



Intermediary Liability in Kenya

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Introduction

Internet access in Kenya has increased exponentially and is now estimated at 11.8¹ million users, at over 28.7²% of the population. According to a report by market research firm, TNS RMS, 77% of Kenyan internet users access the internet via their mobile phones³, others access through internet service providers, data processing and web casting providers. Companies such as Access Kenya, Kenya Data Networks and Wananchi – are transforming into tier two and three companies by offering converged voice, data and video/entertainment data services and rolling out national and municipal fibre backbones and wireless broadband access networks. A Kenya ICT Board⁴ report on how Kenyans use the internet, notes that most Kenyan internet users go online everyday mainly to communicate and search for information. Internet intermediaries play a critical role in facilitating this sharing and exchange of information and knowledge.

According to the OECD⁵, 'Internet intermediaries bring together or facilitate transactions between third parties on the internet. They give access to, host, transmit and index content, products and services originated by third parties on the internet or provide internet based services to third parties.' The OECD⁶ defines internet intermediaries as including 'internet access and service providers (ISPs), data processing and web hosting providers including domain name registrars, internet search engines and portals, internet payment systems, e-commerce intermediaries and participative networking platforms which include internet publishing and broadcasting platforms that do not themselves create or own content being published or broadcast'.

From a Kenyan perspective, it is important to consider mobile service providers as intermediaries since mobile telephony continues to set the stage for adoption of internet access. The Communications Commission of Kenya introduced a unified technology neutral licensing and regulatory framework for the ICT sector in 2009, under which the following 3 categories are internet intermediaries.

¹Communication Commission of Kenya, Quartely Statistics Report Third Quarter of the Financial Yr 2011/2012, 6, http://www.cck.go.ke/resc/downloads/SECTOR_STATISTICS_REPORT_Q3_JUNE_2012.pdf

² Ibid. 27

³Bob Burgoyne "Digital life, Kenya's Findings" CIO Magazine (East Africa) 14 March 2012, <http://www.cio.co.ke/news/top-stories/Digital-life,-Kenya-findings/>

⁴Kenya ICT Board, Julisha Kenya ICT Market Survey Report 2011 <http://www.scribd.com/doc/100515878/Julisha-Kenya-ICT-Market-Survey-2011>

⁵OECD Role of Internet Intermediaries in Advancing Public Policy Objectives (2011) 21 http://www.oecd-ilibrary.org/science-and-technology/the-role-of-internet-intermediaries-in-advancing-public-policy-objectives_9789264115644-en

⁶OECD The Economic and Social Role of Internet Intermediaries (2010) 9 <http://www.oecd.org/dataoecd/49/4/44949023.pdf>

Network Facilities Provider (NFP)	Can own and operate any form of communications infrastructure (e.g. satellite, terrestrial, mobile, or fixed)
Applications Service Provider (ASP)	Provides all forms of services to end users using the network services of a facilities provider
Contents Services Provider (CSP)	Operates content platforms for information services, data processing services, IPTV, premium rate and similar companies.

Source: http://www.cck.go.ke/links/consultations/closed_consultations/unified_licensing.html

Internet intermediaries play a role in shaping how Internet users perceive and manage their personal information. By providing access and understandable privacy options, backed up by privacy friendly default settings that allow users to stay anonymous, Internet intermediaries can help users to control their personal data⁷. Hosting providers facilitate forums for expression, which are open and mostly free of charge. This openness means that some users will post content that is unlawful or offensive but in the same breath this can be looked at as enabling individuality and self-expression.

According to the Centre for Democracy and Technology⁸ 'Intermediary liability arises where governments or private litigants can hold internet intermediaries liable for unlawful or harmful content created by users of their services.' Unlawful or offensive content can result in litigation for internet intermediaries since they are the easiest to deal with considering they have an office, an address, and a bank account. According to the OECD (2010), however, internet intermediaries facilitate the dissemination process as opposed to making decisions on what content passes through their infrastructure. The role of internet intermediaries as well as their limitations on enabling communication and facilitating information flows has recently placed a policy focus on internet intermediaries.

⁷OECD The Economic and Social Role of Internet Intermediaries (2010) 42
<http://www.oecd.org/dataoecd/49/4/44949023.pdf>

⁸Centre for Democracy and Technology Intermediary liability: protecting Internet platforms for expression and innovation (Washington CDT 2010) 1 [https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability_\(2010\).pdf](https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability_(2010).pdf).

