

Determining the dynamic policy guidelines and principles necessary for an evolving digital ecosystem

Introduction

The internet has opened up a complex network of stakeholders that connect online and interact digitally in value-creating ways.¹ This network is described as the digital ecosystem. Internet intermediaries are the conduits in this ecosystem. They facilitate transactions between third parties (natural and legal persons).² Internet intermediaries include website hosts, search engines, social media companies, e-commerce platforms, payment systems and domain name registrars.³ Internet intermediaries also provide tools for users to navigate, retrieve and publish information online.⁴

Online intermediaries 'affect people as citizens whose utility and well-being depend on factors beyond those captured by standard economic measures. For example, online intermediaries can help support important society outcomes such as democracy or freedom of speech.⁵ Furthermore, online intermediaries support capital formation through allowing diverse platforms such as small, micro- and medium enterprises (SMME's)⁶ to be e-commerce market players. However, with the

¹ OECD Competition Economics of Digital Ecosystems – Note by Georgios Petropoulos Hearing on Competition Economics of Digital Ecosystems, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2020\)91&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)91&docLanguage=En)

² Some internet intermediaries connect users to the internet, enable processing of data and host web-based services, including for user-generated comments. Others gather information, assist searches, facilitate the sale of goods and services, or enable other commercial transactions. Importantly, they may carry out several functions in parallel, including those that are not merely intermediary. Internet intermediaries also moderate and rank content, mainly through algorithmic processing, and they may perform other functions that resemble those of publishers. As a result, different regulatory frameworks can apply, respectively, to their intermediary roles and to their other functions. See Europam Convention on Human rights, available at <https://www.coe.int/en/web/freedom-expression/internet-intermediaries>

³ OECD (2010), *The Economic and Social Role of Internet Intermediaries*, pg. 6, available at <https://www.oecd.org/sti/ieconomy/44949023.pdf>

⁴ I adopt the Organisation for Economic Co-operation and Development ("OECD")'s definition of internet intermediary. (OECD, *Economic and Social Role of Internet Intermediaries* (April 2010), online: <https://www.oecd.org/internet/ieconomy/44949023.pdf> (last accessed: 8 March 2017) [OECD], 9).

⁵ Copenhagen Economics, 2015, *Online Intermediaries: Impact on the EU Economy*, Pg. 4

⁶ We define SMMEs as follows: Businesses made up of the entrepreneur only and employing no workers are referred to as "Own-account"; businesses with between 1 and 4 employees (excluding the owner) are referred to as "Micro"; businesses with between 5 and 9 employees are referred to as "Small"; businesses with between 10 and 49 employees are referred to as "Medium"; and businesses with 50 employees or more are referred to as "Large". "SMME" refers to the combination of "Own-account", "Micro", "Small" and "Medium" businesses and includes all businesses with between 0 and 49 employees.

increased use of online platforms since the COVID-19 pandemic, online intermediaries provide both risks and opportunities for users.

Although intermediaries are not responsible and cannot control what content users post, they often profit from content and have power to mediate between those who post content and those who object to it. According to the United Nations (“UN”) Guiding Principles on Business and Human Rights, internet intermediaries have the responsibility ‘to respect the internationally recognised human rights of their users and of third parties affected by their activities.’⁷ Any intermediary rules should be human-rights based, i.e., prescribed by law with a legitimate aim, and comply with principles of necessity, proportionality, transparency, accountability and due process.⁸ Furthermore, online intermediary regulation should enable and promote innovation; and encourage social responsibility by intermediaries to manage defamation on their platforms too.

Lately, there has been a push by governments of multiple nations to hold intermediaries liable for content published on their platform and to regulate content moderation as well.⁹ Such changes have implications for the nature of value creation that takes place in the ecosystem. As a senior associate in economics and damages at the Berkeley Research Group (“BRG”), I understand that global developments on the regulation of big tech affects economic outcomes in digital markets. Therefore, policy formation in this regard should be multi-pronged to address multi-dimensional challenges. This paper assesses key concerns raised for online intermediaries, particularly for social media and e-commerce platforms. The paper draws from international case studies to consider various mechanisms when determining internet intermediary liability, highlighting gaps and challenges. With these nuanced challenges in mind, the paper then recommends a list of human-centred principles to guide ongoing future policymaking for online markets.

