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Conference Paper

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22nd Biennial Conference of the International Telecommunications Society (ITS): "Beyond the Boundaries: Challenges for Business, Policy and Society", Seoul, Korea, 24th-27th June, 2018

Provided in Cooperation with:

International Telecommunications Society (ITS)

Suggested Citation: Yeh, Chih-Liang; May, Cheryl Toh Shuet (2018) : Internet Intermediary Liability under the Internet Governance: Taiwan's Legislative Action, 22nd Biennial Conference of the International Telecommunications Society (ITS): "Beyond the Boundaries: Challenges for Business, Policy and Society", Seoul, Korea, 24th-27th June, 2018, International Telecommunications Society (ITS), Calgary

This Version is available at:

<https://hdl.handle.net/10419/190423>

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Internet Intermediary Liability under the Internet Governance: Taiwan's Legislative Action

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Abstract

The Internet intermediary has difficulty to monitor all the information on the website. To solve the issue whether the intermediary should be jointly liable for the direct infringer regarding the infringing content, current Copyright Law has rendered an immunity constructed by the notice-and-takedown rule, which does not extend to the other types of online infringement. Such a cooperative obligation has made the intermediary bear heavy burden to monitor online activities. Some countries provide the mechanism of site blocking to protect the rights of right holders; however, such a measure has been challenged by many sectors of community. Recently Taiwan's government announced the proposal of Digital Communications Act attempting to adopt the multi-stakeholders model of Internet Governance to make a smooth communication and to keep the government from intervene the Internet management by administrative measures. It also helps establish the mechanism of value compensation among right holders, users and intermediaries and maintain the neutral role of intermediary to check balances of various interests.

This paper attempts to explore the legal development of Internet intermediary liability, to understand the jurisprudential meaning of the concept of Internet governance, and to review whether current legal remedies are enough or not, especially focusing on whether the site blocking measure can be adopted and how to make balances of interests. This paper makes solid suggestions to correct the flaws of the legislation of Digital Communications Act and argues that the Internet Governance focuses not only on the legitimacy of procedural participation but also on the protection of substantial rights, so as to preserve the sound development of entire Internet.

Keywords: Internet Governance, Multi-stakeholders Model, Internet Intermediary Liability, Safe Harbors, Site Blocking, Digital Communications Law

This manuscript is prepared for the ITS Biennial Conference held in Seoul, Korea, June 24-27, 2018. Do not quote this manuscript without authors' permission.

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I. Introduction and Research Questions

With the arising of Internet intermediaries that play roles in mediating the Internet between content authors and audience, it also raises the difficulty of monitoring websites information. Current “notice-and-takedown” procedure rendered by Copyright Law appears to solve the issues of intermediaries for direct or indirect infringement liability; however, it somehow increases the intermediaries the burden on monitoring online activities. To maintain the neutral role of intermediary, many national regulators have adopted the “multi-stakeholders model” of Internet governance, no matter by the legislative action or soft laws (such like self-regulation), to allow smoother communication and avoid governmental intervention of Internet management.

In mid-November of 2017, Taiwan’s Executive Yuan (the cabinet) established a milestone of communications legislation, entitled “Digital Communications Act” and later on the Draft has been submitted to Congress for review. The Draft emphasizes that the legal environment should support the dynamic development of social and economic behaviors ranging from ICT networks, proper deregulation, more market competition and innovative services, and digital dividend. To meet the characteristics of digital communication and connect to the legal rules in real world, the purpose of the Draft is to fulfill the digital transformation, to harmonize the relationship between the intermediaries and users, and to find the balancing point of online services and social orders.

This paper aims to explore the legal development of Internet intermediaries’ liability and to investigate the sufficiency of current legal remedies, especially focusing on possibility of site blocking measure adoption and discussing on method of making balances of interests. Substantial suggestions would be provided in this paper to revise the flaws of the Draft Digital Communications Act.

Against the above background, the purpose of this paper focuses on discovering what kind of attitude and method should be adopted by the Internet intermediary under the Internet governance to assist the right holders to fill the gap of values and make the balance of interest among intermediaries. Thus, this paper categorized the following issues to be addressed:

1. The position of intermediaries and the possible improvement of balance of interest in regard of liability exemption of Internet intermediary, and slight discussion on legal meaning of multi-stakeholder model of Internet governance that are widely adopted in the global community.

2. Should traditional tort liability theory be applied in the online environment? How can the jurisdictional issues of network service be solved? Confronting overseas infringement, how can the local authority provide feasible law enforcement and civil remedies for the right owners (or victims)?
3. Since the Taiwan's Draft Digital Communications Law emphasizes that the government should refrain from intervening in management of online activities, it is interesting to know whether the framework of self-restraint mechanism provided in the Draft could be practically beneficial.

Throughout the above discussion, it will be helpful for the legal profession to understand the relevance of many behavioral patterns on the Internet, the definition of the role of Internet intermediaries, and the meaning that Internet governance is legally available for law practice.