Internet Service Providers

The Internet Service Provision (ISP) industry in Kenya is competitive. There are 72 licensed ISPs of which about half are operational.⁹ The mass market is controlled by mobile telecom companies and thus harder to penetrate. The cost of deployment/setting up shop is high. Furthermore, there are several licensing requirements needed before starting a business in Kenya.

ISPs are required to register with the Communications Commission of Kenya (CCK). The licensing regulations i.e. the Kenya Information and Communications (Licensing and Quality of Service) Regulations 2010 are governed by s. 24 and 25 of the Kenya Information and Communication Act.¹⁰

The CCK operates a Unified Licensing Framework (ULF). Under this system, applicants are required to provide the CCK with information in the prescribed forms that include: registration/identification documents,¹¹ information on shareholding,¹² directors etc., contact information,¹³ detailed business plans where applicable, details of experience in managing proposed services/activities, and any other relevant information e.g. evidence of tax compliance. Applicants must also pay the prescribed fees after which the applications will be considered and response given within 135 days.

Legislation in its current form encourages self-regulation, since the existing legislation may not be exhaustive or comprehensive in all cases. In light of this, Kenya has an industry association - Telecommunications Service Providers Association of Kenya (TESPOK)¹⁴ a professional, non-profit organization representing and advocating for the interests of Telecommunication service providers in Kenya established in 1999. However, while TESPOK is not recognized by regulation, it plays a key role as stakeholder in policy and legislation development processes.

The Kenya ICT Action Network (KICTANet) and the Telecommunications Service Providers Association of Kenya (TESPOK) in partnership with the Ministry of Information and Communications introduced, and are spearheading debate, including research on intermediary liability.

The first series of debates on intermediary liability were introduced by KICTANet's discussions on internet governance during the Kenya Internet Governance Forum (KIGF-2012), which begun with mailing list discussions conducted on three mailing lists, KICTANet, Skunkworks and ISOC-Kenya Chapter. The Kenya and East Africa IGF's held in August 2012 held sessions that introduced the issue for the first time. The research on Intermediary Liability in Kenya which was disseminated to

⁹"Kenya Internet Usage and Telecommunications Reports" Internet World Stats
<http://www.internetworldstats.com/af/ke.htm>

¹⁰Communications Commission of Kenya The Kenya Information and Communications Act Chapter 411a <http://www.cck.go.ke/regulations/downloads/Kenya-Information-Communications-Act-Final.pdf>

¹¹ Entities should be registered in Kenya

¹² 20% shareholding should be held by Kenyans on or before the end of 3 years after receipt of license

¹³ Registered offices and premises

¹⁴<http://www.tespok.co.ke/>

stakeholders¹⁵ who included the country's major telcos, the industry regulator, the Ministry of Information and Communication, Civil Society among others.

Constitutional and Legislative Environment

The Constitution

The Constitution of Kenya 2010 is the country's supreme law.¹⁶ This Constitution, replaced Kenya's old Constitution upon its promulgation in August 2010. It introduced far-reaching changes to the governance of the Country.¹⁷ Kenya is currently in a period in which new legislation is being passed in order to be congruent with the constitution, and all hitherto existing legislation is subject to revision dependant on its constitutionality.

The Constitution contains a Bill of Rights¹⁸ which provides a framework for the recognition and protection of human rights and fundamental freedoms of all Kenyans. These are considered inherent and subject only to the limitations contemplated in the Constitution.¹⁹ Further, in applying provisions of the bill of rights, courts are required to among others, adopt interpretations that favour the enforcement of the rights or fundamental freedoms.²⁰

The Bill of Rights creates duties and responsibilities on all persons, the breach of which would give rise to various forms of liability. These include among others: Article 31, which guarantees the right to privacy;²¹ Article 32, which guarantees freedom of conscience, religion and opinion; Article 33, which guarantees freedom of expression; Article 34, which guarantees freedom of the media; Article 35, which provides for the right of access to information; Article 40, which protects the right to property; Article 46, which provides for the rights of consumers; Article 47, on the right to fair administrative action; Article 48, which guarantees access to justice and Article 50, which guarantees fair hearing to all persons.

