YouTube LLC, and Google, Inc., Case No. 1:2007cv02103, (S.D.N.Y, March 13, 2007) also available at http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/1/; Io Group Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Ca, 2008); *See also Required Reading for 'User-Generated Content Sites'*, ELECTRONIC FRONTIER FOUNDATION DEEPLINKS BLOG, August 2008 at http://www.eff.org/deeplinks/2008/08/required-reading-user-generated-content-sites-io-g.

[45] Décision n° 2009-580 DC du 10 juin 2009, at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html.

Korea and Japan. Graduated response proposals are under discussion in the U.K., Denmark, Ireland, and New Zealand. The Graduated Response is a direct challenge to the legal protections established in the U.S. and EU limitation of liability regimes for Internet intermediaries that are "mere conduits" providing users with access to the Internet.[46]

As the European Parliament emphasized in its Report on the Cultural Industries,[47] in the digital age, excluding citizens from the ability to connect to, and communicate on the Internet, amounts to cutting-off individuals from civic and cultural life. This is a disproportionate response to the harm in issue. The penalty imposed is far more severe than traditional copyright monetary sanctions, both for the individual involved, and also for society at large. Adopting such a response to meet the perceived needs of one group of rightsholders is likely to create social division, and detrimentally impact the development of the Internet's global infrastructure for all humankind, contrary to the goals of the Seoul Declaration. The recent negotiations on the European Community's Telecom reform Package have highlighted the harm of monitoring and filtering the Internet and the importance of due process and judicial oversight for consumer protection.[48]

Mandatory Disclosure of Personal Information

Copyright owners have also insisted that Internet intermediaries be required to expeditiously disclose the identities of customers alleged to have engaged in copyright infringement, without any process of judicial oversight. U.S. law does not currently provide an extra-judicial mechanism forcing disclosure of the identity of individuals allegedly engaged in file-sharing activity.[49] However the absence of such a mechanism has not provided any obstacle to U.S. copyright holders' ability to enforce their rights against alleged file-sharers, as evidenced by the more than 30,000 lawsuits brought against individuals since 2003.[50]

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[46] Section 512(i) of the U.S. Copyright statute defines the conditions for eligibility for Internet Service Providers to benefit from the safe harbor regime. Section 512(i)(A) states that it applies to a service provider only if it "has adopted and *reasonably implemented*, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the *termination in appropriate circumstances* of subscribers and account holders of the service provider's system or network who are *repeat infringers*;" (emphasis added). Some content rightsholders have maintained that this provision would permit the adoption of the Graduated Response. However, other commentators disagree and interpret the italicized terms to require termination only after a judicial adjudication of a repeat infringement. *See for instance*, Prof. David Nimmer, *Repeat Infringers*, 52 J. Copyright Soc'y 167 (2005).

[47] Article 23 of the Guy Bono Report on the Cultural Industries in Europe, European Parliament resolution of 10 April 2008 on cultural industries in Europe (2007/2153(INI)), adopted April 10, 2008, at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0123.

[48] Amendments 138 and 166 of the Telecom Package, a proposed set of amendments to five EU Directives: the Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Framework Directive 2002/21/EC, Universal Service Directive 2002/22/EC and Privacy Directive 2002/58/EC. Trautmann Report. Amendment 138, available at http://www.europarl.europa.eu/oeil/file.jsp?id=5563972 (European Parliament, 2nd Reading, last document), amending Art. 8 par. 4 point (ga) of Directive 2002/21/EC); and Harbour Report. Amendment 166, available at http://www.europarl.europa.eu/oeil/file.jsp?id=5563642 (European Parliament, 2nd Reading, last document) amending Art. 32a of Directive 2002/22/EC.

[49] USC § 512(h) provides an expedited subpoena process, but this does not extend to obtaining the identity of alleged file-sharers extra-judicially. See Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc., *3*51 F.3d 1229 (D.C. Cir. 2003).

