



Intermediary liability in South Africa

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This paper is part of a research project conducted on intermediary liability in Nigeria, Kenya, South Africa and Uganda. The paper draws on the independent research conducted by in-country researchers. The research includes five reports, as well as blog posts. The entire research is available at <http://ia.apc.org>. This paper and the accompanying reports are licensed under a Creative Commons Attribution-ShareAlike 3.0 Unported License (CC BY-SA 3.0).

Introduction

In the last two years the amount of internet users in South Africa has doubled from 10% of the population in 2009 to 21% in 2011.¹ Competition in the ISP market has historically been stifled due to the dominance of the national fixed-line operator, Telkom, as well as due to policy and regulatory failures. Competition has recently increased along with internet penetration due to a number of factors, including the landmark court ruling in 2008 that internet service providers and internet access providers could self-provide their own connectivity; the landing of the SEACOM undersea cable in 2009 and the launch of the WACS cable in May 2012; and increased adoption of broadband by small businesses as well as by individual mobile users.² With only 1.8 fixed-line broadband subscriptions per 100 inhabitants,³ the majority of South Africans access the internet through mobile phones, mobile connections, or through internet cafés. There are at least 159 ISPs in South Africa,⁴ most of which retail bandwidth from larger providers.⁵

Defamation in common law, legislation dealing with obscenity and indecency, and legislation dealing with hate speech can possibly expose internet intermediaries to liability. The Ministry of Communications and the legislature recognized that internet service providers “play an important role in the provision and availability of internet services to the public at large”, and that “the application of the rules relating to publishers such as newspapers, journals and even radio and television, did not quite seem fit in respect of parties such as [ISPs] who technically were publishing information, but had very little control over the content which they published on behalf of others.” Nonetheless “the potential for delictual and criminal liability under the provisions of the South African common and statutory law was huge and potentially very dangerous for the continued existence of ISPs and the effective functioning of the internet.”⁶

Chapter XI of the Electronic Communications and Transactions Act (Act 25 of 2002)⁷ is an attempt to deal with these challenges and provides limitations on liability similar to safe harbor provisions in the United States of America (USA) and European Union (EU).⁸ Under Chapter XI certain intermediaries classified as “service providers” are provided with limited liability under certain conditions. There are however many intermediaries that do not qualify for limitations on liability.

1 From 10% in 2009 to 21% in 2011, International Telecommunication Union, ICT Statistics Database, <http://www.itu.int/ITU-D/ICTEYE/Indicators/Indicators.aspx>, last accessed 26 July 2012.

2 Freedom House, South Africa in Freedom on the Net 2011, <http://www.freedomhouse.org/report/freedom-net/freedom-net-2011>

3 International Telecommunication Union, ICT Statistics Database.

4 The Internet Service Providers' Association has 160 members at the time of writing. Not all internet service providers or internet access providers are members of ISPA. See ISPA list of members at <http://ispa.org.za/membership/list-of-members/>.

5 See Gregory Massel, 2008, “Topological Map of South African Internet Service Providers”, <http://www.ispmap.org.za/>.

6 Department of Communications, “Guidelines for the Recognition of Industry Representative Bodies of Information Systems Service Providers”, Government Notice No 1283, 14 December 2006. <http://www.pmg.org.za/files/gazettes/061214communications-guidelines.htm>.

7 http://www.internet.org.za/ect_act.html

8 These are in the US: the Digital Millennium Copyright Act and Communications Decency Act, and in the EU the E-commerce Directive as mentioned in the first paper in this series.

Legislative and regulatory environment

Limitations on liability for intermediaries under the ECT Act

Chapter XI of the Electronic Communications and Transactions (ECT) Act entitled "Limitation of Liability of Service Providers" provides intermediaries with limited liability provided that they are a member of an industry representative body recognised by the Minister of Communications, they conduct their operations in an automatic manner, they adhere to the industry representative body's code of conduct, and respond to court orders and take-down requests. After the ascension of the ECT Act into law in May 2002 ISPs were not officially afforded the limitations on liability in the act for seven years. "Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers" were published in December 2006.⁹ The ISPA code of conduct was formally adopted in 2002, in 2008 it was revised in order to comply with the guidelines.¹⁰ The Internet Service Providers Association (ISPA) was finally recognized by then Minister of Communications Sipiwe Nyanda as an industry representative body (IRB) in May 2009.¹¹ Limitations on liability now apply now to its members, provided they adhere to the ISPA code of conduct and respond to take-down requests and court orders.