The rights and freedoms listed above, save for the right to fair trial, are subject to certain limitations imposed either by the Constitution or statute law. For example, freedom of expression and freedom of the media do not extend to expressions that amount to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or

¹⁵ The dissemination meeting took place on 10 October 2012

¹⁶ Article 2, Constitution of Kenya, 2010

¹⁷ Most notably; the devolution of power and separation of Sovereign power with an independent Judiciary, an Executive and Parliament; with the latter two having devolved structures and legislative assemblies respectively, in each of the 47 counties across the country.

¹⁸ Chapter 4, Constitution of Kenya, 2010

¹⁹ Art. 19, Constitution of Kenya, 2010

²⁰ Art. 20, Constitution of Kenya, 2010

²¹ This includes: the right not to have their person, home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.

incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4)²² of the Constitution.²³

Legislative and Regulatory Environment

Proposed Legislation

Kenya has several bills that refer to intermediary liability. These include the Consumer Protection Bill 2011,²⁴ Freedom of Information Bill 2012,²⁵ the Data Protection Bill 2012.²⁶ At the time of writing, the bills are undergoing internal review and stakeholder consultation, a process being spearheaded by the Commission for the Implementation of the Constitution (CIC).²⁷

However, while the bills are silent on, and do not directly define internet intermediaries, they do give rise to new rights and duties the breach of which would in effect, amount to the introduction of new forms of liability. The Consumer Protection Bill for example, has provisions that would create liability for the breach of the right to privacy, the provision of unsolicited services, and the failure to disclose of material information. Under the Data Protection Bill, intermediaries can be found liable for unlawful collection of information, misuse of information and wrongful disclosure of information.

One bill which would have changed the intermediary landscape should it have been passed into legislation is the Electronic Transactions Bill, 2007. This bill contained key provisions on intermediary liability which unfortunately were not, like other sections thereof, integrated into the Kenya Information and Communication Act during its revision in 2009.

The bill borrowed extensively from the EU Commerce Directives²⁸ made provision for 'safe harbours' limiting civil and criminal liability for service providers in respect of third parties where they acted as mere conduits, when hosting, with respect of caching processes, and where they used information location tools.²⁹ Further, it provided for a notice and take-down procedure for addressing complaints of infringement of rights, while also granting service providers immunity for any actions taken once notified of the infringing activity.

²²The grounds include: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

²³Art. 33 (2) and 34 (1), Constitution of Kenya, 2010

²⁴<http://cickenya.org/bills/consumer-protection-bill-2011>. The Consumer Protection Bill provides for consumer rights and warranties, regulates consumer agreements and unfair trade practices in consumer transactions, provides remedies to consumers, and establishes a Consumer Protection Agency. Further, this Bill may come into force earlier as it is awaiting presidential assent having already received parliamentary approval.

²⁵<http://cickenya.org/bills/freedom-information-bill-2012>. The Freedom of Information Bill provides for a framework for the implementation of the right to access to information held by the state.

²⁶<http://cickenya.org/bills/data-protection-bill-2012>. The Data Protection Bill seeks to regulate the collection, processing, storage and use of personal information. While there is no specific date when the freedom of information bill and the data protection bill will come into force, it is expected that they shall be presented to Parliament within a year of their publication or soon thereafter.

²⁷ This is an Independent Constitutional Commission whose function is to monitor, facilitate, coordinate and oversee the development of the legislation and administrative procedures required to implement Kenya's 2010 Constitution.

²⁸<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0001:EN:PDF>

²⁹Part IV

Moreover, it stated in Clause 27 that service providers were not under any general obligation to monitor data transmitted or stored or to actively seek facts or circumstances which were indicative of unlawful activity, although they were required to monitor and report unlawful activity once they were aware. However, the limitation on liability proposed under the bill did not extend to obligations such as: those founded on contract; imposed by law or court processes; and those based on common law or statute.