II. Civil liability exemption for ISP: Status quo survey

The Internet has become part of the daily life of modern people. Recently, the Internet celebrity economy and live broadcasting trend have picked up. Live broadcaster (or live host) has shared livelihoods through live broadcasting, which can be known as a representative product of the Media Era. Although the live broadcasters and the live broadcast platforms are mutually beneficial, however, they are often subject to the users' live broadcast of pornographic content and other controversial issues, as it stirred up criticisms and disputes. In addition, the Internet users upload multimedia content without permission from the copyright owner to platforms, and some even engage with non-domestic websites by providing illegal audio and video content for the sake of online advertising benefits. It causes struggles for rights holders to defend their rights and to claim their rights because of jurisdiction issues.

It is not easy for platforms to supervise the flow of information on the website with the need to take into consideration of the freedom of speech and the human rights of the user. If the website contains infringing content, defamatory content, or inappropriate pornography content, as a platform provider (intermediary with the nature of content provision to consumers), should they be jointly responsible for the above-mentioned illegal or inappropriate content and direct infringers? There are different evaluation and treatment methods in different areas of law.

The term "intermediary" refers to the party that transfers information from one side to another and does not actively make decision on its own. Under this definition, providers such as telecommunications services and Internet services are all considered

as intermediaries.¹ Regarding the normative approach of online intermediary, based on considerations of particularity, conflicts of interest, and legislative and policy considerations on various issues, there are three main types of absolute exemptions (Article 230, Section C of the US Communication Decency Act 1996), conditional exemptions (the Safe Harbor provisions of the US Copyright Act), and strict liability (Article 15 of the China Internet Information Service Administrative Measures). The “notice-and-takedown rule” adopted by most countries in the copyright system serves as the basis for the exemption of liability for Internet service mediators, but it still fails to improve the increasing copyright infringement problems and criticized by right owners² and advocates of Internet freedom.³

In Taiwan, the government agency, empowered under Articles 46 of the Child and Juvenile Welfare and Rights Protection Act, entrust private content protection agencies with self-regulation measures (or similar controls) to prevent harmful content on the Internet that influences children’s physical and mental health. The Internet intermediaries are required by the government agency with the obligation to restrict access or prior removal when the content is found harmful to children or appropriate protective measures are not taken. Under such circumstances, it seems that the Internet intermediaries taking actions are not under self-discipline but are subject to certain legal obligations, which increases the obligations of Internet intermediaries for online infringement.

What can be done to handle the liability of Internet intermediaries? In 2015, a consensus was reached at the conference RightsCon through experts from around the world including EFF (Electronic Forwarding Foundation), CIS (Centre for Internet & Society), and industrial experts. They proposed Manila Principles on Intermediary

¹ See Thomas F. Cotter, *Some Observations on the Law and Economics of Intermediary*, 2006 MICH. ST. L. REV. 67, 68 (2006). In addition, Law Professor Peter Yu called it “Middleman.” Peter K. Yu, *On Monks, Medieval Scribes, and Middleman*, 2006 MICH. ST. L. REV. 1 (2006). According to the OECD report in 2010, it categorized the Internet intermediaries as six basic forms: Internet access and service providers, data processing and web hosting providers, search engines and portals, electronic commerce services, Internet payment systems and participative network platform. See Karine Perset, *The Economic and Social Role of Internet Intermediaries*, OECD Digital Economy Papers, No. 171, <http://dx.doi.org/10.1787/20716826> (last visited 2018/4/18).

² IFPI pointed out four abuses of safe harbors, including unfair negotiation scenarios, ineffective notice-and-takedown mechanism, unfair reimbursement of right holders and breaking the fair competition. IFPI, *GLOBAL MUSIC REPORT 2016: MUSIC CONSUMPTION EXPLODING WORLDWIDE 23*(2016), <http://www.ifpi.org/downloads/GMR2016.pdf> (last visited 2018/4/18).

³ See Elliot Harmon, *Copyright Law Shouldn’t Pick Winners*, EFF (June 20, 2017), <https://www.eff.org/deeplinks/2017/06/copyright-law-shouldnt-pick-winners> (last visited 2018/4/18); see also REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* (2012); EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* (2011).

Liability,⁴ trying to avoid over-restrictions on user freedom and Internet innovation by the state or the private sector when current regulatory policies are not flexible, clear, and lack of consistency. The main spirit is that Internet intermediaries should be exempted from liability for the third-party content placed on Internet intermediaries unless they are required by law or court orders. However, the *de facto* obligation formed by the “notice-and-takedown” mechanism under the Safe Harbor provisions of the Copyright Law has a profound impact on Internet intermediaries, and it may be difficult to be replaced in a short period of time. In another word, substantial change may not necessarily be beneficial to the improvement of the current situation.