Intermediaries are only provided with limitations on liability for performing certain roles. A service provider is not liable for being a "mere conduit" of infringing information or data,¹² or for the automatic caching of unlawful content.¹³ A service provider is also not liable for hosting of unlawful content and is also not liable for damages arising from data stored at the request of a user. Provided that they did not have knowledge of infringing activity or data, and that the data or activity relating to it infringes the rights of a third party.¹⁴ A service provider is also not liable for being an "information location tool" (providing links or references in an automatic manner) – like a search engine, or aggregator.¹⁵

In order to qualify for these limitation on liability, a service provider has to respond to take-down notices, it must designate an agent to receive notifications of infringement.¹⁶ Protection from liability is dependent on ISPs responding to take-down notices, if ISPs fail to comply with take-down notices, then they may lose their protection from liability. Intermediaries also need to comply with court rulings.¹⁷

9 Department of Communications, Notice 1283, Published in Government Gazette Vol 498 No 29474, 14 December 2006, Accessible: <http://www.ellipsis.co.za/wp-content/uploads/2011/02/IRB-Regulations-Gazette-29474.pdf>

10 ISPA, Code of Conduct, <http://ispa.org.za/code-of-conduct/>

11 ISPA, ISPA Recognised as Industry Representative Body, 20 May 2009, <http://ispa.org.za/press-release/ispa-recognised-as-an-industry-representative-body/>

12 That is, when they are merely "providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages". The service provider must not initiate the transmission, must not select the addressee, and must perform the functions in an automatic and technical manner without selection of data, and not modify the data contained in the transition (ECT Act Section 73).

13 Meaning it "is not liable for the automatic, intermediate and temporary storage of that data, where the purpose of storing such data is to make the onward transmission of the data more efficient to other recipients of the service upon their request" As long as the service provider does not modify the data, complies with conditions on access to the data, complies with rules regarding the updating of the data, specified in a manner widely used and recognised by industry, and does not interfere with the lawful use of technology to access that data. (ECT Act Section 74).

14 ECT Act Section 75.

15 ECT Act Section 76.

16 ECT Act Section 75.

17 ECTA Sections 73(3), 74(2), 75(1)c and 75(3).

Notice and takedown procedures under the ECT Act

Under the ECT Act ISPA members are exempt from liability when transmitting, caching and storing, or hosting, and linking or referring to unlawful content. Provided that they were not aware of the content, were not active in creating the content and did not select the receiver or modify the content. In exchange for this, ISPs need to participate in 'notice and take-down' procedures outlined in Section 77 of the ECT Act. When someone become aware of unlawful material or action taking place the networks of intermediaries, they may notify the intermediary of the infringement and require it to remove or disable access to the unlawful material or activity.

Take-downs procedures for unlawful or infringing content are governed by Section 77 of the ECTA. In order to keep their limited liability, service providers are required to respond to "take-down notices", which are written notifications of unlawful activity "addressed by the complainant to the service provider or its designated agent". Any member of the public or organization may submit a take-down request. Service providers that are members of ISPA, generally assign ISPA as their designated agent to receive take-down request, although some may deal with take-down notices themselves. ISPA forwards the requests to the relevant service providers, after checking that the content is actually hosted on the accused organisation's network, and that the remedial action specified by the complainant is feasible. The requests are then forwarded by ISPA to the service provider in question. Complainant should generally receive a response as to the status of the request within three working days. "Once a service provider has responded to the notification, either by removing the content concerned, or by refusing to remove the content for some reason", the complainant receives further notification from ISPA or directly from the service provider concerned.¹⁸

Intermediaries are not liable as long as they respond to valid take-down requests. However if an intermediary decides the request is not valid, as it is not a violation, or it is in bad faith, then the burden of proof falls on the intermediary, which may have to prove this in court. This system could be open to abuse to individuals or corporations seeking to remove content from the internet for purposes other than concerns in good faith over unlawful content.

The Film and Publications Act

Under the Film and Publications Act (Act 65 of 1996)¹⁹ intermediaries may be liable for content on their networks that has been censored, or is not classified by the Film and Publications Board. The Film and Publications Act (FPA), requires "Any person who distributes, broadcasts or exhibits any film or game " to register with the Film and Publications Board (FPB) as a distributor or exhibitor of films or games.²⁰ ISPs and internet cafes also have to register with the FPB. Failing to register with the Board, or knowingly distributing in public a film or game without having first registered Board, constitutes an offence that may be subject to a

18 See ISPA, How to request a Take-Down Notice, <http://ispa.org.za/code-of-conduct/take-down-guide/> and ISPA, Request a Take-Down Notice, <http://ispa.org.za/code-of-conduct/request-a-take-down/>.