Legislation possibly affecting intermediary liability

Legislation governing intermediaries and circumstances under which they are liable include among others:

1. The National Cohesion and Integration Act of 2008 - s.62 makes liable any newspaper, radio station or media enterprise for publishing any utterance which amounts to the offence of ethnic or racial contempt.³⁰
2. The Sexual Offences Act- makes any person liable under – s.12 for the promotion of sexual offences with children through the manufacture, distribution, supply or display of articles or content; under s.14 for the promotion of child sex tourism; and under s.16 for the distribution of child pornography.³¹
3. The Kenya Information and Communication Act- s. 29 makes it an offence for any person to send messages that are grossly offensive, indecent, obscene, or those that are false and are intended to cause annoyance, inconvenience or needless anxiety on others. Secondly, s.30 makes persons running telecommunications systems liable should they out of the course of duty, intentionally modify or interfere with the contents of messages sent through their systems. S. 31, makes a licensed telecommunication operator liable should they intercept, or disclose the contents of messages sent through their telecommunication systems outside the course of their business. Also, s. 84D makes any person liable for the publication or transmission of obscene information.³²

Further, S.93 makes it an offence to disclose personal information during the lifetime of an individual save for where the information is required to facilitate a statutory function of the CCK and for the purposes of any criminal or civil proceedings. Rule 26 of the Domain Name Regulations³³ made under the Act, provides that a registrant (i.e. a domain name holder) bears liability for the infringement of third party rights and interest arising from holding or using a domain name in the ccTLD.

³⁰Act No. 12 of 2008 <http://www.cohesion.or.ke/images/downloads/national%20cohesion%20and%20integration%20act%202008.pdf>

³¹Act No. 3 of 2006 [http://www.kenyalawreport.co.ke/Downloads/Acts/Sexual%20Offences%20Act%20%20\(%203%20of%202006\)%202009.pdf](http://www.kenyalawreport.co.ke/Downloads/Acts/Sexual%20Offences%20Act%20%20(%203%20of%202006)%202009.pdf)

³²Cap 411A (Rev. 2011);

[http://www.law.co.ke/klr/fileadmin/pdfdownloads/Acts/KenyaInformationCommunicationsAct\(Cap411A\).pdf](http://www.law.co.ke/klr/fileadmin/pdfdownloads/Acts/KenyaInformationCommunicationsAct(Cap411A).pdf)

³³The Kenya Information And Communications (Electronic Certification And Domain Name Administration) Regulations, 2010

4. The Penal Code –s.20 provides for the parties to offences;³⁴s.194 makes a person liable for defamation if they publish or convey defamatory material. In addition, in s.117, it criminalises any act, which in any way interferes or prevents the execution of any legal process.³⁵
5. The Copyright Act- s.35 creates liability on any person for the violation of any copyrights, and this includes among others, the distribution, broadcast and the availing to the public of protected works without the licence or consent of the copyright owner.³⁶S. 38 creates offences related to copyright infringement and penalties³⁷ for acts such as the sale, hire, distribution, possession, importation of copyrighted works.
6. The Trademark Act- s.7 outlaws the use of identical or near resembling marks likely to deceive or create confusion.³⁸S.58D makes forgery of a registered trademark and the false application a registered trademark to goods and services an offence. Further, S.58F makes it an offence to counsel, aid, abet or be an accessory to the commission of an offence under Part XI of the Act.
7. The Industrial Property Act – s. 105 creates liability for the infringement of patent, registered utility models or industrial designs.³⁹ Further, s. 109 provides for the offence of intentional infringement of patent, registered utility models or industrial designs.
8. Common Law – Intermediaries can also be liable through actions founded on common law of contracts such as breach of contract, conditions or warranties. In addition, liability can arise through tortious actions based on subjects such as defamation, copyright infringement, negligence, nuisance, invasion of privacy, breach of confidence, infliction of emotional distress, pain and suffering, economic torts such as fraud, tortious interference, and so on. Claims based on vicarious liability can also be made leading to liability of intermediaries for the acts or omissions of their employees.

³⁴Includes every person who committed the act or omission, and every other who enabled, aided, abetted, counselled or procured the commission of the offence in question.

³⁵Cap 63 (Rev. 2009) <http://www.kenyalaw.org/fileadmin/pdfdownloads/Acts/PenalCodeCap63.pdf>

³⁶No. 12 of 2001. http://www.copyright.go.ke/rough/copyright_act.pdf

³⁷ Include fines of up to Kes. 400,000 (1US\$ is equivalent to Kes. 83) and imprisonment terms of up to 10 years.

³⁸

³⁹Act No. 3 of 2001 (Rev.

