



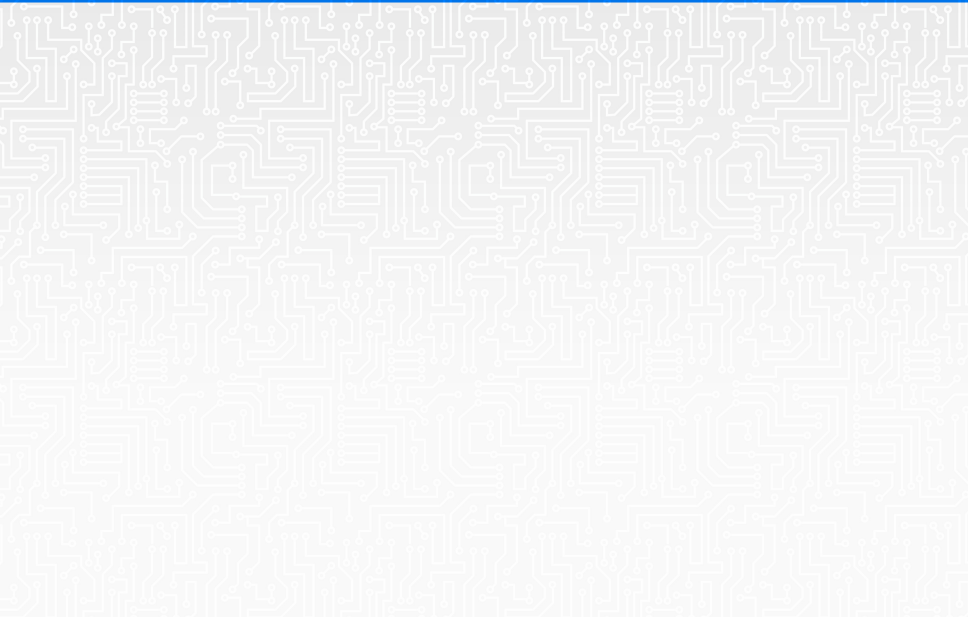
# The Manila Principles on Intermediary Liability

Jeremy Malcolm

Asia-Pacific Regional Internet Governance Forum, Macau, China



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## What are the Manila Principles?

- Best practice guidelines for limiting intermediary liability for content to promote freedom of expression and innovation



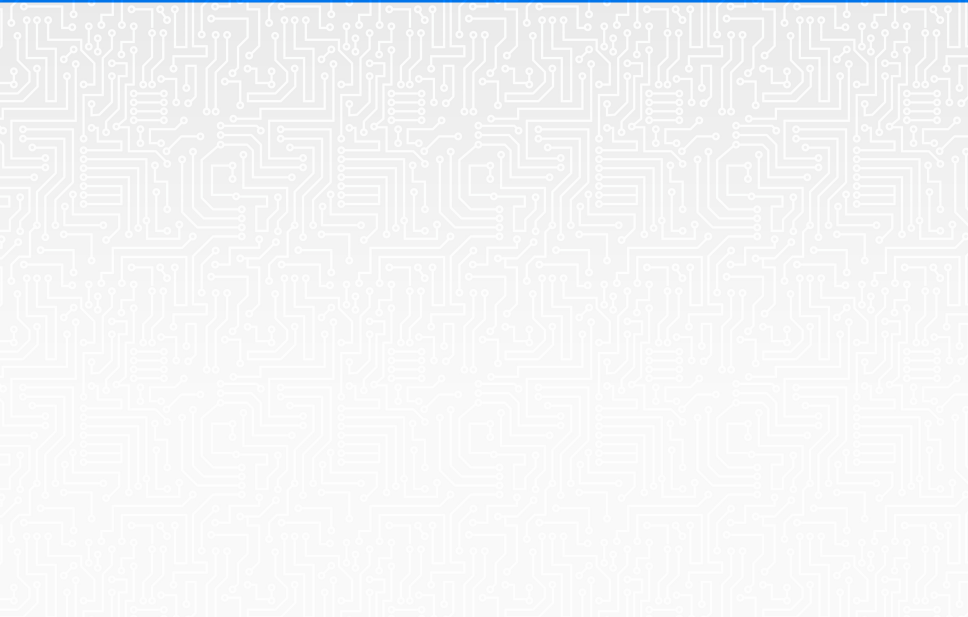
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## Who are intermediaries?

'Internet intermediaries' bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties

— OECD, 2010



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**Immunizing intermediaries from liability ensures users can maximally engage in lawful expression online**



## International legal opinions

[I]ntermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).

— Joint Declaration of Special Rapporteurs for Freedom of Opinion and Expression, 2011



## How intermediary immunity is undermined

- No safe harbor protection
- Safe harbor conditions that are not judicially assessed
  - For content hosts, notice and take-down
  - For ISPs, graduated response (“three strikes”)
- Increasing soft pressure
  - Under the TPP, “legal incentives to deter unauthorized storage and transmission of copyrighted materials”
  - Under the NETmundial Principles, “cooperation among all stakeholders should be encouraged to address and deter illegal activity, consistent with fair process”
- Extraterritorial jurisdiction of content restriction laws and decisions



## Escalation of threats to limit ISP immunity

The big operators, and we know who they are, can no longer close their eyes if they are considered accomplices of what they host. We must act at the European and international level to define a legal framework so that Internet platforms which manage social media be considered responsible, and that sanctions can be taken.

— French President Francois Hollande, February 2015



## Legal background

- There are three approaches to intermediary liability
  - Expansive Protections Against Liability for Intermediaries

### Example

U.S. CDA 230





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  - Conditional Safe Harbour from Liability

### Example

U.S. DMCA, EU  
E-Commerce  
Directive

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- There are three approaches to intermediary liability
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  - Blanket or Strict Liability for Intermediaries

### Example

Thai Computer  
Crime Act



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### Example

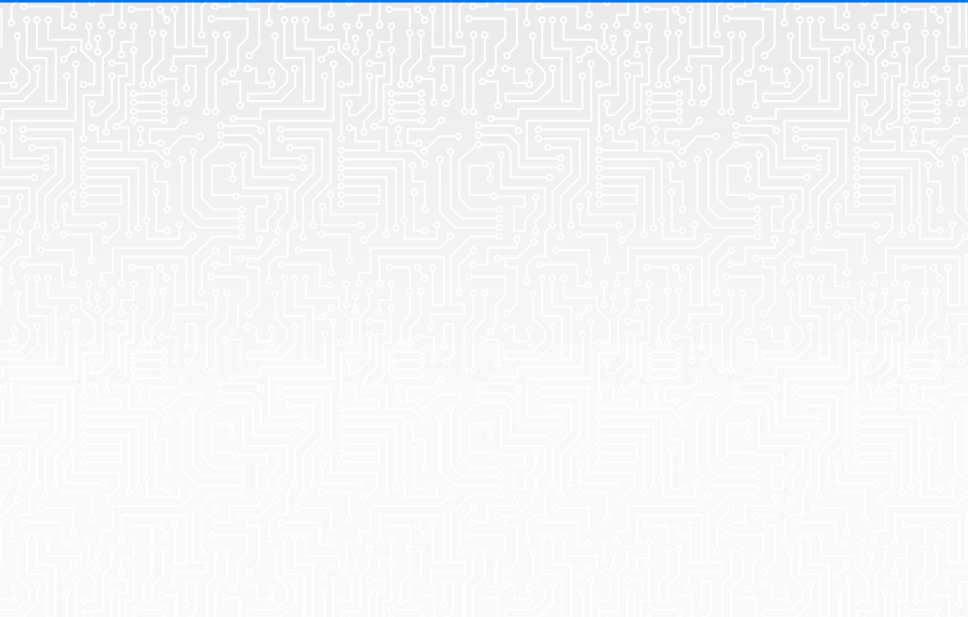
Korean  
Copyright Act,  
Networks Act

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- There are three approaches to intermediary liability
  - Expansive Protections Against Liability for Intermediaries
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  - Blanket or Strict Liability for Intermediaries
- Different regimes may apply to different types of content
- Obligations can be hard or soft

### Example

CDA 230 good samaritan provision



## Documentation

- Principles
  - Six high-level principles, each which expand out with numbered sub-points.
- Background paper
  - More detailed, with references. Non-normative (ie. not everyone who endorses the principles endorses everything in the background paper).
- Jurisdictional analysis
  - Analysis of intermediary liability laws and policies from many jurisdictions.
- FAQ
  - Overview, “How does this apply to me”, also non-normative.

## The Manila Principles version 1.00

- 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
- 6 Transparency and accountability must be built into laws and content restriction policies and practices



# 1 Intermediaries should be shielded from liability for third-party content

...

- Intermediaries should be immune from liability for third-party content in circumstances where they have not been involved in modifying that content.
- Intermediaries must not be held liable for failing to restrict lawful content.
- Intermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime.



## 2 Content must not be required to be restricted without an order by a judicial authority

- Intermediaries must not be required to restrict content unless an order has been issued by an independent and impartial judicial authority that has determined that the material at issue is unlawful.
- Orders for the restriction of content must:
  - Provide a determination that the content is unlawful in the jurisdiction.
  - Indicate the Internet identifier and description of the unlawful content.
  - Provide evidence sufficient to document the legal basis of the order.
  - Where applicable, indicate the time period for which the content should be restricted. ...



## 3 Requests for restrictions of content must be clear, be unambiguous, and follow due process

- Intermediaries who host content may be required by law to respond to content restriction requests pertaining to unlawful content by either forwarding lawful and compliant requests to the user content provider, or by notifying the complainant of the reason it is not possible to do so (“notice and notice”). ...
- When forwarding the request, the intermediary must provide a clear and accessible explanation of the user content provider’s rights, including in all cases where the intermediary is compelled by law to restrict the content a description of any available counter-notice or appeal mechanisms. ...

## 4 Laws and content restriction orders and practices must comply with the tests of necessity and proportionality

...

- Any restriction of content should be limited to the specific content at issue.
- When restricting content, the least restrictive technical means must be adopted.
- If content is restricted because it is unlawful in a particular geographical region, and if the intermediary offers a geographically variegated service, then the geographical scope of the content restriction must be so limited. ...

## 5 Laws and content restriction policies and practices must respect due process

- Before any content is restricted on the basis of an order or a request, the intermediary and the user content provider must be provided an effective right to be heard except in exceptional circumstances, in which case a post facto review of the order and its implementation must take place as soon as practicable. ...
- Intermediaries should provide user content providers with mechanisms to review decisions to restrict content in violation of the intermediary's content restriction policies.
- In case a user content provider wins an appeal under (b) or review under (c) against the restriction of content, intermediaries should reinstate the content. ...

## 6 Transparency and accountability must be built into laws and content restriction policies ...

- Governments must not use extra-judicial measures to restrict content. This includes collateral pressures to force changes in terms of service, to promote or enforce so-called "voluntary" practices and to secure agreements in restraint of trade or in restraint of public dissemination of content.
- Intermediaries should publish their content restriction policies online, in clear language and accessible formats, and keep them updated as they evolve, and notify users of changes when applicable. ...
- Intermediaries should publish transparency reports that provide specific information about all content restrictions taken by the intermediary ...



## Outreach and next steps

- Workshops
  - Global Philanthropy Forum, April
  - Freedom Online Coalition, May
  - World Press Freedom Day, May
  - EuroDIG (joint with I&J Project), June
  - South Korean action day, June
  - Asia Pacific Regional IGF, July
  - Internet Governance Forum, November



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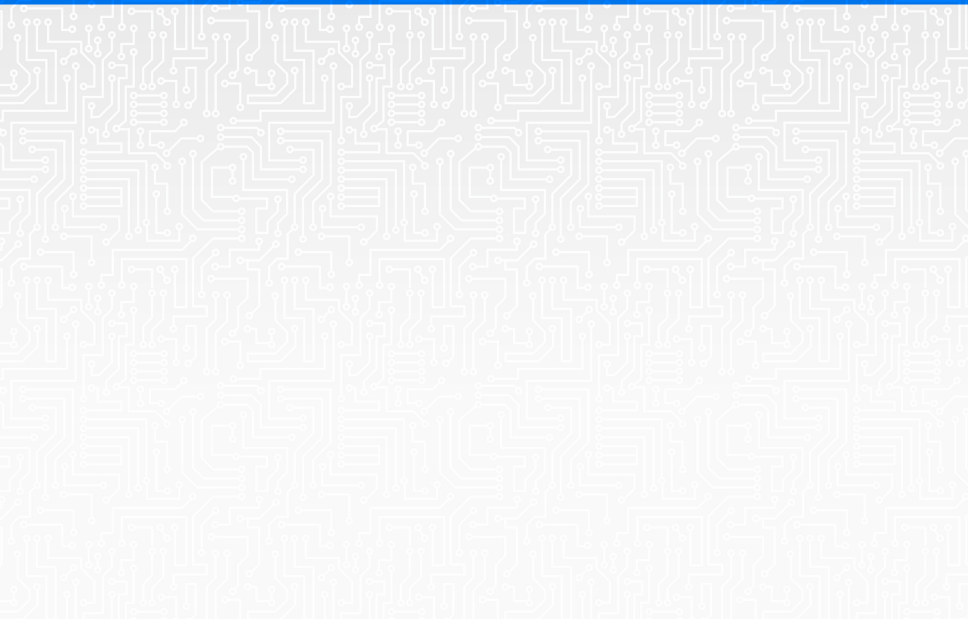
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- Bilateral meetings with intermediaries (ongoing)
- Resources to support the Principles
  - Template notice to users of their rights when content restriction is sought







## The Manila Principles in the Asia-Pacific Region

- The Manila Principles were born in Manila in March when
- Today we relaunch the Principles in seven new languages including Chinese and Korean
- Our jurisdictional analysis covers two Asian countries (South Korea and India)
- On Monday our first country visit was to South Korea asking for law to be aligned with global norms
- Today we hear from other panelists about intermediary liability issues throughout the region



## Conclusions and recommendations

- Limiting intermediary liability is the only way to ensure freedom of expression flourishes online
- The Manila Principles project is a broadly shared statement of best practices with that objective
- Countries of the Asia-Pacific region should align their laws with global norms
  - Providers should be shielded from liability for user content not ruled unlawful by a court
  - No proactive monitoring obligation or negligence standard, leading to preemptive censorship
  - No extra-legal pressure on intermediaries to remove content that has not be ruled unlawful



# Questions

Jeremy Malcolm  
[jmalcolm@eff.org](mailto:jmalcolm@eff.org)