

LAW ON THE WINGS OF DIGITAL:

Intermediary Liability of Companies in the Internet

By

A&E Law Partnership



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In Focus

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The Now

Who is an Intermediary?

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Issues Arising in Local Cases



Our Digital World

The internet is promoting all categories of content, from amateur user-generated content to professionally produced content distributed via various internet service platforms. The interactions on these new platforms produce disputes, which require better understanding of the roles of different parties

ATTENTION on YouTube

- *300 Hours of video uploaded every Minute*
- *5 Billion Videos watched everyday*
- *30 Million Visitors per day*

via

<https://merchdope.com/youtube-stats/>

Players on the Internet



The content of our new laws and the way we interpret existing laws will influence whether or not we as a nation benefit from this new economy .

Players understand the internet economy, its respective segments and are able to deliver jobs, higher returns and contribute to economic and social development through the internet and its scale effects.

Players on the Internet Cont'd

Network Operators; Companies that are **telephone network operators, metropolitan or countrywide network operators**. They also provide internet access(IAPs).

Network Infrastructure Providers; Companies that **create and maintain networks** for network operators

Internet Access Providers(IAPS); Companies that **provide access to the Internet**

Internet Service Providers(ISPs); Companies that **provide internet services** such as, **email providers – eg Gmail**, many IAPs and network operators, are also ISPs and the terms are used interchangeably

Players on the Internet Cont'd

Hosting Providers; Companies that **provide online hosting** and **storage services**

Web Search Engines; Companies that **provide web search services.**

Social Networks; Companies that **provide user-generated content (UGC) platforms** for blogging, microblogging, and sharing



WHO IS RESPONSIBLE?



LANDLORD

VS

TENANT

The Landlord/Tenant Analogy

The Landlord/Tenant Analogy Cont'd

- To what extent can landlords be held liable for what tenants do in their rented apartment?
- What extent of privacy does the law provide for the tenant?
- In what circumstances can quiet possession be “legally” invaded?
- What is the role of the contract between the intermediary and the platform user?

A Common Issue Arising; Defamation

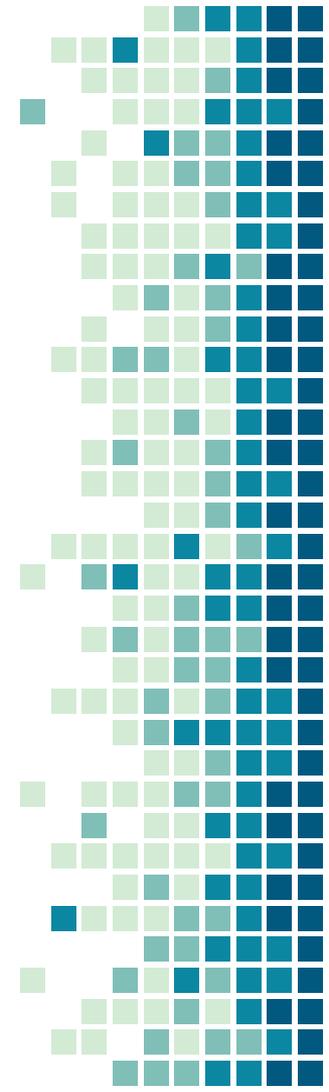
Defamation has been defined to mean, a statement which tends to injure or lower the reputation of a person to whom it refers in the estimation or assessment of ordinary and right thinking members of the society and thereby expose such person to hatred, ridicule and contempt and it does not matter whether or not such statement is believed by those to whom it was published. **Salawu V. Makinde (2003)1 WRN 91 at 102.**



Publication by which other persons are likely to be induced to shun, avoid, ridicule or despise him

Remoteness of Responsibility or damage

- IF A Slanders B and B is rightly or wrongly dismissed from work. A will be responsible if B's dismissal is a natural and probable result of the slander. If it is not, A will not be liable in tort for B's dismissal.
- IF A Slanders B to C and C repeats the slander to D who then dismisses B, A May not be liable for B's Dismissal since damage is remote, but A will be liable if.
 - He encouraged or authorized the repetition, or
 - C had a moral or legal duty to repeat the slander or
 - A should have foreseen that his slander will be repeated