In addition to the “notice-and-takedown” mechanism, or the self-regulatory measures of intermediaries mentioned above, such as the three-strike policy (or called “graduated response”) system, there are still rights holders who believe that there are still deficiencies in the means of safeguarding their rights. They believe that the heaviest responsibility for Internet intermediaries is to adopt site blocking measures in some countries, especially the cases of copyright infringement, and they often compare and discuss the blockage actions with other law enforcement purposes, such as the blockade of child pornography websites through INTERPOL, the blockade of websites advocating terrorist attacks, and websites that partially disseminate content for specific purposes. For instance, Germany explicitly prohibits websites that disseminate racial discrimination and hate speech; Singapore and Quebec Province, Canada, which prohibits online gambling websites, etc. When the site blocking can be taken through the implementation of domestic laws against the above illegal activities, some commentators have pointed out why not use site blockade measures to prevent violations of copyright violations?⁵ This may involve several conflicts of interest or policy choices because the surface of “blocking the infringing content” and the “suffocation of freedom of expression” appear to be the same. However, during policy decision, slippery slopes are often caused by external conflicts of interest. Therefore, the use of site blocking as a means of safeguarding rights has been highly concerned

⁴ The Manila Principle has addressed six points suggesting each regulator to limit the liability of Internet intermediaries, including: (1) intermediaries should be shielded from liability for third-party content; (2) content must not be required to be restricted without an order by a judicial authority; (3) requests for restrictions of content must be clear, be unambiguous, and follow due process (4) laws and content restriction orders and practices must comply with the tests of necessity and proportionality; (5) laws and content restriction policies and practices must respect due process and (6) transparency and accountability must be built into laws and content restriction policies and practices. Manila Principles on Intermediary Liability: Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation, https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf (last visited 2018/4/18).

⁵ See Hugh Stephen, *Blocking Offshore Pirate Websites: It can be Both Effective and Manageable*, HUGHSTEPHENS BLOG (Aug. 29, 2016), <https://hughstephensblog.net/2016/08/29/blocking-offshore-pirate-websites-it-can-be-both-effective-and-manageable/> (last visited 2018/4/18).

by the netizens.

Since overseas infringing websites are difficult to be audit or managed by the domestic law, in the past, the Intellectual Property Bureau of the Ministry of Economic Affairs of Taiwan planned to require Internet access service provider (IASP) to block overseas flagrantly infringing websites.⁶ However, it immediately triggered the netizens to rebound and criticized for the disregarding of basic rights such as freedom of speech and freedom of information. Despite, there are also a few countries that have adopted network closure measures. According to a survey of Motion Picture Association International, up to 42 countries have implemented such measures to block infringing websites (as of June 2017), including the all members of European Union and most countries in the Asia Pacific region (Singapore, India, Australia, South Korea, Indonesia, Malaysia, Thailand, etc.). As for how to initiate site blockade measures, some countries adopt judicial channels and must be implemented through court orders (Singapore, India, and Australia), some countries apply site blocking through administrative channels (South Korea, Indonesia, Malaysia).⁷

According to a research conducted by Carnegie Mellon University in the United States,⁸ the blockade of single-infringing websites (such as Pirate Bay) did not work well because users can still obtain content from other infringing websites that they regularly use. However, it has recently been discovered that implementing measures to block overseas infringing websites may change consumer behaviors and possibly direct them to move from infringing websites to legitimate websites. A recent report from the Information Technology and Innovation Foundation (ITIF)⁹ pointed out that although the implementation of the site blockade measures may change the behavior of consumers, it is also questioned that, the site blocking itself has its own problems. For instance, the implementation of site blocking is too costly; potential technical difficulties result in disruption of network functions; users easily avoid network closure measures; and opening the door to allow the government to freely intervene in information on the Internet.

From the US mechanism “notice-and-takedown” established by the DMCA and the subsequent SOPA and PIPA Act, which have been shelved, more

⁶ TIPO, press release, 2013/05/21, <https://www.tipo.gov.tw/ct.asp?xItem=425645&ctNode=7123&mp=1> (last visited 2018/4/18).

⁷ Motion Picture Association International, *Site Blocking in the World*, http://www.mpa-i.org/wp-content/uploads/2017/07/IR_June2017-.pdf (last visited 2018/4/18).

⁸ See Brett Danaher, Michael D. Smith & Rahul Telang, *Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior*, April 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795 (last visited 2018/4/18).

⁹ See Nigel Cory, *How Website Blocking Is Curbing Digital Piracy Without “Breaking the Internet”*, Aug. 2016, <http://www2.itif.org/2016-website-blocking.pdf> (last visited 2018/4/18).

non-DMCA-regulated online intermediaries have been included in the prevention of digital infringement. In fact, the interest of either party is at the risk of being invaded by the infringed party. Under the interaction of existing mechanism and actual situation, the question of the balance of interests are to be solved urgently.