2010) <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/IndustrialPropertyActCap509.pdf>

Institutions

Several institutions are relevant to intermediaries in Kenya. They are:

- The Communications Commission of Kenya (CCK) which was established in 1999 as a semi-autonomous regulatory authority. It carries out several functions within the communication industry such as licensing and regulation of the industry; management of the country's frequency spectrum and numbering resources; development of e-commerce; approval of communication equipment; consumer protection; tariff regulation; and management of the universal access fund.
- Kenya Copyright Board which was established in 2001 and is mandated to administer and enforce copyright and related rights in Kenya. Its functions include administration, coordination and oversight of implementation of copyright legislation; regulation of collective service management societies; training; civic education and maintaining a data bank of authors and their works.
- Kenya Industrial Property Institute (KIPI) is a government parastatal established in 2002. Its functions include among others: the administration of industrial property rights i.e. patents, utility models, industrial designs and "technovations"; provision of technological information to the public; promotion of invention and innovation and the provision of training on industrial property.
- The National Cohesion Integration Commission (NCIC) was established in 2008 as an independent body to spearhead national reconciliation, cohesion and integration and to eliminate discrimination especially ethnic, racial or religious discrimination after Kenya went into post-election violence.
- The Competition Authority was established in 2010 as an independent body and its mandate is to promote and safeguard competition in Kenya and to protect consumers from unfair or misleading conduct through the enforcement of the law. Functions include: compliance, investigation, public education, among others.
- The Central Bank of Kenya was established in 1966 to implement Kenya's monetary policy and ensure the stable functioning of the country's financial system. In addition, the bank is responsible for the licensing and supervision of authorised dealers, and the regulation and supervision of payment, clearing and settlement systems.
- The Kenya Film Classification Board (KFCB) is the public regulator of films destined for public exhibition, distribution and broadcasting in Kenya. Its functions include examining, rating and approving films according to age suitability. It gives advice, having due regard to the

protection of women and children against sexual exploitation or degradation in cinematograph films and on the internet. Further, it issues licenses and certificates to distributors and exhibitors of films in the country and develops guidelines to be applied in classification and ratings of films.

Obligations of Intermediaries

Intermediaries are responsible for filtering, removing and blocking content that is considered illegal e.g. under copyright or hate speech legislation. However, they have no obligation to monitor content/data traffic on their networks unless they are made aware of an illegal/unauthorized content or activity. It is important to note that as stated above, the interception of messages or the disclosure of their content is a criminal offence.⁴⁰

Further, under s. 27 of the Kenya Information and Communication Act, the Minister in charge of communications is empowered to make rules in consultation with the CCK with respect to among others, the running of telecommunication systems, privacy of telecommunication, the provision of telecommunication services, the preservation of messages and the registration of subscribers to telecommunication services. The minister thus may introduce obligations for intermediaries.

Copyright

Kenya utilises a dual system of copyright enforcement, and as such one can enforce copyright either as a criminal or civil action, or both. Police officers and inspectors of Kenya Copyright Board, have power, upon receipt of a complaint, to investigate, inspect premises, arrest, and prosecute copyright infringers for various offences related to copyright.⁴¹ Remedies for infringement available in civil suits include anton pillar orders, injunctions, claims for damages and royalties, and the delivery of infringing copies or items used for making infringing copies to the plaintiff.⁴²

Currently, there are no stated take down laws, policies or procedures. There is also no safe harbour for intermediaries or similar provisions limiting their liability such as those contained in the US Digital Millennium Copyright Act⁴³ or the EU Data Protection Directive.⁴⁴ Further, neither the Copyright Act nor other legislation imposes specific penalties on service providers for failing to block or remove infringing content. However, the continued existence of copyright material on a website, can be construed as a continuing violation and thus fall under the 'distribution' clause under s. 35 and 38 of the Copyright Act, thus giving rise to liability.

⁴⁰Per s.31 of the Kenya Information and Communication Act, the term intercept includes listening to, or recording a function of a computer, or acquiring the substance, its meaning or purport of such function.