Means or Tools used in the slander

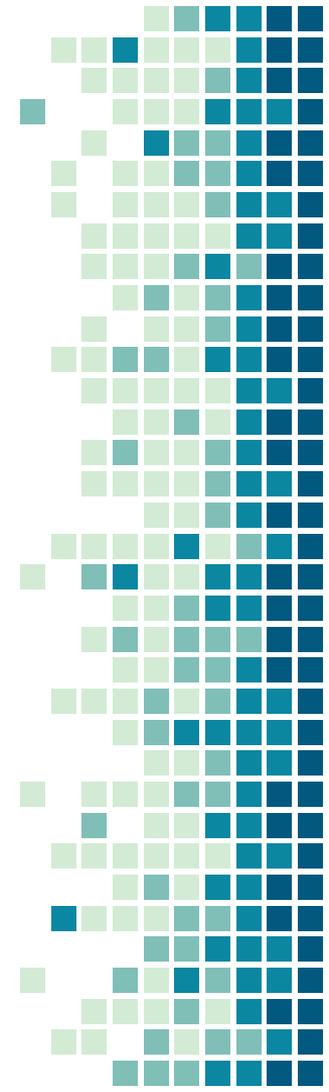
- Oral Communication
- By telephone or Google Hangout or skype

In what circumstance will A's telephone company or Google operators of Google Hangout be liable?

- What is the situation if it was by text message?
- What if a whatsapp message?

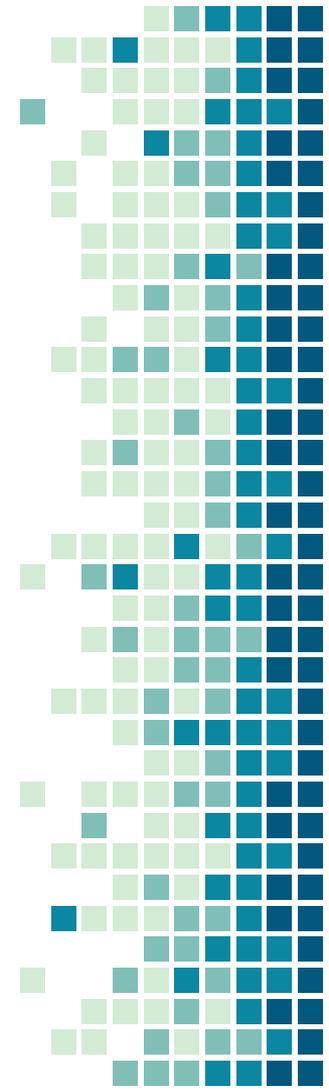
Does it change the telephone company's liability status?

What is the liability of Whatsapp?



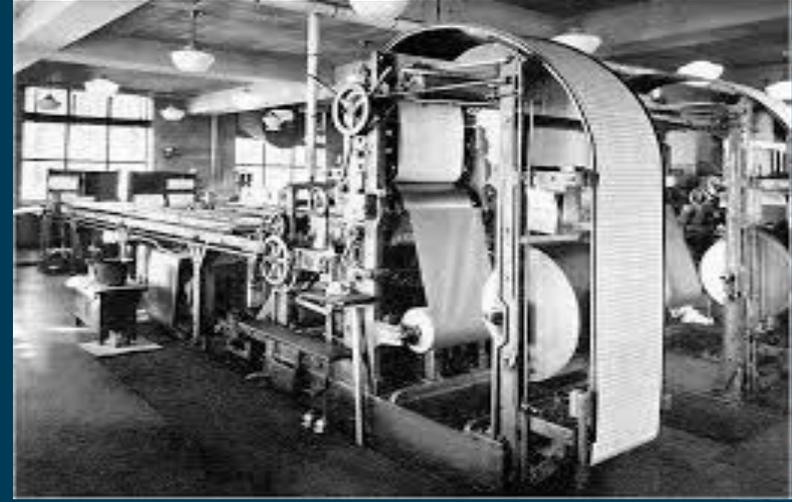
What Determines Liability?

- It is the “act” and not the medium of publishing a defamatory matter concerning a 3rd party that makes a person liable to another in defamation.
- In the case of libel published in a book, periodical, newspaper etc, there could be levels of publication and liability. The first, is the publication by the author to the publisher for which the author is solely liable. The second is the publication by the author and the publisher to the printer for which the author and the publisher are jointly and severally liable. See the case of *Ogbonnaya v. Mbalewe* (2005) 1 NWLR (Pt. 907)252 at 264,
- The Basis of the publishers liability.