Liability for content posted by others

Humans exercise agency on online platforms. Agency embodies free will, reflexivity, and conscious decision-making.¹⁰ ‘Liability for content can include /defamation; adult material; child

⁷ <https://rm.coe.int/leaflet-internet-intermediaries-en/168089e572>

⁸ Emily Laidlaw & Hilary Young, Law Commission of Ontario, July 2017, INTERNET INTERMEDIARY LIABILITY IN DEFAMATION: PROPOSALS FOR STATUTORY REFORM, Defamation Law in the Internet Age, pg. 95

⁹ Alpha Partners, October 2020, Social Media Intermediaries: Liability For User Generated Content And Right To Curate It, https://alpha-partners.org/2020/10/30/social-media-intermediaries-liability-for-user-generated-content-and-right-to-curate-it/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

¹⁰ Agency in a Datafied Society: Communication between and across humans, platforms and machines, International conference at the Centre for Media, Communication & Information Research (ZeMKI) / University of Bremen in cooperation with the Communicative Figurations research network, the Mediated Communication, Public Opinion & Society Section of the International Association of Media and Communication Research (IAMCR) and the Media Sociology Division of the German Communication Association (DGPK), Bremen, December 02 – 04, 2020, available at <https://www.uni->

sexual images; terror/hate material; blasphemy; copyright infringement; fraud or false advertising; breach of privacy criminal trading standards law.¹¹

A critical role of internet intermediaries is to establish trust, including through protection of user privacy. By enabling individuality and self-expression, they also offer potential improvements to the quality of societies in terms of fundamental values such as freedom and democracy.¹² They have the obligation to refrain from violating the right to freedom of expression and other human rights in the digital environment.¹³ They also have an obligation to protect human rights and to create a safe and enabling environment for everyone to participate in public debate and to express opinions and ideas without fear, including those that offend, shock or disturb any sector of the population.¹⁴ In addition, the protection of privacy and personal data is fundamental to the enjoyment and exercise of most of the rights and freedoms.¹⁵ This role becomes difficult in light of the obligation to protect people from online harms.

Moreover, internet intermediaries are deemed to have an impact on democratic processes and the political debate. In some countries, digital rights are under threat and, as a consequence, citizens are losing the appetite to participate in public affairs, and they often practice self-censorship in their online engagement. This undermines the philosophy of a free and open internet that drives innovation, enables the enjoyment of rights and improvement of livelihood.

Social media

Intermediaries do not have an inherent right to curate any content on their platforms and their roles are limited to receiving, storing and transmitting data/ content. Yet most social media platforms actively curate the content accessible to their users based on their preferences through algorithms and have added labels and identifying markers to content on their platforms as well.¹⁶ This implies the need to extend internet intermediary liability.

bremen.de/fileadmin/user_upload/fachbereiche/fb9/zemki/media/photos/veranstaltungen/conferences/Call_Agency_Media_300420.pdf

¹¹ Lilian Edwards, Regimes of Legal Liability for Online Intermediaries: an Overview, OECD Workshop, September 2011, The role of Internet intermediaries in advancing public policy objectives, <https://www.oecd.org/sti/ieconomy/45509050.pdf>

¹² OECD, page 8, <https://www.oecd.org/sti/ieconomy/44949023.pdf>

¹³ <https://rm.coe.int/1680790e14>

¹⁴ Ibid.

¹⁵ <https://www.coe.int/en/web/data-protection/convention108/background>

¹⁶ Alpha Partners, October 2020, Social Media Intermediaries: Liability For User Generated Content And Right To Curate It, https://alpha-partners.org/2020/10/30/social-media-intermediaries-liability-for-user-generated-content-and-right-to-curate-it/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

Internet intermediaries like Facebook for instance have community standards which go beyond illegal and harmful content. Facebook spends enormous amounts of resources to police content and take down illegal, harmful and objectionable content.¹⁷ Likewise, YouTube took down 7.9 million videos between July and September last year. The review made of Europe's Code of Conduct on hate speech suggest that 90 percent of notifications are attended within 24 hours.¹⁸ At this rate, big platforms will have to spend even more resources. Is this sustainable?

