

Erosion of intermediary liability safe harbor as an international human rights standard and in Asia and Germany's NetzDG

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Intermediary liability safe harbor as international standard

- 2000 EU e-commerce directive
- DMCA 512

→ cannot be held liable for contents that intermediaries are not aware of.

→ should not require general monitoring obligations

→ **Q: Is it okay to hold intermediaries liable for contents that they know the illegality and existence of? A: Yes**

→ **Loophole:** How about holding intermediaries liable for contents they know the existence of but they do not know the illegality of? **A:** If this is allowed, intermediaries will err on the side of deleting (vs retaining) contents “noticed upon” by third parties. Many lawful contents taken down.

Germany's NetzDG

- 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 that grey area by requiring "noticed" contents to be taken down if 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, flagged by Ministry - similar to NetzDG

Manila Principles (2015)

- No liability for content “un-modified” by intermediaries
→ CDA230 level

Further issues:

What to do with platforms **knowingly** retaining illegal contents

→ Those platforms should be held liable under general tort law.

→ Only those knowing of illegality, not just of existence, should be held liable just as general tort liability. The problem with mandatory notice and takedown is that it puts another pressure/liability via “notice” on intermediaries to over-censor (i.e., take down lawful contents).