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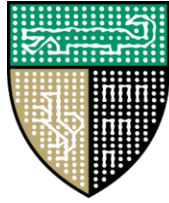
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Information Society Project  
Yale Law School

# **Beyond Intermediary Liability: The Future of Information Platforms**

**Workshop Report**  
Tiffany Li<sup>1</sup>

*Yale Law School*  
*February 13, 2018*

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<sup>1</sup> Report written by Tiffany Li, Resident Fellow, Information Society Project, with gratitude to Kamel Ajji, Rebecca Crootof, Elizabeth Goldberg, Claudia Haupt, Thomas Kadri, Shlomo Klapper, and Helena Uršič for their assistance, as well as to all workshop participants for an insightful discussion. This event was hosted by the Wikimedia/Yale Law School Initiative on Intermediaries and Information and partially funded by the Oscar M. Ruebhausen Fund at Yale Law School.

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## **Executive Summary**

On February 13, 2018, the Wikimedia/Yale Law School Initiative on Intermediaries and Information (WIII) hosted an intensive workshop entitled “Beyond Intermediary Liability: The Future of Information Platforms.” Leading experts from industry, civil society, and academia convened at Yale Law School for a series of non-public, guided discussions.

The roundtable of experts considered pressing questions related to intermediary liability and the rights, roles, and responsibilities of information platforms in society. This report presents a synthesized collection of ideas and questions raised by one or more of the experts during the event, providing an insider’s view of the top issues that influential thinkers on intermediary liability are considering in law, policy, and ethics. Nothing in this report necessarily reflects the individual opinions of participants or their affiliated institutions.

The remainder of this section summarizes key themes from the roundtable and specific recommendations for information intermediaries,<sup>2</sup> policymakers, and civil society.

### **Clearing up Confusion**

- Information intermediaries should take greater steps to inform policymakers and the public about the practical realities of content moderation at scale. Consumers often (incorrectly) assume it is easy to determine what content to take down and how to do so efficiently. Information intermediaries should also share information regarding the types of content they remove and the analysis undergirding their content removal policies.
- “Neutrality” is a confusing idea. There is no legal requirement for information intermediaries to be neutral, but policymakers and the public often incorrectly assume that information intermediaries have legal obligations to provide neutral venues for speech.
- “Intermediary liability” is a confusing frame for discussion because it focuses on issues of discrete harm and compensatory obligations, while ignoring user and intermediary rights and the larger questions surrounding the roles that intermediaries play in society. A better way to frame the issue could be to focus on positive rights and obligations of both information intermediaries and their users and the ways in which laws can protect such rights and enforce obligations.

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<sup>2</sup> Generally, this workshop used the term “information intermediaries” to describe online service providers facilitating the hosting, transfer, or access of information, while “platforms” refers to a subset of information intermediaries that were distinguished by their focus on content, their scale, or their relationships to users.

## **Global Scope**

- Information intermediaries play a vital role in protecting free speech, free expression, and access to knowledge globally. This is especially crucial for minorities and political dissidents living under authoritarian regimes. Information intermediaries should work with civil society to amplify the views of marginalized groups.
- It is difficult, and at times impossible, for information intermediaries to comply with conflicting laws from different countries. Furthermore, varying requirements disproportionately affect smaller companies, which have fewer resources to contest or implement required actions and who have lower risk allowances than larger tech giants. To avoid liability, information intermediaries often default to over-censoring content.
- Policymakers should consider the impact that proposed regulations in one jurisdiction may have on people in the rest of the world and on global democracy. Restrictive speech regulations in democratic countries may provide support for illiberal regimes to call for greater censorship of online content.

## **Legal and Policy Proposals**

- Information intermediaries are no longer the companies they were when intermediary liability laws first developed, and the role of platforms in society is changing. Existing laws may be inadequate to address the technological and social changes that have occurred. The law must find a way to flexibly address these changes, with an awareness of the ways in which existing and proposed laws may affect the development of information intermediaries, online speech norms, and global democratic values.
- A hybrid model of governance, with a larger role for lawmakers and an opportunity for judicial review and a right of reply in content takedown decisions, might better address the competing issues raised in speech regulation.
- Creating a transparency safe harbor would allow companies to provide more information to the public about their reasons for removing content.
- Policymakers could consider enacting different levels of regulations for different types of information intermediaries (infrastructure vs. content platforms, small companies vs. large companies, and so on). For example, it might be possible to implement content-neutral regulations for infrastructure information intermediaries that do not primarily handle content.