⁴¹S. 42, Copyright Act http://www.copyright.go.ke/rough/copyright_act.pdf

⁴²S. 35, Copyright Act

⁴³Digital Millennium Copyright Act <http://www.gpo.gov/fdsys/pkg/PLAW-105publ304/pdf/PLAW-105publ304.pdf>

⁴⁴ OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data <http://www.oecd.org/internet/interneteconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm>

The Act does provide some protection for would be infringers. It is worth noting in a civil action, a plaintiff shall not be entitled to damages where a defendant was not aware that the works to be infringing, and had no reasonable grounds for suspecting the subsistence of copyright in the works so infringed. Moreover, in a criminal action, an accused person shall not be convicted if they can prove that they acted in good faith and had no reasonable ground for supposing that a copyright would be infringed.

Other defences available include fair dealing, incidental inclusion, educational use, public interest, works permanently situated in public places and for use in libraries, archives and public administration,⁴⁵ but it does not provide exceptions for temporary copies useful in automated technical processes e.g. caching in computers.

Under s. 35 of the Act, a Court where an infringement has been proved or admitted will consider the flagrancy of the infringement and the benefits that have accrued to the defendant by reason of the infringement, where an infringement has been proved or admitted. This aspect may invalidate defences for intermediaries, who by the very nature of their business e.g. a web hosting service, could be deemed to facilitate the offence while at the same time appearing to benefit income received from the use of their services by users to keep or showcase infringing material.

Hate Speech

Most of Kenya's previous elections since 1992 have been characterized by inter-ethnic violence among various local communities. The most recent was the 2007-2008 post-election violence where it was reported by an inquest following the violence that 1,133 persons died, 3,561 were injured, and more than 350,000 were displaced.⁴⁶ The inquiry revealed that hate speech, distributed through channels such as email, SMS, FM Radio and TV broadcasts, played a key role in fanning the violence that ensued.

Following this, the National Cohesion and Integration Act was passed by Parliament in 2008, to among others, regulate and stem the spread of hate speech. One of its key provisions, s.62, holds liable any media enterprise for publishing any utterance, which amounts to hate speech. While this provision can be invoked to remove or block content including online content, it has also been useful in promoting proactive action by service providers and other state agencies in monitoring and stemming the spread of hate speech. Such action has become increasingly important not only because of the increased usage and access to mobile telephony and the internet across the country, but also to avert possible recurrence of violence as the country approaches the next general elections, scheduled for March 4th 2013.

⁴⁵S. 26, Copyright Act

⁴⁶Report of the Commission of Inquiry into Post-Election Violence, 2008 <http://wlstorage.net/file/wakireport-2008.pdf>

A Self-regulatory Environment?

Given their operative environment, Intermediaries strive to conform to existing laws and regulations. However, in the absence of clear legislation defining where intermediaries are liable, and where they are protected, intermediaries self-regulate while also taking proactive actions, which may serve to mitigate or avoid liability.

One of the ways which is advantageous to service providers is through reliance on their customer service agreements and policies to enforce compliance with the law. Such agreements for example, state that actions such as the use of the services for illegal purposes, can lead to the suspension or termination.⁴⁷ Therefore, intermediaries can use this to remove content deemed as hate speech, obscene material, copyrighted, or trademarked⁴⁸ once they are informed or become aware. Further, such provisions can be beneficial to intermediaries since they can be used to avoid adverse action against the intermediary, especially since legislation may in some cases e.g. copyright and hate speech, present the possibility of interpretation that may give rise to liability such as under the 'distribution' clause in the Copyright Act discussed above.

With regard to hate speech, organizations such as the Nation Media Group⁴⁹ have since put in place guidelines on blogging coupled with moderation of all comments on its websites in an effort to curb the spread of hate speech.⁵⁰ In addition, mobile phone service provider Safaricom⁵¹ has in the recent past, released guidelines for political mobile advertising on its premium rate-messaging network.⁵² Furthermore, the industry regulator Communications Commission of Kenya (CCK) has also released for comments from the public, proposed guidelines for political messages.⁵³

Extra Legal

Since there are no regulatory frameworks that place a requirement on intermediaries to police online behaviour, most intermediaries cooperate with law enforcement, despite the absence of legislation on due process. Corporate agreements between service providers and media companies do not oblige intermediaries to police the use of content and to punish infringements on intellectual property.

However, user service agreements include clauses which outlaw the conduct of unlawful activity by users while also indicating the service provider readiness to cooperate with law enforcement agencies should the outlawed conduct/activity be detected or reported.