The Internet is now extremely important to human's daily life, and Internet intermediary are playing a very important role in the process of service. Although the emergence of the Internet has shaken the long-established order of some laws (such as copyright law), the main reason is that the content circulation channels are more convenient and diverse, and ample media allows the public to reduce the cost of content utilization. Content reverses its nature from the scarcity created by ownership, and thus it not only has a great impact on the exercise of legitimate rights but also leads users to no longer play the role of consumers. Therefore, the appearance of Internet intermediary under the online environment will be viewed from different perspectives and will be given different roles rather than passive roles in the past. The Internet intermediary has become the adjuster with collaborative role. For the discussion on the legal system of intermediaries, it is not only necessary to review the shortcomings of existing safe harbor provisions, but also to consider the self-regulatory mechanisms.

When it comes to the multi-stakeholder model, there is still no single conceptualization could explain what model could be viewed as a "multi-stakeholder model." Instead, there are few models are being used and are constantly evolving to meet new governance challenges. The Internet Governance Forum (IGF) has assembled stakeholders such as governments, private sectors, technical communities, academia and also civil societies to a public and transparent debate once a year on the global Internet governance issues to discuss future internet governance agenda.¹⁰ The multi-stakeholder model should have consisted the four characteristics:

- Stakeholder-driven (stakeholders have the right to determine processes and decisions)
- Open (open to all stakeholders)
- Transparent (all stakeholders and public could access to deliberations)
- Consensus-based (decisions and outcomes are all consensus-based by stakeholders)

The U.S. government has utilized multi-stakeholder models for the domestic Internet policy decision in terms of privacy, cybersecurity and copyright protection. The

¹⁰ Lawrence E. Strickling & Jonah Force Hill, *Multi-Stakeholder Internet Governance: Successes and Opportunities*, 2 J. CYBER POL'Y 296 (2017).

National Telecommunications and Information Administration (NTIA) found that, the multi-stakeholder model assisted to bring together all stakeholders to identify and promulgate the best practice and codes of conduct in the industry. One of the most significant examples is that, NTIA has utilized the multi-stakeholder model to develop a code of conduct that specified White House's Consumers Privacy Bill of Rights that applies for business contexts¹¹. It is believed that the multi-stakeholder model could helps in creating innovative, productive and civil focused technology environment.

III. How the concept of Internet governance affects the fate of ISPs

The Internet governance is a process in which the government, the private sector, and the civil society each plays a role, shares principles, norms, rules, decision-making procedures and plans to shape and evolve the Internet with emphasis on the participation and discussion of technology and policy groups. However, how does multi-stakeholder participation conceptually understand its legal implications? From the perspective of participants, what are the directions for the formation of public-private partnerships other than community diversification? Is it necessary to stick to the informal form in addition to the open transparency requirement? And does the result of their participation tend to be non-binding or non-legal? Does it create new areas of soft law? How does it differ from self-regulation and co-regulation?

The academic literature on the concept of Internet governance and the accountability of Internet intermediaries has been discussed a lot. Recent discussions on Internet governance in related organizations such as WSIS, WGIG, IGF, etc. have begun to emerge with new topics, from the awakening of users in the post-SOPA era, privacy and data protection triggered by Snowden events, to recent cyber-attacks, social media,¹² secured online environment, and national cybersecurity issues. Topics related to Internet intermediaries began to multiply.¹³

In terms of international jurisdiction, the Internet is recognized as having

¹¹ The White House, Fact Sheet: Plan to Protect Privacy in the Internet Age by Adopting a Consumer Privacy Bill of Rights (2012), <https://obamawhitehouse.archives.gov/the-pressoffice/2012/02/23/fact-sheet-plan-protect-privacy-internet-age-adopting-consumer-privacy-b>.

¹² See generally L. DeNardis & A.M. Hackl, *Internet Governance by Social Media Platforms*, 39 TELECOMM. POL'Y, 761 (2015).

¹³ See Milton L. Mueller & Farzaneh Badiei, *Governing Internet Territory: ICANN, Sovereignty Claims, Property Rights and Country Code Top-Level Domains*, 18 COLUM. SCI. & TECH. L. REV. 435 (2017); Michael JG van Eeten & Milton Mueller, *Where is the Governance in Internet Governance?* 15 NEW MEDIA & SOCIETY 720 (2012).

borderless characteristic,¹⁴ but how should the law application of specific cases be handled? As early as 1996, Johnson & Post considered that the concept of national boundaries and sovereignty should be abandoned in the online world and new rules should be adopted by defining the legal nature of person and property.¹⁵ Professor Reidenberg from Fordham Law School in the United States believed that national jurisdiction can be still be claimed by exercising state power through the development of technology and the new service market.¹⁶ Antwayne Robertson argued that there may be some cases of extraterritoriality but the issue of copyright infringement should still be based on the choice of laws.¹⁷ Finnish scholar Pekka Savola takes the same view.¹⁸

In terms of copyright infringement, site blocking is proven to be known as an effective way to reduce copyright infringement. National government plays a role of protecting intellectual property, including blocking or filtering access to contents¹⁹. Online censorship also included site blocking, removal of content, notice and takedown and also self- censorship. For the issue of site blocking, Pekka Savola published three pieces of academic articles on the blockade measure and pointed out that the court should carefully considers the proportionality, whether the content involving the user generated content (UGC), and relevance of direct, indirect or joint liability of the website owner.²⁰ French scholar Geiger & Izyumenko argued that site blocking must consider the issue of free speech not only of the users but also of the ISPs.²¹ Husovec & van Dongen, from the perspective of the Netherlands, reviewed recent court cases and evaluated the reasonableness.²² Cory examined the

¹⁴ James Grimmelmann, *The Internet Is a Semicommons*, 78 FORDHAM L. REV. 2799, 2802-03 (2010).