E-commerce

Concerns in this area involve the growing complexity of online transactions, and where consumers should turn when they suffer loss or damages due to misleading/fraudulent business practices, or unsafe products.¹⁹ Should e-commerce platforms be held liable towards a platform customer for the violations caused by platform suppliers? The Court of Justice of the European Union ("CJEU") judgements in *Asociación Profesional Elite Taxi v Uber Systems Spain, SL* (2017) and in *Airbnb Ireland* (2019)²⁰ are useful cases to reflect upon. Platform operators may be considered as providers of the services going beyond mere intermediary or information society services. Even if the platform operator does not qualify as a party to the contract, they may be held liable towards customers for the failure to exercise the duty of care in these situations: (a) the operator is informed about the violations or fraudulent activity performed by a platform supplier but does not remove the respective information on the services (goods) or the supplier's account, or (b) the operator interferes with the comments left by customers (amends or remove them) to make a false impression that the supplier is a prudent and honest platform user.²¹

Other liability effects

A variety of network effects²² and mergers have led to the existence of fewer, larger entities that dominate the market in a manner that may jeopardise the opportunities for smaller intermediaries or SMME's and places them in positions of influence or even control of principal modes of public communication. The power of such intermediaries as protagonists of online expression makes it

¹⁷ <https://ecipe.org/publications/digital-services-act-reforming-intermediary-liability-rules/>

¹⁸ Fredrik Erixon, "Too Big to Care" or "Too Big to Share": The Digital Services Act and the Consequences of Reforming Intermediary Liability Rules, European Centre for International Political Economy (ECIPE) Policy brief, Pg.,3,

¹⁹ OECD (2016), Consumer Protection in E-commerce: OECD Recommendation, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264255258-en>

²⁰ See Judgement of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112 and Judgement of 20 December 2017, *Uber Systems Spain SL*, C-434/15, EU:C:2017:981

²¹ Filatova-Bilous, N. (2021). Once again platform liability: on the edge of the 'Uber' and 'Airbnb' cases. *Internet Policy Review*, 10(2). <https://doi.org/10.14763/2021.2.1559>

²² . Economists use "network effects" to describe contexts in which a good or service offers increasing benefits the more users it has. See <http://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf>

imperative to clarify their role and impact on human rights, as well as their corresponding duties and responsibilities, including as regards the risk of misuse by criminals of the intermediaries' services and infrastructure."²³

Those intermediaries who do become dominant can influence the choices we make; how we interact online; and even the way we exercise our rights as they control the platform. For example, social media platforms use algorithms which can lead to 'echo chambers' or 'filter bubbles': where a user is presented with only one type of content instead of seeing a range of voices and opinions.²⁴ This can promote disinformation or biased information. These intermediaries have a responsibility to ensure their actions do not act as bottlenecks or gatekeepers for competitors or rival platforms to be part of the ecosystem.

Likewise, there sometimes exists tension between various functions of Internet intermediaries; for example, tension between preserving identity and privacy while personalising products and services in ways that benefit users or between infrastructure provision and usage.²⁵ These may also affect the type of engagement and content posted on platforms.

Mechanisms which can be taken by intermediaries

There has been a proliferation of retrogressive laws, procedures and practices such as the systematic criminalisation of online communication and dissent, the arbitrary arrest, illegal detention, flawed prosecution and excessive punishment of government critics.²⁶ Certain countries have different types of regulation standards for different kinds of online content.²⁷ Some countries hold online intermediaries liable for content they are aware of, i.e., 'have actual knowledge' about.²⁸ For example, Australia, India, Japan and the Philippines and the US (only for online intermediary liability for copyrights) apply this mechanism.