### **Further Questions**

- If our goal is for individuals to feel able to speak freely, should platforms should operate more as open public squares or as small communities? Do individuals feel more free to speak when there are no constraints, or when there are protective norms governing what kinds of speech is permitted? Will a public square model result in speech being drowned out by bots? Will a small community model result in a less diverse online speech environment or echo chamber?
- Some argue that platforms are now so powerful and pervasive that governments should regulate platforms as economic actors subject to antitrust law. Others claim they should be considered information intermediaries subject to intermediary speech and privacy laws. Are these conceptions mutually exclusive? What distinctions are relevant in deciding how different platforms should be regulated?

## **Navigating Global Speech Norms**

While many notable information intermediaries are based physically in the United States, most platforms have a global reach and must attempt to comply with laws around the world. These laws, which address important topics like intermediary liability, online speech, intellectual property, and privacy, often come into conflict.

Transnational legal conflicts raise difficult questions: Who should be responsible for protecting democracy? Do we really want tech companies to be the global arbiters for truth? Are tech companies the scapegoats for governments who do not know how to protect speech while also protecting democracy? What is the role of government? What responsibilities do platforms have for protecting speech or democratic values? Should governments regulate platforms like speech actors, media publishers, utilities, or other entities?

### **Free Expression, Human Rights, Democratic Values**

Many workshop participants recognized the vital role of information intermediaries in fostering environments conducive to free speech, free expression, and the free access to knowledge necessary for the protection of democratic values. Participants addressed the difficulty for information intermediaries to create and protect positive speech environments while complying with laws that are often conflicting or restrictive.

Some noted Germany's NetzDG law as an example of a national law that regulates online speech with potentially negative consequences for global freedom of speech.<sup>3</sup> Among other issues, the law is unclear regarding what kinds of speech constitute hate speech, as it does not include exceptions for speech acts such as parody and commentary. Other laws, including the U.K.'s proposed two-hour window to take down extremist content,<sup>4</sup> place unreasonable burdens on tech platforms. When a law demands strict compliance from tech platforms, it is likely that platforms will take down more content than necessary, to avoid the risk of large fines or legal consequences. This could have a negative impact on free speech and free expression, particularly in countries under authoritarian rule, where minority groups and political dissidents may become, as one participant put it, "collateral damage" of global trends toward increased online speech restriction laws.

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<sup>3</sup> See Philip Oltermann, *Tough New German Law Puts Tech Firms and Free Speech in Spotlight*, THE GUARDIAN (January 5, 2018), <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight>.

<sup>4</sup> See Heather Stewart, *May Calls on Internet Firms to Remove Extremist Content Within Two Hours*, THE GUARDIAN (September 19, 2017), <https://www.theguardian.com/uk-news/2017/sep/19/theresa-may-will-tell-internet-firms-to-tackle-extremist-content>.

Participants discussed whether online speech regulation laws in democratic countries could lead to a damaging precedent for illiberal states to also regulate online speech in more drastic manners. (If Germany can force Facebook to follow its speech and content takedown rules, other countries could make similar, content-based demands.)

There was some debate as to whether information intermediaries, in choosing to support free speech online, were effectively exporting values (such as the Miltonian marketplace of ideas) to other countries in a colonialist manner. Regulating speech is a sovereign right, and the ruling governments of illiberal regimes should have their sovereignty respected. However, others argued that freedom of speech and access to knowledge were fundamental rights that should be available to all. There is a reason international treaties and norms treat certain values as universal. Furthermore, some emphasized that complying with censorship standards of authoritarian regimes would harm vulnerable peoples, including political dissidents.

