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SESSION 4

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>> MODERATOR: We will wait another five minutes if that's okay. People are gathering after lunch. So we will wait a moment, if that's okay.

>> MODERATOR: Okay. Good afternoon everyone. I think we will make a start even though the room is sparse at the moment. Probably if people can hear interesting noises coming from this room, they might wander in.

So without further ado, welcome to the workshop on Manila principles on Intermediary Liability which were born this year in Manila, hence the name the Manila Principles. And I'll open the session with on introduction as to what these, what this document is, how it came about and why we think it's important.

Then we have three other panelists. The panel shrunk a little due to sickness and Visas and other dramas associated with events like this. But we have three excellent speakers, following my opening.

We have Ksenia Duxfield-Karyakina from Google, who is going

to talk about the role of intermediary liability protections for the digital economy and the APAC data ecosystem.

Then Jennifer Zhang, who has done a lot of work with the Hong Kong transparency report that's relevant to the intermediary liability issues, and I'm looking forward to what she has to say about her research and what is going on in our very close neighbor, Hong Kong.

And then Hong Xue from Beijing Normal University is going to talk about the applicability of the Manila Principles in the context of the Chinese copyright law and the eCommerce law.

And we will have a longer than anticipated period with engagement with the audience, which is good, because we are going to be unhurried and we can certainly cover any of the questions or insights that you may wish to share.

So that's our session. We have 90 minutes. So I'm going to introduce you to the Manila principles on liability. Some of you may have heard of them and some of you may not have because they are fairly new.

These are the guidelines for limiting the liability of Internet intermediaries for third party content. The objective of these guidelines is to promote freedom of expression and innovation. So, in other words, we're not protecting intermediaries for their own sake. We're not doing this because we think that intermediaries are nice companies that we just want to improve their profits. We think by protecting intermediaries we are protecting users. Also, the other thing is that intermediaries aren't just big companies. They are small companies and they are not companies at all in some cases; even individuals can be Internet intermediaries. If you have an open WiFi hot spot at home that you allow neighbors to visit or access, then you are an Internet intermediary yourself. Maybe you host a message board on your favorite hobby and sometimes you have to intermediate spam comments that you do get. If you do that from your own home, that still makes you an Internet intermediary. So by protecting intermediaries, we are protecting the freedom of expression for those users who rely on intermediaries to express themselves and to organize.

This is a civil society document. We have a broad range of civil society organizations that came together to form this document and its purpose is really to be a sort of demands from civil society and intermediaries themselves about how we think internet intermediary liability should be managed. We deliberately didn't decide to make this a multistakeholder document, not because we don't think multistakeholder is a good objective but simply, technically, that this would be a civil society document that would be a statement of our demands and in that way we didn't really have to negotiate it and reach a

middle ground. That's not to say we don't want to do that, we do want to do that as well, but our starting point is this document and it is owned by the civil society. We did consult with intermediaries in the process though and in fact in our meeting in Manila we had some lawyers for intermediaries who were really useful in providing feedback and insuring that we were on the right track and weren't saying things that didn't make sense so we weren't completely misguided. So we did have useful intermediaries along the way but it is a civil society document.

Here are just a few of the groups that came together to endorse the principles and there were many, many more, these were just the ones I could think of when I was creating this slide. As you can see they come from all over the world and amongst these groups on this screen, most of them were on the steering committee of the project as well and we decided to have representation from each global region on the steering committee so that we didn't overlook things that are relevant to one region and not to another region.

So that's what the Manila principles are. As I said, intermediaries are pretty much any entity that sits in between a user as the rest of the Internet. And this is the definition from the OECD which we drew upon. We looked at a number of different definitions of intermediaries and they were all pretty much similar. They were quite broad. In other words, they can -- they're not just limited to ISPs. They are not just limited to social networks. They are not just limited to Web hosting companies. But they can include -- some things you may not expect. I already mentioned open WiFi hot spots. You may not think of that as an intermediary, but it is. Also DNS providers can be intermediaries as well. Because often what do you do if you're a right's holder and you want to take down content at any time? Rather than going to the user who uploaded the content, you go to their DNS provider and say hey, I want you to delete that domain. So a DNS host can also be an intermediary. And many others.

If you want to have an exhaustive list of categories that we included in this definition, you can have a look at background paper to the Manila principles, which I'll be referring to in a minute.

So in general, we tried to make the principles applicable to all categories of intermediaries, but in some cases they are principles that are only relevant to one or the other. And in general you can divide them into hosts and conduits. A host is an intermediary who actually has your content stored on a server that other people can access. Why whereas a conduit is someone like an ISP who sort of passes the traffic along. So for some

of the principles we did distinguish between hosts and conduits, in other cases we treated them together. But host and conduits is probably the distinction that you need to bear in mind.

Now, as I alluded to, we are protecting intermediaries from liability not for their own sake, but because it promotes Freedom of Expression and Freedom of Association, as well as other human rights online. How does it do this? Well, most intermediaries are risk-averse profit-maximizing private actors. They want to minimize their exposure to legal liability and that just makes sense.

So, the value to them of any given instance of user's speech on their platform is generally pretty minimal. Like Facebook doesn't care if one uses a photo is removed from their service because it has an infinitesimal value to them. But the value to the entire user base is extremely large.

So this is the problem that faces intermediaries, that if someone tries to take down a particular piece of content they are not likely to care very much, because it's not worth very much to them.

Also, intermediaries, particularly those that are corporations, they don't have primary legal responsibility for upholding human rights. They do have a responsibility to do so, but it's not their -- the primary responsibility, of course, falls on States.

So the result of the foregoing is that generally, if an incentive is given to a private intermediary to censor speech, they will probably do it just to protect their bottom line. In some cases of course we have intermediaries who are very principled and will stand up for their users, and that's great. We certainly like to praise them when they do that. But we can't rely on them to do that. And that's why intermediary liability rules are so important.

And that's the conclusion. Immunizing intermediaries from liability ensures that users can maximally engage in lawful expression online.

We are not alone in saying this. There is a body of opinion out there from various sources which again we cataloged in our background paper to affirm what we're saying. This comes from The Joint Declaration of Special Rapporteurs for Freedom of Opinion and Expression in 2011 which states very clearly that intermediaries shouldn't be required to monitor the contact that users upload, shouldn't be subject to content take down without judicial oversight, and especially critical of notice and take down rules.