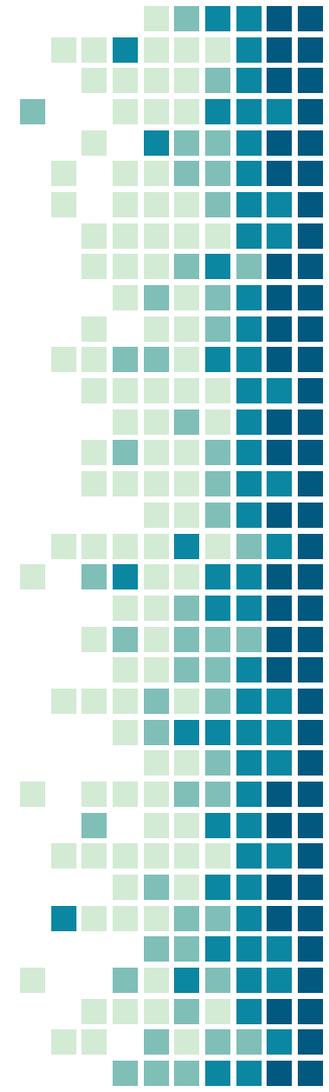


A step back in time on Con...



What is the Basis of the Publishers liability

- The Role of the Book Publisher. A book publisher is a group or person who is responsible for bringing the book to the public for reading purposes. The book publisher is involved in the major steps of developing(including proof reading), editorial, production, marketing, printing, and distributing the book.



A Step Back In Time

- Content Creation



- Content Distribution



Back to Reality

- Content Creation Today



- Content Distribution Today



- Sharing Content Today



Who is an Intermediary?

An Internet Intermediary is an entity which provides services that enables people to use the internet.

Understanding Intermediary Liabilities

Intermediary Liability refers to the legal responsibility (“liability”) of intermediaries for illegal or harmful activities performed by users using their services (e.g., creation of harmful user-generated content)

Question

Haruna sends an email with **malicious or defamatory content** to Emeka using Gmail and Emeka forwards the same email to 500 people using Gmail.

A). Who is liable for the spread of that email?

- **Haruna who first sent the email to Emeka?**
- **Emeka who forwarded same to many other people?**
- **The owners of the Email Service/Distribution platform (ISP)?**
- **The internet access providers(IAP)?**

B). Who are the intermediaries here?

Another scenario

Tunde posts a malicious video via his social media public timeline and profile,(such as Instagram, YouTube or Twitter) where he has over 2000 followers.

Within five minutes, his followers share/repost the content and over 1m people are now viewing this content.

- Who is the intermediary here?
- Who is liable for the spread of this malicious video?
Tunde or the social media platform?

Question

Emeka sends a book via email platform, Yahoo without permission of the owner to a third party and the same content is then forwarded to many other people, there is a copyright infringement?

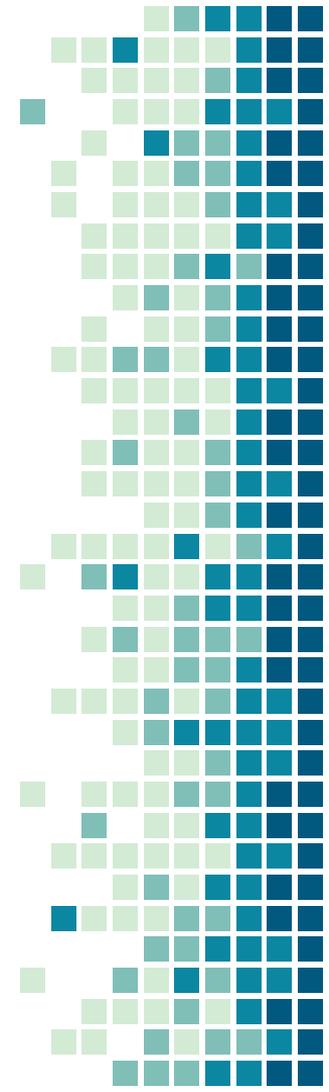
Discussion: Who is responsible for the infringement?

Emeka or the email platform, Yahoo or both ?