¹⁵ See David Johnson & David Post, *Law and Borders – the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1369 (1996). Professor Post reiterated the same opinion after 20 years, see David G. Post, *How the Internet Is Making Jurisdiction Sexy (Again)*, 25 INT’L J.L. & INFO. TECH. 249 (2017), <https://doi.org/10.1093/ijlit/eax019>.

¹⁶ Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PENN. L. REV. 1951 (2005).

¹⁷ Antwayne Robertson, *Internet Piracy of Sports Broadcasts: Finding the Solution in the United Kingdom and United States*, 25 MARQUETTE SPORTS L. REV. 469, 476 (2015).

¹⁸ Pekka Savola, *The Ultimate Copyright Shopping Opportunity: Jurisdiction and Choice of Law in Website Blocking Injunctions*, 45 INT’L REV. INTELL. PROP. & COMP. L. 287 (2014).

¹⁹ Masters, Jonathan. "What is Internet governance?." *CFR Backgrounders* (2014).

²⁰ *Id.* Pekka Savola, *Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers*, 5 J. INTELL. PROP. INFO. TECH. & ELEC. COMM. L. 116 (2014); Pekka Savola, *Blocking Injunctions and Website Operator’s Liability for Copyright Infringement for User-Generated Links*, 36 EUROPEAN INTELL. PROP. REV. 279 (2014).

²¹ Christophe Geiger & Elena Izyumenko, *The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking*, 32 AM. U. INT’L L. REV. 43 (2016).

²² Martin Husovec & Lisa van Dongen, *Website Blocking, Injunctions and Beyond: A View on Harmonization from the Netherlands*, 12 J. INTELL. PROP. L. & PRAC. 695 (2017), <https://doi.org/10.1093/jiplp/jpx129>.

effectiveness of implementing site blockade measures in the UK by reviewing a report of Carnegie University in the United States and he argued that site blocking may meet the anticipated result but the adequacy of law enforcement should be review and site blocking cannot be viewed as the only way to solve the problem of copyright infringement.²³

Returning to the discussion of ISP liability limitations/exemptions, Section 230 of the Communication Decency Act in the US gives almost universal exemption from liability to ISPs, and it differs from Article 520 of the Copyright Law DMCA, which requires ISPs to implement notice-and-takedown mechanism. In 2017, US Fordham Law School held a seminar on “Inciting Cyber-attacks” to discuss whether it is necessary to review the law after 20 years of implementation. Professor Tsesis, the host of the conference, believes that faced with multiple attacks on the Internet, it is still necessary to uphold the principles of free speech, transparency, due process and judicial review before they can begin to restrict many online activities.²⁴ Many scholars also suggested that the actor should be responsible for oneself and promote the ISP’s voluntary removal of inappropriate content.²⁵

As early as June 2008, the OECD proposed “*The Seoul Declaration for the Future of Digital Economy*” to promote sustainable economic growth of the Internet economy and stimulate a sound policy and regulatory environment for sustainable economic growth and prosperity, support for innovation, investment and competition in the ICT sector. In 2010, the report “*The Economic and Social Role of Internet Intermediaries*” was published, which clearly defined and explained various types of Internet intermediaries and the economic and social role of intermediaries in the value chain.²⁶

The EU has proposed concrete plans for the legal reform of hosting services, either is the “Notice and Action”²⁷ based on the e-commerce directive or the new legislation for hosting services in the widely-integrated Digital Single Market, both showing that right holders cannot be underestimated and demonstrating how ISPs

²³ Cory, *supra* note 9, at 21.

²⁴ Adam Tsesis, *Terrorist Incitement on the Internet*, 86 FORDHAM L. REV. 367, 377 (2017).

²⁵ Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Raphael Cohen-Almagor, *The Role of Internet Intermediaries in Tackling Terrorism Online*, 86 FORDHAM L. REV. 425 (2017); Catherine Tremble, *Wild Westworld: Section 230 of the CDA and Social Networks’ Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825 (2017).

²⁶ See Karine Perset, *The Economic and Social Role of Internet Intermediaries*, OECD Digital Economy Papers, No. 171, <http://dx.doi.org/10.1787/20716826> (last visited 2018/4/18).