So this is absolutely in accord with the Manila principles, and I'm glad to say that the current UN Special Rapporteur for Freedom of Opinion and Expression has endorsed the Manila

principles and referred to them with approval in his latest report to the United Nations. So we're in good company. It's not just a fringe document, I think it's a pretty mainstream document.

Now, the reason why we started on this project is that we perceived that intermediary immunity was being undermined around the world in various ways. And how can that happen? Well, firstly, there are some countries that don't offer immunity or limited liability to intermediaries at all. In other words, no safe harbor protection. Because what we refer to as a safe harbor is when an intermediary has qualified immunity from liability. Or maybe they have safe harbors but the safe harbors are too narrow. The safe harbors, the conditions for entry into the safe harbor, are too stringent.

So the case that we focused on is where a court is not involved in assessing the legality of content, as I'll explain on the later slides. The Manila Principles always call on a court to be involved in making authoritative determination on the legality of content. So if intermediaries are required to take content down without judicial assessment, that undermines the liability -- the intermediary's immunity. And likewise, this is a case where we have the distinction between content hosts and the conduits that I mentioned. For hosts, a notice and take down regime is one that requires them to censor content from the Internet without a judicial order. For conduits like ISP, the equivalent is a graduated response regime and what is called a three strikes regime which requires them to suspend a user's account if they are accused of infringing copyright or making some other illegal access to content. These are some of the problems we see. We also see increasing soft pressure. When, even though there is not a legal imperative for them to censor content, they are being pressured to do so through back door channels. So I've given a couple of examples. Even the NETmundial principles which we support were flawed in this respect when they said that stakeholders have to cooperate to address and deter illegal activity consistent with fair process. Now fair process is not a legally defined word so we thought this language was not very good. We thought it was designed to put soft pressure on intermediaries to comply with extra judicial content take down procedures. Because that's, you know, cooperation sounds like a great word. But it actually means doing things outside of the rule of law. And that's dangerous for the reasons that I've outlined, that intermediaries are inclined to cooperate, just because they are protecting their profits.

Another problem that we find with intermediary liability regimes is when a court makes a judgment and tries to apply it

to the whole world. In this way, we find intermediaries being pressured to remove content from the whole Internet, when actually there is a court order that is only entitled to limit it in one jurisdiction so we have attempted to address that in the Manila Principles as well.

This year has been especially bad. Following the Charlie Hebda attacks in France, this is what the French President said. He said that 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 have to define the legal framework so that Internet platforms that manage social media are considered responsible and sanctions can be taken.

That's a pretty direct threat to intermediaries, frankly. They are putting Web hosting and social media and search engines in the frame for hosting terrorist content, even if they are not aware of it. They are considered accomplices, they are considered responsible.

So I'm about to go into what the principles say, but before I do so, I have to spend a bit of time on the legal background because all of you might not be aware of it. There are three approaches that we found in our research and that we summarized in our background paper. The first one is expansive protections against liability which means generally an intermediary has no liability for third-party content. And this is exemplified by the US law called CDA section 230 of the communications Decency Act. This applies to everything except for copyright and Federal criminal law. But anything else, such as defamation, falls under this. So an ISP, hosting company, any intermediary, has no liability for that user content.

So that's a really broad protection. Then, the intermediate one is the conditional safe harbor model, which I already eluded to where yes, there is a protection from liability but it's subject to conditions. Examples of this are the Digital Millennium Copyright Act in the United States and the EU eCommerce directive. The DMCA applies to copyright and the EU eCommerce applies to a range of things. And it basically means something like notice and take down regime where you get protection from liability if you take the content down after receiving a notice.

Now, the problem with that is that the incentive for ISPs is not to look at the notice but just to take it down. They don't even need to check whether the notice is legally valid. They may do, but chances are, nine times out of ten, they will just accept the notice and take the content down, without any determination of whether it's actually valid.

So this is not as good as the previous one. And worst of all is where intermediaries are held directly liable for the

user's content. Even though it's not their speech, they are treated as if it was their speech. They are treated as if they were the ones who uttered or published the defamatory comment. So the example I've given there is the Thai Computer Crime Act, where intermediaries can be held directly responsible if one of their users, for example, criticizes the king.

Different regimes may apply to different types of content. I've already given one example of that in the US, the CDA 230 regime, the broad protection, applies to things like defamation and the narrow protection, safe harbor, which applies to copyright. Korea is another example of that. They have the Korean Copyright Act which is actually the reverse of the US position. The copyright act, although it's a notice and take down regime, that's better for intermediaries than the Networks Act which covers everything else. Under the Networks Act, intermediaries are actually more likely to be found liable for content that they didn't even know about. I've just come from Korea, and as I'll explain later, we have a bit of a campaign going to change Korean intermediary law.

Finally, as I've alluded to, sometimes there are soft obligations on intermediaries and these are also important to push back against. An example is also found in the CDA 230 law from the U.S. It's a good Samaritan provision, so-called, which means the ISP is protected from liability to the user if they voluntarily take content down that they think is offensive or illegal, even if a court judgment hasn't been made.

So sorry for that crash course on the law but it will be helpful to understand the context in which these principles operate.

So what are the principles? We have a short document with six high level single sentence principles, which are relatively direct. And then underneath each of those principles, we have a set of sub-points which go into more detail. I'll flip over to the website so you can see what I'm talking about.

So apart from the introduction here, here are the principles, the six of them. And then if we arrow down we can get these detailed points underneath.

Then we have the background paper. The background paper is available under this link. And that contains a much more detailed set of references and some examples, and so on. It's not necessarily endorsed by everyone who endorses the principles. It's more of a document that is provided by the steering Committee for reference.

There is also the jurisdictional analysis paper, which we have an earlier version of here and I'm going to be providing an updated version. This is obviously too small for you to read. But this is just the schedule of the paper, which examines

intermediary laws in six jurisdictions. And that's going to be updated very soon with a more legible version.

And finally, we have the FAQs page also available on the Web site here, which explains the -- some questions in more detail. Like, for example, we're often asked: Does this apply to graduated response regimes? And the answer is no. I'm not going to explain why. But if you have any questions about the principles after reading them, this is in fact -- the FAQ is the place to go.