19 www.info.gov.za/view/DownloadFileAction?id=70901. The act is amended by Films and Publications Amendment (34 of 1999), the Films and Publications Amendment (18 of 2004), and the Film and Publications Amendment Act (Act 3 of 2009) (See http://www.home-affairs.gov.za/PDF/Acts/Films%20and%20Publications%20Act%2065%20of%201996_as_amended.pdf and <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/Films%20and%20Publications%20Act%202009.pdf>)

20 Film and Publications Amendment Act (Act 3 of 2009) Section 21, which substitutes paragraph 18 of the principal Act.

fine or up to six months imprisonment, or both.²¹

It is an offence to knowingly distribute or broadcast, exhibit in public, sell or advertise films games and publications that have been classified as "XX", refused classification, or have not been classified. This is punishable by up to five years in prison, a fine or both²² Films are classified as XX such if they contain "a scene or scenes, simulated or real" which includes either a person under the age of 18 "participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity", "explicit violent sexual conduct", "bestiality", "explicit sexual conduct which degrades a person and which constitutes incitement to cause harm", or "the explicit infliction of extreme violence or the explicit effects of extreme violence which constitutes incitement to cause harm".²³

A legal advisory by law firm Elipsis states that "Probably the most important issue for the FPB is the fight against child pornography and the exposure of children to pornography and other inappropriate material. License holders need to take their responsibilities here very seriously and ensure that they take active steps to report child pornography and cooperate with investigations into it."²⁴ The FPB requires that intermediaries take steps to ensure that their services are not utilized for hosting child pornography. Intermediaries that have knowledge that their services are being used to host or distribute child pornography must report the incident to the police, as well as the particulars of the user, preserve evidence for investigation and prosecution, and provide the police with users who gained access or attempted to gain access to child pornography.²⁵ ISPs that fail to comply will with these obligations could be guilty of an offence and sentenced to a fine or imprisonment for a maximum of five years.²⁶

The Film and Publications Board established the PRO-CHILD Hotline in 2008. The hotline is available for members of the public to report child pornography. The hotline alerts ISPs of reported content on their networks and works closely with law enforcement agencies.²⁷

Services providers that provide child-oriented services also have certain duties according to the Film and Publications Amendment Act (3 of 2009) which include moderating and monitoring services to ensure that they are not used for the commissioning of offences against children; displaying safety messages that can be understood by children; providing mechanisms to enable children to report suspicious behaviour in chat-rooms; reporting details of suspicious on-line behaviour towards any child to the relevant authorities; and where feasible making filtering software available, along with information on the installation and use of such software, to all subscribers wishing to block children's access to pornographic websites. Any person failing to

21 The Film and Publications Amendment Act (18 of 2004) inserts s27A 1(a), The Film and Publications Amendment Act (3 of 2009), which substitutes 27(4) and inserts 24A(1).

22 The Film and Publications Amendment Act (3 of 2009), 24A(2).

23 FPA Schedule 6.

24 ellipsis regulatory solutions, Overview of electronic communications regulations in South Africa, 12 March 2012, <http://www.ellipsis.co.za/wp-content/uploads/2012/03/Overview-of-Electronic-Communications-Regulation-in-South-Africa-2012.pdf>.

25 FPA Section 27A inserted by s. 12 of Act 18 of 2004, substituted by s. 15 (a) of Act 18 of 2004.

26 FPA Section 30(1). inserted by s. 15 (b) of Act 18 of 2004

27 Elipsis regulatory Solutions, Op cit.

comply with these duties is an offence, punishable upon conviction by a fine or up to six months imprisonment.²⁸

Despite the intentions of the FPA to combat child pornography, to protect children from inappropriate content, and to control hate speech. The Act could also unduly expose intermediaries to liability and possibly have chilling effects on freedom of expression. If the Act were properly implemented, and an online multimedia clip or video containing moving images was determined to be a "Film" then it would require all user-generated content and file sharing sites in South Africa that are aware that their sites are being used to distribute films to monitor their content so as to ensure that there are no films on their website that are not classified. As Neil Dominic O'Brien argues, this "would amount to an onerous and potentially expensive monitoring obligation for ISPs...Should online film be defined as 'film' for purposes of the FPA, the effect would be that films made by private persons and placed on social networking websites would have to be classified as they have been placed into the public domain."²⁹

Hate speech

Section 16 of the Constitution states that "Everyone has the right to freedom of expression which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research." This right does not extend to "propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."³⁰ Knowingly broadcasting or distributing films and publications that incite violence, or advocates hatred based on race or ethnicity, gender or religion and constitutes and incitement to cause harm is an offence; punishable by a fine or no more than five years of imprisonment or both.³¹ ISPs can thus be liable if they knowingly distribute hate speech.