Who can be successfully sued?

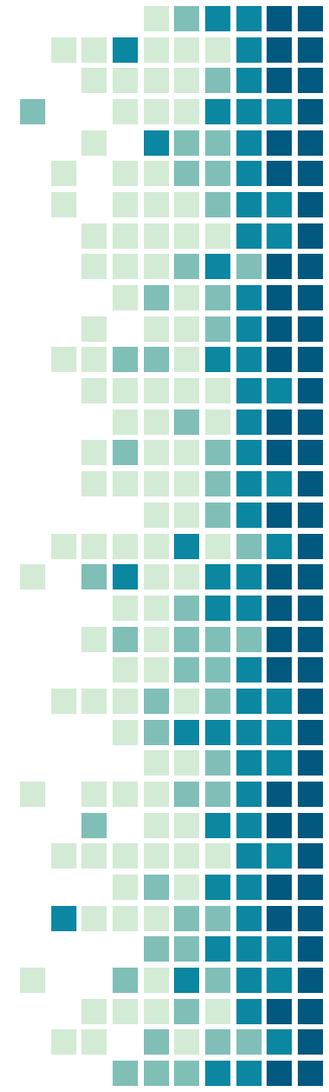
Roles and Relationship

- Structure of relationship
- Service Offering
- Terms of Service
- Level of engagement of service provider in the third party use of the platform



Common mistakes litigating on intermediary civil liability

- Failing to notify the intermediary and request pull down before litigation
- Suing the wrong parties
- Failure to conduct forensic due diligence before litigation
- Improper service
- Use of originating summons in contentious causes of action like defamation.
- Ignoring the relationship structure and contract between the parties



Where the publication constitutes a crime?

According to **S.23 of the Cybercrimes Act 2015**, Any person who intentionally uses any computer system or network in or for producing child pornography; offering or making available child pornography; distributing or transmitting child pornography; procuring child pornography for oneself or for another person; possessing child pornography in a computer system or on a computer--data storage medium:
commits an offence.

Also, any person who knowingly makes or sends other pornographic images to another computer by way of unsolicited distribution shall be guilty of an offence

Additionally, any person who, intentionally proposes, grooms or solicits, through any computer system or network, to meet a child for the purpose of engaging in sexual activities with the child; where use is made of coercion, inducement, force or threats; abuse is made of a recognized position of trust, authority or influence over the child, including within the family; or abuse is made of a particularly vulnerable situation of the child, mental or physical disability or a situation of dependence; recruiting, inducing, coercing, exposing, or causing a child to participate in pornographic performances or profiting from or otherwise exploiting a child for such purposes; commits an offence

Where the publication constitutes a crime?

An email content consist of child pornography and Party A publishes it on his FaceBook Page where he has over 1000 followers. Some followers repost/share the content after viewing it.

One of the followers forwards the content in an email to all his gmail contacts consistently for five (5) weeks.

He is traced and arrested by enforcement officers under the cybercrime Act.

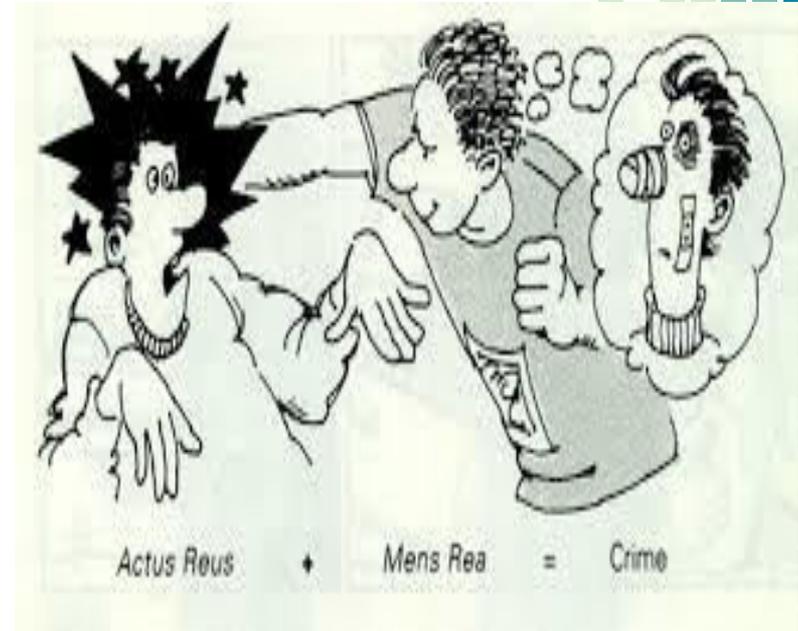
To what extent is Facebook liable?

