

Is the Internet safe harbour in danger?

July 2018

Michael Kende and David Abecassis

A group of 70 Internet pioneers was recently moved to write a letter to the President of the European Parliament, warning, “as a matter of urgency, about an imminent threat to the future of this global network [the Internet]”. The subject of their concern was a proposed change in the regulations that would require online platforms to block content that infringed copyright, but the thrust of the letter was more broadly a call to protect the open and free Internet from “substantial” damage.

The specific bone of contention is Article 13 of the proposed revision to the EC Copyright Directive, which if passed, would force online platforms to take technical measures to prevent the availability of copyright-infringing content. Proponents of Article 13 (largely content rights holders) see it as a necessary counterweight to what they view as the negotiating power of the large Internet platforms, while opponents (tech platforms, free speech advocates and those 70 Internet pioneers mentioned above, many of whom work with Internet companies) see it as a costly mandate to monitor and censor content.

The ongoing shifts and disagreements run more deeply, however. Before the Internet, professional content was provided by publishers or distributors who had editorial responsibility over all stories, videos and audio that they published. At that time, it was impossible for anyone to reach a mass market without passing through a publisher. The editorial responsibility to create or choose content also carried with it the obligation to ensure that the content met relevant regulations, including, depending on the country and medium, safeguarding copyright, limiting hate speech, protecting minors, limiting political advertising and promoting diversity.

The Internet shifted all of this. Where before we had to write a ‘letter to the editor’ in the hopes of having it printed, today we can write a tweet to the world. Blogs, songs, videos and photos can all be made available to anyone with ease. Online platforms that host all of this third-party content sit between the creator and the audience. It is the role of these platforms that is now under question.

As platforms emerged, the content that was uploaded soon created issues; some of it infringed copyright and some of it broke local content regulations. This put platform providers in a difficult position for three reasons.

- Firstly, even if a platform wanted to restrict content, it may not be possible without severely restricting the scale of what is being posted and uploaded.
- Secondly, even if it was possible to review the content, the platform may have commercial incentives not aligned with policy objectives for content regulation.
- Finally, and critically, even if the first two points could be overcome, the very act of blocking some content could create editorial responsibility for platforms.

This ultimate constraint on any self-regulation of content led policymakers to strike an important balance in the early 2000s. Platforms would be treated as intermediaries, with broad immunity from liability (also known as a safe harbour), in return for the removal of content upon suitable notice. This has been applied to copyright, an

issue of particular concern in the early days given the impact of Napster, and to other broader content issues, such as incitement to violence and hate speech.

Under this light-touch approach, the Internet flourished in ways that would otherwise have been unimaginable. The BBC developed an archive equivalent to 68 years of video over its television history (with a growth rate of one minute per minute broadcast per channel), whilst in contrast YouTube already has 80 000 years' worth of video, which is growing at a rate of 400 hours uploaded per minute. Facebook, Twitter, Snapchat and others have billions of users broadcasting, messaging and sharing content every day. This volume could never be reviewed by people in real-time, and algorithms are costly and have difficulty addressing context and nuance.

This explosion of content, and the economic and social value that it creates, has downsides. More people rely on the Internet for their news, entertainment, politics and social life, but the Internet is also a force multiplier for bad actors and bad actions. We now see fake news, election tampering, sex trafficking and copyright infringements that grow in impact. This is leading to a growing and worrying 'techlash' among users.

Governments are beginning to respond, partly by questioning safe harbour provisions. In the USA, the President signed a bill (FOSTA-SESTA) earlier this year that amends the safe harbour by imposing liability on platforms that host content relating to sex trafficking. In the European Union, revisions to the AVMS directives are likely to bring video-sharing platforms within the scope of audio-visual regulation. At the same time, the revised Copyright Directive discussed above may force platforms to filter copyright-infringing content. Governments also have their hands full considering how to address fake news, election meddling, terrorist recruitment and hate speech.

While every change in the online rules corresponds to existing offline regulations, these rules begin to shift the nature of platforms into that of publishers and start to alter the balance that was struck with safe harbour. The challenge for opponents (eloquently addressed in the Internet pioneers' letter) is to acknowledge the underlying public policy objectives while opposing the shift in responsibility. The challenge for policymakers is to address the 'techlash' and achieve their policy objectives while acknowledging both the value of preserving the fundamental nature of the Internet and the slippery slope that their recent actions may initiate.

Analysys Mason, working with Google, recently released two reports (on AVMS and on copyright, with Hogan Lovells and Allied for Startups, respectively) exploring these challenges. This is only the beginning of a long debate, with innovation, market power and democracy at its heart.