²⁷ Aleksandra Kuczerawy, *Intermediary Liability & Freedom of Expression: Recent Developments in the EU Notice & Action Initiative*, 31 COMPUTER L. & SECURITY REV. 46 (2015).

should act to prevent digital infringement. Scholar Giancarlo F. Frosio published four monographs in 2017 to explain how the earthquake in the European Union's single market strategy has brought about a major change in the legal system of European Internet intermediaries.²⁸

Professor Raymond from Indiana University believes that, under the current legal system, ISPs bears too many collaborative obligations and should deal with the considerations of weighing rights among various stakeholders instead of directly prioritizing the rights of rights holders.²⁹ Turkish scholar Kaya also mentioned in his article about the balanced rights and obligations that ISP should bear.³⁰ However, Gao & Yang believes that ISPs should uphold the neutral nature of "common carrier" to bear their responsibilities.³¹

IV. Taiwan's latest legislation in response to the Internet governance

According to Taiwan's newspaper in September 2017, the domestic advertising agencies and the intellectual property rights alliance signed a memorandum of cooperation in hopes that advertisers will avoid placing advertisements on infringing websites to block the financial resources of infringing websites and achieve the goal of combating the existence of infringing websites. This self-disciplined practice is supported by the Intellectual Property Office of the Ministry of Economic Affairs.³² In the meantime, the National Communications Commission (NCC) completed public consultation and public hearing procedures on the two bills of "Telecommunications Business Management Law" and "Digital Communications Law" and reported them to the Executive Yuan for review. On November 16, 2017 the bills were sent to the

²⁸ Giancarlo F. Frosio, *From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe*, 12 J. INTELL. PROP. L. & PRAC. 565 (2017); Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW U.L. REV. ONLINE, 19 (2017); Giancarlo F. Frosio, *To Filter or Not to Filter That Is the Question in EU Copyright Reform*, 36 CARDOZO ARTS & ENT. L.J. (forthcoming); Giancarlo F. Frosio, *Why Keep a Dog and Bark Yourself? From Intermediary Liability to Responsibility*, INT'L J.L. & INFO. TECH. (forthcoming), <https://doi.org/10.1093/ijlit/eax021>.

²⁹ Anjanette H. Raymond, *Heavyweight Bots in the Clouds: The Wrong Incentives and Poorly Crafted Balances That Lead to the Blocking of Information Online*, 11 NW. J. TECH. & INTELL. PROP. 473 (2013).

³⁰ Mehmet Bedii Kaya, *The Regulation of Internet Intermediaries under Turkish Law: Is There a Delicate Balance between Rights and Obligations?*, 32 COMPUTER L. & SECURITY REV. 759 (2016).

³¹ Wei Gao & Yao Yang, *Chaining Cyber-titans to Neutrality: An Updated Common Carrier Approach to Regulate Platform Service Providers*, 31 COMPUTER L. & SECURITY REV. 412 (2015).

³² NOWNews, 2017/09/04, <https://www.nownews.com/news/20170904/2603986> (last visited 2018/4/18) °

Legislative Yuan for deliberation.³³

The purpose of the “Digital Communication Draft” is to fully utilize the advantages of the Free and Open Internet. With the spirit of Internet governance,³⁴ citizen participation, open information, rights relief, and multiple values are important concepts that emphasize that government should avoid direct intervention to manage the Internet; instead, the multi-stakeholders model should be adopted to communicate and coordinate with each other and seek the governance model that meets most interests and respects minority.

The Digital Communications Draft clearly provides that the digital communication service providers are not responsible for prior monitoring and subsequent supervision of users’ behaviors (Article 13); however, the draft bill also provides three sorts of safe-harbor exemptions for infringement (Articles 14 to 16). Below is a brief introduction of ISP’s liability stipulated in the draft. However, **Article 18 demonstrated that, if there are matters stipulated in the Copyright Law, the provisions of the Copyright Law shall apply, and this draft shall not be applied.**

1. General principle – Not responsible for the third party’s behavior

According to the Article 13 (Refer to Appendix) in the draft, it stated that, the current ISP that provides intermediary services were categorizes into roles that include:

- providing users access to Internet services
- hosting services for providing third-party information for others to use
- cloud storage, and other information storage services
- various types of services that provide Internet content applications

When the service provided by ISP or the user involved in illegal act, it often

³³ NCC, press release, 2017/11/16, https://www.ncc.gov.tw/chinese/news_detail.aspx?site_content_sn=8&sn_f=38317 (last visited 2018/4/18) .

³⁴ The literature about Internet governance, readers can refer to JOVAN KURBALIJA, AN INTRODUCTION TO INTERNET GOVERNANCE (7TH ED.) (2016); ROY BALLESTE, INTERNET GOVERNANCE: ORIGINS, CURRENT ISSUES, AND FUTURE POSSIBILITIES (2015); IAN BROWN & CHRISTOPHER T. MARSDEN, REGULATING CODE: GOOD GOVERNANCE AND BETTER REGULATION IN THE INFORMATION AGE (2013); ERIK BROUSSEAU, MERYEM MARZOUKI & CÉCILE MÉADEL, GOVERNANCE, REGULATIONS AND POWERS ON THE INTERNET (2012); ROBIN MANSELL, IMAGING THE INTERNET: COMMUNICATION, INNOVATION, AND GOVERNANCE (2012); MILTON L. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE (2010); DAVID G. POST, IN SEARCH OF JEFFERSON’S MOOSE: NOTE ON THE STATE OF CYBERSPACE (2009); ADAM THIERER & CLYDE WAYNE CREWS, JR., WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION (2003).

questioned that should the ISP who plays the intermediary role be responsible for the user's wrongful acts. For this reason, it is important to clearly regulate the responsibilities of relevant ISPs to clarify the existing legal disputes.