[50] EFF Report, *RIAA v. The People: Four Years Later*, available at: <http://w2.eff.org/IP/P2P/riaa_at_four.pdf>

By comparison, the European Union introduced a mandatory disclosure obligation in the "right of information" enshrined in Article 8 of the 2004 Intellectual Property Enforcement Directive (2004/48/EC). National courts in the European Community have for some time been making determinations about requests for customer data made by European rightsholder organizations, taking into consideration EU Directive 2004/48/EC and the EU Information Society directive 2001/29/EC, the EU Electronic Commerce directive 2000/31/EC and European personal data protection directive 2002/58/EC.

However, following the European Court of Justice's decision in January 2008 in the *Productores de Música de España (Promusicae) v. Telefónica de España*[51] case where a Spanish ISP was not required to divulge customers' information to rightsholders in a civil copyright case, entertainment industry groups have asked that ISPs be required to disclose customer information for alleged copyright infringers in their public submissions to the United States Trade Representative's Office on the proposed Anti-counterfeiting Trade Agreement (ACTA).[52] These developments raise significant privacy and civil liberties concerns for all Internet users.

Intermediaries' Role in Protecting Freedom of Expression

Internet intermediaries play a key role in facilitating citizens' online freedom of expression. There are sound policy reasons for limiting Internet intermediaries' liability or granting them immunity for comments made by third parties in order to foster free speech and the flow of information online. However, overbroad notice and takedown regimes, such as the U.S. copyright safe harbor regime have proven to be particularly susceptible to abuse and have imposed significant costs on Intermediaries. In providing its stocktake of legal regimes for Internet Intermediary liability, the ICCP report should consider the benefits of different types of regimes for meeting the various goals of the Seoul Declaration, including the protection of citizens' freedom of expression and personal information, the development of innovative new Internet services and technologies, the promotion of competition and user choice, and the expansion of access to and use of the Internet infrastructure.

Misuse of Notice and Takedown Regimes

The U.S. copyright notice and takedown provisions in section 512 of the Copyright statute have been misused by private parties to censor legitimate criticism, rather than to protect intellectual property.[53] In 2003, after much public criticism about the performance of its

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[51] European Court of Justice 2008/C 64/12, 29 January 2008, Case C-275/06 referred from Juzgado de lo Mercantil No 5 de Madrid, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:064:0009:0010:EN:PDF.

[52] Public comments received by the Office of the U.S. Trade Representative in response to the Request for Comments of February 15, 2008, posted in four PDFs, July 2008, available at http://www.ustr.gov/assets/Document_Library/Federal_Register_Notices/2008/July/asset_upload_file476_14996.pdf.

[53] Jennifer Urban and Laura Quilter, *Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, SANTA CLARA COMPUTER & HIGH TECH. L. J .,Vol. 22 No. 3, p. 621,

electronic voting machines, Diebold, Inc. issued a series of copyright takedown notices to numerous online service providers (OSPs), demanding that they take down websites that hosted email messages from Diebold employees that disclosed security vulnerabilities in the company's electronic voting machines, which were to be used in the upcoming 2004 U.S. Presidential election, and websites that linked to those messages. In this case there was a legal challenge; the court subsequently ruled that Diebold was misusing the copyright takedown provisions to censor material that was covered by "fair use" under U.S. law - political commentary on a matter of high public importance.[54] However, in the vast majority of cases, an OSP is not likely to investigate the validity of a purported takedown notice, or expend resources to obtain clarification of its legal obligations, and the operator of the removed website will not have the resources to challenge the takedown.