Other countries have adopted the 'notice and take' down mechanism which provides users the opportunity to call upon an Internet intermediary directly to remedy a wrongdoing they believe

²³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14

²⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973939/Online_Harms_White_Paper_V2.pdf

²⁵ OECD, pg. 42, <https://www.oecd.org/sti/ieconomy/44949023.pdf>

²⁶ ICT Policy Center for Eastern and Southern Africa, CIPESA, 5 May 2021, Why Data Rights are Central to Protection of Online Freedom, <https://cipesa.org/2021/05/why-data-rights-are-central-to-protection-of-online-freedom/>

²⁷ Ashley Johnson Daniel Castro, 22 February 2021, How Other Countries Have Dealt With Intermediary Liability, <https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability>

²⁸ Ashley Johnson Daniel Castro, 22 February 2021, How Other Countries Have Dealt With Intermediary Liability, <https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability>

they have been subject to.²⁹ A generic term for this mechanism is ‘notice and action’ (“N&A”), designed to ‘eliminate illegal or infringing content from the Internet upon request of the rights holder.’³⁰ This approach is applied by countries including South Africa, New Zealand and the United Kingdom (“UK”). The most commonly encountered notice and action mechanisms globally include:

- ‘Notice and take down’ (“NTD”), where an Internet intermediary is called upon directly by a private entity (individual, company, rights holders, organization, etc.) to remove or disable access to information in response to a breach of their rights.³¹
- ‘Notice and notice’ (“NN”), where an intermediary receives a notification with a complaint, which they then forward to the content provider.³² The content provider is given an opportunity to correct the behaviour, which halts the procedure, or to defend it within a provided time limit, which may lead to further actions.
- ‘Notice and stay down’ (“NSD”) where the intermediary receives a notification about illegal or infringing character of hosted content, similar to NTD. In this case, the intermediary must not only remove the information, but also take additional measures to ensure the content is not subsequently reposted, either by the same user or by other users.³³

The variation and severity of the above-mentioned mechanism varies by country, i.e., subject to national implementations.

Moderation comes with a price

Content restriction and moderation is shifting the perception of online intermediaries from being just conduits or mediums to ‘active gate-keepers’ of content uploaded and shared by users.³⁴ The notice and action approach for example incentivizes online intermediaries to remove content as

²⁹ Kuczerawy, Aleksandra, From ‘Notice and Take Down’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression (December 19, 2018). Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online*, 2019, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3305153>

³⁰ See more in European Commission, ‘Communication to the European Parliament, The Council, The Economic and Social Committee and The Committee of Regions, A coherent framework for building trust in the Digital Single Market for e-commerce and online services’ (Communication) SEC(2011) 1640 final, 13, ft 49

³¹ Martin Husovec, ‘The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?’ (2018) *Columbia J of L & the Arts* (forthcoming)

³² See OECD, Directorate for Science, Technology and Industry, Committee for Information, Computer and Communication Policy, *The Role of Internet Intermediaries In Advancing Public Policy Objectives, Forging partnerships for advancing public policy objectives for the Internet economy, Part II* (22 June 2011) 11.

³³ See Christina Angelopoulos and Stijn Smet, ‘Notice-and-Fair-Balance: How to Reach a Compromise Between Fundamental Rights in European Intermediary Liability’ (2016) 8(2) *J of Media L* 266, 294-300

³⁴ Frosio, Giancarlo and Mendis, Sunimal, *Monitoring and Filtering: European Reform or Global Trend?* (July 12, 2019). in: Giancarlo Frosio (ed.), *The Oxford Handbook of Online Intermediary Liability* (OUP, 2019 Forthcoming) , Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2019-05, Available at SSRN: <https://ssrn.com/abstract=3411615> or <http://dx.doi.org/10.2139/ssrn.3411615>

soon as they receive notice that it may be harmful or illegal, even if the notice or is unfounded or a mistake.

The censorship, filtering and blocking of internet platforms; along with the rise in online content restrictions and regulations is threatening digital trade.³⁵ For instance, the prospect of extracting lucrative insights from rapidly growing pools of data is galvanizing entrepreneurs and investors in all sectors of the digital industry.³⁶ However, since content moderations and filtering tools lead to over removal of content, some foreign internet services are discouraged from market access for technology services. This may have negative implications for investment in digital.

