

Intermediary Liability in Kenya

Victor Kapiyo

Intermediaries

- Key drivers in development of the internet
- They host, locate and search for content and facilitate its distribution
- Include – ISPs, Telcos, - Wananchi, Accesskenya, Safaricom, Airtel etc

Issues

- Conflict of Laws- Constitution – supremacy of the people (art 1) and the constitution (art 2); general rules of international law (2 (5)) and ratified treaties and conventions (art 2 (6)) also form part of Kenyan law
- Real world vs Cyber world
- Jurisdiction issues - No borders - Multi-nationals
- Conceptual understanding of issues - definitions

Constitutional rights

- Art. 31. Right to Privacy – search and seizure of property, collection or revelation of private information and communications – (PS Ndemo govt monitoring of emails); hacking, security, LinkedIn passwords – data protection bill; official secrets act; spam, viruses
- Art. 32. Freedom of conscience, religion, belief and opinion
- Art. 33. Freedom of expression – seek, receive, impart information & ideas; limitations – war

Const. cont'd

- Art. 34. Freedom of the media – independence of electronic, print & other media; limitations present
- Art. 35. Right of Access to information – held by state; necessary for the protection of a right/fundamental freedom – Freedom of info bill
- Art. 27. Freedom from discrimination – e.g. employment, offering services
- Other social, economic, cultural and political

Const. cont'd

- Art. 40. Right to property – of any description - includes IP; property in the cloud
- Art. 42. Right to a clean and healthy environment – global warming
- Art. 46. Consumer rights – quality goods and services; information; protection of health, safety and economic interests; compensation for defective goods and services; fair, honest and decent advertising – consumer protection bill

Criminal

- Sexual offences act – s.12 – promotion of sexual offences through distribution, supply or display of content; s.14. – promotion of child sex tourism; s.16 – distribution of child pornography; effect of social media & web 2.0 - unwanted postings; KCA s. 84. Publication or transmission of obscene information
- Hate speech – Penal code - s.77

Crim. Cont'd

- Typical crimes of Fraud, theft, extortion, forgery
- Obstruction of legal processes – s.117 penal code
- Threats to national security – al shabaab on twitter
- Information communications act – s31 – interception, disclosure of messages; disclosure of contents of statements or accounts – vis a vis – police investigations

Civil

- Common law and statute
- Unauthorised access to info and disclosure – vicarious liability
- Defamation – libel and slander- publication or communication to 3rd party; commercial reputation – defamation act; baobab case
- Negligence – assuming duties – knowledge of act; duty of care, breach of duty
- Contract – law of contract act - enforceable

Civil cont'd

- sale of goods act – superior knowledge; breach of conditions or warranties; s.15 – correspond to description; 16-fitness for purpose;
- deceptive trade practices, unfair competition, false advertisement – consumer protection bill; competition act
- Tort - Interference with business relations - ethics
- Tort - Emotional distress – pain and suffering:

IPR

- Copyright – using/sharing what you don't own/w/o perm – web 2.0 (user generated content), streaming, hosting
- Copyright act 2001- s.35 (1) – doing any act controlled by © without licence of owner, import for private use, - paris and berne conventions – fair use
- S. 35(3)(d) Copyright and related rights shall be infringed by a person...who distributes, imports, broadcasts or makes available to the

IPR cont'd

- Database protection – copyright and patent – google Kenya vs mocality; opendata
- Trademark – Trademark act, Madrid agreement and protocol - confusion about a brand – suck domain names – safaricon website, dalyfiggis, applesucks, ihatetoyotta - typo-squatting – cybersquatting - iphone5.com; name squatting on social media e.g. twitter (@alfredmutua); WIPO dispute resolution mechanisms & registrars

Trends

- Trends - Blocking of websites – Egypt, UK, India case-ashok kumar; wiki leaks; domain name seizure – megaupload; US-sopa-acta; eradication of pointers – google/piratebay; follow the money - visa, paypal-mpesa, pesapal,zap etc
- US – Digital millennium copyright act – protects service providers from liability for copyright infringement –safe harbour provision – Viacom v youtube

- Net Neutrality – filtering, censorship etc – abuse? Conflict of interest; proportionality of action – india case – blocking piratebay; Authority of the judiciary (administration of justice) – art 169; 23 (bill of rights)
- Social media –arab spring, arrest of uk protesters, kenya case

Way forward

- Self-regulation – safcom; Co-regulation; Legislation
- Implementation – due process (Notice and take down procedures; Timeframes; role of intermediary; efficacy of procedures) ; will require partnerships; business models
- New approach to IPR regime – brought by internet P2P, sharing online – RT
- Consumer education