



# WHICH INTERMEDIARIES HAVE YOUR BACK?

**The role of Kenyan intermediaries  
in upholding privacy**

January 2019



## Introduction

Information and Communication Technologies (ICTs) have become crucial enablers of socio-economic development in Kenya. The country has a population of 48.47 million people, and an internet penetration rate of 89.4 percent.<sup>1</sup> This rise in population has contributed to the increase in uptake of services provided by internet intermediaries.

Digital rights may be described as the rights to access to and control of digital information, or the human rights which allow for the access, use, creation, and publishing of digital media or the access and use of computers, other electronic devices, or communication networks. They comprise the freedoms of expression, information, media, association and privacy. The state interest to control human rights online makes the role of intermediaries in the promotion and protection human rights critical.

A majority of internet users in Kenya have little or no knowledge of the implications of using the services provided by internet intermediaries. Further, the policies and practices of internet intermediaries on take-down requests including their responses, number, nature and the sources of the requests, affect freedom of expression online. These factors may result in the abuse or violation of user rights by internet intermediaries. In addition, available studies<sup>2</sup> on the liability of intermediaries in Kenya identify challenges such as indecision over which institutions should regulate internet intermediaries; inadequacy of consumer protection provisions; and the lack of robust privacy and data protection legislation. Others are anti-competitive behaviour and monopolistic practices; the need for regulators to accommodate emerging technologies and to enhance their ability to regulate them

## Privacy Practices

A study by the Kenya ICT Action Network (KICTANet)- How Kenyan Intermediaries Protect Human Rights Online (2019) found that majority of Kenyans use mobile phone services and apps without informed consent on how their personal data is handled.

Only about a third of the study participants read privacy policies before using mobile services. Even those who read stated that they did not opt out because they either had to accept the services in whole or not use it. While about 48% of the respondents were aware of a change in policies, they did not understand what the changes meant. It emerged that towards May 2018, many companies in the country updated their privacy policies in response to the coming into effect of the GDPR. From the study, it is evident that most companies did not have effective privacy policies prior to the GDPR coming into effect in May 2018. Those that did, updated them shortly before or after May 2018.

The study analysed the policies of select internet intermediaries. These included telecommunication providers, such as Safaricom, Airtel and Zuku; fintech mobile money and mobile loan providers such as Mpesa, Airtel Money, and Tala; and Sports betting companies such as Sportpesa and Betin. Others were e-commerce platforms, such as Jumia and OLX; taxi service providers such as Little Cab and Taxify, courier service providers such as Sendy; and Kisafi, a cleaning services provider. In addition, Airbnb, an accommodation service provider, Truecaller, a caller identity application; and Tinder, a dating application.

The policies of each of the intermediaries were assessed on how they managed personal user data; whether they respected consumer rights including allowing users to access, correct and remove their data, and the available forms of redress for grievances. The companies were subsequently ranked in the order of which their policies provided for the most detail, and were the most compliant with international data privacy principles and digital rights in general. The research also reviewed key documents and analysed responses obtained from the respondents.



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1 Kenya - Internet Usage Stats and Market Reports <https://www.internetworldstats.com/af/ke.htm> accessed on December 29, 2018

2 Alice Munyua, Grace Githaiga and Victor Kapiyo, 'Intermediary Liability in Kenya', Association for Progressive Communications, 2012, Accessed: 13 September 2017, [http://www.apc.org/sites/default/files/Intermediary\\_Liability\\_in\\_Kenya.pdf](http://www.apc.org/sites/default/files/Intermediary_Liability_in_Kenya.pdf); Mutemi, M., Walubengo, J., 'Treatment of Kenya's Internet Intermediaries under the Computer Misuse and Cybercrimes Act, 2018' available at: [https://www.researchgate.net/publication/329160797\\_Treatment\\_of\\_Kenya's\\_Internet\\_Intermediaries\\_under\\_the\\_Computer\\_Misuse\\_and\\_Cybercrimes\\_Act\\_2018](https://www.researchgate.net/publication/329160797_Treatment_of_Kenya's_Internet_Intermediaries_under_the_Computer_Misuse_and_Cybercrimes_Act_2018) accessed on December 31, 2018; State of Internet Freedom in Africa 2017: Intermediaries' Role in Advancing Internet Freedom - Challenges and Prospects, CIPESA [https://www.opennetafrika.org/?wpfb\\_dl=74](https://www.opennetafrika.org/?wpfb_dl=74); Digital Rights in Sub-Saharan Africa, Analysis of Practices of Orange in Senegal and Safaricom in Kenya, Internet Without Borders [https://www.accessnow.org/cms/assets/uploads/2018/02/RDR-Africa\\_Final-version-5\\_January-2018.pdf](https://www.accessnow.org/cms/assets/uploads/2018/02/RDR-Africa_Final-version-5_January-2018.pdf) accessed on June 19, 2018; CIPIT, Strathmore University Law School, 'Safaricom and Internet Traffic Tampering', March 2017, Accessed: 13 September 2017, <http://blog.cipit.org/wp-content/uploads/2017/03/Final-March-Brief-pages.pdf>; Institute for Human Rights and Business, 'Corporate Responses to Hate Speech in the 2013 Kenya Presidential Elections', November 2013, Accessed: 13 September 2017, <https://www.ihrb.org/pdf/DD-Safaricom-Case-Study.pdf>

