



Intermediary Liability

Safeguarding Digital Innovation and the Role
of Internet Intermediaries

Safe harbor, shifting sands

The age of two crucial pieces of legislation in this area—the European eCommerce Directive of 2000, and the U.S Digital Millennium Copyright Act [DMCA] of 1998—is itself revealing. Both laws were enacted at a time when the internet was widely heralded as the great facilitator of eCommerce, enabling new means of social interaction and novel ways to access content and information.

“Safe harbors” were put in place to allow the emerging internet market to develop and to safeguard hosting companies in particular against third party liability claims. Under the European e-Commerce Directive for example, hosting providers, or ‘intermediaries’, are not directly liable for content uploaded by users on their platforms, unless they are specifically made aware of infringing material and in receiving such a notification, so gain “actual knowledge”. This reflects the reality of what a hosting provider really can do on a day-to-day basis, and also helps encourage innovation and investment.

These safe harbor provisions are still in place today and in most cases provide mere conduit, caching, and hosting exemptions for intermediaries, together with the exclusion of a general obligation to monitor content. Slowly however, a wider net of intermediaries—from hosting providers to search engines, eCommerce platforms and other internet players—have been encouraged to help address new societal challenges, to help “clean up the web”, and effectively become internet police. Innovation continues but at the same time is threatened.

Duty bound

It is generally accepted that some categories of content might require different policy approaches and certain forms of illegal content need particularly rapid action – child sexual abuse online being one obvious example. In recent times, the ability of online hate speech to incite widespread violence has come to politicians’ attention, paving the way for an industry [Code](#) of Conduct in the EU. In both these areas, voluntary industry initiatives have seen hosting providers and social media platforms assuming increased responsibility.

Voluntary practices have also been developed to address online copyright infringement, alongside copyright legislation. The US Copyright Alert System, which concluded in early 2017 after a four year run, saw a group of leading ISPs co-operate with the content industry to tackle copyright infringement. In the UK, search engines [commit](#) to remove links to infringing content. Registries and Registrars are also under pressure to voluntarily do more at the DNS level.

“Fake news” represents a new frontier and social networks have committed to explore possible solutions, although this is a challenging area.

All to say, the concept of intermediary liability, originally framed by legislation, is rapidly moving towards an intermediary responsibility framework, with actors all along the value chain increasingly expected to assume a duty of care. While many of these new initiatives are laudable, they also risk shaking the foundation of the intermediary liability regime. Back-door attempts to update legislation should be monitored closely.

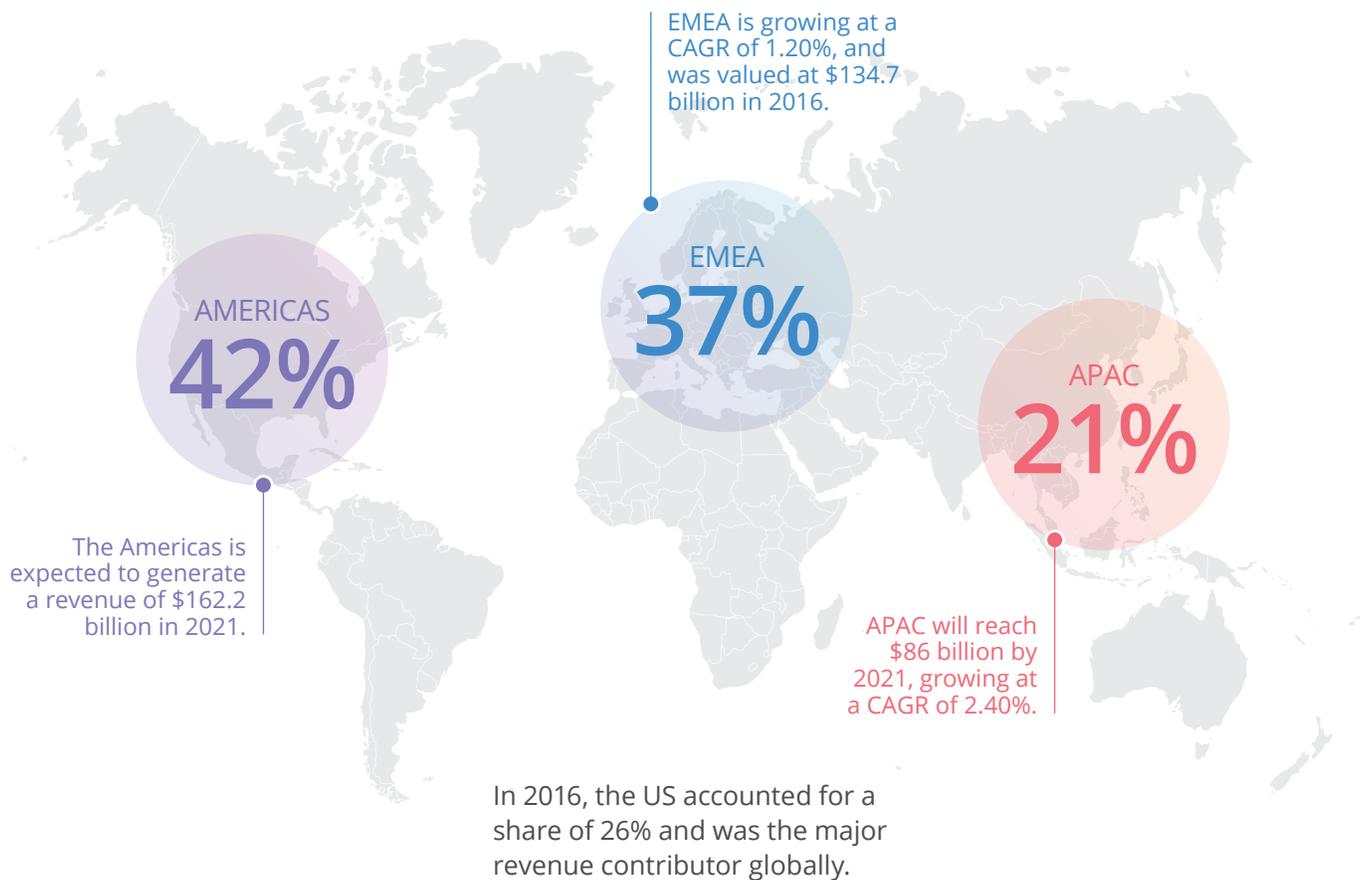
The value gap—fact or fiction?