So without further ado, these are the principles, and I'm going to go through them one by one. I'm not going to read everything because there's too much. But I'm just going to pick out some of the most salient points.

The first one is fundamental and that is that intermediaries should be sheltered from liability from third-party content and I'll explain why because that actually serves the interest of the user.

Importantly, intermediaries must not be held liable for failing to restrict lawful content. That seems like it goes without saying, right? Why would you be held liable if the content is lawful? As I mentioned, in Korea that is the case. You can be held liable as an intermediary if you fail to act on a content take down request, even if the content in question is not illegal. Even though it sounds obvious, we had to say it. Likewise, intermediaries should never be made strictly liable, they should always have a defense to liability, or be able to raise a defense to liability and they should never have to monitor it proactive. If you have that, it's shutting down the service. Imagine YouTube, which gets million, maybe you can tell us, how many millions of uploads every week, imagine trying to proactively watch all of those to check for content. It would destroy many of the services that are so valuable to us.

Number two, content must not be required to be restricted without a court order. Now, this was a provision that we argued long and hard in the process of developing the principles. Some people felt that it was not practical. But I'll explain why we decided it was. Firstly, there really isn't anyone who is capable of rendering an authoritative judgment as to the locality of content. Often those who want to take down content, they say this is obviously illegal, you can just tell. But in surprisingly few cases is that true. If something is obvious to one person it may not be obvious to another. So we think there is no substitute for a court. That is not to say you can't have an accelerated court process. There are such things in Chile for example. They have an accelerated course process, where the court takes a shorter time to decide and it is a cheaper, faster process. But even though, we reckon it should be a judicial

authority.

And the lawyers of the judicial authority have to be specific and precise.

Yes, did you have a question?

>> AUDIENCE: (Off microphone.)

>> MODERATOR: Just take a note and we will come back to you. Here are things that we expect the court order should specify, including the time period in which they want the content restricted. It may be that content is only disallowed during an election period. After that, it's legal again. So we don't want content to be removed forever if there is no justification of that. I won't readout the rest with you. You can see it on the Web.

Number 3, requests for restrictions of content must be clear and unambiguous and follow due process. The Manila Principles do not anticipate a notice and take down system because we think this does not satisfy the criteria that we set out, such as the judicial order. However, we do acknowledge that notice and take down systems do exist and they are not going away soon. Therefore, this principle is applicable in a case where there is a preexisting notice and take down system.

And, it also gives an alternative to notice and take down, which we do support. And that is called notice and notice. Now, the difference is under notice and take down, if an intermediary receives a notice, they have to take the content down themselves whereas under notice and notice the intermediary just forwards a notice of claimed infringement to the user and then the user has the option of taking it down. So that gives the user some choice about whether it's a legitimate complaint or not. And if it isn't, then the onus goes back to the person who requested the take down, to take the matter further with the user.

So we support notice and notice. We suggest that the notice that the intermediary forwards to the user should contain a statement of the user's rights because otherwise these notices themselves can be abused. And the example is the case of Canada. In Canada, they had a new notice of notice system which just came into effect this year, actually. And it's for the copyright system only. So in Canada, we found the rights holders were sending notices to users, threatening to sue them, and offering to settle their case for such and such thousands of dollars. And the warnings that the copyright owner was giving in this notice were completely false. They were based on US law and not Canadian law. So there is a problem with the Canadian system and we're trying to make sure and -- in these principles, that any notice that is sent to the user about allegedly illegal

content has an accurate statement of their rights.

Number 4, laws and content restriction orders and practices must comply with the tests of necessity and proportionality. Now, the difference between laws and orders and practices is laws, from the Government, orders are from the court, and practices can be from intermediaries themselves. This does extend to internal practices.

And one thing, these are some excerpts from that paragraph about limiting the scope of restriction to the minimum possible extent. For example, if content is only ruled to be illegal in one country, it should be limited in that country and made accessible on the rest of the Internet. This is something that is coming up in practice, time and again, in countries like Canada, and France, there are orders that Google or another intermediary should restrict content over the entire Internet based on the court order of one country and we don't think that is acceptable.

Number five, and this is the second last one. We're almost at the end. Laws and content restriction policies and practices must respect due process. This is mainly about offering the user review in case content is removed wrongly, which does happen quite a lot. So in most cases the user should have a right to be heard before the content is taken down. We acknowledge that there are exceptional circumstances where content is required to be removed immediately. You know, you can jump to the obvious example of child pornography. But in those cases, the user should have an ex-post facto right to challenge the removal.

And if importantly the content is taken down and the user does challenge it, and is successful in that challenge, the content should go back up.

Finally, transparency and accountability must be built into laws and content restriction and policies and practices. This precludes the use of the back door extra judicial soft mechanisms and voluntarily practices. It calls on intermediaries to be transparent in their practices by publishing things like transparency reports and Government, too, should publish transparency reports.

They should say also -- users should also be notified of the changes in intermediaries' content policies. Now, one of the other controversies that we have to deal with, I mentioned one, do we have to have a court order, the other one is should intermediaries be entitled to decide the basis on which they restrict content on their terms of service.

Now, that seems kind of obvious that intermediaries should be able to restrict content based on terms of service, but the difficulty is often that is used as a back door for censorship

by third parties. So rather than a copyrighter going through the court to take the content down, they would approach the intermediary and say this is against your terms of service, just take it down, and bypass the court. So that's why some people thought we shouldn't allow intermediaries to apply their own terms of service to remove content. And we thought that was ridiculous. We have to allow intermediaries to do that. Say you're operating a Web forum about football and someone posts something about ballet, you don't want to have articles about ballet on a football forum so you're entitled to take that down. That's inescapable. We can ensure that whenever content is taken down by an intermediary based on their own policy, there is transparency about that. That's the compromise that was reached.

That also softens the requirement that a court ought to be required for compelling the removal of content. The argument against that, that rights holders and law enforcement make, well, that is impractical for us to go to court to obtain 200,000 court orders to take down 200,000 copies of Madonna's latest album. Yes, but if you can convince the intermediary to take it down voluntarily and if they are transparent about that, that saves you from going to court.