⁴⁷Terms and Conditions of the Safaricom Domain Name Registration and Web Hosting Service"<http://domains.safaricom.co.ke/terms.pdf>

⁴⁸For example to deal with cases of cyber-squatting or name-squatting

⁴⁹Blog rules"http://www.nationmedia.com/about_us.html

⁵⁰<http://www.nation.co.ke/meta/-/1194/1132038/-/88lbspz/-/index.html>

⁵¹<http://www.safaricom.co.ke/about-us>

⁵²<http://bloggers.or.ke/safaricom-issues-tough-guidelines-for-political-messaging/>

⁵³http://www.cck.go.ke/links/consultations/current_consultations/National_Guidelines_for_Bulk_Political_SMS_-_Draft.pdf

However internal administrative processes used in ensuring compliance by service providers are often subjectively applied and are neither regulated nor do they accord to any cohesive set of agreed upon principles or norms, and as such may even lack appellate procedures. However, it is worth noting that most service agreements do make provision for parties to seek legal recourse through arbitration⁵⁴ or in mainstream Courts as alternative avenues to resolve disputes arising under the agreements.

There is no evidence that intermediaries have or have had pressure from government or corporate actors to give preference to certain type of content. Nevertheless, they do throttle speeds and enforce data caps based on their fair use principles.

In addition, while it is not clear whether intermediaries face pressure from government or powerful interest groups to police online behaviour, the influence of government agencies or their power cannot be underestimated or overlooked.

Lastly, it must be stated that given the absence of legislation specifically governing intermediary liability, the true extent of the liability of intermediaries needs to be assessed on a case by case basis, as individual facts could either give rise to or limit liability.

Take Downs, appeals and legal cases

The Duncan Muriukivs Baobab Beach Resort and Spa (2012) court case is on-going.⁵⁵In May 2012, Muriuki complained that some words published by the hotel on its Facebook page were defamatory. The comments Muriuki complained about were posted on the beach resort's Facebook page after a dispute between him and the management of the hotel on alleged denial of entry to the hotel. At the interlocutory stage, an order was obtained mandating the respondent to remove infringing content that had been posted on the said Facebook page.

More recently, in July 2012, a book, "Peeling Back the Mask", by MigunaMiguna was the subject of a copyright infringement claim.⁵⁶ The book, according to the author, was released as a soft copy in PDF to the Nation Media Group for serialization in its daily, the Daily Nation. Following this, copies of, and links to the book were circulated by email, web, and social networking sites such as Twitter within days of the launch of the book.

However, a cursory search online conducted in September 2012, reveals that some of the websites that had, or were linked to the said book had since deactivated them following take down requests, notably under the US Digital Millennium Copyright Act,⁵⁷ which is indeed indicative of a response to

⁵⁴Under the Arbitration Act No. 4 of 1995

⁵⁵Judy Ogutu, "Judge Faults Hotel for Ignoring Order on Facebook posts" Standard Newspaper 12 June 2012 http://www.standardmedia.co.ke/?articleID=2000059762&story_title=Judge-faults-hotel-for-ignoring-order-on-Facebook-posts

⁵⁶Karongo C. "Migunato sue NMG over copyright breach" Capital News 19 July, 2012 <http://www.capitalfm.co.ke/news/2012/07/miguna-to-sue-nmg-over-copyright-breach/>

⁵⁷<https://dl.dropbox.com/u/92492293/Peeling%20Back%20the%20Mask.pdf>.

legal action. Moreover, the matter does highlight some of the challenges posed to the role of intermediaries and to the law with regard to internet distribution of content and more so on the question of jurisdiction and the conflict of laws, since most internet hosts are not locally based companies.

The Mobile Internet

There is no legislation applied differently to the mobile internet. However, the adoption of mobile internet usage has to some extent changed the intermediary liability landscape. While the positions on liability remains unchanged, the increase in the number of users has brought to focus, the absence of, and gaps in existing legislation, as more people begin to interact more with the internet.

In addition, service provider contracts now provide extensively for exclusion of liability, and some e.g. Safaricom a local mobile phone service provider, have initiated preventative measures⁵⁸ i.e. screening bulk SMSs especially as Kenya approaches 2013 general elections.