While online speech can be a force for positive social change, some, particularly in the human rights community, have been concerned with the potential for large tech platforms to be weaponized by extremist groups or used for political manipulation. Some participants observed that there may be tension between governments seeking to protect democratic values in their own territory and protecting the cause of global democracy. Restricting intermediary liability protections could be an option that would minimize the impact of hate speech and media or political manipulation, which could help those concerned about the impact of online speech on democracy in their nation or region. However, this could run counter to the goal of protecting democracy globally, as intermediary liability protections are necessary to allow for platforms to foster open speech environments in places without strong free expression protections.

### **Intermediary Policy in the European Union**

Some noted that protectionist reasons may lead E.U. regulators to increase regulation of information intermediaries. The call for greater scrutiny may be a reaction to the rapid rise in power and growth of the Internet industry, an industry some view as arrogant or disruptive. It is no surprise that some policymakers are proposing increasingly restrictive speech laws at the same time as antitrust pressure increases against large American tech companies.

However, some participants pointed out that the Internet landscape includes more than just the tech giants and, in fact, laws mandating speech takedowns would disproportionately affect smaller companies with limited resources. As a practical matter, one participant noted that “it doesn’t help [the image of tech companies] when we just continually send guys from Silicon Valley” to be the public face of information intermediaries, when many of the issues affect people around the world, especially vulnerable populations in countries with oppressive regimes.



One participant noted that much of the conversation surrounding platform regulation in Europe was happening behind closed doors and that many involved have security backgrounds, not free expression or human rights backgrounds. This was particularly the case with policy discussions regarding extremist content. Policymakers should include more diverse representatives from civil society to raise the views of varied groups affected by speech restrictions.

### **Recommendations – Private Sector**

Participants discussed strategies for information intermediaries to best serve global audiences while balancing legal requirements and cultural norms from different countries.

First, companies are not effectively informing the public or policymakers about the difficulty of scale – that is, the difficulty of complying with strict legal requirements (such as takedowns with short notice) for information intermediaries who deal with high volumes of content or data. Relying on user reports, for example, is not efficient, as users do not accurately flag content. (Many users flag anything they personally find objectionable or offensive, with no regard to the terms of service or potential legal issues.)

In addition to the scaling problem, it is also not as easy to identify illicit content as some laws assume. For example, some laws include specific requirements for content linked to extremist groups (for example, U.S. laws regarding material support of terrorism).<sup>5</sup> However, there are no simple or foolproof ways to identify accounts or posts belonging to extremist groups. This problem is even harder when applied to “fake news” accounts or posts. Automated solutions using artificial intelligence are also not as effective as many seem to believe, and a human is still necessary for almost all determinations of whether an intermediary should remove a piece of content. As one participant put it, “there are no magical robots” to manage content decisions.

Some argued that tech platforms should focus on *ex ante* solutions rather than *ex poste* solutions, such as content takedowns. For example, platforms could employ safeguards to prevent users from posting certain kinds of content, as opposed to removing content after it has been posted. However, pre-publication review is impossible once platforms reach a certain size or number of users. Also, *ex ante* solutions that would prevent users from posting certain content would lead to greater censorship of content. Many argued that tech platforms already must censor content more than they should, and *ex ante* solutions in this vein would only increase that burden, which should instead be the responsibility of government actors. Platforms could also work harder to make their Terms of Service clearer for layperson users. This could be an *ex ante* solution that would change user behavior before users post problematic content.

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<sup>5</sup> Providing Material Support to Terrorists, 18 U.S. Code § 2339A.

Many also mentioned a need for greater awareness and education of the public at large, so that users could understand their online rights and how national and global laws might endanger those rights. Platforms should share more information about what kinds of content they remove and why, as well as why some content remains online despite user or government requests. One method of doing this could be by presenting specific use cases to the public, along with data on prevalence of each type of case, to show some difficult content-related decisions that intermediaries often make.

### **Recommendations – Public Sector**

Many participants supported increased collaboration between the public and private sectors, so that lawmakers could develop digital literacy and better understand the practical realities of online content moderation.