Based on the rule of law, individuals must be responsible for their own acts without distinguishing the virtual world and real world. Therefore, ISPs should bear civil, criminal and administrative responsibilities according to law on the information provided. In addition, based on the characteristics of network transmission and the promotion of digital communication and circulation through this Law, with the concern of safeguarding the freedom of speech, the spirit of Manila Principles on Intermediary Liability was referred. The ISPs shall not be responsible for pre-examination and post-monitoring of user's use behavior.

2. ISPs' Categorized immunity from third party's infringement

2.1 For ISP who provides access to services

According to Article 14 (Refer to Appendix), while an ISP provides access to services (such as those providing broadband Internet access services), if the information transmitted is not by its own initiative, and the processing of the information is carried out through automation technology, and when its untransmitted information can be filtered or modified, it deserves liability exemption to avoid obstruction to the normal development of digital communication services.

2.2 For ISP who provides the information storage service

On the other hand, stated in Article 15, it demonstrated that, an ISP may still be jointly liable for services provided by third parties for the use by others (For example: types of information storage services such as hosting services and cloud services), then an ISP will be required to bear the responsibility of supervision and will have an adverse effect on the protection of free speech. To this end, an ISP must provide a certain amount of storage space for users to store information before they are stored. If an ISP does not have knowledge of the illegal acts or information and at the time the victim requested for damages when the facts or circumstances that are shown cannot identify whether the behavior or information is illegal, or when an ISP has knowledge of the illegal acts or information (such as administrative sanction or court ruling) and immediately take appropriate measures to prevent continuous damage to the victim, an ISP is not liable for the damages.

2.3 For ISP who provides other services

With the rapid development of Internet technology, new types of Internet

services are emerging. For instance, services provided through various social networking platforms such as platform that allows third parties to leave messages, and integrated services such as advertising messages broadcast by others or themselves. In this regard, to clarify the scope of the rights and obligations of an ISP, the protection of free speech and the circulation of information are indeed promoted. After an ISP receives a notice of infringement of its users by right holders, an ISP does not need to be responsible for determining the infringement but to confirm the existence of the notice and remove or blocking others from accessing to be exempted from liability.

2.4 Counter Notification

After an ISP has removed the content of the user and appropriately blocked it, the costs and expected possibilities of the notice are clearly determined only when the two parties have agreed on a contact method. To avoid loss of information, if there is no special agreement between the ISP and the user, the content removed shall be kept for a period of time under the conditions of its service type and technical feasibility. However, the two parties have agreed otherwise to rely on the principle of autonomy in private law from its agreement.

When an act that constitutes infringement or involves disputes, there should be certain procedures that balance the interests of both parties and enable an ISP to avoid over-burdening judgment or hinder the circulation of digital communications. In this case, users who are allegedly involved in infringement are also required to notify the ISP on the inspection of document. The ISP shall immediately notify the right holder and the right holder shall file a lawsuit after receiving the notice. If the right holder fails to file a lawsuit or is rejected, the ISP shall recover the content in dispute in a situation where the service type is allowed and the technology is feasible. In addition, the right holder of the original notice or the user involved in the infringement should claim its rights in good faith and should be liable for any damages caused by misrepresentation.

3. The procedure of ordering an injunction

Where there are disputes over private rights in the use of digital communication services, it is not appropriate for the state to intervene. However, since the Internet has personal, instant, interactive, borderless, hyperlinked, and data-searching features, an immediate relief channel should be established to avoid the harm by the unlawful activities on the Internet. If it is necessary to prevent major damage or avoid imminent danger or other similar circumstances, the ISP, its user, or a third party may file a motion to the court for the preliminary injunction to prevent the damage from being expanded.

Taiwan has adopted the multi-stakeholder model for participating in international discussions on Internet governance as a Non-UN member. Policy-making mechanisms are set up by various stakeholders and the network policy is generated through consensus among multi-stakeholder groups. However, it is an important and realistic research topic as to how to evaluate the effectiveness of the “participation” of multi-stakeholders in the process of crystallization of feasible laws through the Internet governance process.

V. Conclusion

Apart from the discussion of Internet governance and the norms of intermediary responsibility, the purpose of this paper is to clarify the problems of current laws and suggest on how to promote new laws or amendments in administrative or legislative bodies. This paper argues that the “notice-and-takedown” mechanism suggested by the Safe Harbor that are provided in the current copyright law needs to be reviewed as for the predicament that right holders face in defending their rights, including the conditions for setting up a condition in the form of a preliminary injunction and the pre-removal of ISPs’ exemption conditions in the draft of the Digital Communication Act are also worth considering. The reconstruction of legal system must be taken as the starting point. Taking Article 46 of Taiwan’s Protection of Children and Juvenile Welfare and Rights Act as an example, the NCC authorizes the content protection agency to make efforts to expand social participation, promote industrial self-discipline to implement various tasks.

If amendments can be made for the defects of the current law, it will not only influence on the rights holders, ISPs, users, infringers and even the government, but also affect the future development of the Internet. Codes of conduct on the Internet often change with the type of service and user acceptance, and traditional law norms are often difficult to correspond in a timely manner. However, whether the law is the only indicator of Internet norms?³⁵ Obviously, no. For instance, to solve spam mail in the past, many countries have introduced various laws for prevention, but it still been knocked down by the improving network technology.

Today, OTT has positive impact on the traditional communications industry, however, existing players also sees to adjust their strategies to invest in the OTT market. Just as everyone was surprised that the US FCC’s repeal of net neutrality policy, and rather sees the dramatic changes in the entire Internet over the past decade.

³⁵ See LAWRENCE LESSIG, CODE VERSION 2.0 122-123, 129-130 (2006); Ashwin J. Mathew, *The Myth of the Decentralised Internet*, 5 INTERNET POL’Y REV. 1, 12 (2016).

Demand-driven network transmission (such as CDN) has replaced the hierarchical network structure of the past. The issue of interconnection arrangement (peering/transit) no longer could be answered by a single answer, and many problems could not be solved by the law itself.³⁶ However, when the existing system (legislations or other regulations) is obviously lacking, or to say the damage of the rights holder is too great and the public welfare is infringed, there is a need to review and amend the existing legal system or consider creating a new legal system.

³⁶ Chih-Liang Yeh, *Conceptualized Framework for Regulation of OTT Video Services: A New Battlefield of Interconnection and Peering*. 20th ITS Biennial Conference, Rio de Janeiro, Brazil, November 30 – December 3, 2014.

Appendix – Digital Communications Bill

Article 13

A digital communications service provider (hereinafter “ISP”) is responsible for the content that is provided by the ISP itself. However, an ISP is not responsible for pre-examination and post-monitoring the information that is transmitted or stored by the third party (users).

Article 14

An ISP that provides access to services shall not be liable for any infringement of its users under any of the following circumstances:

- i) The transmitted information is initiated or requested by the user;
- ii) The processing of information is carried out through automation technology and there is no screening or modification of the information transmitted.

Article 15

An ISP who provides the information storage service that third parties provide others such information to use shall not be liable for the damages if it meets one of the following circumstances:

- i) Illegal act or information is unknown, and as per fact demonstrated, the infringement of the act or information may not be identified Illegal when damages requested by others;
- ii) Remove or make the information inaccessible after knowing that the act or information is illegal.

The third person mentioned in the preceding paragraph does not include the person supervised by the ISP.

Article 16

An ISP that provides services other than the preceding two articles shall not be liable for infringement of its users in any of the following circumstances:

- i) The transmitted information is initiated or requested by the user without changing the information accessed by the user.
- ii) Remove or make the information inaccessible for the other users on the infringing content or related information after the right holder notifies that the user has been involved in the infringement.

Article 17

In accordance with section (ii) of Article 16, the ISP shall notify the user involved in the infringement according to the contact information provided and agreed by the user. However, it is not applicable to those who unable to notified due to the nature of services.

The ISP that removes the content in accordance with section (ii) of Article 16 should keep the removed content within the appropriate period according to the nature of its services. However, it is not applicable for service providers that are unable to keep due to the nature of the service or the contract is otherwise agreed.

If the user involved in the infringement in the Paragraph 1 considers that he/she has no infringement, he/she may file a reply notification and require the ISP to recover the content or related information that was removed in accordance with section (ii) of Article 16.

If the user intentionally or negligently informs the ISP on false information, such user shall be liable for the person who is harmed by the false information.

After receiving the reply notification in the Paragraph 3, an ISP shall immediately reply to the right holder of the original notice.

Within ten working days from the next day after receiving the notification, the right holder shall submit the case that has been filed against the user to ISP as a proof. If the right holder fails to provide proof of litigation, or the lawsuit was rejected or lost in final decision, the ISP shall recover the content of user. An ISP should provide appropriate ways for the user to recover the content when the ISP fails on the recovery.

Article 18

For the matters stipulated in the preceding four articles, when there are provisions in the copyright law, the provisions of the Copyright Law should be applied.

Article 19

When it is necessary to prevent major damage or avoid imminent danger or other similar situations that arise over the use of communication services between an ISP and its user or a third party, the ISP, its user, or a third party may file a motion to the court for the preliminary injunction according to the provisions of the Civil Procedure Law.

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