So that works, so long as the user has been informed of the terms of service, including any changes to it and is given the opportunity to have the removal reviewed, and the removal is included in a transparency report.

So that's it. That's the Manila Principles. We have been shopping these around the world. As I said they were released first at Rights Con this year in Manila. We have been to the other events that you can see, including today, which is the second to last one shown there. And this is the first presentation at NIGF. But the global IGF will be the next one in November. We are also talking directly to the intermediaries and we are also developing more resources to support the intermediaries. Remember how I spoke about the notice to notice regime and how misleading that can be. We want to draft a template notice that can be forwarded to users that ensures that they have an accurate understanding of their rights. So that is going to be one of the accompanying resources that will join the other ones on our website, such as the background paper and the jurisdictional analysis.

Now, the Manila Principles were born in Manila. And we are returning to the region today to launch it in 7 new languages, including Chinese and Korean. I had hoped that today we would be able to have a button here which would switch between the languages. That is not quite ready. And there are still some other Kinks being worked out. But I'll show you the current

state of the Korean text, which is here. At the moment, there is no link to get here, but within the next week or so there will be a link to Chinese, Korean, Spanish, Portuguese, Russian, and Arabic, and I think there's probably one that I've missed out.

It works just the same as the English version. You can see that there are a few terms that need to be translated.

So that's what we had hoped to be launching today. So you can consider that sort of a soft launch.

The jurisdictional analysis paper covers two of the countries in the region. And this week I was in South Korea, talking to legislators and intermediaries and users about how South Korean law is not in alignment with the Manila Principles. I didn't do the hard work. It was really the open net Korea that did the hard work in analyzing Korean law and finding the problems. And open net Korea put together an open letter, which they invite all of you in this room to sign. There are some copies on the table over here. And you can read in that letter how Korean law is amongst the worst in the region. The very worst out of all of the Asia Pacific region in terms of making intermediaries liable when they are not even aware of infringing content on their services.

So please do grab a copy of that letter. And if you want to sign it in paper, you can do so and hand it back to me. Otherwise take a copy anyway, and you'll be able to see where you can endorse it online.

Also there we have some paper copies of the Manila Principles themselves. And we have stickers, everyone loves stickers, right? So we have lots of stickers there. Please take them and plaster them all over your laptop and take some home. If you run out, I've got extras, so go for it.

Now in conclusion, so limiting Intermediary Liability is what we do to protect users, not to protect intermediaries. And the Manila Principles project is our pretty measured assessment of what kind of laws and practices we need to see in order to do that.

And there are countries in this region that do not comply with the principles. In fact there are few countries anywhere that do comply with the principles, but that's why it's Civil Society's objective to shop these around the world and to increase the level of compliance.

And the kind of things that we want our providers to be shielded from is liability from users content unless a court has ruled it to be illegal. We don't want intermediaries to be subject to proactive monitoring obligations because if they are, they will stop hosting stuff. It's not worth their while if they have to proactively monitor. And we don't want extra legal

pressure on intermediaries to be there so that they take it down on the sly, without transparency and accountability.

So that is your introduction to the Manila Principles on Intermediary Liability. That is my lecture. I neglected to say at the start that I work for the Electronic Frontier Foundation, but that's been obvious from the heading at the top. So we are a digital civil liberties group based in the United States but I'm on the International team and we're responsible on our team for making sure that civil liberties online are upheld around the world.

So I am happy to take questions. And let's see if we have a microphone.

>> AUDIENCE: You talked about the liability or the absence of liability of content networks for third-party content. Has the user examined the implied obligation of social networks and content networks, the users? For instance, I'm a user. I have a picture or a document on a drive or published certain content in a social network. And I trust the content network or social network to -- not to take down content without sufficient reason or due warning to me or not to open up my stored data for third parties, including Government, without my consent.

>> JEREMY MALCOLM: Yep.

>> AUDIENCE: If these are my rightful expectations, why is it difficult for content networks or the social networks to decline requests from governments to open up my data or to take down my content without sufficient legitimate process?

>> JEREMY MALCOLM: Yes. Well, thanks for the question. So we do have some parts of the principles that speak to intermediaries and as to their obligations to their users. We had a choice in writing these principles that we could address them to Governments or to intermediaries or to both. So we decided both because that seemed to make the most sense.

It doesn't cover all of the issues that you mentioned. For example, access to your data is outside of the scope of the principle, because it's about the -- because the scope is about liability for -- their liability for your content. Although it's a very important issue, it's outside of the scope. There are other principles that will deal with that.

One of the sets of principles that we based this on was the 13 principles, the necessary, proportionate principles which deal with communication surveillance. So one of your concerns may fall under that set of principles or maybe there is a third set that we need to write that covers miscellaneous issues. But what it does cover is to make sure the intermediaries tell you what they are doing, tell you what they have done and give you a chance to respond if they are going to take your content down. So to that extent, yes, this does speak to your concerns.

And so some of these things will be welcome -- intermediaries will be happy with some of this and other parts they will be less happy about. They're not really happy about us telling them to allow users to appeal from their own terms of service. But some intermediaries do do that. So Facebook, for example, full credit to them, they have got an appeal mechanism from their terms of service. So if they take your content down under terms of service, you're entitled to appeal. It's an internal appeal, not an appeal to court. But that's an example of Facebook complying with that aspect of the Manila Principles.

>> AUDIENCE: I was more talking in the context of these large companies being arm twisted by Governments to open up, to provide a back door. And on the face of such pressure, is it possible or is it not easy for them to tell the Governments or whoever that is pressurizing them, that look, we have an obligation towards users? And we have a promise to keep. And we can't betray the users' trust. So follow due process, follow the legitimate process. Give due warning to the user before you ask us to provide you with a back door.

>> JEREMY MALCOLM: Well, back door access to user content is again out of scope. It's important but it's not something that the Manila Principles cover, because we decided, actually, our scope is broad enough. We didn't want to try to cover everything.

I'm going to hold additional questions until later because we have three other panelists to get to hear. And I'll ask Ksenia Duxfield-Karyakina to come up and give the next presentation. Thank you very much.

>> KSENIA DUXFIELD-KARYAKINA: Thanks, Jeremy. Hello everyone. I work for the Google Original Public Policy team in Hong Kong and overseeing APAC. It's a pleasure to be here. It's a great honour. And Jeremy also promised lots of stickers, so I'm obviously in.