Section 10(1) of the Promotion of Equality and the Prevention of Unfair Discrimination Act (The Equality Act) states that no person may publish, propagate, advocate or communicate words, against another person that could demonstrate a clear intention to be hurtful, harmful, incite harm or promote or propagate hatred.³² Section 12 of the act also says that no one may broadcast or distribute content that "amounts to speech that clearly intends to unfairly discriminate against any person." This however does not "preclude bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the

28 In terms of section 24C as inserted by The Film and Publications Amendment Act (Act 3 of 2009), <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/Films%20and%20Publications%20Act%202009.pdf>

29 N.D. O'Brien, The Liability of Internet Service Providers for Unlawful Content Posted by Third Parties, Masters Thesis, Faculty of Law at the Nelson Mandela Metropolitan University, January 2010, <http://dspace.nmmu.ac.za:8080/jspui/bitstream/10948/1149/1/NDOBRIEN.pdf> p. 74

30 Constitution of the Republic of South Africa, 1996, <http://www.info.gov.za/documents/constitution/1996/index.htm>.

31 This does not apply to bona fide scientific, documentary, dramatic, artistic, literary or religious works. FPA Section 29 and 30, as amended by Act 18 of 2004.

32 If these words are based on the "prohibited" grounds, which are defined in Section 1 of the act and refer to "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth; or any other ground where discrimination based on that other ground – causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affect the enjoyment of a person's rights and freedoms in a serious manner."

Constitution.”³³

The Equality Act may impose an obligation on ISPs to monitor content for hate speech and for unfair discrimination. If an ISP fails to do this they may expose themselves to liability in the form of financial loss or time spent on administration due to an order imposed by the Equality Court.³⁴

Copyright

Due to a history of poor quality of service and bandwidth caps, “to date, South African rights holders have benefited from an unusual grace period with respect to Internet piracy.” Thus the uptake of peer-to-peer file sharing services has been limited. As new undersea cables are coming into service, competition is growing and the prices are dropping, the availability of bandwidth to South Africans is set to radically increase, and “participation in both the licit and the illicit global digital media economies is likely to expand dramatically.”³⁵

A report by the Social Science Research Council on digital piracy in emerging economies notes that “media piracy in South Africa is shaped by poverty and social inequality.” And that low incomes, “high media prices, and a pervasive advertising culture create high demand for media goods but very limited legal access for the great majority of South Africans.”³⁶ According to Price Waterhouse Cooper’s, the South African recorded music market has experienced physical decline, and 17,3% losses in 2009.³⁷ A Recording Industry of South Africa report claims that 3.6 million songs are downloaded on a monthly basis accounting to estimated losses of R 36 million per month.³⁸ However other research has shown that the reported rates of piracy in South Africa are the lowest in Africa and among the lowest in developing countries.³⁹

In South Africa, with regards to copyright infringements by third parties “there is a great deal of room for uncertainty about the scope of the ‘safe harbor’ for service providers, and to date there is very little clarifying South African jurisprudence. In particular, there is currently no basis for the ‘contributory infringement’ standard established in the United States.”⁴⁰ The Copyright Review Commission of the Department of Trade and Industry in its recent report states that while the liability of online service providers “remains controversial in intellectual property law”, “when the liability of a particular [online service provider (OSP)] is to be determined, one should remember that the law of delict and copyright impose liability for acts or omissions in a specific instance. So an OSP’s liability will depend on the role it plays in a particular transaction. Where an OSP makes unauthorised reproductions of a protected work (for example, for technical reasons such as caching) it may be liable for direct infringement of copyright. But where it merely transmits or facilitates

33 Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000), http://www.acts.co.za/prom_of_equality/index.htm

34 N.D. O’Brien, op cit p. 61.

35 Natasha Primo and Libby Lloyd, “South Africa”, in Media Piracy in Emerging Economies ed. Joe Karaganis (Social Science Research Council, 2001), <http://piracy.src.org>, 105, 117.

36 Op cit, p. 1.

37 Pricewaterhouse Coopers, South African Entertainment and Media Outlook: 2010-2014 Cited in the Copyright Review Commission Report (2011), Department of Trade and Industry, 28 <http://www.info.gov.za/view/DownloadFileAction?id=173384>.

38 Cited in the Copyright Review Commission Report (2011), p. 34.

39 Natasha Primo and Libby Lloyd.

40 See Natasha Primo and Libby Lloyd, 118.

access to copyright infringing material, it may be liable for 'contributory infringement' at common law." However "the principle of 'contributory infringement' has not been established in any reported decision on South African copyright law."⁴¹

Under the ECT Act ISPA members are exempt from liability when transmitting, caching and storing, or hosting, and linking or referring to copyright infringing content that they were not aware of. They however are no longer protected from liability if they become aware of a copyright infringement by means of a notice, and do not respond to this notice. The copyright and takedown system under the ECT Act also extends also to copyright infringing material to the extent that is also unlawful. Thus rights holders may submit take-down notices to service providers requesting them to take down copyright infringing content. This request is submitted to the service provider, or in the case of ISPA members, to the ISPA, which acts as a designated agent and forwards the requests to the service providers. Take down requests to ISPA members can be submitted through ISPA online.⁴²