Both platforms and government should have roles and responsibilities in protecting speech and democratic values. Laws that require platforms to take down content remove a level of due process that citizens should have regarding their speech. Traditional speech regulation systems are not easy and frictionless, and that is historically beneficial for protecting speech rights. Thus, to protect the rights of individuals, some argued that governments should play greater roles in speech takedown decisions.

Many called for a new hybrid model of governance, which would involve a larger role for the government and, potentially, the courts. For example, many noted that there could be more judicial intervention in the content takedown process. Currently, many laws mandating takedowns do not include any judicial review unless the takedown later becomes a matter of litigation. This may incentivize cautious and conflict-avoidant information intermediaries to take down more content than necessary. However, some recognized that governments—and judicial systems—also would have difficulty dealing with the scale of these issues.

Some argued that platforms and governments should not seek 100% takedown of all problematic speech. As one participant said, “We don’t have 0% crime offline. Why should we expect perfection online? Governments need to think of policing online spaces as they do offline spaces.” Others offered general arguments in favor of keeping problematic speech online, including historical or newsworthy purposes, as well as the general idea of “sunlight as the best disinfectant”<sup>6</sup> and the solution to bad speech being more speech.<sup>7</sup>

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<sup>6</sup> “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis Brandeis, *What Publicity Can Do*, HARPER’S MAGAZINE (1914).

<sup>7</sup> “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

## **Content Neutral Speech Standards**

Given the controversial and complicated nature of online speech standards, particularly in a global context, one avenue for finding consensus is to focus on relatively content-neutral standards (for example, standards for regulating bots, automated content, and political advertisements). This session first addressed whether it was effective to create or implement speech standards that were content-neutral; it then explored alternative models for developing new regulatory standards.

### **Are Content Neutral Standards Helpful?**

One relatively easy content moderation area is spam: software can often detect it, and most platforms and governments agree that it can or should be taken down. Some noted that other content-neutral standards—such as regulations and norms for managing extremist content or child protection issues—have also been successful. In these limited cases, there has been consensus and cooperation among platforms and governments, but most types of content regulation are more difficult. Others responded that there are still controversial issues involved with managing those types of content, including delineating between extremist/hate speech and incitement/true threat, as well as the concern that geo-blocking certain regions based on their laws would create a Balkanized Internet.

In a discussion of the “fake news” problem, one proposed relatively content-neutral solution would be to avoid focus on the problematic content and instead address how many people the content reached through social media. Focusing on the amplification of content cannot solve every problem, but it could be possible to address terrorism or hate speech and to target enforcement efforts at behavior that amplifies problematic content. However, some participants argued that focusing on the spread of problematic content would not be simpler than focusing on the content itself. Also, whenever an intermediary announces a new enforcement mechanism to curb the circulation of problematic content (such as limits for posts by new accounts), people quickly figure out ways to circumvent those restrictions.

In general, content-neutral standards are difficult, if not impossible, to create and implement, simply because context changes the meaning and impact of speech. For example, some consumers and policymakers believe it is easy for platforms to spot and take down posts created by bots. In fact, this issue is harder than it appears, and automated systems are not sophisticated enough to detect malicious bot accounts with efficacy. Humans are still necessary for the moderation process. Furthermore, in some contexts, posts created by bots may not be the kind of speech that should warrant removal. Bots do not exist without human creators, so it would not be correct to create an entirely separate set of standards for bot speech versus human speech.

Overall, most participants did not believe that content-neutral standards should be the focus of intermediary liability policymaking or advocacy due to the difficulty of creating or implementing effective content-neutral standards.

### **Different Regulations for Different Information Intermediaries**

Many noted the importance of differentiating between infrastructure information intermediaries (such as ISPs) and content information intermediaries that facilitate communication (such as social media networks). It might be possible to create content-neutral standards for infrastructure information intermediaries that do not primarily focus on content transmission. For example, a set of content-neutral standards (like common carrier regulations) could apply to infrastructure intermediaries, while separate standards that are not content-neutral that would apply to content intermediaries. One participant noted that infrastructure intermediaries that do not handle content can still be “non-neutral” and raised the case of Cloudflare rejecting the Daily Stormer website.<sup>8</sup> Others argued that the distinction between these two types of information intermediaries might collapse in the near future.