Requirement of Mens Rea and Actus Reus in Criminal Liability

Mens Rea is the intent a person has behind committing a crime. Typically there has to be intent behind the crime.

Actus Reus is the action the person takes to perform the criminal act. i.e. the physical action and **such action must not be a reflex..**

Structure of Relationship and Contracts between the parties.



Question

Under what Circumstances can an intermediary acquire liability for actions on his platform?

What Kind of Liability?

- Civil Liability
- Criminal Liability

Safe Harbour and Take Down Procedures



General Principles

Whether or not the intermediary had knowledge of infringing material

- Actual knowledge
- Red flag knowledge

Whether or not the intermediary was notified of the infringed content

Whether or not a take-down procedure; as provided by law was followed after notification of infringing content

The US Safe Harbour Principles;

Regulated by the Digital Millennium Copyright Act of 1998 in the United States of America

- It outlines certain legal duties with which online service Providers (OSPs) must comply in order to limit their legal liabilities in the event of a user of their service who violates copyright laws.
- Provides a safe harbor against monetary damage and most injunctions, if in compliance
- Covers conduit, hosting, caching and linking activities;
- Transmission was at the direction of someone other than the service provider (internet user)
- The transmission or other activity was automatically carried out without selection by service provider
- Content is transmitted to the requester (user) without modification by service provider

The US Safe Harbour Principles;

Regulated by the Digital Millennium Copyright Act of 1998 in the United States of America

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- Service provider does not store specific transmission or other instruction for further specific use
- The liability of the service provider is also limited where it abides by the notice-and-take down procedures of the DMCA to terminate repeat infringers
- The service provider has no duty to monitor (See Section 512(m))

S.230 of the Communications Decency Act 1934

- Protects online service providers from legal liability arising from content created by the users of their services. However, with some exceptions (where intermediary acted with the requisite mens rea.
- Permits intermediaries to publish others' content without reviewing it for criminality or other potential legal issues
- The Courts in application of this provision have developed a 3 part test;

Ø is the defendant a provider or user of an interactive computer service(ISP)

Ø is the claim based on information/content provided by another.

Ø is the claim treating the defendant as the publisher or speaker of that information

The US Court of Appeals 1st Circuit 2016 Civil action N0 15-1724 in Jane Doe & Ors Vs Backpage .com, LLC & ors

Take down procedure in the US

- Upon notification, service provider must act expeditiously to take down or disable access to allegedly infringing content
- Formalities for take down must include;
 - Notice in writing
 - electronic or physical signature of claimant
 - allegedly infringed material –
 - Contact information of notifier
 - Statement of good faith belief that the use of the material was not authorized
 - statement that information of claimant is accurate

Safe Harbour in the EU

EUR E-Commerce Directive safe harbors (2000/31/EC) Provisions

- Bars monetary damages, but provide only limited protection for intermediaries against injunctions.
- Coverage covers all claims, not only copyright
- Covers conduit, hosting, caching (not linking) activities - art. 12, 13, 14
- Hosting safe harbor provisions only applies to “passive” hosts, and the line between “active” and “passive” hosting is blurry See *L’Oreal v. eBay* (130-168)
- No duty to monitor user content - art. 15

- **The igmart.ng example**

The Growth Platform Made for You

No matter the size of your business or even if you have not sold online before, our platform will help you to engage shoppers and make more sales.

Get Started Today!

Learn How it Works



Absence of Safe Harbour Provisions in Nigeria

Currently there are no Safe Harbour provisions in Nigeria, but proposed copyrights bill pending consideration in the legislature will be discussed in the next slide.

This means that contractual terms of contract (Structure of relationship /Service Offering /Terms of Service /Level of engagement of service provider in the third party use of the platform) are important to determine liability

Some Proposed Reforms in Nigeria Copyright Bill

- Extension of current Fair dealing provisions
- Safe harbors for intermediaries
- Site blocking
- Take down notice procedures

Proposed Safe Harbour Provisions in Nigerian Copyright Bill.