The ECTA Act requires intermediaries to take down content on their servers when valid take-down requests are received, but not to block content that infringes on copyright or breaks the law. Such requests must pass through a criminal investigation and a court order.⁴³ consulting firm, There are no reports of internet service providers blocking access to peer to peer download websites or websites that sell or offer for free infringing music, there are currently no laws that would require this. Intermediaries are not required to police downloads of pirated music by internet users. In terms Section 78(1) of the ECT Act, intermediaries are under no general obligation to monitor the data they transmit or store, or actively to seek facts or circumstances that indicate unlawful activity. Furthermore, if intermediaries did monitor data for infringing activity through intrusive methods like deep-packet inspection they may be guilty of an offence.⁴⁴ Anecdotal evidence suggests that rights holders are not aware of, or do not make use of take-down notices, despite the large amount of advocacy they conduct around digital piracy. The South African Music Rights Organisation (SAMRO) and the Recording Industry of South Africa (RiSA) where provided by ISPA with their own specialised take-down notice form,⁴⁵ RiSA has not sent any take-down notices since 2008, and SAMRO has never sent any take-down notices.⁴⁶

In 2008, the Recording Industry of South Africa (RiSA), sent notices to the Internet Service Providers Association of South Africa regarding three South African hosted file sharing sites: BitFarm, Newshost, and Ninja Central. Two of the sites were bittorrent trackers, like the Pirate Bay and provided links to torrent files, hosted on other websites, that connected users to torrents in order to Peer-to-Peer download or share/upload. Another site indexed NZB files, which are files that assist computers to download multiple files from Usenet

41 Department of Trade and Industry, Copyright Review Commission Report (2011), <http://www.info.gov.za/view/DownloadFileAction?id=173384>, 35.

42 "Request a Take-Down Notice", <http://ispa.org.za/code-of-conduct/request-a-take-down/>. Take-down procedures are outlined at, <http://ispa.org.za/code-of-conduct/take-down-procedure/>

43 Natasha Primo and Libby Lloyd, 119.

44 The ECT Act 86(1) states: "Subject to the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992), a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence."

45 Lodge a RiSA Specific Takedown, <http://ispa.org.za/code-of-conduct/lodge-a-risa-specific-takedown/>

46 Copyright Review Commission Report (2011), Op cit. p. 37, Interview with Ant Brooks, former General Manager of ISPA and current member of the ISPA Secretariat.

Servers. Both sites did not host pirated content themselves, but rather links to torrents files and NBZ files.

Two of the sites were reported to have been taken down. The sites' lawyers argued (outside of court) that there was no precedent that "hosting of torrents and NZBs and the indexing of such files is unlawful or illegal". "Sites that collect, index and host so-called torrents are legal in South Africa – the content of such sites is not only protected by the constitutional right to free speech, but is also outside the scope of any copyright claims." It seems that a private agreement may have been made between RiSA and the two South African websites. BitFarm shutdown, and Ninja Central had a message that the site had been closed.⁴⁷

In 2009, RiSA requested that ISPA block access to block two Russian music sites that sold unlicensed/infringing mp3s. ISPA Representative Ant Brooks stated that, it was not ISPA's responsibility under the ECTA to block sites, rather its role was to "assist and advise its members in dealing with take-down notices made in terms of the ECT Act", and that copyright law does not allow for intermediaries being required to block content that is outside of their networks in other countries.⁴⁸

The Copyright Commission (CRC) Report notes that it is not just file-sharers that are contributing to digital piracy in South Africa, but also wireless access service providers and paying consumers. Many companies in South Africa sell unlicensed content over mobile phones. Wireless Application Service Providers (WASPs) have been selling ringtones for over a decade and that "an overwhelming majority have paid no royalties". According to evidence provided to the CRC, "only 14% of all mobile operators are licensed by NORM to provide downloads of sound recordings and ringtones to consumers, and only Vodacom has concluded a mechanical rights licence with SAMRO. This means that the majority of mobile providers (and, by implication, consumers) are dealing in infringing sound recordings and may be held criminally liable for copyright infringement."⁴⁹ In this case, wireless service providers who sell unlicensed copyright material are liable for copyright. In this case however the entity concerned is of course not an intermediary. As they are actively creating and selling content. Thus neither the definition of intermediary or the limitations on liability in the ECT Act apply.

The Copyright Commission has made five recommendations concerning copyright.⁵⁰ The most worrying, from both an intermediary and a human rights perspective is the recommendation that "the ECT Act and the Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers should

47 enigmax, Recording Industry Takes Down BitTorrent & NZB sites, (TorrentFreak, 6 November 2008), <http://torrentfreak.com/recording-industry-takes-down-bittorrent-nzb-sites-081106/>; enigmax, "Recording Industry Negotiates with Bittorrent and NBZ Sites" (TorrentFreak, 24 November 2008) <http://torrentfreak.com/recording-industry-negotiates-with-bittorrent-and-nzb-sites-081124/>; and Rudolph Muller, "Risa and Torrent Website Truce?" (MyBroadband 24 November 2008) <http://mybroadband.co.za/news/internet/6101-risa-and-torrent-website-truce.html>.