More recently, major media companies have used DMCA copyright takedown notices to silence political speech. In 2007 a supporter of Barack Obama created "Vote Different", a YouTube video parody of the famous Apple "Superbowl" advertisement based on George Orwell's *1984*, which portrayed Hilary Clinton (then a Presidential candidate) as "Big Brother". The video was met ith a copyright threat by the publisher who claims to own the copyright in George Orwell's novel.[55] During the 2008 Presidential campaign, overreaching DMCA copyright notices from CBS, Fox News, the Christian Broadcasting Network and NBC networks took down videos from the respective campaigns of Senators McCain and Obama that had been posted on YouTube.[56] And in January 2009, YouTube cancelled the channel of trade union publication Progress Illinois after receiving several copyright takedown notices for its videos from Fox News.[57]

(2006), Summary at http://mylaw.usc.edu/documents/512Rep/, the only empirical study yet to be completed on takedown notices under the DMCA, noting that notices to ISPs sent to the Chilling Effects project contained a substantial number of demands to remove files from peer to peer networks (which are not covered under the DMCA's safe harbor provisions). An ISP could only honor these by terminating the user's entire account. The report also noted that one third of the takedown notices analyzed contained an obvious question for a court to adjudicate, and over one half of the notices sent to Google under 17 USC 512(d) demanding removal of links in its index were sent by businesses targeting apparent competitors. See also Malla Pollack, *Rebalancing Section 512 to Protect Fair Users from Herds of Mice-Trampling Elephants, or a Little Due Process is Not Such a Dangerous Thing*, SANTA CLARA COMPUTER & HIGH TECH. L. J, Vol. 22, No. 3, p. 547, (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=873902.

[54] Online Policy Group, Nelson Chu Pavlosky and Luke Thomas Smith v. Diebold, Inc. and Diebold Election Systems, Inc., (N.D. Ca, Case No. C 03-04913, September 30, 2004), available at http://www.eff.org/legal/ISP_liability/OPG_v_Diebold/20040930_Diebold_SJ_Order.pdf.

[55] PR NEWS WIRE, *Owner of Rights to Orwell's '1984' Novel Speaks Out on Political Ad Controversy*, March 27, 2007, available at http://sev.prnewsire.com/advertising/20070327/CGTU06327032007-1.html.

[56] *McCain Campaign Feels DMCA Sting,* EFF DEEPLINKS BLOG, October 14, 2008 at http://www.eff.org/deeplinks/2008/10/mccain-campaign-feels-dmca-sting; John Eggerton, *NBC, Obama Campaign Spar Over YouTube Video*, October 1, 2008, Cable & Broadcasting, available at http://www.broadcastingcable.com/article/talkback/115679-NBC_Obama_Campaign_Spar_Over_YouTube_Video.php.

[57] *Fox News Censors Political Expression,* EFF DEEPLINKS BLOG, January 7, 2009 at http://www.eff.org/deeplinks/2009/01/fox-news-censors-political-expression.

The DMCA provisions give OSPs the incentive to take down first, and ask questions (if at all) later. As a result, the U.S. copyright takedown provisions have effectively acted to censor much speech on the basis of a mere claim of infringement by a private party.[58]

The notice and takedown process has largely been automated through the use of "bots" which scan the Internet for potentially infringing material. Unfortunately this has led to notices being issued with little, if any, human review. Copyright owners have issued takedown notices for material that is in the public domain (and hence not copyrighted), for a child's book report about "Harry Potter", for a family photo of a "Mrs. Harrison" (no relation to former Beatle George Harrison) and for a song written by a professor of astronomy with a similar name to a popular recording artist.[59] Section 512(c)(3) requires the copyright owner to state that he or she has a "good faith" belief of infringement. However, content owners have maintained that section 512 does not require any consideration as to whether the use in question is a lawful fair use.[60]

The misuse of takedown notices could be avoided by requiring that takedown notices be reviewed by a judge,[61] or alternatively, by adopting an appropriately tailored "notice and notice" regime such as that recently proposed by Canada.[62]

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[58] The Church of Scientology has also used copyright takedown notices to silence its critics. This has been particularly successful against critics that reside outside of the United States because of a limitation in the DMCA's counter-notification process. The Church issued a takedown notice to a U.S.-based ISP to remove a website that it was hosting that was critical of the Church's teachings. The website's authors resided outside of the United States. Although they believed the copyright infringement claim was false, they were not able to issue a counter-notice, to have the website restored, because that would have required them to agree to the jurisdiction of U.S. courts, which was not appropriate given their location. The Church of Scientology has also sent dozens of takedown notices to the Internet search engine, Google, demanding that it remove links to certain websites that are critical of the Church when it displays search results for 'Scientology'. Thus, the Church of Scientology has successfully used the DMCA notice and takedown provisions to prevent Google users from finding criticism about the Church.