- Intermediaries have immunity from liability emerging from user-generated and third-party content because they have no “actual knowledge” until it is brought to their notice using “take down” requests or order.
- ISPs may be liable if they store infringing material for re-use.
- If they know that the material infringed copyright and do not prevent access to such as soon as they become aware of the infringing material.

TAKE Down Procedure

- a Notice of Infringement signed by the copyright owner or their agent must be received by ISPs before action can be sought against it
- Users must also be immediately notified if the ISP deletes their material, or prevents access, due to infringement
- ISPs can be liable where they do not delete temporarily stored material or prevent access to the same after it has been deleted from its original source or access has been prevented at source or following a violated court order

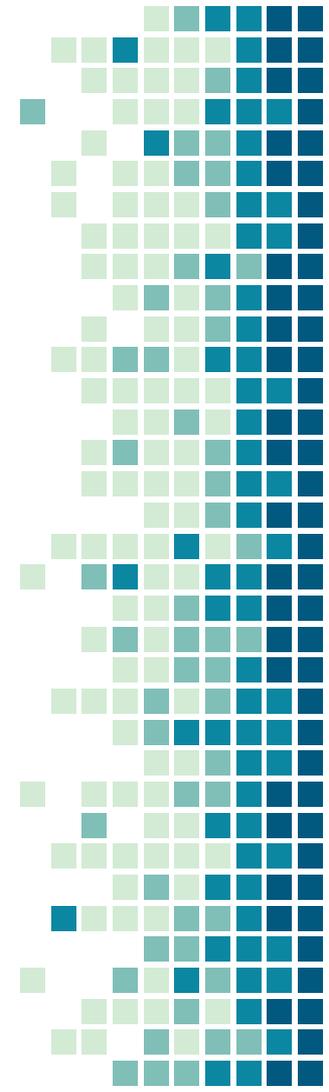
Circumstances where an Intermediary can be found liable

Where adequate and sufficient notification has been given to the intermediary.

The Intermediary fails to to act expeditiously to takedown or disable access to the infringing content/subject matter of notice.

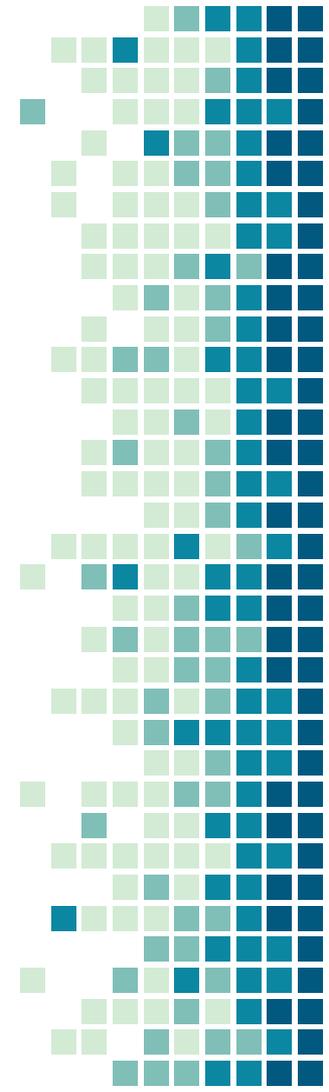
Should Intermediaries be responsible and liable for third party use of their platform?

- Intermediaries are not in a position to judge what's legal or not, that's the job of courts.
- Analysis done by the Brennan Center for Justice shows that almost 50% of requests targeted potentially legitimate or protected speech (Brennan Center for Justice).
- It makes sense from a fairness perspective to hold the people who posts content responsible for that content, not the services who host it.
- Intermediaries already implement policies, procedures and tools that flag inappropriate content.



Impact of Intermediary Liability

- Making Intermediaries broadly liable for actions of third parties who use their platforms will embolden the third parties to undertake wrongful conduct.
- Safe harbors provide intermediaries with the legal certainty to build innovative solutions for addressing harmful content.
- Direct and excessive liability will kill innovation.
- Finally, intermediaries generate tremendous and broad economic benefits and the law should promote those (OECD 2010, Copenhagen Economics 2013)



THANKS!

Any more questions?

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