48 enigmax, "ISPs refuse to block cheap Russian music sites" (TorrentFreak 11 August 2009) <http://torrentfreak.com/isps-refuse-to-block-cheap-russian-music-sites-090811/>.

49 Copyright Review Commission Report (2011), 37 – 38.

50 1) All mobile network operators and wireless access service providers should be barred from distributing content unless they are licensed by the relevant collecting societies, 2) The Copyright Act should be amended to make provisions the right to communicate literary and musical works to the public and the right to make available copies of sound recordings, 3) WASPA should amend its Code of Conduct to provide for the suspension of members that fail license works or pay royalties, and 4) "The ECT Act and the Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers should be amended to require ISPs to adopt a graduated response for repeat infringers culminating in the suspension of access services of an individual." 5) "Collecting societies should take proactive measures to ensure that they efficiently collect royalties for the digital exploitation of the works they administer." (Copyright Review Commission Report, 38).

be amended to require ISPs to adopt a graduated response for repeat infringers culminating in the suspension of access services of an individual.” The report of the commission investigated “graduated responses to infringements that culminates in the suspension of access services to individuals” (called in the report, “three strikes” policies) in France (the HADOPI system), the United Kingdom (the Digital Economy Act) and New Zealand (the Copyright [Infringing File Sharing] Amendment Act). And has recommended similar policies in South Africa that leads to the termination of service of repeat infringers. The three strikes policy has been criticized by the French Minister of Culture, Aurelie Filippetti who has called the system, ineffective, and a waste of money; “12 million euros a year and 60 officers is expensive just to send a million emails.”⁵¹ Furthermore, terminating internet access for a civil offence is an unjustified infringement on the freedoms of expression, freedom of association and freedom to access information.

Issues

Take-down procedures

Once intermediary gains knowledge of content, and that it is unlawful, the intermediary is only free from liability if they respond to take-down notices. ISPs must thus comply with take-down notifications in order to keep their protection from liability. An ISP is not liable for hosting provided that “upon receipt of a take-down notification” the service providers “acts expeditiously to remove or to disable access to the data”.⁵² Similarly an ISP is only not liable for infringing data that it has cached, provided that it removes access to the cache of the infringing data upon receiving a take-down notice.⁵³ An ISP is not liable for infringing content when it acts as an information location tool providing a link or reference to that content, provided that it removes, or disables access to, the reference or link within a reasonable time after being informed that the content infringes on the rights of a person.⁵⁴

Intermediaries are not liable as long as they respond to valid take-down requests. However if an intermediary decides the request is not valid, as it is not a violation, or it is in bad faith, then the burden of proof falls on the intermediary, which may have to prove this in court. There is little thus incentive for an intermediary, or ISPA to contest a take-down request.

According to the ECT Act procedures “any person who lodges a notification unlawful activity with a service provider of knowing that it materially misrepresents the facts is liable for damages for wrongful take-down.”⁵⁵ However, “A service provider is not liable for wrongful take-down in response to a notification.”⁵⁶ The Copyright Review Commission notes that “Strangely, this sweeping exemption does not require the [intermediary] to have acted in good faith.”⁵⁷ ISPA and service providers may be incentivised to err on the side of caution by responding to the take-down request rather than challenging it, and possibly having to be liable

51 French minister: 3 strikes anti-piracy rule a 'waste of money', (The Register, 8 August 2012).

52 ECT Act Section 75 (1)c

53 ECT Act, Section 74.

54 ECT Act, Section 75.

55 ECT Act Section 77(2).

56 ECT Act Section 77(3).

57 Department of Trade and Industry, Copyright Review Commission Report, op cit.

for this decision in a court of law. Third parties those who created or posted or transmitted the allegedly infringing content, have no avenues open, other than the courts to contest take-downs.

It has been suggested Neil Dominic O'Brien that "The take-down procedure negatively affects the freedom of expression and the third party's rights to due process." Under the ECTA, content can be removed "on the basis of a mere allegation without any notification to the third party either before or after removal. The ISP may elect not to remove the content. It will then however lose the protection of the safe harbour." There is no appeals mechanism for take-down notices, leaving ISPs and third parties who created or posted the content in question with limited options to contest take-down notices, other than through the courts. All users of the internet are not on an equal footing with regards to take-down procedures. "the third party is not provided the opportunity to defend himself and is reliant on the ISP to defend his interests." It is therefore hard to determine whether ISPs are responding to take-down requests to remove lawful content out of fear of liability. "It is possible that the ECTA take-down procedures may be too effective in providing relief to victims of Internet abuse and fail to provide an adequate balance between the rights of all Internet users. Due to the ECTA not providing protection to third parties, it would then appear that it does not provide an adequate balance between ISP accountability and the interests of all the users of the Internet."⁵⁸ This system could be open to abuse to individuals or corporations seeking to remove content from the internet for purposes other than concerns in good faith over unlawful content.