Fragmented national jurisprudence on online liability

Data privacy, data governance, and digital regulation policies tend to exist in silos, For example. The European Union (“EU”) has an e-commerce directive, data protection directive, and doctrine of freedom of expression.³⁷ Similarly, South Africa has the Electronic Communications Act (“ECA”), Minimum Information Security Standards (“MISS”), National e-strategy, SA Cybersecurity framework, etc., but with no coordination between the different departments to support and drive the development of the digital economy.³⁸ The nature of engagement between all relevant stakeholders in digital, including private sector, public service, media, civil society, education establishments, human rights organisation and academia, should be made easier. The different policies should be linked and complement each other, especially in light of online intermediary regulation.

Moreover, it is almost impossible for intermediaries to comply with all laws from multiple jurisdictions regulating content on their platforms due to multiple laws in other jurisdictions.³⁹

³⁵ This trend is illustrated in two key regions: Turkey and India. See <https://www.project-disco.org/21st-century-trade/072921-rising-internet-censorship-threatens-digital-trade/>

³⁶ <https://www.cigionline.org/static/documents/documents/Data%20Series%20Special%20Reportweb.pdf>

³⁷ Bart VAN DER SLOOT, "Welcome to the Jungle: the Liability of Internet Intermediaries for Privacy Violations in Europe", JIPITEC, Vol. 6, 2015, <https://www.jipitec.eu/issues/jipitec-6-3-2015/4318>

³⁸ <https://www.ellipsis.co.za/wp-content/uploads/2021/04/Proposed-Data-and-Cloud-Policy.pdf>, pg. 9

³⁹ Alpha Partners, October 2020, Social Media Intermediaries: Liability For User Generated Content And Right To Curate It, https://alpha-partners.org/2020/10/30/social-media-intermediaries-liability-for-user-generated-content-and-right-to-curate-it/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

Ongoing regulation of intermediaries across the globe

The EU is responding with the forthcoming digital services act (“DSA”) package which will set rules on how companies such as Google, Facebook and Twitter will have to police illegal and possibly harmful content online.⁴⁰

The UK Online Harms white paper proposes a new digital framework overseen by an independent regulator for online safety. The framework gives online intermediaries more responsibility for the safety of their users whilst protecting freedom of expression and encourage innovation for online intermediaries. ‘The regulator will have a suite of powers to take effective enforcement action against companies that have breached their statutory duty of care. This may include the powers to issue substantial fines and to impose liability on individual members of senior management.’⁴¹

In South Africa, the ECA “Limitation of Liability” provision provides intermediaries with limited liability if they are a ‘member of an industry representative body recognised by the Minister of Communications, they conduct their operations in an automatic manner, they adhere to the industry representative body’s code of conduct and respond to court orders and take-down requests’.⁴²

Some researchers suggest content-sharing service providers put in place an effective and expeditious complaint and redress mechanism available to their users in case of any disputes regarding the uploaded content.⁴³ This is to allow for a process where content creators/providers can appeal for effective remedy.

There is an urgent need for citizens’ digital and data literacies to include a critical understanding of the economy and ‘ecologies’ of digital platforms. It is critical to institute across jurisdictions education programs on an ongoing basis to tackle new emerging. media changes and make sure people from various backgrounds have appropriate access and resources to these literacies.⁴⁴

⁴⁰ European Parliamentary Research Service, May 2020, Reform of the EU liability regime for online intermediaries: Background on the Forthcoming digital services act, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA\(2020\)649404_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf)

⁴¹ Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for the Home Department by Command of Her Majesty, April 2019, Online Harms White Paper, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973939/Online_Harms_White_Paper_V2.pdf

⁴² Alex Comminos, 2012, Intermediary Liability in South Africa, Alliance for Progressive Communications, https://www.apc.org/sites/default/files/Intermediary_Liability_in_South_Africa-Comminos_06.12.12.pdf

⁴³ Kuczerawy, Aleksandra, From ‘Notice and Take Down’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression (December 19, 2018). Giancarlo Frosio (ed), The Oxford Handbook of Intermediary Liability Online, 2019, Forthcoming, pg. 17 Available at SSRN: <https://ssrn.com/abstract=3305153>

⁴⁴ Carmi, E. & Yates, S. J. & Lockley, E. & Pawluczuk, A. (2020). Data citizenship: rethinking data

Behavioural insights have been used by governments and other public policy organisations within their consumer policy making process and policy initiatives.⁴⁵ ‘Behavioural economics is basically the incorporation of psychological insights into the study of economic problems.’⁴⁶ Surveys, lab experiments and randomized control trials could be considered to understand why users online may behave irrationally⁴⁷ (i.e., not reading terms and conditions on online platforms, posting fake/unverified news, etc.). Considering how the digital marketplace is becoming the new marketplace, it’ll be critical to understand going forward how and why users respond to certain triggers/stimuli online the way they do. Behavioral insights can also help capture information on user biases as well insensitivities when participating online.