Internet innovation has kept pace but many content creators and rights-holders have not adapted, and many content creators claim a loss in earning power as a result of online piracy.

Rights-holders frequently refer to a “value gap”, the idea being that that revenues generated from the online use of copyright-protected material are being unfairly distributed within the internet eco-system. Many rights-holders are frustrated by their own inability to monetize the exchange of protected content and so the internet is seen not as a digital opportunity but rather a digital threat.

Much of this rhetoric is exaggerated, as noted in a 2014 [report](#), “*The Sky is Rising: a detailed look at the state of the entertainment industry*”. There is an amazing range of new content being produced, consumed, shared and monetized. While many creative businesses are experiencing turbulence from digital copyright infringement, the measurable impacts are not as stark as sometimes suggested. According to a [report](#) by Technavio, the global content publishing market is expected to generate revenue of more than USD 391 billion by 2021, in large part due to digital opportunities:

Global content publishing market geographical segmentation 2016 (% share)



Facts remain

The fact that voluntary measures are increasingly seen as a tool to curb illicit and infringing activities online is not necessarily a problem. However, as the frequently referenced OECD [Principals](#) on Internet Policy Making note: proportionality and the protection of all relevant fundamental rights (eg freedom of expression, and the right to privacy) are key considerations. Voluntary measures have their limits and care must be taken not to have intermediaries be pushed into the area of excessive monitoring or indeed censorship. Intermediaries should not be forced to act as judge and jury, and indeed putting commercial entities in such a position is dangerous.

While a lot of creativity can be applied as regards the mechanisms to address illegal/harmful content, some facts and realities remain. The pool of intermediaries that can be drawn into the debate may ebb and flow as new business models emerge, however some actors, such as Cloudflare, will simply be restricted in what they can do by virtue of where they sit in the eco-system and the limitations of what they do/see.

The temptation to pull in more players across the spectrum has in part grown due to an approach known as “follow the money”, by which legislators have sought to reach down into the full stream of players benefitting financially from commercial scale infringement. There is merit in this approach, but again it has its limits and does not change a company’s business and capabilities.

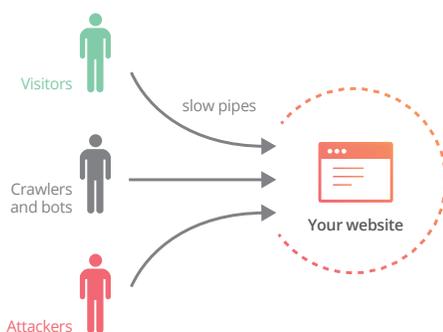
Cloudflare’s position

Cloudflare is often misrepresented as being a hosting provider, and can be erroneously pulled into copyright infringement disputes. However, **Cloudflare does not host or store any content and simply acts as a ‘reverse proxy’**. Cloudflare accelerates content downloads and applies some caching in order to do so, but that content would still continue to exist without Cloudflare’s being. Further, Cloudflare’s cybersecurity solution—a DDoS protection shield which sits between the third party hosting provider and the website—is reacting to external cyber threats and does not alter or manipulate the content on a website in any way.

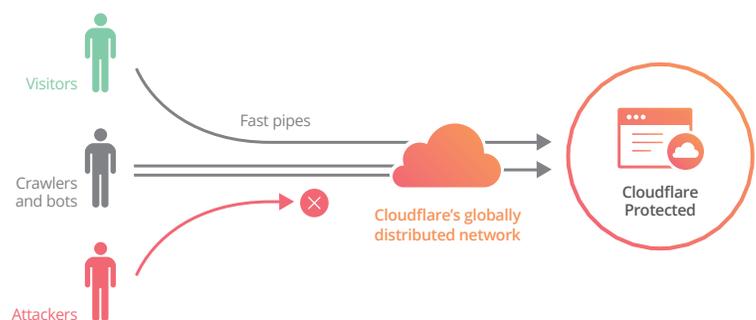
Services like Cloudflare exist to add efficiency and security to a third party website. Even if it were able to, **Cloudflare does not monitor, evaluate, judge or store content appearing on a third party website**. It will, however, always act in the event of a violation of its Terms of Service, upon receipt of a court order and follows procedures under the DMCA when made aware of harmful or illegal content, including alleged copyright infringement. In the case of child sexual abuse material, Cloudflare takes rapid action and alerts the relevant authorities, and hotlines.

Cloudflare’s service

Without Cloudflare



With Cloudflare



Preserving innovation

The well-established liability protection regime still maintains validity today and has been the bedrock of internet innovation over the years. It is important to acknowledge the importance of creative works—and to ensure that creators receive fair financial compensation for their efforts—but policy makers should not look for quick, short-term solutions to other complex problems of the moment involving the internet. A firehose approach which soaks anyone and everyone standing around an issue, is simply not the way forward. Companies need legal certainty and as with every policy debate, there must be an adequate problem definition and an evidence-based discussion. Finally and importantly, the internet eco-system and its players, with their different positioning in the value chain, need to be properly understood.



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