Another key distinction could be between larger and smaller companies. One participant noted that laws requiring large-scale content takedowns, or those with brief time frames for takedowns, would merely serve to entrench the market power of incumbent tech companies. Smaller companies would find it difficult to compete, with limited resources, and any fines would disproportionately affect small companies.

### **Recommendations**

Participants again called for more collaboration between platforms, governments, and civil society. One participant suggested that governments be required to first conduct risk assessments before passing new laws, allowing for platforms to offer expertise and assistance in explaining practical realities of legal changes. Many also noted the need for greater government transparency regarding the policymaking and enforcement processes. Another participant suggested that tech platform companies create informational packages for stakeholders (governments, businesses, civil society, academia) which would include sets of commitments and accountability mechanisms. This would show that the information intermediaries were making a good faith effort to find solutions and could help alleviate some of the public pressure.

Many highlighted the importance of transparency, especially regarding content takedowns. The Lumen database, a publicly available site that tracks content takedowns, is a key resource for this kind of information. Currently, companies must balance the need for transparency with the legal and reputation risks of disclosing certain information. Additionally, there may be conflict

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<sup>8</sup> See Steven Johnson, *Why Cloudflare Let an Extremist Stronghold Burn*, WIRED (January 16, 2018), <https://www.wired.com/story/free-speech-issue-cloudflare/>.

between the goal of being transparent about content takedowns and the European right to be forgotten, another instance in which transparency could lead to greater risk of liability for companies. Given these competing interests, some participants proposed the legislative creation of a transparency safe harbor. This would protect information intermediaries who seek to disclose information from having the disclosed information used against them in further legal proceedings.

There was broad consensus among participants that many (including policymakers) misunderstand the concept of neutrality. Correcting this misunderstanding could help policymakers craft better, more responsive laws for information intermediaries. Namely, there is no legal requirement under U.S. law for platforms to be content neutral. Yet many policymakers often conflate intermediary status with neutrality, imposing a burden on information intermediaries that does not actually exist in law. If the government were to legislate neutrality requirements for platforms, this could open a Pandora's box of issues regarding speech regulation. Many participants also noted that the term "intermediary liability" was also confusing. New framing of intermediary issues would help better inform policymakers and the public.

One participant pointed out that net neutrality is a framework that supports some speech goals and yet remains content-neutral. Others emphasized that the strength of the internet was decentralization and variety; no platform should try to be all things to all people.

## **Intermediary Liability in a Changing World**

This session began with an overview of some innovative technologies (including artificial intelligence, virtual and augmented reality, biohacking<sup>9</sup> and genetic modification, and deepfakes) that may present new challenges to existing intermediary liability frameworks. Participants also discussed novel issues raised by the increasing presence of information intermediaries, including discrimination, harassment, and revenge porn.

Participants raised many novel questions relevant to understanding the future of information intermediaries: What do we value when we value intermediary liability protections? What harms are we solving for? Why should we protect information intermediaries? What tradeoffs are we willing to make? Instead of fighting a diminishing negative rights framework, would it be possible to create a new positive rights framework for information intermediaries—to move from intermediary liability to intermediary rights and obligations?

### **New Technological Opportunities**

In the future, updated technologies may change the role that platforms play in the public consciousness and public discourse. Deepfakes and increasingly sophisticated methods of altering or creating false video, audio, and photos are already creating problems. These will only continue, making it even more difficult to discerning what is true on the Internet. This will likely exacerbate the “fake news” debate, with potentially grave consequences for the public understanding of shared truth.

New technologies may also create new platforms. Virtual and augmented reality may create new forms of platforms (such as the Google Glass overlay), which would then likely need new or different standards of regulation. One participant suggested the biohacking free market as an example of an unregulated new platform fueled by updated technologies.

Some noted that discussions about the impact of artificial intelligence on information intermediaries are often overblown, considering the practical realities of artificial intelligence technology. For example, calls for the use of AI-backed content moderation systems fail to recognize that these systems are not sophisticated enough to moderate content without human intervention. However, in other areas, AI systems have already had significant impact, raising concerns for issues like AI bias and algorithmic discrimination.