I'm going to talk -- obviously I represent one of the large intermediaries. And I'm going to talk more about the economic perspectives and benefits of Internet liability protection for the broader ecosystem in the region.

In recent years, technology innovation emerged as key enablers of digital growth for economic, educational and cultural sectors. The Internet is a global platform. More information and content is being created and shared. More publications, art work, educational materials are being produced globally today. And obviously the internet has allowed people from all over the world to connect to share access to knowledge. And that is happening through a broad variety of online services, from search engines, to social platforms which are the digital intermediaries which have created, which have enabled,

new opportunities for the Internet audience all over the world.

And when you think about companies like ourselves, like Google, like eBay, Pinterest, or wikipedia, all of those grew out of smaller intermediary startups which wouldn't be possible today if not for the safe harbor and intermediary protection regime created under the US legislation, DMCA, and DMCA-like legislation regimes which have obviously created legal certainty for the new platforms to emerge and for them to develop their businesses.

Here in Asia we see today more and more inspirational success stories of such platforms like Line, or Wechat, or Kakau, global giants, and in general terms the growth of digital content and online has been surprising Europe for the past year, and that includes video and new business models. UT is a good example of that. The great success stories that we see in YouTube in Asia are truly inspirational for all of us. I'll give you a couple of examples that are close to my heart. I come across every day as part of my work. Home schools they have over 50,000 subscribers and the main purpose is to create educational content and doesn't cause barriers to access knowledge or education in the country.

Or take a Japanese Beatbox and blogger on YouTube Hikakin who has a channel with over a million subscribers, and the audience is from all over the world. And he has made YouTube a key source of revenue and a key channel to promote his creative works.

And another YouTube channel called kid’s toys, which was created by a family, by two parents of two little girls in a tiny village outside of Manila in the Philippines, speaking of the Manila Principles. And this is a simple education content of kids playing with toys that has huge amounts, millions of subscribers. And the YouTube is now said to be generating the key source of revenue for the family.

These are human stories that represent the value and the power of intermediaries today. And it does speak for themselves for the value of intermediary protection.

Moreover, we see that the intermediaries generate more and more interest from the International investors and enable digital growth. Therefore, I would like to give you a couple of examples from a recent study conducted by the US based think tanks that serve as a panel of several hundred investors from different countries in Europe, US and in Asia. And it looks into how various regulated trends impacting intermediary liability protection would have an effect on investor’s behavior in these countries.

So the majority of the investors across the world, in particular here in Asia, confirmed that a lack of legal

certainty and lack of protection for digital intermediaries, digital content intermediaries, would become the key inhibitors for their decisions on investing to these platforms. Over 58 percent of early stage investors see the risk of high damages as a major factor in making them uncomfortable about investing in media platforms and digital content intermediaries. And nearly 80 percent of investors would be deterred from music uploads and video if they knew that laws would expose them to high risk of intermediary liability.

Another independent study looked into several frameworks in Germany, Chile, Thailand, and in India has shown that an improved intermediary liability regime would increase start up success rates across those countries. In India they would see start up success rates increase by over 20 percent and in Thailand by nearly 25 percent and also raise the expected profits of the startups.

That is due to improvement of legal certainty and enabling the intermediaries to grow their businesses without burdening them down with high cost of compliance and over compliance with the regulatory framework. It's important to note that this study in particular, found that in India and Thailand, most of the intermediaries are -- tended to over comply with the content removals, and thus removing the majority of cases legal content, when the risk of liability and therefore damages.

An enabling intermediary protection regime is not only a milestone of the digital economy today and the driver flourishing entrepreneurship system, it's obviously serving the greater purpose of protecting human rights and the Freedom of Expression today all over the world, which is the core foundation of discussion here at IGF and the core foundation of the Manila Principles. So we're very happy to be part of the discussion and especially here in Asia, where we live in aspiration of growing a new Silicon Valley. Thank very much. And I'm happy to take question, if you want to do it now Jeremy or after all of the panelists?

>> JEREMY MALCOLM: (Off microphone.)

And we did have -- we have apology from Joe Lam from the Hong Kong golden forum, who would like to have been here to give the perspective of a successful Hong Kong intermediary. They were the number three or I think are the number three discussion forum in Hong Kong. And actually had some legal problems with content demands, and he is ill today otherwise he would have been here.

So, hopefully I'll certainly fill him in maybe at a future event we can hear from him.

So let’s move on to hear from Jennifer Zhang on the local application of the principles. Maybe you can shed some light on

the Hong Kong situation. She is going to tell you about her work with the Hong Kong transparency report.

So thank you very much. Jennifer.

>> JENNIFER ZHANG: Thank you, Jeremy, for including me on this exciting panel, The Manila Principles.

So during my presentation I would like to first introduce our project, Hong Kong transparency report and then relate our work to the Manila Principles.

First, who we are. So we are an independent research program and a media status centre from the University of Hong Kong and our program started in 2013. So we research Hong Kong Government's subscriber, Internet subscribers, and the content removal request, and we also have advocacy for transparency reporting and accountability from the Government and the Internet companies perspectives.

So, why transparency reporting? So we understand that it's a law enforcement and Governments do it here to prevent crimes by requesting the online users data and the taking down of the controversial reports and the web forums. The OSPs have the responsibility to cooperate with the law enforcement, but they also need to understand that they have a responsibility to defend the online users of free speech.

And then the users, they have the right to know whether the Government's access to and removal of their own comments is necessary and proportionate.

And the transparency reporting is obviously good for the Hong Kong Government and companies to build accountability. And so bearing these ideas in mind, the report has been working with the Hong Kong legislators to request the content removal data. So in February 2013, lawmaker, legislator Charles Mok started asking the Government to release the number of users and content removal requests. And the Hong Kong Government produced the data.

And so this is the request. So originally the Government released the data in such PDF format. And then we realized the removal requests from the Hong Kong Government on a yearly basis, and also we were able to categorize the content take downs by departments. As you noticed, the biggest content removal of Government organisations is the Department of Health.

As to the reasons for the content take downs. So the biggest reason is actually to combat suspected auction or sales of controlled or unregistered drugs or medicines followed by the infringement offences.