International Agreements

So far, the government of Kenya does not have any commitments regarding intermediary liability pertaining to any international agreements. However, Kenya is a party to the Berne Convention for the Protection of Literary and Artistic Works, Universal Copyright Conventions,⁵⁹ and to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and a signatory of the WIPO Copyright Treaty.

The covenants e.g. TRIPS contain requirements for national laws to meet on copyright and specify enforcement, remedies and dispute resolution procedures. Developing countries were allowed additional time to implement the applicable changes to their national laws, in two tiers of transition according to their level of development. The transition for least developed countries was extended to 2013. Further, review of legislation will therefore be required to take into account global developments since 2001, when the legal regime on intellectual property rights was last revised.

⁵⁸<http://www.nation.co.ke/News/politics/Safaricom+issues+tough+guidelines+on+political+messages+/-/1064/1429144/-/95yclmz/-/index.html>

⁵⁹Both UCC Geneva and UCC Paris

Conclusions

Kenya continues to experience exponential growth in internet use with mobile telephony enhancing the uptake. Internet intermediaries are among the key stakeholders in the development of the internet. Their increasing influence as well as their evolving role continues to create debate regarding their liability in relation to illegal online activity and content, their role in facilitating the internet's development, and creating a trusted online environment.

The new 2010 Constitution as the supreme law of the land and its bill of rights offers protection of consumers and intermediaries alike and introduces duties and responsibilities, the violation of which would give rise to liability. While there are several bills are under stakeholder review, which make reference to intermediary liability they do not specifically define internet intermediaries and conditions under which they would be held liable.

Further, the absence of specific legislation to provide for take downs, as well as the absence of safe harbour provisions for example, has created an uncertain environment for the enforcement of online copyright, while at the same time placing unwarranted burdens on intermediaries. This situation has incentivised intermediaries to self-regulate.

Recommendations

Some internet intermediaries have been misused or engage in illegal and harmful activities and the government is rightly concerned about this. To address these legitimate policy concerns, there is a need to explore a variety of approaches, which may include legislation, co-regulation, various forms of self-regulation, offering users tools and guidance for content management, developing new business models, collaborating with law enforcement, and responding promptly to notices of illegal activity and content.

Current laws in Kenya are reactive and are not dynamic enough to meet the needs and challenges of present times. Therefore, there is need to make sure that the law is consistently developed to ensure that there are clear provisions in relation to internet service providers and other internet intermediaries.

There is need to ensure that the law provides for the limitation of liability for intermediaries with respect to the actions of third parties. In this regard, the unimplemented provisions of the defunct Electronic Transactions Bill 2007 on intermediary liability remain instructive. And as such, these provisions need to be revisited and implemented to ensure that current legislation provides for safe harbours for intermediaries and effective take down procedures in line with international best practises

and global developments, learning from the implementation of similar legislation in the US,⁶⁰ EU,⁶¹ South Africa,⁶² Uganda⁶³ and so on.

Intermediaries should therefore aim to engage proactively and take actions beyond just responding to specific requests. They should, through their business policies and systems, provide mechanisms for the reporting illegal conduct, the notification of users of alleged wrongdoing, and for the redress of such wrongdoing. Intermediaries should also actively engage in legal and policy development processes. Further, while users bear ultimate responsibility for their conduct online, intermediaries can also take steps to encourage proper conduct of their users online, including through educating them on their rights online and on the remedies available for the breach of such rights.

Governments on the other hand need to provide a conducive policy and regulatory environment to facilitate the type of innovation and competitiveness that leads to socio-economic and political benefits as more people find innovative and creative ways to use the internet. In developing policies, there is a need to involve all relevant stakeholders to encourage full range of views in creating policy regulatory solutions and to promote ownership and commitment by stakeholders in the implementation of the policies, due process, efficient notice and take down procedures with reasonable timeframes and lastly, clear definitions of the roles of intermediaries.

More research in this area is required to encourage informed policy development as well as to assess costs and benefits of various policy options. Also, there is a need for discussion of new approaches to the intellectual property rights regime to address some of the challenges brought by the internet including among others Peer to peer (P2P) and other forms of sharing online.

⁶⁰US Digital Millennium Copyright Act; US Communications Decency Act

⁶¹ EU Commerce Directives

⁶²Electronic Communications and Transaction Act

⁶³ Electronic Transactions Act

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