New challenges arise as the digital ecosystem keeps changing

Strides to regulate the digital ecosystem are definitely being made. A case in point is the ‘Online Safety Data Initiative’ which brings together expertise from a range of government, academic, and civil society stakeholders. The initiative will drive innovation in the safety tech sector by providing companies with access to the vital data needed to develop world-class safety tools to identify and remove harmful content online.’⁴⁸

Nonetheless, online Intermediaries continue to evolve, change and grow. Under current EU legal framework for example, internet intermediaries are not responsible for hosting illegal content, but are required to removed illegal material once flagged.⁴⁹ However, because technologies and business models are constantly changing, the EU framework struggles to capture liability issues raises by new platforms. The nature and scale of liability is also evolving, with new harmful online

literacy in the age of disinformation, misinformation, and mal-information. *Internet Policy Review*, 9(2).

DOI: 10.14763/2020.2.1481

⁴⁵ OECD DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INNOVATION COMMITTEE ON CONSUMER POLICY, 02 Feb 2017, *USE OF BEHAVIOURAL INSIGHTS IN CONSUMER POLICY*, available at

[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2016\)3/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2016)3/FINAL&docLanguage=En)

⁴⁶ Behavioural research is highly relevant for emerging markets and developing economies (“EMDE”) policy makers, especially in contexts where financial systems are evolving rapidly and integrating large numbers of base of the pyramid (“BOP”) users. See Rafe Mazer, Katharine McKee, and Alexandra Fiorillo, June 2014, *Applying Behavioural Insights in consumer Protection Policy*, Consultative Group to Assist the Poor (“CGAP”) focus note No. 95, <https://www.cgap.org/sites/default/files/Focus-Note-Applying-Behavioral-Insights-in-Consumer-Protection-Policy-Jun-2014.pdf>

⁴⁷ Behavioural insights often involve multidisciplinary research in fields such as economics, psychology, neuroeconomics and marketing science to understand consumer behaviour and decision making.

⁴⁸ Over 15 months, the project will test methodologies for improving access to datasets that can be used for training Artificial Intelligence (AI) solutions to remove harmful and illegal content and networks, <https://faculty.ai/blog/online-safety-data-initiative-data-access-for-online-harms/>

⁴⁹ This is known as a ‘safe harbour’ principle

practices creating a need for new frameworks that updates the responsibilities of internet intermediaries.⁵⁰

As moderation and removal policies to tackle hate speech strengthen, extremists and hate groups are looking for alternative solutions. This has resulted in the proliferation of alternative platforms which are less regulated or even actively promote a lenient approach to content moderation. For example, platforms like VK.com, gab.ai⁵¹, RuTube, and Telegram are known for hate speech. 'Alternative' and Fake News outlets like unzensuriert.at, wochenblick.at and allesroger.at, along with extremist magazines like ZAROnews.world are becoming more pervasive.⁵² Policy must mitigate such outcomes.

Guiding Principles for an efficient communications environment

Liabilities of online intermediaries cannot be assessed in isolation. Dynamic and multi-faceted principles are pertinent for an ever-evolving communications environment. I recommend the following guidelines to be considered for policymaking which balances human rights concerns with copyright and economic concerns:

- I. People must be made to feel they have a sense of ownership and responsibility on digital platforms. Support for initiatives promoting media and information literacy skills for accessing and managing the digital space. Educate citizens to protect their data and to demand their digital rights; and to have strong, well-resourced and independent data protection authorities. Such efforts should be implemented through various means, including formal and non-formal education. Schools should also incorporate into their curriculum information for youth on how to handle online content. These initiatives can be supported with resources from the leading/dominant social media, news and e-commerce platforms.
- II. Processing of personal data must be based on the free, specific, informed and unambiguous consent of the user.⁵³ Make contracts and online user agreements (terms of service and privacy policy) easy for consumers to understand