And then, so, last year we had the occupy movement. And there was speculation that the Hong Kong activist and the State surveillance and also during this period the Hong Kong Government is using this ambiguous cybercrime law to detain the

social media activists who are using Facebook and the -- our local forums to post radical comments, such as bombing the Government headquarters or organising people to occupy certain streets. And then so we see during the, so when we come to the police force request to remove information so during the occupy period, the October 2014 period, the total number of take downs was like more than the total number in the past four years. In the past three years. Sorry.

And also, here are the number of issues and concerns. So based on our dialog with the Government and our local forums, there is no -- there are no formal procedures when it comes to the Government's request to take down the contents. Fringes, some local Web forums, they just decided that the police can make several -- can make phone calls to them to ask them to take down certain users' content. And the local small ISPs or OSPs, such as the -- for instance, Hong Kong golden is quite big Web forum. But a lot of small forums who have only -- who have only like 2 to 3 staff; they are under great pressure to remove content. And the -- under the Government's order. And there is no independent oversight or review.

Although I would like to state it has been questioning the Hong Kong Government's practice of taking down content, the Government has been insisting that they are following their Internet procedures and that they are confident that their officers are conducting the content take downs in accordance to their internal regulations. So there are no independent oversights.

And what about the companies? So and we have been -- the Hong Kong transparency report has been working with several local organisations to conduct this survey, who is on your side. It's modeled on the EFS, who has your back. So we surveyed our nine local forums. You can see Hong Kong golden is here. So these nine forums, although most of them, the -- they have -- they publish their privacy policy statement. But they don't have the comprehensive legal guidelines in terms of how to deal with the Government's request to take down contents. And most of them, they don't have transparency reports notifying users of how many requests they receive and how many requests they complied with.

And so as a result -- as I just mentioned, for the companies, the local ISPs and OSPs, the forums, they don't have detailed legal guidelines when it comes to the Government's take down requests. And then there are no public disclosures of such content take downs. And I think it's a culture in Hong Kong that is the webmasters, they are performing the duty of the police. So they actually are actively monitoring the website content. And then -- and during the occupy period, they posted

announcements to remind users to mind their comments, not to issue radical or political comments.

And there is also the general preference of keeping business running than upholding the users' rights of freedom of speech.

As I mentioned, most of our local online forums, they are small operations. And most of them they don't have a big lawyer team so they don't have the legal resources to combat the Government's take down requests.

And so in terms of progress, our legislators are challenging the Government's controversial take downs. And certain Web forums, they have started to notify users of the content take down requests. So they may send a message, send a message to a certain person notifying them that the Government asked -- orders them to take down their own content. The Web forums, they leave the decision to the users. But according to our knowledge, most of the users will take down their comments once they receive such notice from the webmasters.

Okay. So here are our recommendations. So, including the past. First for the Government. We hope the Government can obtain a court order for their content removal requests, rather than just a call to the webmaster to order the take downs. And they should regularly publish transparency reports. Letting the public know how many requests they have issued and how many requests were listened to. And of course also the reasons for such take downs.

And the companies should publish clear content restriction policies, and have user notification policy, regular transparency report, and they need to realize the balance between business operations and the users' rights to freedom of speech.

Finally, Civil Society, in Hong Kong we have two groups that have been working on the online censorship issues. So, they have been organising the awareness raising campaigns, such as writing public letters to the legislative council and submitting policy recommendations. Also, holding workshops.

Okay. So in general, the reality in Hong Kong is the Government's power is very easily -- can be easily abused when we don't have a strong Civil Society and we don't have strong oversight.

So there is too much -- the balance is not really a balance. So because the companies, they are small, they don't have a big lawyers team. And so they prefer to comply with the Government's request than fight for the users.

And we hope that the Government, both the Government and the companies, they can realize -- they can realize these are principle, legality, necessity, proportionality when it comes to

the content take downs.

Okay. So thank you for your attention.

>> JEREMY MALCOLM: Thank you very much for that Jennifer. That was really interesting. And we have one final presentation. Let me just switch back. Professor Hong Xue from Beijing Normal University is going to talk to us now.

>> HONG XUE: Thank you very much. Xaw Xu thanks you very much. This is a very valuable session. I guess it's brainstorming. We learned a lot about the new set of principles.

I know that Jeremy mentioned already two country studies. This is about Korean law and India law. I guess it's quite meaningful to have a study regarding Chinese law and China is the largest economy in the world and is conducting a large scale legal reform. It's quite relevant to the intermediary liabilities. And especially the Chinese Government has made it clear they want to make Internet a cross-cutting element, to update the whole economy. That is the meaning of Internet plus. So this Internet is not more, it's not only one sector or is one stimulating element in the economy, actually, it's about everything in the economy. So it says Internet intermediary service provider will be very critical stakeholders in the whole economic development.

Let's have a quick look. Sorry. There is a pass code required here. Okay. Cool. Sorry.

Right. There is a Senate shot as a relevant legal reform that is happening right now in China. You can see there are many new laws emerging. And some of them are old laws, but there is a new update or amendment. This is a very short list. There are many others. But these are most relevant because it's relevant to the information communications on the Internet.

The copyright. The copyright of course, this is the most traditional legal one relevant to information communication on the Internet. Copyright law was enacted in the last century; now it's being updated. We call these substantive revisions, the fourth one. But the last one that happened in 2008 is a very small one. It's a minor revision. It's not so much substantive.

The third substantive revision will have an overhaul of Chinese copyright legal regime. Intermediary liability no wonder has very important components. I'm one of the advisers to this copyright law forum projects. The tort liability law is a new law and in that law is a very famous stipulation. Article 36, and it outlines what are the general principles in Chinese tort law, China is a civil law country, the tort liability is basically the civil liability of intermediary services.

And the consumer protection law is very new, was enacted in 2013, two years ago. The criminal law, it's ongoing, it's a nice amendment to the criminal law, I'm going to talk about some very interesting proposals, which is not to criminal liability. It's not clear, the Manila Principles is only about civil liability or it can be extended to criminal liability as well.

The last one is the eCommerce law, it's relevant. It's on eCommerce. It's on Internet economy. There is a five-year plan from 2013 to 2018. China is going to launch a comprehensive new law regulating all the aspects of eCommerce. It is more than eSignature or the eTransaction. It's about all the other aspects and to establish the liability regime.