One participant suggested that the true technological change driving much of the industry was the scale of content and the velocity and speed of amplification of content on platforms. Others

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<sup>9</sup> See Geoffrey Woo & Michael Brandt, *Humans: The Next Platform*, TECHCRUNCH (April 16, 2018), <https://techcrunch.com/2015/03/18/humans-the-next-platform/>.

noted that, on a more fundamental level, the increase in use of mobile devices was a major technological change that merited more research. Increasing use of mobile devices, especially among children and in the developing world, is changing the way the Internet develops and the role platforms play in global society.

## **Recommendations**

Some participants believe that it is impossible to predict new technologies' implications and thus impossible to address them ahead of time in policy discussions. Instead, policymakers will likely have to figure out how to regulate new technologies without knowing much about them, just as most technology regulation has occurred in the past. One participant responded that that line of reasoning was what led to the creation of CDA 230,<sup>10</sup> which was beneficial to new Internet companies. Other participants argued that this was precisely the reason intermediary liability laws need a refresh – policymakers wrote the original laws to retrofit regulation to the Internet after problems had already occurred, but both the Internet and information intermediaries regulated by CDA 230 have since changed.

Given the impossibility of predicting the future, many suggested that regulations should allow for greater innovation as opposed to overly restricting potential new technological developments. Many participants were concerned with the future of CDA 230 intermediary liability protections and questioned how to move forward. Some questioned whether it was possible to propose new laws that would strengthen information intermediary protections. They suggested that there could be standards based on process as opposed to outcomes (such as requirements for companies to follow certain steps in moderating content, as opposed to promising to take down a certain amount of content).

Once more, participants debated how to convey the values protected by information intermediaries to the public, given that “intermediary liability” sounds confusing and potentially negative. Some pointed out that tech companies could do more to help civil society, by providing more information and greater transparency around their policies and practices.

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<sup>10</sup> 47 U.S. Code § 230.

## **Defining Platforms and Information Intermediaries**

Discussion concluded with a final overarching question: What is a platform? Information platforms are no longer the same, on a technical or sociological level, as the companies that the first intermediary liability laws sought to regulate over a decade ago. What is important, then, is understanding, on a fundamental level, the role of information platforms in society. What role should platforms play in society today, and we are at an inflection point to shape what companies are doing into the future? Are information platforms more like speech actors or like speech venues? Should platforms foster small communities or provide decentralized public space? Are platforms more like utilities or common carriers?

### **Public Sphere vs. Communities**

Participants questioned the role or place of information platforms in providing spaces for speech and communication. Platforms can either act as open public squares or as small communities. (One participant alluded to this difference as similar to the *Gesellschaft vs. Gemeinschaft* dichotomy.<sup>11</sup>) In open public squares, there are few or no restrictions on what may be said. In communities, members encourage only some types of speech.

Platforms may eventually move toward a more communitarian discourse model. If so, platforms may consider creating more spaces in which individuals can form self-governing communities. Self-governing communities would be able to establish their own speech norms and be able to choose their own boundaries for which users and kinds of content would be acceptable. Hostile and discriminatory speech usually do not create positive speech environments for communities. Indeed, some participants noted that there is already increased pressure for platforms to become closed communities.

While some claimed that this model could be effective for understanding how to create strong communities that foster discourse online, others responded that a shift from platforms-as-public-sphere to platforms-as-communities would mean a loss for the Open Internet and the concept of an open digital public sphere. One participant noted that it would be a shame if all internet spaces became homogenous, with people only interacting with likeminded people instead of exploring and being exposed to different ideas. It is possible that transforming platforms to small communities instead of public spaces simply reinforce the echo chamber/filter bubble problem. Some believed a move toward small communities as opposed to large public spaces could be isolating. Furthermore, one participant suggested that platforms creating small communities could be a form of censorship, because the act of gathering people and fostering a community

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<sup>11</sup> The *Gesellschaft vs. Gemeinschaft* (community vs. society) dichotomy refers to a concept first coined by the German sociologist Ferdinand Tönnies to describe community and society as two distinctly different sociological types.



effectively was an act of speech regulation (as it requires determining who could speak, where, and according to which rules and norms).

Without platforms as open public squares, we may lose the ability for the Internet to foster debate and encourage both speech and counter speech. However, it is often difficult to convince people (and regulators) of the value of counter-speech.

### **Speech Venues vs. Speech Actors**

Some perceived a tension in U.S. law between platforms claiming First Amendment rights and taking advantage of CDA 230 immunity. On one hand, platform companies can be speech actors that could claim free speech protections. However, as intermediaries, these companies often act less like speech actors and more like speech conduits or communications carriers (perhaps drawing comparisons to telecommunications companies). If, instead, platforms are neither speakers nor speech actors, the concept of content neutrality may not matter at all.

Platforms often argue that algorithmic curating of content should be speech. However, some scholars are concerned about this line of reasoning in terms of First Amendment expansionism. Some participants also noted that it may be detrimental for platforms to argue that they are speech actors when it comes to First Amendment rights but information intermediaries when they want intermediary liability protections. (Claiming both at the same time may result in confusion that could decrease the effectiveness of either argument alone.) One participant said it could be interesting to draw a line between platforms as speakers and platforms as speech venues and perhaps frame regulations based on specific speech functions.

### **Relationships and Size**

Other participants questioned whether there was a difference between “information intermediaries” and “platforms” and how that difference might be important for policy discussions. While information intermediaries play an intermediary function that is defined in law, the term “platform” can mean many things. Some use the term “platform” to refer to any company in the internet sector. In that framing, information intermediaries provide spaces for interactions between actors, while platforms are (arguably) economic actors in their own right.

Some argued that a difference between information intermediaries and platforms could be that the assignment of “platform” to a company assumes a certain level of responsibility, whether by virtue of a special trust relationship between user and company or due to the size and power of the company and the lack of choice for consumers. Many disagreed, claiming that it would be difficult to determine at which point a company crosses that line. However, others noted that scholars have routinely sought to understand platforms under a public utility or essential

facilities doctrine. It is likely that that line of reasoning may continue, as platform companies grow in ubiquity and market power worldwide.

## **Recommendations**

One participant suggested that we should choose the definition of platform based on which problem the definers are attempting to solve, which might require more than one definition.

Relatedly, others emphasized the importance of recognizing that platforms are not monolithic. Some operate exclusively digitally (most social media networks) while others operate in physical space (car-sharing apps, e-commerce sites, and so on). There is a difference between infrastructure and content information intermediaries. Some are large corporations; others are small startups. Some had non-profit or hybrid corporate models. Some have a centralized management system of governance; others, a decentralized system. An overbroad, all-encompassing definition of platforms may not be useful. However, a taxonomy could be helpful, as indexing the diverse types of platforms would highlight the diversity of platforms in face of regulations that seek to broadly regulate all to the same standards.

There are also various levels of information intermediaries that may function together, complicating liability analyses. For example, a user may make a comment on a commenting app hosted on a news site that is part of a media network that runs on different infrastructure intermediaries, accessed through an ISP. We may need to determine how different liability models attach to the various information intermediaries in complicated fact patterns.

One way to assign liability may be to pinpoint who controls the content or the activity. Some noted that it was important to separate smaller companies from the large tech giants, because the issues they face are different and regulations would impact them disproportionately. The proposed U.S. Honest Ads Act,<sup>12</sup> for example, includes an exception for smaller companies.

One participant noted that the definition of a platform was unimportant. What was important was which regulations might apply to each type of platform. In that sense, how pervasive or large or influential a platform is will influence the way in which policymakers seek to regulate it, regardless of academic discussions around theoretical definitions.

Others suggested that what is really underpinning much of the proposed regulatory pressure was competition policy, particularly in the European Union. Smaller companies lack a voice in D.C. and abroad, and this has negative ramifications for how information intermediary policy develops.

