



# Implications of Internet Intermediary Liability Regimes for Freedom of Expression and Innovation

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# Policy benefits of limitations on intermediary liability

- Most online expression takes place on centralized platforms (e.g., YouTube) and social networks (e.g., Facebook) operated by Internet intermediaries
- Intermediary platforms make available:
  - Avenues of expression for everyday people and online communities where people can collaborate to effect positive change
  - Improved communication systems between government and the governed (e.g., Obama town hall meeting on YouTube)
  - Diverse sources of information, allowing better informed choice
  - Marketplaces for conducting business with low transaction costs and accessible to a broad range of potential consumers, creating revenue-earning opportunities without high barriers to entry (e.g., Etsy: over 800,000 active shops; Q1-Q2 2011 sales of \$224.7 million, <http://www.etsy.com/press/>)
  - Job creation through proliferation of new enterprises (e.g., McKinsey survey of 4,800 global small and medium enterprises found the Internet created 2.6 jobs for each lost to technology related efficiencies, [http://www.mckinsey.com/mgi/publications/internet\\_matters/index.asp](http://www.mckinsey.com/mgi/publications/internet_matters/index.asp))



# Policy benefits of limitations on intermediary liability

Protecting intermediaries from liability for user actions promotes free expression and innovation

- *Free expression*
  - Fear of liability creates incentives to block user participation or remove user expression, affecting lawful activity:
    - Intermediaries will perform overbroad blocking to avoid risk that unlawful activity is allowed to take place
    - Intermediaries are not well positioned to make determinations about legality of content
  - Users are not able to seek, receive, impart information and opinions without undue interference



# Policy benefits of limitations on intermediary liability

- *Innovation & economic growth*
  - Enables intermediaries to develop and support innovative platforms that encourage user participation and creativity without fear of reprisal
    - Without protection, risks of and actual litigation costs too high to support
    - Monitoring for illegal activity both unfeasible (lawfulness of content is not evident on its face) and prohibitively costly
    - New enterprises without financial capacity to support obligation thresholds cannot enter market



# Approaches to liability limitation: Guiding principles

- When creating new legal norms:
  - Export the whole package: Incorporate limitations and exceptions as well as enforcement mechanisms
  - Legal systems that do not recognize secondary liability do not need limitations on liability; adopting such provisions may create undue pressure to establish secondary liability rules where they do not currently exist:
    - 2003 Industry Functional Trade Advisory Committee Report re: U.S.-Singapore FTA p. 19 (explicitly noting this consequence)
    - U.S.-Peru FTA fn 28 (agreement language deliberately tempering that conclusion)  
[http://www.ustr.gov/webfm\\_send/1031](http://www.ustr.gov/webfm_send/1031)



# Approaches to liability limitation: Guiding principles

- When creating new legal norms *cont.*:
  - Incorporate schemes that protect platforms against other kinds of claims that go beyond intellectual property
  - Provide flexibility for future technological developments:
    - U.S.-Australia FTA fn 31: “Either Party may request consultations with the other Party to consider how to address...functions of a similar nature to the functions identified...that a Party identifies after the entry into force of this Agreement.”



# Approaches to liability limitation: Guiding principles

- Limitations of liability regimes require balance:
  - Conditions of qualification should not be too onerous
  - Redress-seekers should meet appropriate thresholds for obtaining remedies
  - Consequences should be commensurate with actions and provide opportunity for ex ante review
- International emphasis on importance of limitations on platform liability for protecting citizens' freedom of expression
  - United Nations Special Rapporteur on Freedom of Opinion & Expression, *Report to the UN General Assembly Human Rights Council*, June 2011  
[http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)



# Approaches to liability limitation: U.S. DMCA section 512

- Enacted to preserve and promote innovation and expression online
- Protects eligible service providers against copyright claims
- Statute's components have a direct impact on citizens' freedom of expression & privacy and on innovation -- for example:
  - Notice and takedown scheme
  - Repeat infringer policy
  - Standard technical measures
  - User privacy / subpoena provisions





# Approaches to liability limitation: U.S. DMCA section 512

Notice and takedown scheme: Provides important safeguards for free expression and innovation but also has unintended negative consequences for both

- Process:
  - Copyright holder sends takedown notice to service provider
  - Service provider must remove identified content to preserve safe harbor (no judicial review)
  - Content must be restored after 10-14 days if user counter-notices, unless copyright holder files a lawsuit
  - 17 U.S.C. § 512(c), (d), (g)



# Approaches to liability limitation: U.S. DMCA section 512

## Notice and takedown scheme *cont.*

- Impact on lawful expression
  - Some procedural safeguards (e.g., “complete” notice; liability for knowing material misrepresentation, 17 U.S.C. § 512(f))
  - Expedited process without judicial oversight tempts abuse and may be improperly used due to misunderstandings of the law (e.g., trademark claims, defamation claims, fair use, etc.)
    - Commentary (e.g., UMG takedown of podcast about Akon; Michael Crook takedown of Fox News footage)
  - Even short downtime can have meaningful impact on freedom of expression
    - Political speech (e.g., NPR takedown of political ad; NBC takedown of Obama campaign video)



# Approaches to liability limitation: U.S. DMCA section 512

## Notice and takedown scheme *cont.*

- Impact on innovation
  - Regulation can vastly increase costs beyond the ability of startups: Even if large companies have technical and financial capacity to take certain actions, small startups typically do not (e.g., filtering)
  - Administrative requirements also can have real costs: Many smaller U.S. sites find themselves ineligible for safe harbor protections because of failure to register with Copyright Office



# Approaches to liability limitation: U.S. DMCA section 512

Other conditions and provisions: Other conditions of eligibility as well as related provisions impact citizens' freedom of expression, privacy, and innovation

- Repeat infringers
  - Reasonably implemented policy providing for termination in appropriate circumstances of subscribers and account holders who are repeat infringers (17 U.S.C. § 512(i)(1)(A))
  - Discretion left to service providers: Does not require automatic Internet disconnection upon a given number of allegations of copyright infringement



# Approaches to liability limitation: U.S. DMCA section 512

## Other conditions and provisions *cont.*

- Standard technical measures
  - Accommodation of and no interference with standard technical measures developed by broad consensus of copyright owners and service providers in open, fair, voluntary, multi-industry standards process and that do not impose substantial costs on service providers or substantial burdens on systems or networks (17 U.S.C. § 512(i)(1)(B) & (i)(2))
  - No obligation to monitor service except to the extent consistent with standard technical measures *as defined* (17 U.S.C. § 512(m))
  - Network level filtering does not satisfy these conditions
- Protection of privacy / anonymity: Leading case holds that copyright holders must file lawsuit prior to issuance of subpoena for identity information of alleged file sharers



# Approaches to liability limitation: Other examples

- Chile: Copyright holders can petition courts for injunctions requiring Internet intermediaries to remove or block access to particular allegedly infringing content
  - Intermediaries are not in position of making legal determinations
  - Sound incentives structure; no undue pressure on intermediaries to remove = more protection for citizens' legitimate expression



# Approaches to liability limitation: Other examples

- U.S. Communications Decency Act section 230
  - Provides legal certainty that allows economically valuable services based on reputational information to flourish (e.g., Amazon, eBay, Yelp)
  - Protects service providers against most tort claims and state laws; no protection against federal law IP and criminal claims
  - No notice and takedown regime or registration requirements: Blanket immunity for qualifying providers; responsibility for user submissions solely on author of content in question
  - Conditions of eligibility: Provider must not edit submissions or be otherwise considered a creator of the content in question



# Thank you

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