⁵⁰ European Parliamentary Research Service, May 2020, Reform of the EU liability regime for online intermediaries: Background on the Forthcoming digital services act,

[https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA\(2020\)649404_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf)

⁵¹ The shooter who attacked a synagogue in October 2018 announced his attack on the gab.ai platform

⁵² Specialised Cyber-Activists Network, Beyond the "Big Three": Alternative platforms for online hate speech, s Analytical Paper was funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020), <https://www.voxpol.eu/download/report/Beyond-the-Big-Three-Alternative-platforms-for-online-hate-speech.pdf>

⁵³ <https://rm.coe.int/leaflet-internet-intermediaries-en/168089e572>

- III. Institute comprehensive Code of ethics for news and current affairs content providers and over the top (“OTT”) platforms (e.g., cable, broadcast, and satellite television platforms).
- IV. Establish clear data rights for content creators and shares on the different platforms they should be notified in advance of all changes in relevant policies.
- V. Intermediaries should also provide meaningful public information about the operation of automated data processing techniques, including the operation of microtargeting algorithms that facilitate searches based on user profiling. Intermediaries should regularly publish transparency reports that provide clear and meaningful information on all restrictions to the free and open flow of information and ideas.
- VI. Establish more nuanced set of regulations for foreign internet services. Most foreign multinational platforms come with investment benefits that would otherwise be foregone until regulations which are too restrictive. Regulations should be both consumer protective and inclusive.
- VII. Antitrust agents should engage with data privacy, data consumer, online marketplace bodies. Private companies should partner with civic actors and public officials to promote digital rights and be transparent about their data handling practices. Promote collaboration between data privacy, data sovereignty and competition regulators. I propose the establishment of an independent data and digital body that can form new amendments to regulation as the digital ecosystem continues to evolve.
- VIII. Utilize behavioural insights to better understand how users behave on online platforms This will support ongoing development of effective co-regulatory and self-regulatory mechanisms.
- IX. Protect consumer privacy by ensuring that their practices relating to the collection and use of consumer data are lawful, transparent and fair, enable consumer participation and choice, and provide reasonable security safeguards. Manage digital security risk and implement security measures for reducing or mitigating adverse effects relating to consumer participation in e-commerce.
- X. Develop a clear appeals procedure for take downs and effective redress mechanisms (e.g., They should have procedures to handle complaints, disputes, queries, and feedback.
- XI. In the context of e-commerce platforms, conditional liability should be aligned to the judgements in the above-mentioned uber and Airbnb outcomes.
- XII. In her entry, Sofia Mancilla, 2020 IIC Future Leaders Competition Winner wrote, ‘... a human in the loop is always "desirable" in applications that may cause harms to

individuals.⁵⁴ Diversity of content moderators is critical. The coders who curate and update the algorithm-based filters should come from diverse racial, religious, age, gender orientation, ethnic and demographic backgrounds.

Conclusion

Internet services are dynamic, technical and fast changing, which means establishing business guidelines and regulatory practices for intermediaries is complicated. The digital ecosystem relies on the efficient functioning of internet intermediaries. Online intermediaries help consumers access new markets and information (more choice and niche products); helps smaller players in e-commerce and up and coming publishers to grow. Liability policy then should not get to the point where intermediaries feel restricted to be enablers and drivers of innovation.

Humans are still necessary for the moderation process, so regulation ought to involve humans. Governments and intermediaries need to work together as they incorporate the above-mentioned recommendations for effective policy aimed at achieving effective consumer protection in whilst stimulating innovation and competition in the digital platforms.⁵⁵

⁵⁴ <https://www.iicom.org/wp-content/uploads/sofia.pdf> and <https://www.iicom.org/feature/sofia-mancilla-winning-entry/>

⁵⁵ OECD (2016), Consumer Protection in E-commerce: OECD Recommendation, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264255258-en>