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<sup>12</sup> S. 1989, 115<sup>th</sup> Congress (2017).

Finally, some participants discussed the need to change the conversation surrounding information intermediaries from one focused on problems to one focused on potential. Instead of reacting to problems like media manipulation, policy efforts could instead attempt to address the question of how to create or promote a strong digital economy. There could be better models of accountability that could support digital economy growth and protect against real and perceived harms.

## Workshop Schedule

- 9:30-9:45**      **Welcome**  
*Tiffany Li, Wikimedia/Yale Law School Initiative on Information and Intermediaries*
- 9:45-11:00**      **Information Platforms & Global Speech Norms**  
*Discussants: Elizabeth Banker, Twitter; Rebecca MacKinnon, Ranking Digital Rights*
- The United States plays a unique role in the intermediary debate. Most major intermediary companies are based in the United States, and the United States has a strong valuation of free speech. Increasingly, however, governing bodies in the European Union have been calling for intermediaries to moderate content based on E.U. regulations. Meanwhile, restrictive government regimes regularly shut down access to intermediaries and demand that intermediaries take down content based on the speech goals for those regimes. How can or should intermediaries uphold free speech values in a global marketplace? What are the roles and responsibilities of intermediaries in navigating shifting international and transnational norms?
- 11:15-12:30**      **“Content Neutral” Speech Standards**  
*Discussants: Paul Sieminski, Automattic; Morgan Weiland, Stanford University*
- Intermediaries provide venues for online speech and access to information. However, intermediaries have also been facing increasing regulatory scrutiny in recent years, and there is a growing potential for future regulation that may impact the ability of intermediaries to support online speech. Given the controversial and complicated nature of free speech online, one avenue for finding consensus is to focus on relatively content-neutral standards (for example, standards for regulating bots, automated content, and political advertisements). Is the development of content-neutral standards a practicable and beneficial path forward? Are there content-neutral principles that could be effective? How will these principles impact intermediary liability?
- 12:30-1:15**      **Lunch & Learn: “Community Self-Governance on Wikipedia”**  
*Stephen LaPorte, Wikimedia Foundation*
- 1:15-2:30**      **Intermediary Liability in a Changing World**  
*Discussants: Nick Bramble, Google; Anupam Chander, University of California Davis*
- New technologies, like Artificial Intelligence and Virtual and Augmented Reality, present new challenges to existing intermediary liability frameworks. At the same time, new tech-enabled societal changes are also challenging intermediary roles and responsibilities. In a world where people are increasingly more logged-on than off, how should intermediaries shape the digital public sphere? Are current intermediary liability frameworks sufficient, or will they quickly become outdated? Can we “future-proof” intermediary liability to address the new technologies and new social changes?
- 2:45-4:00**      **Recommendations & Takeaways**

## **Workshop Participants**

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### **Paul Siemenski**

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### **Morgan Weiland**

PhD Candidate, Stanford University  
Affiliate Scholar, Stanford Center for  
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## **Workshop Organizers**

The Wikimedia/Yale Law School Initiative on Intermediaries and Information is a research initiative that aims to generate awareness and research on intermediary liability and other issues relevant to the global open Internet. WIII grew out of an ongoing academic affiliation and collaboration between Yale Law School's Information Society Project and the Wikimedia Foundation and is made possible, in part, by funding from the Wikimedia Foundation, in support of Wikimedia's mission to build a world in which everyone can freely share in knowledge.

The Wikimedia Foundation is a nonprofit charitable organization dedicated to encouraging the growth, development, and distribution of free, multilingual, educational content, and to providing the full content of these wiki-based projects to the public free of charge. The Wikimedia Foundation operates some of the largest collaboratively edited reference projects in the world, including Wikipedia, a top-ten internet property.

The Information Society Project (ISP) is an intellectual center at Yale Law School, founded in 1997 by Professor Jack Balkin. It supports an international community of interdisciplinary scholars who explore issues who work to illuminate the complex relationships between law, technology, and society. The ISP hosts over a hundred educational events over the course of each academic year designed to promote novel scholarship, foster the cross-pollination of ideas, and spark new collaborations.