The Minister has recognised these problems with takedown procedures: "the Minister considers that any notice or take-down procedure should allow for the right of reply in accordance with the principle of administrative justice and the audi alteram partem rule [no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them]."⁵⁹ This is an explanation for the proposed amendments to Section 77 of the ECT Act proposed by the Electronic Communications and Transactions Amendment Bill (2012).⁶⁰ The only effective changes to take-down procedures are that the complainant is required to write a first takedown notice to the service provider or designated agent, for which the service provider is given 10 working days to respond, after which another takedown notice will be sent, to which the service provider must comply or face liability.⁶¹ The rights of the creator or uploader of allegedly infringing content to have her story heard are not dealt with in the amendment, thus there is no *audi alteram partem* rule introduced by the new legislation. The proposed amendment has been described as replacing the "notice and takedown" system with a "notice and notice and takedown system".⁶²

Who is not afforded limited liability?

ISPA is the only recognized body, thus the limited liability provided for by the ECTA is only applicable to its 160

58 O'Brien 144.

59 As outlined in the Explanatory Memorandum Accompanying the ECT Act Amendment Bill, cited by Andre Rens, "Notice and Take Down or Notice and Notice and Take Down?", *Ex Africa Semper Aliquid Novi*, 30 November 2012, <http://aliquidnovi.org/notice-and-take-down-or-notice-and-notice-and-take-down/>.

60 Available: <http://www.ellipsis.co.za/wp-content/uploads/2012/10/Electronic-Communications-and-Transactions-Amendment-Bill-2012-for-public-comments-20121026-GGN-35821-00888.pdf>

61 Electronic Communications and Transactions Amendment Act (2012), Section 40 and Section 41 replacing section 77 and inserting section 77A respectively.

62 Andrew Rens, op cit

members, although it is feasible that others may be recognized. The Wireless Access Providers Association, another non-profit industry representative body that represents wireless access providers had claimed in 2007 that "WAPA is finalising amendments to its Code of Conduct so that it can apply to the Minister of Communications for recognition as an Industry Representative Body (IRB) under the Electronic Communications and Transactions Act (ECT Act)."⁶³ This process was not completed. As many WAPA members are also ISPA members, it may not be necessary (from the members viewpoint) to complete this process. WAPA has 110 members currently listed on its website.⁶⁴ The Wireless Access Service Providers Association of South Africa is another Industry Representative Body that represents service providers and access providers rather than just access providers. WASPA has over 250 members.⁶⁵ WASPA also in 2006 submitted an application to the Minister of Communications to be recognized as an IRB, but has not yet been recognised.⁶⁶

It seems that WASPA has decided not to apply for recognition for the moment. It seems unlikely that such recognition would benefit the majority of WASPA members. Very few of them host third-party content, but instead host and sell their own content, which would not be protected under the ECT Act.

Not covered by the limited liability of the ECTA are any persons or organizations or companies that are not members of the Internet Service Providers Association of South Africa. None of the major mobile phone operators other than MTN are members of ISPA, which would mean that they are not afforded liability. ISPA does not represent internet application providers, wireless application providers, online publishers, all e-commerce providers, as well as smaller scale intermediaries, like blog owners. So the limited liability offered by ECTA does not protect all internet intermediaries in South Africa.

The proposed amendments to the ECT Act may allow for a larger amount of intermediaries being afforded protection from liability. Industry Representative Bodies will be more easily recognised but they still need to be tacitly recognised by the minister. An representative body that satisfies all the requirements and has applied to the minister for recognition, if the Minister has not objected to the application after 12 months. Additionally the amendments would add to the definition of a service provider, wireless application services.⁶⁷

Recommendations

All intermediaries that conduct their activities according to conditions under Chapter XI of the ECTA act, need to be afforded conditional liability for unlawful content by third parties: Under the ECT Act there is currently effectively no protection from liability any intermediaries that are not members of the ISPA. Many wireless service providers and wireless access providers do not have protections from liability for content created by third parties. Similarly user-generated content websites, blogs or news sites with

63 WAPA, WAPA responds to iBurst's outburst, WAPA Press Release, 19 February 2007. <http://www.wapa.org.za/wapa-responds-to-ibursts-outburst>.