[59] See *Unsafe Harbors – Abusive DMCA Subpoenas and Takedown Notices*, EFF report on section 512, at http://www.eff.org/IP/P2P/20030926_unsafe_harbors.php, and the Chilling Effects Project, at http://www.chillingeffects.org.

[60] A federal district court has soundly rejected this view, *see* Lenz v. Universal Music Corp. et al, 572 F.Supp. 2d 1150, 1156 (2008).

[61] For instance, in Brazil, case law has held that Internet intermediaries are generally not financially liable for unlawful user conduct and illegal user-generated content. In most situations, Internet intermediaries are only required to act upon receiving a court order, which minimizes legal uncertainty. However, Internet intermediaries can still be held liable for negligence if they fail to comply with court orders determining the removal of illegal content or fail to present to the court information they might have that could help the victim identify the user responsible for the wrongdoing. This approach has the benefit of leaving to the courts, and not to Internet intermediaries, the analysis of what constitutes harmful material, and it also allows victims to receive injunctive relief in certain circumstances. See generally M. LEONARDI, RESPONSABILIDADE CIVIL DOS PROVEDORES DE SERVICOS DE INTERNET (Juarez de Oliveira, Brazil, 2005 (in Portuguese)), also available at www.leonardi.adv.br/mlrcpsi.pdf.

We ask that the ICCP Report examine these issues. It should include data on the volume of misuse, and study the potential benefits for facilitating online freedom of speech by Internet Intermediaries adopting a notice-notice regime in place of a notice and takedown regime.

Protecting Online Speech

By comparison, the absolute immunity that U.S. law provides to Internet Intermediaries in relation to defamation, obscenity and all other basis of liability except for intellectual property infringement has fostered a vibrant array of online speech and Internet-related businesses, such as eBay, and Amazon.com. The United States Congress decided that shielding intermediaries from liability was the best approach to promote free speech and commerce online. It enacted section 230 of the Communications Decency Act, 47 U.S.C. §230 ("Section 230"), which provides federal immunity to any cause of action that would make Internet Intermediaries liable for information originating with a third-party user of the service.[63]

In enacting Section 230, the U.S. Congress intended to promote a range of policy goals. First, the continued development of vibrant and diverse online media and services. Second, it gave Internet Intermediaries the flexibility to engage in voluntary self-regulation — that is, to police their own systems for objectionable content. Under Section 230, users and providers of interactive computer services are protected from being held liable for exchanging others' words, content or observations as part of the dialogue carried on the Internet. Such liability was, "for Congress, simply another form of intrusive government regulation of speech."[64] Section 230 was designed to protect intermediaries from liability "for exercising the usual prerogative of publishers … to edit the material published…."[65] It removes the disincentives for an Internet Intermediary retaining editorial control over material posted on its forum or network, and thereby enables self-regulation of content posted on the Internet.

As previously discussed, online intermediaries play an increasingly indispensable role in facilitating public speech. In the years since Section 230 was passed, U.S. courts have interpreted it broadly to constitute a blanket intermediary protection for the behavior of third party users. As the United States Court of Appeals for the Ninth Circuit explained, Congress enacted Section 230 "to encourage the unfettered and unregulated development of free speech on the Internet."[66] Courts have upheld Section 230 in a variety of contexts. Section 230

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[62] *See* Canadian Bill C-61 (since lapsed without passage): when an ISP receives notice from a rights holder that one of its subscribers is allegedly hosting or sharing infringing material, the ISP would be required to forward the notice to the subscriber. Blocking access to such material would be required only when ordered by a court. Upon receipt of a notice, ISPs would also be required to keep a record of relevant information for a specified time. Rights holders would have the legal means to compel ISPs to comply with the regime. The Government would have the power to prescribe the form that must be used in giving notices and to set fees that may be required to be paid by rights holders to ISPs for processing such notices. Summary at http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01142e.html.

[63] Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

[64] See Zeran, 129 F.3d at 330: "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."

[65] Id.

[66] Batzel v. Smith, 333 F.3d 1018, 1027-28 (9th Cir. 2003).

exempts Internet Intermediaries from defamation liability for republication.[67] However, the protection of Section 230 is not absolute. Section 230's immunity does not apply to federal intellectual property law claims, such as copyright, patent and trademark, nor does it provide protection against federal criminal law or certain federal communications privacy claims. (However, it does provide protection against state criminal laws. See Section 230(e)).[68] Courts have also refused to uphold immunity where an Internet Intermediary materially contributes to the creation of the content.[69]

With clear statutory liability protection, an extremely robust entrepreneurial and innovative Internet culture that encourages third party speech has developed in the United States. Bolstering already-strong First Amendment protections, Section 230 has helped encourage the development of message boards, blogs, online trading and selling websites like craigslist, eBay and Amazon, consumer review sites like Yelp, user generated content sites like YouTube and Flickr, social networking sites like Twitter, Facebook and MySpace, and many more innovative online services.[70]

For example, Amazon.com's site allows users to post reviews of its products, which allow other users to receive information about which products to purchase. Section 230 protects Amazon, enabling user reviews which help consumers make purchasing decisions.[71] Likewise, eBay invites its users to rate and comment on their transactions with other users. Section 230 protects eBay, thereby facilitating the development and sharing of third-party content on eBay's Feedback Forum.[72]

Section 230 reflects particular cultural values – in particular, the view that minimizing government regulation imposing liability for speech on the Internet would "maintain the robust nature of Internet communication"[73] and that adopting a regulatory approach that imposes costs on online speakers would encourage intermediaries to host speech for which third parties – but not the intermediaries – could be made liable. In creating the immunity of

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[67] Barrett v. Rosenthal, 40 Cal. 4th 33, 62 (Cal. 2006).

[68] *See, e.g.,* 47 USC § 230(b)(2), (3): "It is the policy of the United States [...] to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."; 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (Rep. Christopher Cox speaking in support of the future statute, noting that CDA 230 would "protect [online service providers] from taking on liability ... that they should not face ... for helping us solve this problem" as well as establish a federal policy of nonregulation to "encourage what is right now the most energetic technological revolution that any of us has ever witnessed.")

[69] Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 2008 WL 879293 (9th Cir. April 3, 2008).

[70] Section 230 protects a "provider or user of an interactive computer service." Courts have interpreted Section 230 protection to be "quite robust, adopting a relatively expansive definition of 'interactive computer service[.]'" Carafano v. Metrosplash.com, Inc., 339 F. 3d 1119, 1123 (9th Cir. 2003).

[71] Schneider v. Amazon.com, 31 P.3d 37, 43 (Wash. App. 2001).

[72] Gentry v. eBay Inc., 121 Cal. Rptr. 2d 703, 714 (Cal. App. 2002).

[73] Zeran, 129 F.3d at 330; *see* 47 U.S.C. § 230(a)(1): "rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens".

Section 230(c)(1), the U.S. Congress "made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."[74] It was concerned about the chilling effect that the possibility of tort liability for others' speech would have on service providers. "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." [75] Section 230 facilitated Congress' policy goals by providing absolute immunity for certain claims, and thereby avoided the problems of the heckler's veto associated with notice and takedown regimes like the DMCA (discussed above).

Finally, it is worth noting that Section 230 does not prevent the imposition of liability upon third parties who engage in defamation or other conduct that damages other parties. Through separate legal processes, the allegedly injured party can use civil pre-litigation mechanisms to identify the content provider,[76] and the courts can then resolve the underlying dispute between the provider and the alleged injured party. In some cases, challenges not unique to online cases, the tortfeasor may not be readily found or have the resources to adequately compensate an injured party. However, by protecting online service providers from liability for the third-party content (even if this leaves some plaintiffs uncompensated), Section 230 promotes and encourages a set of widely beneficial online services, and reflects a policy judgment that the growth of these services is worth the occasional cost to a particular plaintiff.

Privacy and Due Process Considerations

From the perspective of end-users, data retention policies and the disclosure of their information to law enforcement or government authorities can have serious privacy implications. From the perspective of Internet intermediaries, it can be argued that the costs of compliance might hinder their activities or the overall quality of their services. From the perspective of victims and law enforcement, however, data retention is desirable, as a somewhat effective way to identify the user(s) responsible for the illegal conduct. In its stock-taking of different legal approaches, we urge the ICCP report to consider the impact of both technological and regulatory measures on the privacy of Internet users and to pay special attention to the need to preserve due process for individuals.

Internet intermediaries often receive requests from law enforcement agents and third parties for the disclosure of user data, in order to help with investigative efforts and prosecution of illegal user behavior. However, it is imperative that such requests are handled according to due process rules and with judicial oversight. Any extra-judicial mandatory disclosure obligation raises very substantial privacy and due process concerns.

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[74] Zeran, 129 F.3d at 330-31.

[75] Zeran, 129 F.3d at 331.

[76] However, U.S. courts impose strict procedural safeguards "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *See* Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 771 (N.J. App. Div. 2001).

Unless the secrecy of a request is absolutely necessary for an investigation, users should always be informed about requests for information that concerns them. Users should also be able to appeal a decision before the disclosure of their personal information.

From a public policy perspective, mandating divulgence of customer data from intermediaries in secrecy, without providing appropriate due process and judicial review, threatens users' privacy and personal data protection rights and is ripe for misuse by unscrupulous parties.

Any policy recommendations should lead to solutions that recognize and respect the fundamental rights of all stakeholders in the information society. At a minimum, any disclosure obligation must incorporate adequate due process and be conditioned on a process of judicial review.[77]

Network Management and The Importance of Neutral Networks

Access to the Internet remains an increasingly important resource to individuals, as both consumers and citizens. As consumers, individuals gain access to digital content such as music, films, e-books, games and any number of goods and services through e-commerce. As citizens, individuals gain the ability to both access and create conduits for discourse, debate, and creativity. The wealth of information available, and the variety of applications that consumers can use to communicate, allow for an unprecedented freedom of expression and information.

However, this freedom is under threat. Because many ISPs are vertically integrated with owners of other communication and content services they have the technical ability to act as gatekeepers, blocking or degrading consumers' access to certain content and applications, or limiting the types of equipment that can be attached to the network. There are several examples of such behavior in the US and Canada. In the United States, Madison River Communications, a telecommunications company and ISP, blocked customers from using voice over IP (VoIP) services, which would compete with its own telephony services..[78] Comcast, a major ISP that also provides television programming through its cable television service, sent falsified signaling data along its network interfering with its customers' use of a wide range of popular protocols and applications, including a P2P application widely used for online distribution of lawful movies, television programs, and open source software.[79] A

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[77] We note that Article 10 of the Universal Declaration of Human Rights states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

[78] In the Matter of Madison River Communications, LLC, Consent Decree, File No. EB-05-IH-0110, available at http://fjallfoss.fcc.gov/edocs_public/Query.do;jsessionid=K8FPhccJcYc2LFQsxKBYGLYnDnCLHMTlnlW1zQr5Dzn1B0QqdQJj!-1352151588!-02694468?numberFld=&numberFld2=EB-05-IH-0110+&docket=&dateFld=&docTitleDesc=

Applications, Memorandum Opinion and Order, WC Docket No. 07-52 (August 20, 2008),

[79] *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, WC Docket No. 07-52 (August 20, 2008), available at http://fjallfoss.fcc.gov/edocs_public/Query.do?numberFld=08-183&numberFld2=&docket=&dateFld=&docTitleDesc=.

Canadian ISP, Telus, prevented its users from reaching the website of a labor union that represented the company's striking employees.[80]

Such behavior can severely limit the usefulness of the Internet and frustrate consumer aims. When a provider can selectively control access, it may select against speech or services that it perceives as harmful to its self-interest. This may include content, applications, or devices that compete with the provider's own interests; or content that the provider disfavors, such as criticism of the provider itself. These harms are exacerbated when a lack of competition prevents users from migrating away from discriminatory providers, as well as when consumers lack the ability and information necessary to discover any discrimination.

In addition to consumers, discriminatory network management practices would harm innovators as well. If dozens or hundreds of ISPs start deploying their own secret and discriminatory network management practices, the task of an innovator who conceives and implements a new use for the Internet suddenly becomes daunting. At best, they would have to test and debug their new protocol on all of these networks; at worst they would have to negotiate with all of those ISPs and obtain permission to use their innovation on the Internet.

In order to preserve the openness of the Internet, to achieve the full benefits of the participative web, and to level the playing field for competition that would facilitate convergence in digital networks, goals set out in the Seoul declaration, the ICCP report should study the importance of the non-discriminatory nature of the Internet and recommend best practices for regulations that would prevent Internet service providers from blocking, degrading or discriminating against content, applications, or devices.

Additional Considerations - Cost to business efficiency, sustainability and potential market and technological consequences.

Data retention and compliance with notice and take down regimes or court orders generate significant costs for Internet intermediaries. Big Internet companies can internalize these costs and pass them to subscribers; smaller intermediaries might prefer to close shop instead.

A single-minded focus on identifying alleged copyright infringers and wrongdoers might hinder the goals of the Seoul Declaration. For example, open wi-fi spots can certainly be used by criminals, but demanding user identification and data retention for every wireless point of access to the Internet may prevent the dissemination of these services, due to the associated costs of such demand and the privacy implications for its users.

Conclusion and Recommendations

To develop a comprehensive understanding of the important economic and social benefits provided by Internet intermediaries and to identify the potential public policy challenges in

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[80] OpenNet Initiative: Bulletin 010, *Telus Blocks Consumer Access to Labor Union Website and Filters an Additional 766 Unrelated Sites*, August 2, 2002, Last Update August 2, 2002, available at http://www.opennetinitiative.net/bulletins/010.

the implementation of the Seoul Declaration on the Future of the Internet Economy, we recommend that the ICCP report should:

- provide comparative analysis of the social and economic value attributable to the different Internet Intermediary safe harbor and limitation of liability regimes in use in OECD countries,;
- provide comparative analysis of the respective impacts of immunity regimes, notice and takedown, and notice-notice regimes, in OECD member countries' laws on protection of online speech;
- produce best practice recommendations on legal norms and policy practices for countries considering implementation of legislative limitation of liability regimes, and for entities within OECD countries that are developing policies and practices to implement such legal regimes;
- consider the importance of a non-discriminatory and open Internet for achieving the full benefits of the participative web and to level the playing field for competition that would facilitate convergence in digital networks; and
- produce best practice recommendations for legal norms that would prevent Internet Service Providers from unfairly blocking, degrading or discriminating against content, applications, or devices.

We would be pleased to elaborate on the matters discussed above and to provide any additional information that would be of assistance to the OECD in developing the ICCP report. We look forward to further opportunities to provide comments on the public policy issues raised by Internet intermediaries' role in the implementation of the Seoul Declaration on the Future of the Internet Economy.

The Civil Society Information Society Advisory Council

Experts on Internet Intermediaries

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