## Review of company policies

The intermediaries were ranked based on the comprehensiveness of their policies with respect to digital rights. They were ranked as follows: Tinder, Mpesa, Airbnb, Taxify, Tala, Truecaller, Sendy, Betin, OLX, Jumia, Sportpesa, Airtel, Airtel Money, Little Cab, Kisafi and Zuku. Most of the companies were found to have stand alone privacy policies or a privacy clause in their terms and conditions found on their respective websites. The exceptions were Safaricom, Zuku and Kisafi.

A number of companies' made their privacy policies easily accessible and were available on the homepages of their official websites.

Taxify, an Estonian company, provided an option for viewing the privacy policies in different languages. It also had separate privacy policies for drivers and for users in different languages. In addition, it provided a link for Taxify group companies and partners to access personal data to the extent necessary to provide customer support in the respective country.<sup>3</sup>

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## Data Handling Practices

Some of the companies explained their role as data handlers; what they collected; how they collected the data; and, how it was used. The international intermediaries were found to be more specific and descriptive in general as compared to the local intermediaries. Taxify, appears to satisfy the GDPR requirement for collecting, processing and keeping data for legitimate interests.

Notably, almost all the companies reviewed stated that they did share their data with third parties. However, they did not provide information or explain who the third parties were.

However, most of the companies made no mention of whether data in their custody could be transferred outside of their jurisdiction.

Other privacy practices reviewed under the privacy policies include:

- **Correction of information:** Most of the companies provided information on how a user could correct, update information or access their information. Intermediaries such as Airbnb and Truecaller, which collect and verify personal information require that requests be made to correct one's information about oneself. Truecaller had explicit provisions to address grievances and update or correct data.

- **Data minimisation:** Very few intermediaries in the study gave users the option for less data to be collected. OLX and Sendy use an opt-out approach where customers can select to minimise how their data is shared
- **Data retention:** Most intermediaries are ambiguous on how long they retain data. Taxify specified how different data types are retained for different periods.
- **Informed consent:** Intermediaries design their products such that use of the product implies consent on their privacy policies and other terms of use. They do not provide for express consent or consent for parts of their services.
- **Transparency reports:** None of the intermediaries in the sample publish transparency reports.

## Local or global?

Certain intermediaries appeared to be "local" intermediaries given their Swahili names. However, on further examination, they were found to be registered outside of Kenya. Tala, formerly Mkopo Rahisi (meaning "easily in hand") is registered in California. Sportpesa (meaning "Sportmoney") while registered in Kenya, is a subsidiary of a company registered in the UK. Jumia (similar in sound to "Jumuia" meaning "community") is registered in Germany. This perhaps explains the robustness of their policies, given the fact that they are not locally incorporated.

This registration out of Kenyan territory has implications for data protection and privacy in terms of where data is processed and stored, and therefore governed.

## Conclusions

It also emerged that the bigger the intermediary, the more robust the policies and accountability. This underscores the need for awareness and assistance to micro, small and medium enterprises (MSMEs) to upgrade their policies so that they uphold digital rights. There is still need to assess the extent to which the intermediaries put into practice their commitments in their policies.

The results also bring to the fore the need for continuous sensitisation of users of their privacy online. Also, that even where intermediaries make information available, users do not read such information to know their rights. Moreover, there is still debate over the extent to which regulators should control or intervene in cases of copyright infringement, defamation, hate speech and terrorism on online platforms.

<sup>3</sup> Taxified Cities. <https://taxify.eu/cities/>

# Recommendations

The study recommended the following for different players:

## **Intermediaries should**

- Upgrade their privacy policies to uphold digital rights including freedom of expression, access to information and the right to privacy.
- Produce annual transparency reports relating to how user data is handled.
- Be open about how long they hold information, how they use it, and how they safeguard and protect it.
- Educate their users on their rights.

## **Civil Society should**

- Promote more awareness for consumers on privacy online and other digital rights.
- Monitor the practices of intermediaries and highlight breaches whenever they occur.
- Advocate for rights-based regulation of privacy
- Engage policy makers to have responsive policies for MSMEs

## **Government should**

- Adopt robust legislation to secure the rights of users, oversee the policies and practices of intermediaries, regulate the excesses, and seal the gaps being exploited by intermediaries.
- Implementing the highest standards of privacy where its organs or departments are intermediaries

## **Academia should**

- Conduct research on best practices with respect to the various business models of intermediaries, including the extent to which companies actually practice the commitments in their policies.
- Prepare future generations for the practice of privacy through education on issues such as privacy by design
- Provide thought leadership in designing a rights-based information economy that best serves a middle income country like Kenya



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