There's a cross ministerial Working Group under the leadership of the national people's Congress. And there are also legal experts supporting platform and one of the coordinators of this expert platform, we have determined to have an open, transparent and Internationalized lawmaking process, so we are looking forward to your inputs to our drafting law. And even though this is already staged, the draft is not being released, but I can talk about the proposal, which is back to the intermediary liabilities.

Okay. Manila Principles have six basic principles. This is primarily about principle 1. I guess paragraph 4. I tried to identify the four most important areas across Chinese law. That is compare with the Manila Principles. This is the first area.

Intermediary service provider, on the Internet, has a general obligation to monitor the contents, its users' contents going through his system, his platform, his services. I guess this is very critical.

It seems that this is very -- a very even situation. If you look at copyright law, it seems quite positive. The Chinese copyright law, even though there is still a proposal for the third revision, it seems it's quite clear that with respect to copyright protection, any service provider is not mandatory to monitor or filter third-party contents. There is no general monitoring obligation. This is really good news. And this has been confirmed by the China supreme people's court, the highest judiciary. On the one hand this is positive. On the other hand, look at the criminal law, it's a totally different situation. According to the 9th amendment to the criminal law, the criminal law was enacted in 1997, has been amended from time to time and this is the 9th amendment. It's a very substantial one. Many, many provisions, I guess it's more than 40 provisions will be amended in the 9th amendment. There is one provision that is relevant, it's 268, paragraph 1. It means that the service provider will have new obligations. This

obligation is called online security administrative obligation. The obligation is to prevent any large scale communication of illegal contents. So it's pretty clear, they have to filter or monitor their third-party contents, regularly, frequently, and effectively. Otherwise, it will be totally liable. Under criminal law. So that's very serious for us to their operation.

I don't know whether there will be more detailed guidelines to clarify this obligation. Otherwise, I think this is very clear chilling effects on to the Internet service business in China. And this is eCommerce law. So the eCommerce law is not clear, there is no mentioning whether it's a general monitoring obligation.

My understanding, it is not presumed that these eCommerce platforms, that they are very influential and powerful in China, like Alibaba's platform, the Xing Du and other, they are very strong. They will be able to lobby to the Government.

So it seems that the different legal subjects are handling these very important things in different approaches. It's very scary because the service provider can end up in liability in very -- in very tremendous uncertainty.

Okay. Look at another area. That is -- well, this is liability regime. This is relevant to Manila Principles 1, Paragraph 4 as well.

And under that paragraph, it mentions that it shouldn't be a strict liability. That's true. There is no strict liability to the service providers. It's liability with thought. So it means that a service provider is not liable for third-party content unless it knows or should have known that it is illegal. So it's either for civil liability. It is either a direct knowledge or it is a constructive knowledge. That's for civil liability. For criminal liability, it's only direct knowledge. You are knowingly providing services to illegal content. You should be liable under criminal law.

Well, I guess for this one it's not so much different from the International approach.

The third area, this is more controversial. The content regulation. This is relevant to the Manila Principles on principle 2 and 3.

Well, it's very clear in the Chinese law. The service provider would have to regulate the contents. There is a legal obligation. And there is a very clear legal requirement for notice and take down. But it's very different from what Jeremy mentioned. It's only based on judicial order. That is not the case, actually. Of course, Manila Principles I fully agree with, I was involved in the drafting of the early day, when things like gmail were not accessible to me for a couple months so I was not able to submit my comments in time.

I look at situation in China. It's important for us to know the direction to move forward. It's equally important for us to know what is the starting point? If you look at this very important jurisdiction in the world, it seems that judicial order only approach is very far apart. Currently, there are two possibilities. One is that the order administrative authorities, that the Governmental agencies with regulation powers, they can all issue orders and order the intermediary service provider to take down content. This is very clear. This is their legal obligations, if you don't do this, they will be totally responsible for that.

In addition, the copyright holder can ask a service provider to take down content, yes. They are some due process requirements. For example, they have to identify themselves and who are you? And they need to provide preliminary proof whenever you ask us to take down certain content. What is your justification? Can you provide some initial proof such as your copyright registration, even though China only has momentarily copyright restrictions. It is not as comprehensive and thoughtful as has been stipulated in the Manila Principles.

So for this one, it's not very optimistic.

Look at the last area, the turn up services. This is the most interesting part. I know in the Manila Principles, they put two policies together. This is something I want to comment on but I was not able to do that. If you use the word "Policy" I guess you need to make it consistent. The document I think is a misleading document. It can be clarified and improved from time to time.

And on one hand, the policy means Governmental policies, legal documents or something, Governmental industry policies. On the other, it also means the policies of those service providers, such as the platform policies. What do we say, turn of services? And our turn of youth or TOU or ToS. But these are very different policies. For the second one, this is a kind of self-discipline. I fully agree with the principle highlighted here. These self-discipline, self-censored practices; they should be regulated as well.

Under the Chinese law they have been regulated. From of all, if you make the public commitment to the Government or to the public, it's binding to you. For example, an eCommerce platform, it made promises that we will protect the consumer from any counterfeit or pirate booth that is being sold on the platform. You are bound by a guaranteed liability. So if a consumer procures something counterfeit, you should be compensated for that. So it's legally effective.

Secondly, if the turn of services are not consistent with any laws, any stipulations, then it's invalid from the very

beginning and can be canceled by the court and can be canceled by the competent authority.

Last but not least, due process. This is relevant to the principle 3, to principle 6. It's so relevant. I really like all the due process requirements. But this is very new. I try to introduce the due process notion into the Chinese platform law. They wanted to change their platform policies. They are supposed to publish this policy a certain day. For example, at least seven days before the revision, the effective day and receive the public comments and feedback and be reflective and responsive to the people's comments. If the users are complaining to the change, for example, this is a privacy policy and people are complaining, you're supposed to be responsive to that.

So these are due process considerations that are very important. But it's still very, very new to the Chinese law. And hopefully there will be new -- there will be more development.

And finally, I feel recommendations, -- I have a few recommendations. I think there is no time. Only one recommendation to the Manila Principles that I suggested, and already I'm drafting that, with more research on the categorization of the intermediary services. And I actually recommended to research the intermediary liability to the domain name industry.

For example, domain and registry and registrar, not only registrar, but those registries. It seems ICANN is doing something that is very interesting. In the new gTLD program, specification 11, that's my favorite, it kind of is asking the registries to filtering any pirate, counterfeit, illegal, or phishing virus from this domain. That's a very challenging task. I don't know how that's being implemented because we have thousands of new gTLDs that have been introduced into the Domain Name System. So that's something that the new liability potential, that the -- and the last but not least is that, I guess, it's useful to have some comparative study. How these Intermediary Liability has been implemented across jurisdiction. Recently, we have had discussion on the Manila Principles in Beijing. Well, we are back to the drafting of the eCommerce law. It seems that the Chinese legal communities are still sticking to the traditional knowledge on the liability regime. In civil law, it's kind of assistance to the third-parties' infringement. And in the Angelo American legal system, there is another regime that is more complicated. I guess Jeremy can explain to you what is the secondary liability and in the US law what is contributory infringement and vicarious liability.

So they are still talking about that. Intermediary

Liability is a new concept. It seems clear. We know what intermediary services, there are many categories and service, but what is Intermediary Liability that has not been written into any internationally binding legal documents? It is not in any treaty, so I assume that that may be useful if it could be legally defined and clarified.

Thank you very much.
(Applause)

>> JEREMY MALCOLM: Yes, a round of applause for everyone. Thank you very much to all three of the speakers. And I noticed in the last presentation we had suggestions as well, which is very helpful, because we will be treating this as an open document, which in the interest of time will be revised. And the Manila Principles Website has a platform where additional research can be published and additional resources and I mentioned one of those that we will be adding to what is already there. So if anyone wishes to do some work with others, or even by themselves, and publish it on the Manila Principles's website, then we're very open to that.

So we have only a couple minutes left. The timing was very tight as it turned out. So who would like to ask any of our panelists a question? We have two questions. I think that will be it. So can we have the microphone passed? Yes.

>> AUDIENCE: University of Aukland. When people think about big Germans residing in New Zealand, they don't think about me, they think about Kim.Com and Mega Upload. And looking at the Manila Principles the one thing that strikes me is that they seem to be silent on a case, often organisation, that is an intermediary, you know, probably within all definitions of the term, but that in some ways actively -- I would say sort of maybe, you know, flounce the fact that, you know, that it's actually, you know, hosting a lot of content that is strictly speaking maybe it shouldn't be hosting or that shouldn't have been put there. While, at the same time, saying well, we get 600 files a second being uploaded. We can't check each and every one of those to see whether it's a violated copyright. And yes we have a large amount of non-copyright, you know, violating content.

And this is really a question to you, Jeremy. How do you see a case like MIA upload falling within the scheme of the Manila Principles? And what in your opinion do they say about a case like this?

>> JEREMY MALCOLM: Let's take the other question as well and then we will come to answer them both.

>> AUDIENCE: Yes, I ask this question -- I asked this

question in Manila. And it is about -- it is related to some extent to the
last speaker, when she talks about there are instances when judicial, what was it called again, when you are required, judicial --

>> JEREMY MALCOLM: Order?

>> AUDIENCE: Orders. And so I would put to you that one of the issues, also, around take downs would be around abusive content.

Of course some of the abusive content may not necessarily be about taking down content. It's about changing norms. Right?

But the point I'm making is that -- and it's an increasing -- there are many -- much -- many more cases of abusive content or threats of sexual violence, et cetera, for women and even for young -- it's a real concern.

Now, in most cases you can -- in some country, there are actually regulations where you can then ask for, especially if it's a threat, an actual threat, no? Of violence directly to a person and you can actually get a judicial order. But in many countries, it's not easy to get a judicial order, to be able to tell, you know, the intermediary look, this is really abusive content. It's threatening. It is threatening, et cetera.

And if you require that, it will be -- it will actually be high -- you know, it's a high requirement to be able to -- for the intermediary to do something about it quickly.

>> JEREMY MALCOLM: Yep. Well thanks for both the questions. And sorry we don't have time for more questions or that we can't ask questions of the other panelists as well.

So I'll take those in reverse order.

The -- this was a problem that we grappled with at the meeting in Manila and online, because there are good arguments why we want to have some content taken down because people may legitimately be complaining about doxing of their personal information and so on.

So the only compromise that we were able to reach, and it may not be perfect, is the one that I described. Where if content is really illegal, there is a 99 percent chance that it's also against the intermediary's terms of service. And so in such cases you simply need to contact the intermediary and point that out and ask them to remove it.

And principle number 3 here is designed to help you in that case. It says if you want to contact an intermediary with a request for them to voluntarily remove content as long as it satisfies these criteria such as clarity -- here we go. Content requests have to contain these things... and if they do, the intermediary is likely to be able to comply.

Now, that is sort of leading to the next question, which is what if you've got a rogue intermediary who isn't going to -- who is deliberately going to ignore requests to take down content pursuant to their terms of service or maybe they don't even have terms of service. So in that case I think we can see that the pattern of going to court has been successful. I mean, Kim.Com has lost all of his millions and he is on the skids again. So I don't think we need to worry too much about that case.

Certainly, there are jurisdictions where the operators of the sites are not amenable to legal recourse, and so that's an issue for law enforcement and it's an issue for content providers.

We are really worried about the rights of users here and we haven't seen any -- too many large institutional infringements of users' rights as opposed to copyright, of the kind you are describing.

There are probably some, such as those websites that host revenge porn. But that's a pretty targeted problem and I think the solution to that is not intermediary liability. Fiddling with intermediary liability law, it's probably targeted to other laws, and that's a separate problem and we don't have to worry about the ability of law enforcement to crack down on organised criminal websites.

Apologies that we don't have time to go into this discussion further. I should have abbreviated my opening presentation. But I stupidly thought that we were going to have to fill in time.

So what we do have, though, is this mailing list here. If you go to the website, you can click on the discuss link and it will take you to a subscription form for our mailing list so if you are interested in doing that, you are more than welcome to. So let's give one more round of applauses to our presenters and thank you very much.

(Applause)

(End of session 15:35 PM)

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