64 WAPA, Members, <http://www.wapa.org.za/members>.

65 WASPA, About WASPA, <http://www.waspa.org.za/about/index.shtml>.

66 WASPA, Report to the Adjudicator, 14 August 2006 www.waspa.org.za/code/download/0213.pdf

67 Electronic Communications and Transactions Amendment Act (2012), Section 37 inserts subsection (3) into Section 71 of the principal act. Section 36, replaces Section 70 of the principal act with ""In this Chapter, "service provider" means any person providing information system services or wireless application services" (amendments underlined).

automated online discussions, and internet cafes are not afforded protection from liability under the ECT Act. It would neither make sense, nor be possible for all intermediaries to become members of ISPA, as some are not technically internet service providers. **Chapter XI limitations on liability needs to be extended to non-ISPA members as well as to other types of intermediaries.** One approach would be for intermediaries could organise themselves into industry representative bodies and then applying to be recognised by the Minister. This approach would however privilege “industries” with money and time, and the time taken for recognition of industry bodies is very long, this would be harder to achieve for smaller intermediaries like for example small user-generated content internet startups, or individual bloggers. It may be better for innovation and freedom of speech online, if intermediaries were recognised by how they were defined in legislation, rather than their membership of a legislative body. This would require a revisions to Chapter XI of the ECT Act. It is recommended that government, lawmakers, intermediaries and stakeholders in business and civil society discuss the possible revision and broadening of chapter XI protections.

Smaller intermediaries also need protection: small intermediaries like bloggers or not protected from liability for third-party content on their websites over which they have no direct control, like for example comments on blogs. There is no explicit protection in the ECT Act for these types of intermediaries. Advocacy around this issue should be conducted with the aim of either suggesting amendments to the ECT Act, or finding defences in other pieces of legislation or common law in South Africa. Most existing debate on the matter seems to be biased towards bigger intermediaries that are formally internet access providers or internet service providers.

There is a need for an appeals procedure for takedown notices that addresses the concerns of all stakeholders, including content creators. There is no appeals process for content providers in takedown notice procedures, which occur solely between the complainant and the service provider. This denies content providers with their right to due-process, as well as possibly their right to free speech. Internet service providers, and ISPA are not incentivised to protect the interests of content creators who are subject to takedown notices in bad faith, this cannot be blamed on ISPA, as protecting the rights of content creators could expose ISPA to the threat of criminal or civil liability. Content providers whose content is subject to take down requests should be given the opportunity to appeal a takedown request. This would probably require amendments to Section 77 of the ECT Act, or new regulations in term of the act; there should be multistakeholder consultations involving government, lawmakers, ISPA, and intermediaries, and content creators and provider with regards to issues around appeals procedures.

Copyright concerns need to be balanced by human rights concerns, reform of legislation in the interests of enforcing copyright should not infringe on human rights. Suggestions by the Copyright Review Commission that “the ECT Act and the Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers should be amended to require ISPs to adopt a graduated response for repeat infringers culminating in the suspension of access services of an individual” would have human rights implications. Terminating internet access for a civil offence is an unjustified and disproportionate infringement on the freedoms of expression, freedom of association and freedom to access information. Terminating access to the internet for copyright infringement may be contrary the to right to freedom of expression, and the right

to access to information in the Bill of Rights of the South African Constitution.⁶⁸ The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue was “alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights.”⁶⁹ Such measures would also impose liability on internet cafes and small businesses, or require the installation of expensive monitoring software in order to avoid liability.

Rights holders need to be aware of their rights, and the opportunities available to them to use existing takedown procedures. Rights holders also need to make sure that they make use of the existing takedown system. It is evident that RiSA and SAMRO do not use the existing system as much as they should.

The Film and Publications Act needs to be reviewed to better reflect the realities of the contemporary internet. Requiring all internet service and access providers including internet cafes to register with the Film and Publications Board is cumbersome and hard to implement. These providers are already required to register under the Electronic Communications Act. The imposition of liability on intermediaries when considered “distributors” or “broadcasters” of unclassified or XX content under the FPA remains a possibility, although they need to have “knowingly” distributed this content. Internet Access Providers, as well as some internet service providers, and possibly other intermediaries need to be exempt from responsibilities and obligations to vet the classification of third party content that they are not aware of. There should be multi-stakeholder consultation discussing policy and regulatory reform of the FPA that may deal address these issues.

Multistakeholder consultation and engagement over the state of the Electronic Communications Act and the Film and Publications Act. The issues raised in this paper need to be discussed in a multistakeholder environment. Policy debate should not just be driven by the internet industry and government. Small intermediaries like internet cafes or small businesses, content creators and providers, civil society, and users of the internet all need to engage in discuss over intermediary liability.

68 Chapter 2, Articles 16 and 32.

69 Frank La Rue Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Human Rights Council, A/HRC/17/27, 16 May 2011, para 49, www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf