

# Intermediary liability safe harbor

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# Civilizational significance of the Internet

- Giving powerless people the tools of mass communication
- What is mass communication? TV and newspaper (reaching multitude)
- TV/government, newspaper/corporations, also LIMITED SPACE → elite vs people
- Formal democracy vs. substantive democracy
- Substantive democracy requires equality in communication
- Does internet give us that?
- 2012 Korean Constitutional Court on Internet real name law : “overcome hierarchy offline in age, gender, social status”
- 2011 Korean Constitutional Court on election restriction: “online communication requires AFFIRMATIVE conduct of receiver, so not easily affected by financial dominance”

# Intermediary Liability Safe Harbor

- ISPs/ Social media platforms/ Web hosts/ Search engines
- When should intermediaries be held liable for “aiding and abetting” online illegal content?
- SAFE HARBOR: No liability as long as not aware of illegal contents, why? → if not, GENERAL MONITORING or Prior Censorship → Internet becomes like TV and newspaper subject to gate keeping → People lose the power of speaking to one another without approval
- EU e-Commerce Directive Article 13-15
- US Digital Millenium Copyright Act section 512
- [Japan Provider Liability Article 3 \(1\)-\(2\)](#)
  - Notice and Takedown (Liability-Exempting): “shall NOT be liable if. . .”
  - not liable if you do X. Not doing X does not mean liability but just falls back on ordinary torts → bright line rule of exemption for unknown contents

# Three Types of intermediary liability

- Broad immunity: Communication Decency Act Section 230
- Intermediary Liability Safe Harbor
- Strict liability:
  - [Thailand's Computer Crimes Act 2007 \(CCA 2007\) Article 14-15](#) criminal sanctions imposed, inter alia, for allowing publication of information on public computers in circumstances where the disseminated information is false and is likely to cause damage to a third party or the country's national security → Chiranuch Premchaiporn
  - CHINA – liability for failing to monitor, remove, even without notice

# Intermediary liability safe harbor as international standard

Consideration should be given insulating intermediaries from liability for content produced by others where liability should only be incurred if the intermediary has specifically intervened in the content, which is published online or fails to take down content following a court order (contrary to the practice of notice and takedown).

[2011 Joint Declaration of UN, OAS, OSCE, and ACHPR on Freedom of Expression and the Internet, June 2011](#)

[N]o one should be held liable for content on the internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf.

Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, A/HRC/17/27, para. 43.

# International Soft Law

## MANILA PRINCIPLES ON INTERMEDIARY LIABILITY



### INTRO

All communication over the Internet is facilitated by intermediaries such as Internet access providers, social networks, and search engines. The policies governing the legal liability of intermediaries for the content of these communications have an impact on users' rights, including freedom of expression, freedom of association and the right to privacy.

With the aim of protecting freedom of expression and creating an enabling environment for innovation, which balances the needs of governments and other stakeholders, civil society groups from around the world have come together to propose this framework of baseline safeguards and best practices. These are based on international human rights instruments and other international legal frameworks.

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**Intermediaries should be shielded from liability for third-party content**

## 2016 Trump election → “fake news” debate

- German Network Enforcement Act (NetzDG) 2017
  - Australia’s 2019 “abhorrent violent content” law
  - France 2020 Avia law
- Mandatory notice and takedown law
- Liability-imposing: “. . shall be liable if fails to take down within 7 days/24 hours/1 hr”
  - Technically ok under SAFE HARBOR because applies only to NOTICED content but. . .
- Platform’s tendencies to err on the side of **taking down** vs. **keeping it up**
- MANY lawful postings taken down

# France Avia Law struck down– Constitutional Conseil (June 2020)

- Part I: Terrorist content, child pornography AS notified by administrative authority – within 1 hr
- Part II: Other “manifestly illegal” content – within 24 hours of notice
- Unconstitutional b/c time too short, extrajudicial → criminal penalty not proportionate
- Probably considered impact on free speech – “false positives”
- Conseil national du numerique (French Digital Commission), la Commission nationale consultative des droits de l’homme (French Human Rights Commission) opposed.
- Notice that Part I is not even a liability law but **direct administrative censorship**.
- 2022 October Spanish Supreme Court on blocking order on womenonweb.org – administrative censorship unconstitutional!
- 2009 June French Supreme Court on HADOPI law – **administrative cut-off** of internet access unconstitutional



# We had it all along in Korea and Asia!

- Copyright Act – attempt to copy DMCA 512 but break into 2 sentences – “not liable if take down” + “must take down if noticed”
- Network Act - “must take down if noticed” (2007)
  - -Missing “liability-exempting” language and only “liability imposing”
- Problems of over-blocking – many legal contents taken down.
- Other Asian adaptations of mandatory notice and takedown:
  - Malaysian Copyright Act (2012)
  - Indonesian commerce platform circular (2016)

## Vs. (liability-exempting)

- Japanese Provider Law (2001)
- Indian IT Act (2011)

## However, Germany's NetzDG (2017)

- Over 2 million registered users
- Take down illegal contents defined by Germany's Criminal Code.
- flagged by individuals.
- "manifestly unlawful" : within 24 hours, all other "unlawful content", within 7 days.
- Or face fines of up to 50 million euros

→ **On face, no violation of international standard on safe harbor but exploits the grey area by requiring "noticed" contents to be taken down if and when platform operators are not aware of illegality.**

"over-implementation" by providing an incentive to err on the side of caution rather than free expression

- "privatizing" online censorship because of the scalability issue.  
No public control but reliance on platforms' decisions

# Spread of NetzDG in Broader Contents Scope

- 2019 Philippines Anti False Content Act – mentions NetzDG
- 2018 Malaysia Anti Fake News Act – mentions NetzDG
- 2018 Vietnam Cybersecurity law – “propaganda against Vietman”, etc., - similar to NetzDG, e.g., 24 hours
- 2019 Singapore Protection from Online Falsehoods and Manipulation Act – false statement of facts - mentions NetzDG
- 2021 Indonesia MR5 – “prohibited content”, e.g., 4 hours, 24 hours of **flagging by Ministry** - similar to NetzDG
- 2022 Myanmar Cybersecurity Bill – must remove “timely” all prohibited content **after flagging by the department** including “complained of stmts damaging another’s social standing and livelihood”

# Moving forward

- Direct administrative censorship
- General monitoring obligation
- In the meantime. . .
  - 2021 Australia Online Safety Act - eSafety Commissioner's removal notice to be acted upon
  - 2021 Canada Online Harms bill – upload filtering, 24 hours mandatory (private) notice and takedown.
  - 2021 UK Online Safety bill – duty to detect and remove and Ofcom able to penalize if not fulfilled